

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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FRIENDS OF THE EAST HAMPTON AIRPORT, INC.,  
ANALAR CORPORATION, ASSOCIATED AIRCRAFT  
GROUP, INC., ELEVENTH STREET AVIATION LLC,  
HELICOPTER ASSOCIATION INTERNATIONAL, INC.,  
HELIFLITE SHARES LLC, LIBERTY HELICOPTERS,  
INC., SOUND AIRCRAFT SERVICES, INC., and  
NATIONAL BUSINESS AVIATION ASSOCIATION, INC.

15 Civ. 2246 (SJF) (ARL)

Plaintiffs,

-against-

THE TOWN OF EAST HAMPTON,

Defendant.

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**CORRECTED DECLARATION OF LISA ZORNBERG**

I, Lisa Zornberg, make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am a partner in the law firm Lankler Siffert & Wohl LLP, counsel to Plaintiffs in this action. I am an attorney admitted to practice law in this Court and the courts of the State of New York.

2. I submit this declaration in support of Plaintiffs' Motion for a Temporary Restraining Order.

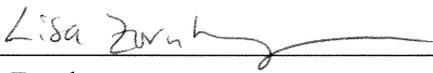
3. Attached as Exhibit A is a true and correct copy of a document prepared by Special Counsel to the Town of East Hampton entitled, "Town of East Hampton Relations with FAA at the East Hampton Airport," dated September 27, 2011. The Town has published this document on <http://www.htoplanning.com/> under the file name "Questions and Answers re grant obligations.DOCX."

4. Attached as Exhibit B is a true and correct copy of a presentation by Peter J.

Kirsch entitled, "Town of East Hampton – Airport Obligations," dated October 11, 2011. The Town has published this document on <http://www.htoplanning.com/> under the filename "Town of East Hampton – Airport Obligations.PPT."

5. Attached as Exhibit C is a true and correct copy of a presentation by Peter J. Kirsch entitled, "East Hampton Airport Safety, Noise and Operational Management Plan," dated December 1, 2011. The Town has published this document on <http://www.htoplanning.com/> under the filename "Town of East Hampton – Safety and Noise Program.PPT."

Executed: April 29, 2015  
New York, New York

  
\_\_\_\_\_  
Lisa Zornberg

# **EXHIBIT A**

# **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*

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### **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.

# **EXHIBIT B**

# Town of East Hampton – Airport Obligations



KAPLAN KIRSCH ROCKWELL

Peter J. Kirsch, Partner

October 11, 2011

## Kaplan Kirsch & Rockwell, Peter Kirsch, Partner

- Legal practice dedicated to airport law issues
  - Nation's largest legal practice dedicated to airport law ([www.airportattorneys.com](http://www.airportattorneys.com))
- Practicing in this area for 25 years
- Firm's lawyers involved in most of the major airport operational disputes in the last two decades, including –
  - Naples, FL
  - Santa Monica, CA
  - Burbank, CA
- Been advising East Hampton since 2007

# Purpose of today's presentation

- How federal requirements impact operation of public airports like East Hampton Airport
- Practical effects of taking federal aviation grants (other than money)
- Practical effects of *not* taking federal money on Town's ability to restrict use of Airport
- Effect of taking federal money on the Town's ability to achieve its objectives for this airport

# Introduction

## I. Grant Assurances

- What are Grant Assurances?
- How long do they last?
- How do they affect operation of the Airport?

## II. Other federal laws that control airport operations

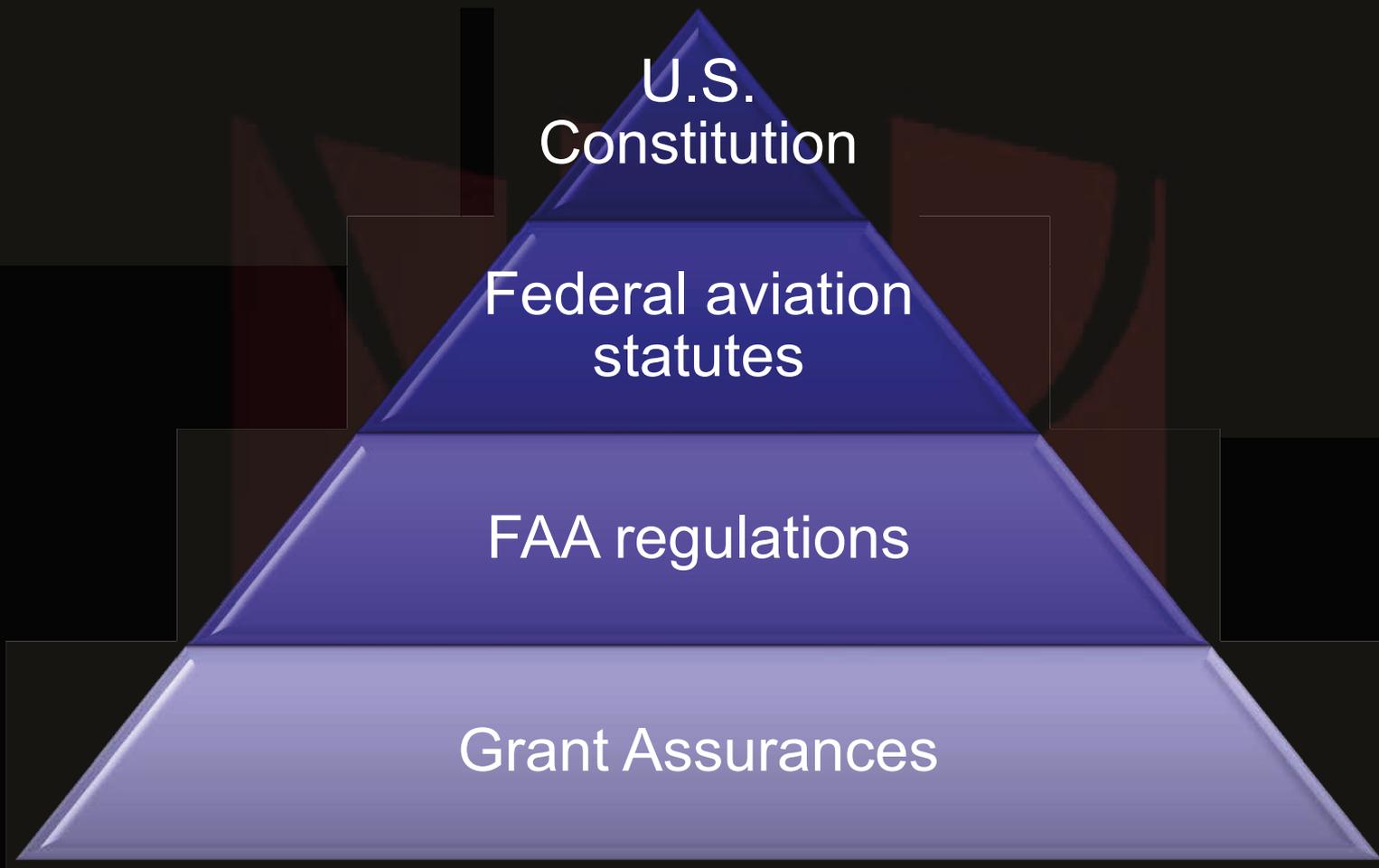
## III. Effect on the Town of not taking FAA grant money

## IV. Ways the Town can gain greater control over Airport access

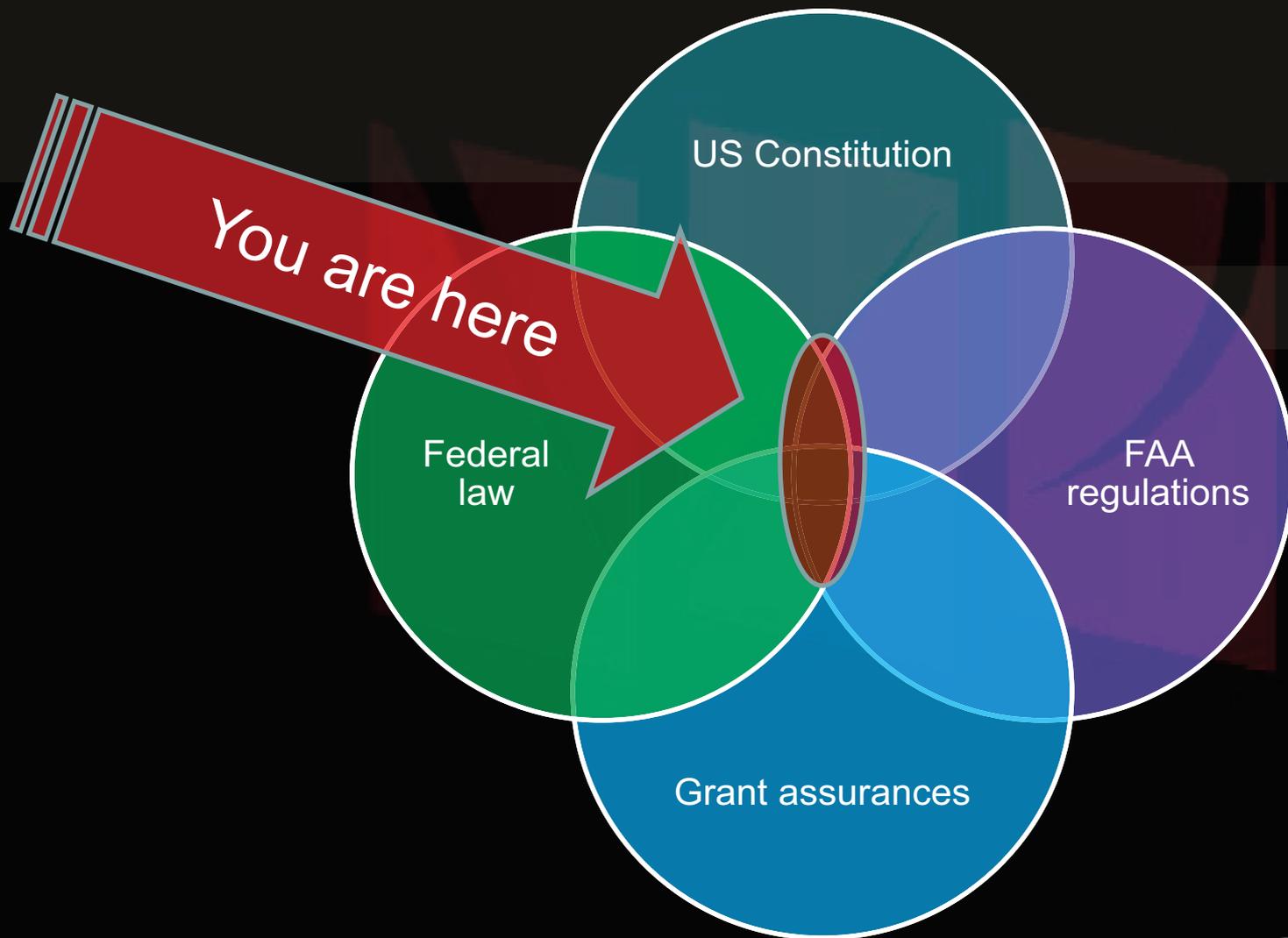
# Common misperceptions

- ✘ The Town's grant assurances will expire at end of 2014
- ✘ Once grant assurances expire, the Town will be free to restrict aviation access to the airport
- ✘ Many other airports have successfully imposed restrictions on their airports in recent years
- ✘ The Town can regulate helicopter routes

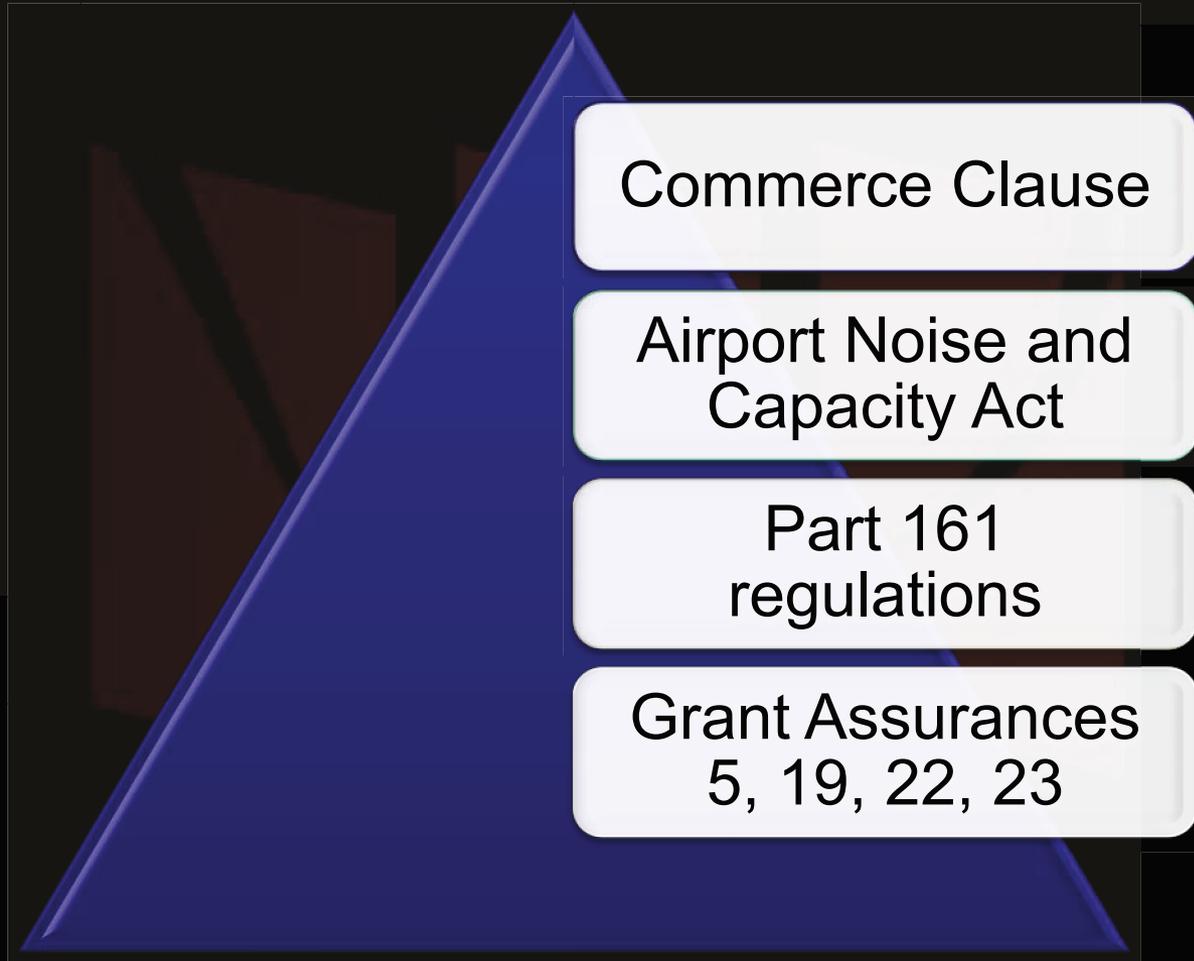
# Source of obligations - one view



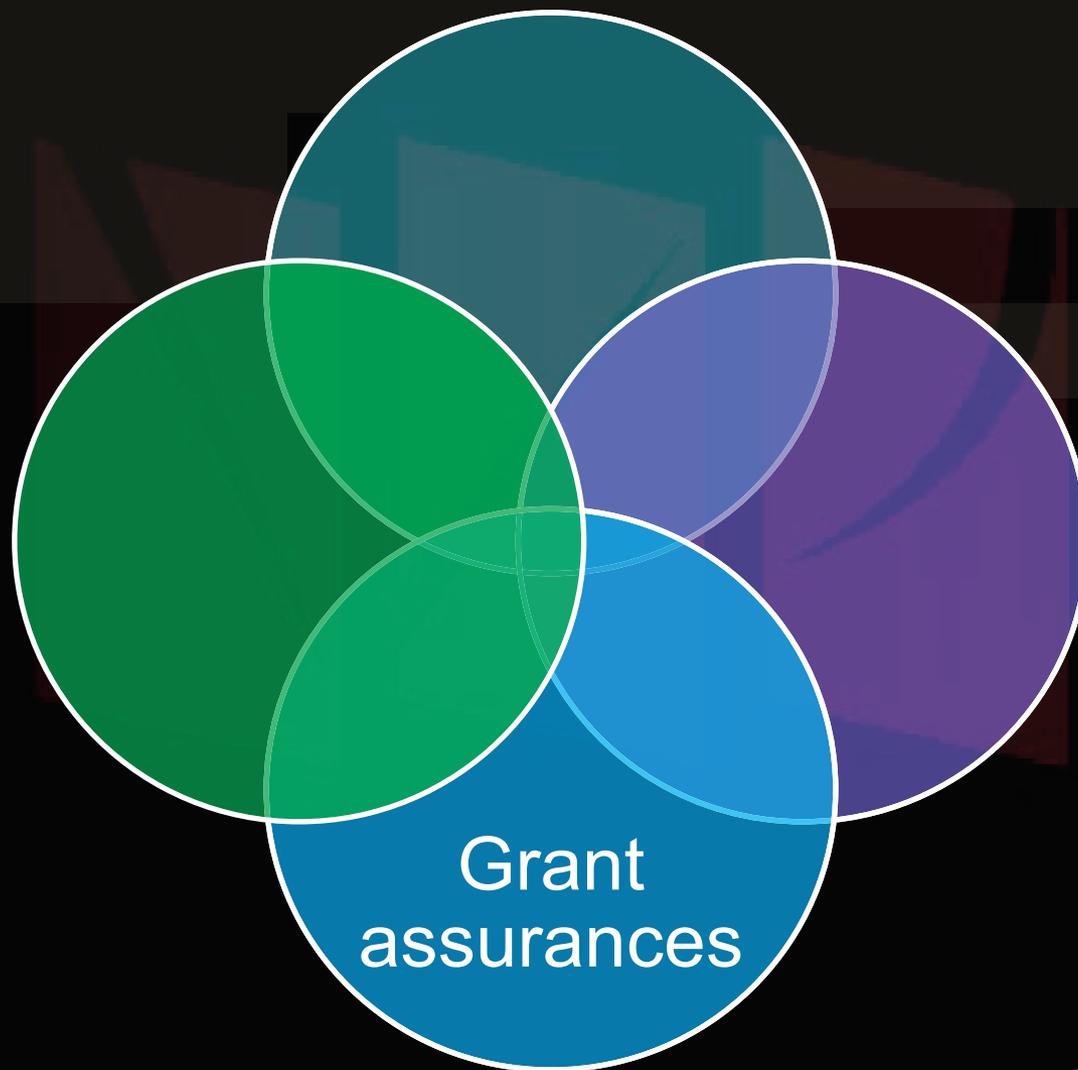
# A holistic view of the law



# Four key sources

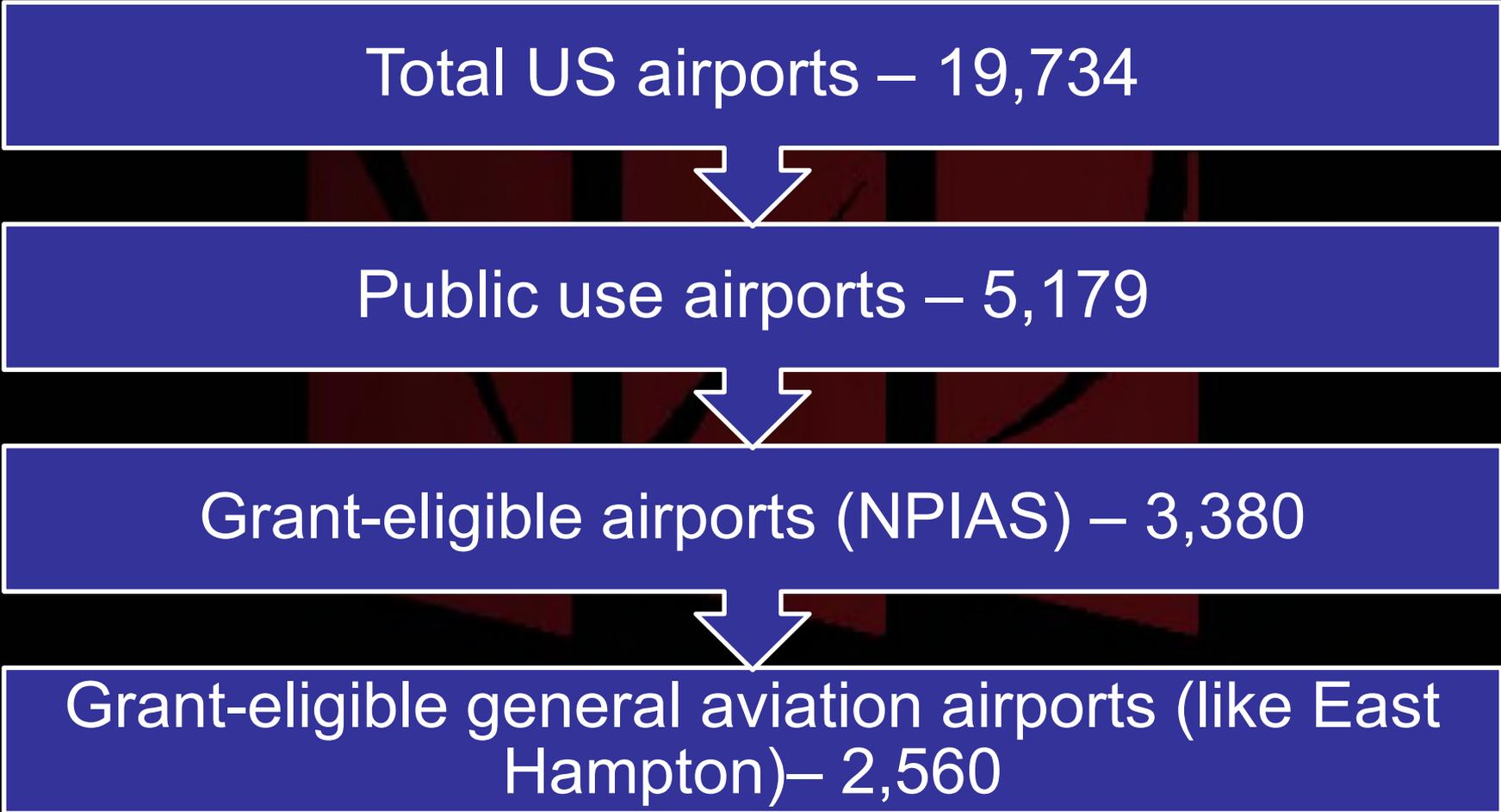


# Part I – Grant Assurances



# Who is grant obligated

Total US airports – 19,734



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graph TD; A[Total US airports – 19,734] --> B[Public use airports – 5,179]; B --> C[Grant-eligible airports (NPIAS) – 3,380]; C --> D[Grant-eligible general aviation airports (like East Hampton) – 2,560];
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Public use airports – 5,179

Grant-eligible airports (NPIAS) – 3,380

Grant-eligible general aviation airports (like East Hampton) – 2,560

# Federally funded airports



# NY- area grant obligated airports



# What are Grant Assurances?

- Contractual commitment by airport proprietor to the U.S. government in exchange for grant funds
- Basic structure in effect for decades
  - Since Federal Airport Act of 1946
- Required by, and implement, federal law (49 U.S.C. § § 40103, 47107)
- Grant assurances allow FAA to enforce *contractually* many of the obligations of federal law
  - Reduces expense of litigation for FAA
  - Simplifies enforcement for FAA

# General Conditions

- Apply to all property and facilities on the Airport Property Map
  - Not just the facilities improved with grants
- Apply for 20 years (except planning grants – 10 years)
- No expiration of assurances for property acquired with federal funds or #23 (exclusive rights)
- Mirror requirements of federal law
  - Also add contracting and financial matters

# Uniform Grant Assurances

- 39 contractual commitments, including
  - Preserving rights and powers (No. 5)
  - Operation and maintenance (No. 19)
  - Hazards (No. 20)
  - Preserving compatible land use (No. 21)
  - Economic nondiscrimination (No. 22)
  - Exclusive rights (No. 23)
  - Self-sustaining finances (No. 24)
  - Prohibition on revenue diversion (No. 25)
  - Airport Layout Plan (No. 29)
  - Disposal of land (No. 31)
  - DBE (No. 37)
- Key grant assurances mirror federal law

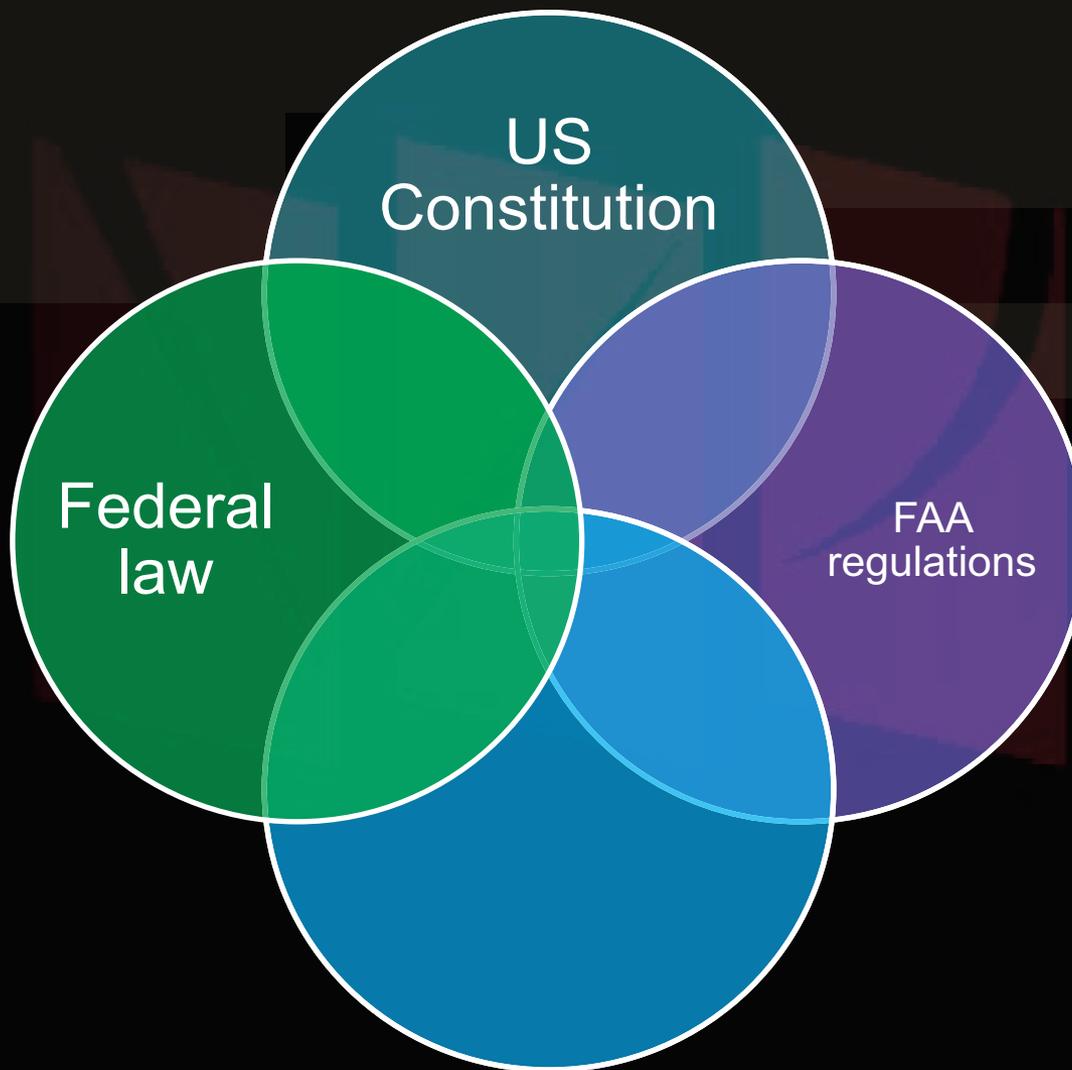
# Grant Assurances at East Hampton Airport

- Last federal grant: 2001
  - Normally, grant assurances would expire in 2021
- In settlement of private litigation, FAA agreed that *four* grant assurances would expire at end of 2014:
  - Grant Assurances 22a and 22h
  - Grant Assurance 29a and 29b

# Enforcement of obligations

- Violation of grant assurances is enforced *only* by FAA
  - Though administrative adjudication
  - In federal court if necessary
- FAA is aggressive and consistent in enforcing both grant assurances and federal law
  - Santa Monica and Naples litigation

# Part II – Other federal laws/regulations



# Application of other federal laws

- Federal law applies to all public use airports
- Independent of grant assurances
- Can be enforced in federal court litigation by
  - FAA
  - User
  - Affected landowner
  - Interest group
- Enforced in court through litigation

# Constitutional requirements

- Federal law and constitutional requirements apply to every public use airport
  - Public use airports must be available to the public
- Proprietor cannot restrict access unless –
  - Reasonable in the circumstances of the particular airport
  - Carefully tailored to the local needs and community expectations
  - Based upon data which support the need and rationale for the restriction
  - Not unduly restrictive of interstate commerce

# Other federal laws

- Laws implement federal control over airports
- Since 1990 – Airport Noise and Capacity Act (ANCA)
  - For restrictions on stage 2 aircraft, airport must complete study and public review procedures (Part 161 regulations)
    - Includes helicopters
  - For restrictions on stage 3 aircraft, airport must complete study *and* secure FAA approval
  - Not clear whether ANCA applies *only* to federally obligated airports

# History of airport use restrictions

- **Many** airports have use restrictions (e.g.: curfews, noise limits)
  - *With only one exception, every one of these restrictions was enacted before ANCA became law in 1990*
  - The one exception is Naples Municipal Airport (FL) which prohibits stage 2 (noisier) fixed wing aircraft.
- Since 1990, very, very few airports have *even tried* to adopt use restrictions
  - Only one airport has completed the process needed for FAA approval to restrict current generation of aircraft (Burbank, CA). They were unsuccessful

# Uncertainties

- Efforts to impose use restrictions since 1990 often result in litigation
  - By FAA (Naples, Santa Monica)
  - By user groups (Naples, New York City)
- Lessons from Naples, Burbank, Santa Monica and New York City: Hurdles are –
  - Practical (Part 161 study)
  - Legal (litigation exposure)
  - Financial (cost of compliance; litigation costs)

# Part III – Effect of not taking grants



# Obligated vs. non-obligated airports

Federally obligated airports	Non-obligated airports
Financial obligations to FAA	No financial obligations to FAA
Eligible to receive grants	No federal money
Use restrictions must comply with grant assurances, Constitution, ANCA	Use restrictions must comply with Constitution and maybe ANCA
Grant assurances for 20 years	No grant assurances
Airport Layout Plan	No ALP required
Most disputes start with FAA administrative process	Litigation starts in trial courts (state or federal)

# Restricting airport access

Item	Obligated airport	Non-obligated airport
Technical Study	Required	Required
Must prove need	Required	Required
Public review process	Required	Desirable
Prove benefits outweigh costs	Required	Required
FAA approval	Only for stage 3 (not stage 2 or helicopters)	No
Safe harbor	Yes for stage 3 No for stage 2	No Litigation necessary
Litigation risk	Medium	High
Likely litigants	FAA, users	FAA, users

# Helicopter restrictions at E.H.

## Before 2021

Comply with  
grant  
assurances

Complete Part  
161 study

Follow  
procedural  
requirements  
of ANCA

Safe harbor

## After 2021

Complete  
analytical  
study

Follow  
procedural  
requirements  
of ANCA (?)

? Litigation ?

## Part IV – Increasing control over *this* Airport

- Focus on strategic objectives
  - Town Board intent (statements) can be critical
- Close coordination with FAA
- Voluntary measures
  - Better monitoring to improve compliance
- Improved enforcement of existing rules, regulations and procedures
- Improved flight track compliance
- Collaboration with federal elected officials (Sen. Schumer, Cong. Bishop) on helicopter routes

# Questions



Peter J. Kirsch

KAPLAN KIRSCH ROCKWELL

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[www.airportattorneys.com](http://www.airportattorneys.com)

# **EXHIBIT C**

# East Hampton Airport Safety, Noise and Operational Management Plan



KAPLAN KIRSCH ROCKWELL

Peter J. Kirsch

December 1, 2011

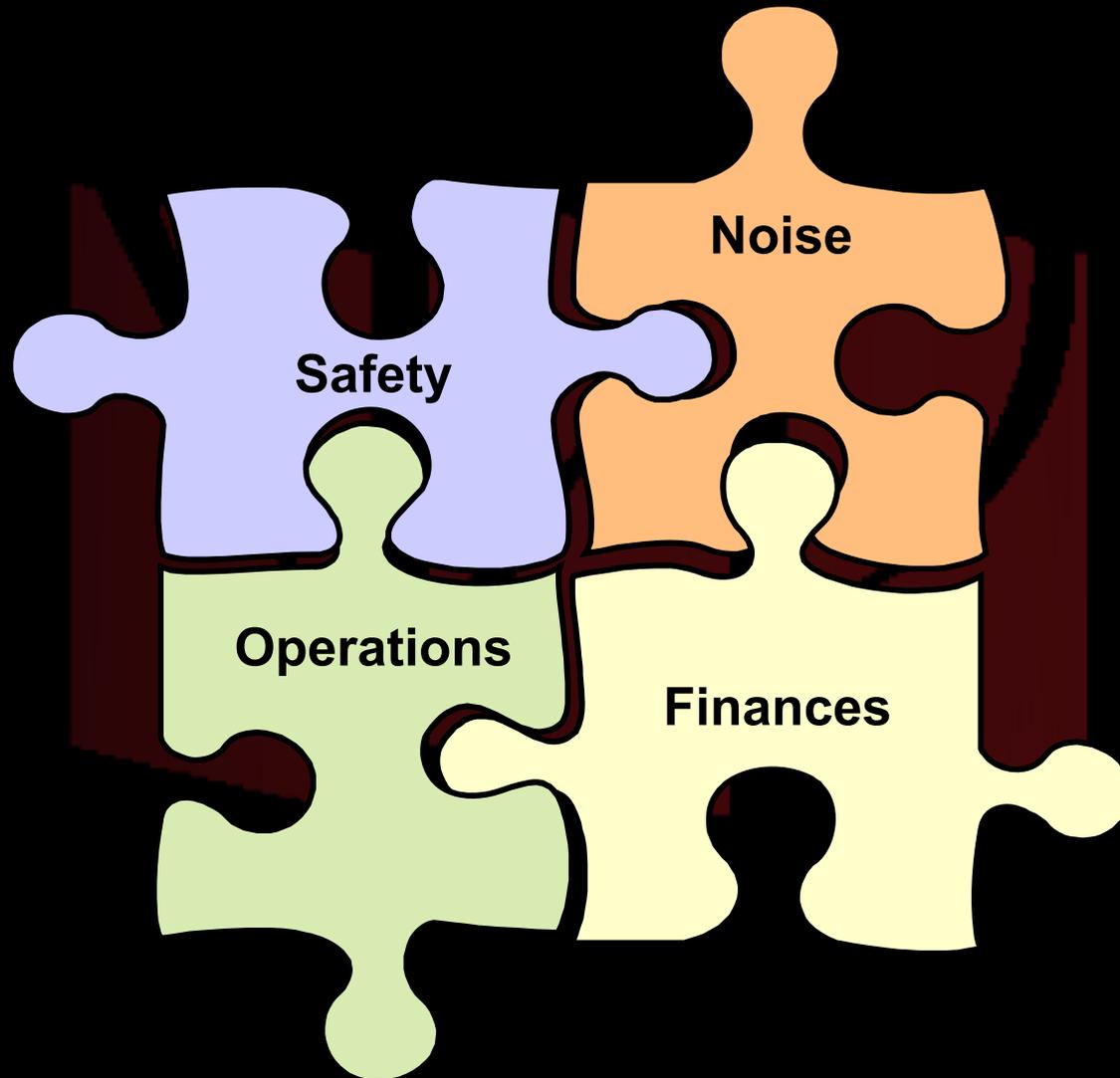
# October presentation summary

- **Town is currently 'grant obligated' to FAA**
  - Most obligations (37) expire in 2021; a few (2) will not be enforced by FAA after 2014
- **Status of FAA grants does not significantly affect ability to address noise and safety issues**
- Town does not now have 'local control' and seeking FAA grants does not fundamentally change that legal reality
  - **Only way to achieve local control is to close airport!**

## Since October

- Councilman Stanzione has been working with staff, consultants, and counsel to draft a management plan to address safety, noise and airport operations
  - Directive to staff: comprehensive and aggressive
- Some measures can be implemented by Town, some by FAA and many require cooperation between the Town and FAA

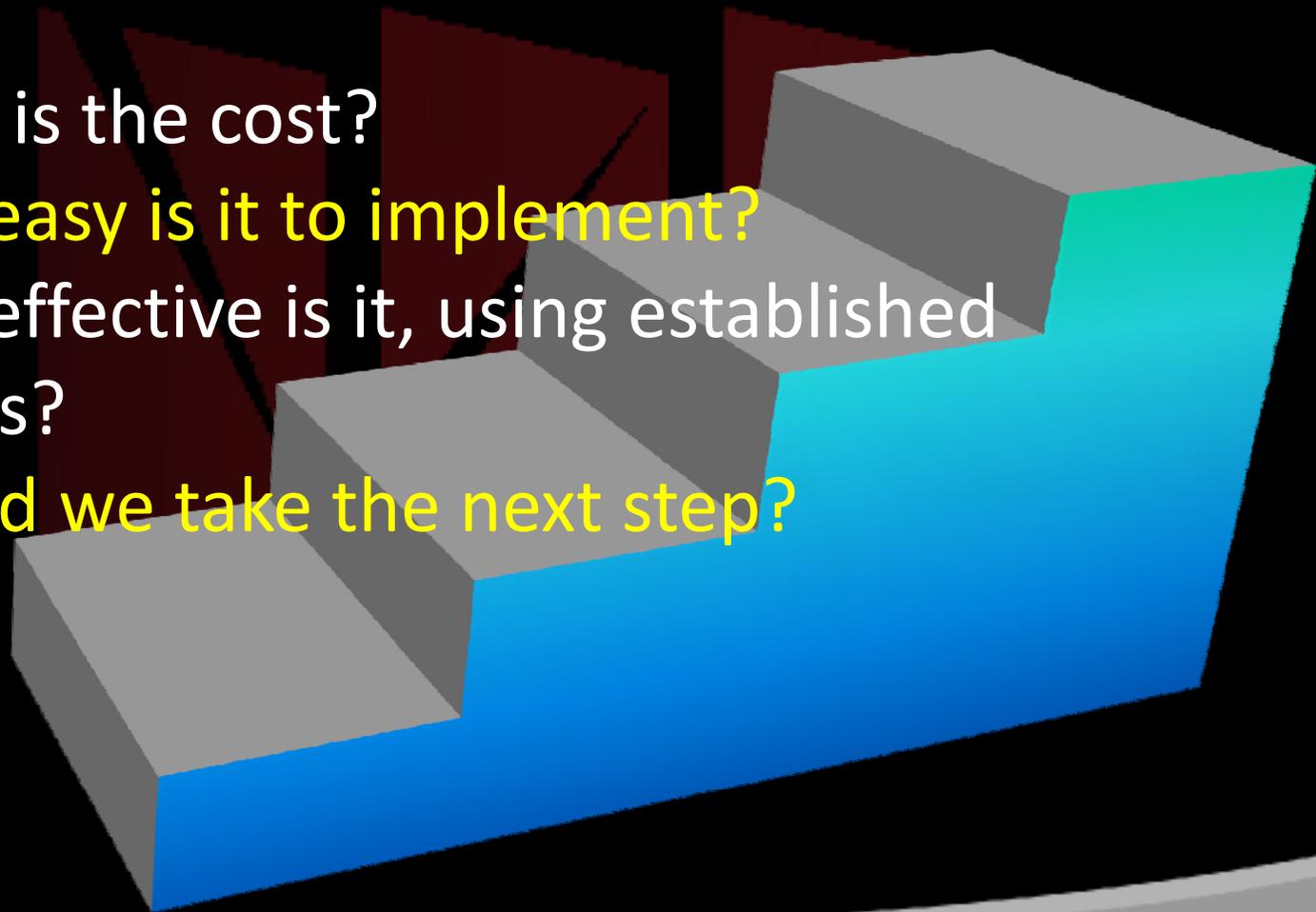
# Gaining More Control over the Airport

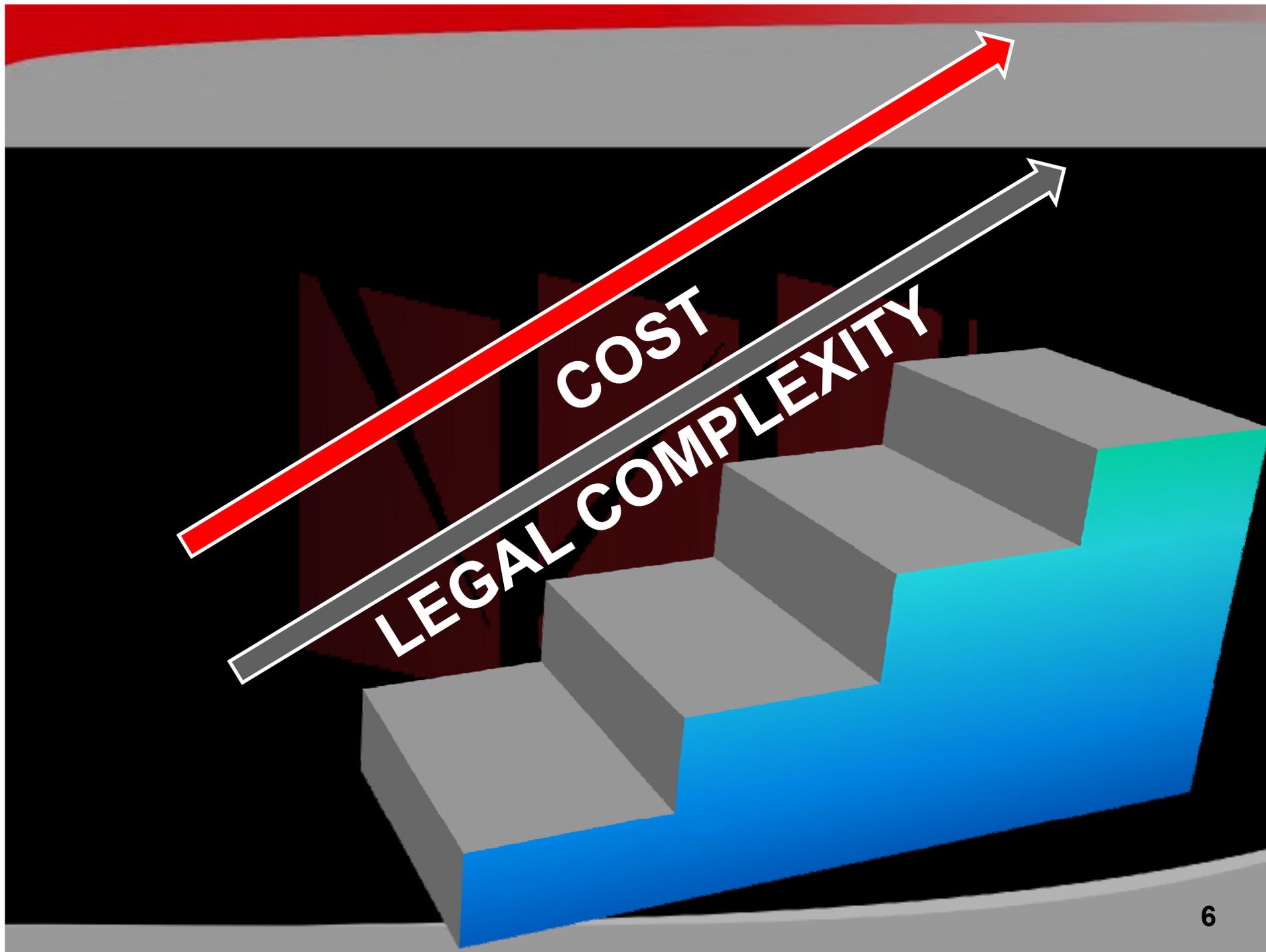


# “Stair Step” Implementation

## For each initiative, evaluate:

- What is the cost?
- How easy is it to implement?
- How effective is it, using established metrics?
- Should we take the next step?





# Management Plan Assumptions

## Mr. Stanzione suggested the following assumptions:

1. All reasonable measures should be considered
2. Plan should be "comprehensive," dealing with airport management in broad terms, across professional disciplines including noise.
3. Individual measures should each be *cost effective* (recommend the most effective and least costly measures first)
4. Program should be evaluated regularly to determine whether to proceed to next step using established metrics to evaluate each measure
5. Program should be financially sustainable
6. No physical expansion of the airport

# Categories of measures

- Group I – Rules and regulations (12 measures)
- Group II – Voluntary measures (11 measures)
- Group III – Capital improvements and modifications (7 measures) – **1 already implemented**
- Group IV – Noise mitigation measures (3 measures)
- Group V – Flight tracks and procedures (4 measures)
- Group VI – Mandatory operational rules (5 measures)

# Group I – Rules and regulations

1. Adopt revised Town policy on mission of airport, and on safety and community impact objectives
2. Conduct inventory of existing rules, regulations and minimum standards
3. Research best practices for similar airports
4. Revise rules and regulations to accord with best practices
5. Enforce rules and regulations in accord with best practices

# Group I

6. Revise minimum standards as appropriate
7. Revise rates and charges as appropriate
8. Assess availability of services at night
9. Adopt ground movement rules
10. Evaluate engine run-up rules
11. Reassess revenue scheme
12. Reevaluate landing fees

## Group II – Voluntary measures

1. Research similar airports' best practices: voluntary measures, rates and charges, operational rules
2. Evaluate success of voluntary curfew
3. Increase hours of curfew
4. Develop 'fly quiet' good-neighbor program
5. Create web-based noise reporting
6. Develop communications program to discourage night operations

## Group II

7. Adopt 'carrot-and-stick' program about night operators
8. Design temporary or permanent noise monitoring systems
9. Enhance noise event reporting
10. Implement monetary reward system for compliant operators
11. Establish oversight or advisory committees on management issues (including noise)

# Group III – Capital Projects

1. Establish permanent air traffic control tower
2. Work with FAA to permanently (not seasonally) commit facilities for protected HTO airspace
3. Review facilities that increase Town control over terminal and ground operations
4. Improve airfield lighting
5. Modify airfield geometry
6. Install noise barriers
7. Establish dedicated helipads

# Group IV – Noise Mitigation

1. Land acquisition
2. **Sound attenuation/ insulation**
3. Prepare FAA-funded Part 150 Noise Compatibility Program

# Group V – Flight Procedures

1. Adopt preferential runway use program
2. Adopt mandatory flight tracks
3. Establish noise abatement departure profile
4. Create, communicate and enforce new South Shore helicopter route

## Group VI – Mandatory Operational Rules

1. Restrict Stage I aircraft
2. Restrict Stage II aircraft and helicopters
3. Restrict Stage III aircraft
4. Adopt mandatory nighttime curfew
5. Time of day restrictions

# Next Steps: Prepare Plan

- Seek Town Board input on plan (overall priorities in Town's best interest, measures, metrics, funding and cost thresholds)
- **Refine initial list of tactics into an effective management program**
- Seek direction on implementation

# Questions



Peter J. Kirsch

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