WOLLMUTH MAHER & DEUTSCH LLP
500 FIFTH AVENUE
NEW YORK, NEW YORK 10110

TELEPHONE (212) 382-3300
FACSIMILE (212) 382-0050

June 15, 2015

By ECF

The Honorable Joanna Seybert
United States District Court
100 Federal Plaza
Central Islip, New York 11722

Re: *Friends of the East Hampton Airport, Inc. v. Town of East Hampton*

Dear Judge Seybert:

We represent the Committee to Stop Airport Expansion, Pat Trunzo, Jr., and Pat Trunzo, III (together, the "Committee"). We respectfully submit as supplemental authority in support of the Committee's motion to file amicus curiae brief, the following briefs filed in *National Helicopter Corp. of Am. v. City of New York*, 952 F. Supp. 1011 (S.D.N.Y. 1997), *aff'd in part and rev'd in part*, 137 F.3d 81 (2d Cir. 1998):

Exhibit A: Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction dated May 23, 1996.

Exhibit B: Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction dated August 9, 1996.

Exhibit C: Plaintiff's Reply Memorandum in Support of Motion for a Preliminary Injunction dated September 16, 1996.

As the Committee has previously noted, the Second Circuit in *National Helicopter*, 137 F.3d at 88-89, ruled that the proprietor exception applies to both the express preemption provisions of the Airline Deregulation Act, and the implied preemption of noise regulation by ANCA and other aviation statutes. In the court below, then-Judge Sotomayor similarly rejected that ANCA and other aviation statutes supported an overriding "general claim of implied preemption." *National Helicopter*, 952 F. Supp. at 1023.

In their opposition to the Committee's motion to file amicus curiae brief, plaintiffs backed-off their prior claim that *National Helicopter* did not address ANCA, asserting instead that the extent to which the Second Circuit considered ANCA "may invite speculation, but is ultimately is irrelevant." (Letter Opp. at 3 (Docket # 55)).

The *National Helicopter* filings hereby submitted demonstrate that the parties in that case in fact fully briefed the same ANCA- preemption arguments as plaintiffs have presented to this Court, and that Justice Sotomayor rejected all of them. In this, the Court of Appeals affirmed Justice Sotomayor entirely.[1]

We note in particular the following portions of the *National Helicopter* briefs: (1) Plaintiff's Memorandum of Law in Support at 19-21, an full section concerning ANCA preemption; (2) Defendants Memorandum of Law in Opposition at 17-20 & n.14, a thorough rebuttal of the plaintiff's ANCA preemption arguments; and (3) Plaintiff's Reply Memorandum at 19, an attempted claim that under the proprietor exception ANCA procedural requirements must be followed.

The Committee requested the Southern District to provide the lower court briefing in *National Helicopter* on May 29, 2015, and such records were made available on June 8. The Committee requested the Second Circuit to provide the appellate briefing on May 21, 2015, but those records have not yet been made available.

The Committee delayed submission of the district court briefing until now in hope of making a single submission of *National Helicopter* briefing, and makes this submission now in view of the June 26 date set by the Court for a ruling on plaintiffs' request for preliminary relief. Unless otherwise directed, the Committee will submit the Court of Appeals briefing as soon as they are made available.[2]

Respectfully submitted,

Thomas P. Ogden

[1] The Second Circuit reversed solely as to Justice Sotomayor's finding that a ban on weekend helicopter operations and a 47% reduction is overall flight operations failed the reasonable, nonarbitrary, and non-discriminatory standards of the proprietor exception.

[2] Plaintiff Helicopter Association International appeared as amicus curiae in *National Helicopter* in both the district court and the Second Circuit, and thus presumably has the appellate briefing in that case readily at hand.

EXHIBIT A

ORIGINAL

18

DEWEY BALLANTINE
Donald W. Stever (DS-8747)
Janis M. Meyer (JM-3194)
1301 Avenue of the Americas
New York, New York 10019-6092
(212) 259-8000
Attorneys for Plaintiff

Of Counsel:
FISCHBEIN BADILLO WAGNER & HARDING
Raymond B. Harding
Jonathan Young
909 Third Avenue
New York, New York 10022
(212) 826-2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL HELICOPTER CORPORATION OF AMERICA,	:	
Plaintiff,	:	
-against-	:	96 Civ. 3574 (SS)
THE CITY OF NEW YORK, THE COUNCIL OF THE CITY OF NEW YORK, THE CITY PLANNING COMMISSION OF THE CITY OF NEW YORK, and THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Table of Contents

Table of Authorities

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

NATIONAL HELICOPTER CORPORATION OF AMERICA,

Plaintiff,

-against- : 96 Civ. 3574 (SS)

THE CITY OF NEW YORK, THE COUNCIL OF THE CITY OF NEW YORK, THE CITY PLANNING COMMISSION OF THE CITY OF NEW YORK, and THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION,

Defendants.

- x

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

New York City impinged upon Congress' long-standing power to control aircraft in this nation's airspace by enacting a local zoning law ("Resolution 1558") on March 6, 1996. Resolution 1558 places onerous noise-related restrictions on the aircraft users of the East 34th Street Heliport (the "Heliport"), including National Helicopter Corporation of America ("National"). The restrictions, including an unprecedented mandate to reduce all operations by 47%, are being implemented by the City's Economic Development Corporation ("EDC"), and violate the supremacy and commerce clauses of the Constitution as well as the equal protection clause of the Fourteenth Amendment. Further, enactment of Resolution 1558 violated state and city law.

As a result of the City Council's unlawful restrictions on helicopter operations, National, the largest non-governmental provider of helicopter transportation in the eastern United States, a commuter air carrier and air taxi operator, and also the lessee/operator of the Heliport, is threatened with irreparable harm. Its access -- and

other users' access -- to federally regulated navigable airspace will be dramatically reduced. Its revenues will plummet. Its clients will disappear. Its employees will face layoffs. Its customers' good will, generated during more than 23 years, will dissolve, as one of the busiest heliports in the world is required to slash operations.

To preserve its rights and protect its business, National seeks a preliminary injunction enjoining defendants from enforcing Resolution 1558 and proceeding further with the RFP.

STATEMENT OF FACTS[1]

In 1973, National and the City of New York Department of Marine and Aviation entered into a leasehold pursuant to which National[2] operates the Heliport, located south of East 34th Street, immediately east of the FDR Drive. McGann Aff. ¶¶ 6, 10. That lease transferred all liability for operations at the Heliport from the City to National. Id. ¶ 11, Ex. "C". The transfer of liability provisions of the lease remain in full force and effect. Id. ¶¶ 11, 30, 32. National constructed the Heliport pursuant to a Special Permit issued under Section 74-66 of the Zoning Resolution, relating to the construction of heliports. Id. ¶¶ 7, 9 (Ex. "B").

National operates the Heliport, maintains it open to the public and all users on a non-discriminatory basis, and is the most frequent user of the Heliport. Id. ¶¶ 13, 38. National's commercial flights include sightseeing, commuter and air taxi flights, and

---

[1] This statement of facts is based on the affidavit of Peter McGann, National's president, sworn to on May 23, 1996. Citations to this affidavit are in the form "McGann Aff. ¶ __."

[2] The term "National" includes Island Helicopter, Inc., a wholly owned subsidiary of National.

contract flights ranging from mosquito control to work for the United States Post Office. Id. ¶ 42. National's flights are engaged in interstate commerce. Id. ¶ 36. The City of New York has spent federal funds under the Federal Airport and Airway Improvement Act, or its predecessor, on the Heliport. Id. ¶ 90, Ex. "H."

On March 6, 1996, purporting to act under Zoning Resolution 74-66,[3] New York City's City Council enacted Resolution 1558. Id. ¶ 81.[4] The measure, intended to address noise concerns raised by local residents, requires a 47% reduction in operations at the Heliport, restricts hours of operation throughout the week while phasing in a ban on weekend operations at the Heliport, mandates flight paths of sightseeing helicopters, imposes marking requirements on helicopters and prohibits certain types of aircraft from using the Heliport. Id. ¶¶ 83-84.

In enacting Resolution 1558 the City Council usurped Congress' exclusive power to regulate airspace, control aircraft noise, and enact measures relating to a price, rate, or service of an air carrier. The City Council also exceeded its power under the New York City Charter. Further, as National's helicopters qualify as Stage 2 or Stage 3 aircraft under the Airport Noise and Capacity Act ("ANCA"), the City Council failed to comply with ANCA's procedural and notice requirements for imposing restrictions on Stage 2 and Stage 3 aircraft. Id. ¶ 86.

---

[3] Section 74-66 provides that the CPC has authority to issue a permit for the "construction, reconstruction or enlargement" of heliports. No such activity was contemplated in this case.

[4] Resolution 1558 is attached to the McGann Affidavit as Exhibit "L." The City Planning Commission decision to which it refers is attached as Exhibit "K."

The present operating lease for the Heliport expires on July 31, 1996. Id. ¶ 32. On May 6, 1996, the EDC issued a Request for Proposals ("RFP") to select an operator for the Heliport.[5] Id. ¶ 88, Ex. "M." The RFP imposes all the restrictions contained in Resolution 1558, but makes slight modifications in some of them. Id. ¶ 92. Unless the EDC is enjoined from imposing the restrictions, any operator chosen to operate the Heliport after July 31, 1996, will be required to comply with the restrictions and impose them on the Heliport users immediately. The EDC has not complied with procedural and notice requirements of ANCA. Id. ¶ 86.

The restrictions contained in Resolution 1558 threaten National's existence as an ongoing concern. Id. ¶¶ 104-113. The restrictions will reduce National's access to federal airspace, halve National's revenue, slash National's helicopter operations, eliminate many of National's clients, and endanger the good will that National has built up over twenty-three years. Id. ¶¶ 102-104.

The restrictions will also increase the congestion and decrease the efficiency and safety of operations at the Heliport during the hours it remains open and will result in shifting of some traffic to other heliports, increasing the work load imposed on Newark-based Federal Aviation Administration ("FAA") air traffic controllers. Id. ¶ 62.

ARGUMENT

NATIONAL SATISFIES THE THREE REQUIREMENTS NECESSARY FOR OBTAINING A PRELIMINARY INJUNCTION

To obtain a preliminary injunction National must show "irreparable harm should the injunction not be granted, and either a

---

[5] The RFP is attached to the McGann Affidavit as Exhibit "M."

likelihood of success on the merits, or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping in the applicant's favor." Chemical Bank v. Haseotes, 13 F.3d 569, 573 (2d Cir. 1994). National clearly meets or exceeds the showing required to obtain a preliminary injunction.

I. NATIONAL WILL SUFFER IRREPARABLE INJURY

Irreparable harm exists where the denial of injunctive relief would cause a substantial loss of business, Doran v. Salem Inn, Inc., 422 U.S. 922, 932, 95 S. Ct. 2561, 2568 (1975), or a major disruption in a business, Petereit v. S.B. Thomas, Inc., 63 F.3d 1169, 1186 (2d Cir. 1995), or a substantial loss of good will, Reuters, Ltd. v. UPI, 903 F.2d 904, 908-09 (2d Cir. 1990).

Disruption of a business constitutes irreparable injury for purposes of injunctive relief because the right to continue a business is often not measurable in monetary terms, even if a damage award is calculable. Semmes Motors Inc. v. Ford Motor Co., 429 F.2d 1197 (2d Cir. 1970).

In United States v. State of New York, 552 F. Supp. 255 (N.D.N.Y. 1982) (Miner, J.), aff'd, 708 F.2d 92 (2d Cir. 1983), the Court granted a preliminary injunction to Beechcraft, an airport lessee and an airport user, because Beechcraft showed imminent harm: twenty-five of its contract customers had given notice of an intent to relocate if an 11:00PM to 7:00AM curfew went into effect. Id., at 260-261. National faces harm more compelling than Beechcraft. By operation of law, National will be forced to reduce all of its flights by 47%, reduce hours of operation, and phase in an elimination of Saturday and Sunday flights. See also United States v. County of Westchester, 571 F. Supp. 786 (S.D.N.Y. 1983) (enforcement of curfew

on airport operations resulting in loss of cargo business constituted irreparable injury).

In sum, if Resolution 1558 and the RFP are enforced, National will suffer irreparable harm. Its access to federally regulated airspace will decrease. Its business will face major disruption with a mandatory 47% decrease in the level of operations. Its revenues will plummet. Its customer goodwill will sour. Efficiency and safety of its operations will deteriorate. At least 60% of its employees will lose their jobs. McGann Aff. ¶¶ 104-112.

II. NATIONAL IS LIKELY TO SUCCEED ON THE MERITS OF ITS SUPREMACY CLAUSE, COMMERCE CLAUSE, FOURTEENTH AMENDMENT AND STATE AND CITY LAW CLAIMS

A. The Supremacy Clause Preempts Local Laws That Interfere With Federal Aviation Statutes And Regulations

The supremacy clause of the Constitution[6] preempts "state laws that 'interfere with or are contrary to laws of congress.'" Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317, 1010 S. Ct. 1124, 1130 (1981). Under the supremacy clause, a local law that conflicts with federal law is "without effect." Maryland v. Louisiana, 451 U.S. 725, 746, 101 S. Ct. 2114, 2129 (1981). Whether such laws are preempted rests on the intent of Congress. California Federal Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280-281, 107 S. Ct. 683, 689 (1987); see Rombom v. United Airlines, 867 F. Supp. 214 (S.D.N.Y. 1994) (Sotomayor, J.).

---

[6] The supremacy clause states: "This Constitution and the laws of the Unites States . . . made in Pursuance thereof; . . . shall be the supreme Law of the Land; . . . any thing in the Constitution or laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl.2.

Federal law preempts state law in one of three ways. Gade v. National Solid Wastes Management Assoc., 505 U.S. 88, 98, 112 S. Ct. 2382, 2383 (1992). First, "when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms." Guerra, 479 U.S. at 280, 107 S. Ct. at 689 (1987).

Absent express preemption, there are two types of implied preemption: "field pre-emption, where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it,' and conflict preemption, where [either] 'compliance with both federal and state regulations is a physical impossibility' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Gade, 505 U.S. at 98, 112 S. Ct. at 2383 (citations omitted).

Federal regulations have no less preemptive effect than federal statutes. Fidelity Federal Savings & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153, 102 S. Ct. 3014, 3022 (1982). Regulatory preemption occurs when a federal agency promulgates regulations with the clear intent that they be exclusive, or when state law interferes with federal regulatory policy. Id. at 155-56, 102 S. Ct. at 3023-24.

Federal law preempts state and local laws that: regulate use of navigable airspace, 49 U.S.C. § 40103(a)(2), (b)(1); define "standards to measure noise and sonic boom" or seek to "control and abate aircraft noise and sonic boom," 49 U.S.C. § 44715(a)(1); see also City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 93 S. Ct. 1854 (1973); "relate[] to a price, route or service of an air

carrier," 49 U.S.C. § 41713(b)(1); or that impose operational limitations on certain aircraft. 49 U.S.C. § 47521 et seq.

B. Federal Statutes And Regulations Governing Aviation, Aircraft Noise, and Airport Development Preempt Resolution 1558 and the RFP

1. The Federal Aviation Act Provides That the United States Has Sovereignty Over Navigable Airspace

The federal aviation transportation statute, popularly known as the Federal Aviation Act ("FA Act"), 49 U.S.C. § 40101, et seq., provides that Congress, not the states or their political subdivisions, has jurisdiction over the airspace of the United States: "The United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103(a)(2). The FA Act further provides that "the Administrator of the [FAA] shall develop plans and policies for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace." Id. at § 40103(b)(1). Finally, the FA Act provides that "a citizen of the United States has a public right of transit through the navigable airspace." Id. at § 40103(a)(1). As Justice Jackson observed

> Congress has recognized the national responsibility for regulating air commerce. Federal control is extensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands.

Northwest Airlines v. Minnesota, 322 U.S. 292, 303, 64 S. Ct. 950, 956 (1944) (concurring opinion).

By enacting Resolution 1558 the City Council encroached on Congress' and the FAA Administrator's control over navigable airspace. Resolution 1558 and the RFP expressly mandate that sightseeing

helicopters follow certain routes in navigable airspace over New York City. Congress and the FAA Administrator have exclusive jurisdiction in this area. The FA Act thus preempts Resolution 1558 and the RFP.

2. Federal Statutes And Regulations Concerning Aircraft Noise Control Preempt Provisions of Resolution 1558 and the RFP Which Limit Aircraft Operations

The Noise Control Act, 49 U.S.C. § 44715, et seq. ("NCA"), provides national standards to measure and control aircraft noise. The NCA preempts Resolution 1558, as modified by the RFP, to the extent that it seeks to control helicopter noise by imposing curfew and other restrictions on operations.

Congress intended the Noise Control Act[7] to preempt the field of regulation of aircraft noise. Burbank, 411 U.S. at 633, 93 S. Ct. at 1859-60 ("[i]t is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is preemption [of Burbank's ordinance]."). Through "field preemption" of the regulation of aircraft noise, the NCA preempts the police power restrictions contained in Resolution 1558, as modified by the RFP.[8]

---

[7] The NCA provides "to relieve and protect the public health and welfare from aircraft noise and sonic boom, the Administrator of the Federal Aviation Administration shall prescribe -- (A) standards to measure aircraft noise and sonic boom; and (B) regulations to control and abate aircraft noise and sonic boom." 49 U.S.C. § 44715(a)(1).

[8] Although New York City owns the Heliport, Resolution 1558 was enacted pursuant to the City's police power. First, the City Council purported to rely on its zoning power to enact Resolution 1558. The zoning power is a traditional police power. Town of Islip v. Caviglia, 73 N.Y. 2d 544, 550, 542 N.Y.S.2d 139, 141 (1989); see Berman v. Parker, 348 U.S. 26, 32, 75 S. Ct. 98, 102 (1954). Second, the City has contracted away all liability for operations at the Heliport to National by leasing the Heliport to National. When a city has transferred all liability concerning operation of an airport to a third party, that entity, not the city, is the proprietor of the (continued...)

Under Burbank, New York City's limitations on the timing of aircraft operations are preempted. In Burbank, the City of Burbank, acting pursuant to its police power, enacted an 11:00 PM to 7:00 AM curfew on jets landing or taking off at the municipal airport. Id. at 625-26, 93 S. Ct. at 1855-56. The curfew affected one regularly scheduled flight, an intrastate flight departing at 11:30 PM Sunday. Id. at 626, 93 S. Ct. at 1856. The Court held that the NCA preempted this curfew on the hours of airport operations, stating that imposing restrictions on the timing of flights:

> on a nationwide basis would result in a bunching of flights in those hours immediately preceding the curfew. This bunching would . . . increas[e] an already serious congestion problem . . . [and] noise problem by increasing the flights in the period of greatest annoyance to the surrounding communities. Such a result is totally inconsistent with the objectives of the federal regulatory scheme. . . . the imposition of curfew ordinances on a nationwide basis would cause a severe loss of efficiency in the use of navigable airspace.

Id. at 627-28, 93 S. Ct. at 1856-57.

Resolution 1558 and the RFP impose a more onerous curfew than the restrictions struck down in Burbank. Burbank's curfew applied to a single intrastate flight while New York City's restrictions apply to thousands of flights, many of which are operated in interstate air transportation.

Since Burbank, curfews on the hours of airport operations imposed pursuant to a municipality's police power are presumptively invalid. In San Diego United Port District v. Gianturco, 651 F.2d 1306, 1308-09 (9th Cir.1981), cert. denied, 455 U.S. 1000, 102 S. Ct.

---

[8](...continued)
airport. Pirolo v. City of Clearwater, 711 F.2d. 1006, 1009 (11th Cir. 1983); see also San Diego United Port District v. Gianturco, 651 F.2d 1306, 1317-19 (9th Cir. 1981), cert. denied, 455 U.S. 1000, 102 S. Ct. 1631 (1982) (holding that a state agency was not a proprietor of the San Diego Airport because the agency bore no liability for the operation of the airport).

1631 (1982), the Court struck down a curfew at the San Diego airport between the hours of 11:00 PM and 7:00 AM. The Court added that the "proposition that the federal government has preempted the area of flight control regulation to eliminate or reduce noise has been accepted without contrary authority by numerous courts which have addressed the subject." Id. at 1315 n.22 (listing 13 cases). In Pirolo v. City of Clearwater, 711 F.2d. 1006, 1009 (11th Cir. 1983), the Court struck down a night-time curfew, holding that the "curfew is directly controlled by Burbank." See also Harrison v. Schwartz, 572 A.2d 528, 532, 535 (Md. 1990) (declaring a curfew on aircraft operations at even a small airport, "not involving . . . commercial cargo or passenger flights. . . ." was preempted).

Resolution 1558's time restrictions are more invasive -- affecting operations earlier into the day -- than the restrictions in Gianturco and Pirolo. The restrictions in Resolution 1558 and the RFP concerning days of Heliport use are also more sweeping -- totally eliminating Saturday and Sunday travel -- than those in Gianturco and Pirolo.

Limits on the overall level of operations, comparable to the mandatory 47% reduction in operations, are also preempted by the NCA, under the Burbank analysis. In Price v. Township of Fenton, 909 F. Supp. 498 (E.D. Mich. 1995), the town restricted the activity of three warplanes providing recreational rides to the public by limiting the hourly number of takeoffs and landings. Id. at 500. Overturning the limit, the Court held that Burbank applied: "[t]here is scant difference between the Burbank restriction on the timing of flights and Fenton's restriction on the frequency of flights. Both are fairly construed as regulations of flight operation." Id. at 503.

Resolution 1558 and the RFP impose more stringent restrictions than those struck down in Price. Resolution 1558's restrictions operate as a progressive ban on all weekend operations while Fenton allowed such operations. Resolution 1558 applies to all aircraft while Fenton's ordinance targeted only aircraft with jet engines or engines over 299 horsepower. 909 F.Supp. at 500 n. 3.

Resolution 1558's mandatory 47% reduction in operations is clearly preempted by the NCA's occupancy of the field of aircraft noise regulation.[9]

3. The Federal Aviation Act Preempts Resolution 1558 and the RFP

In enacting the FA Act, Congress expressly stated its intent to preempt state and local laws:

> a State [or] political subdivision of a State . . . may not enact or enforce a law . . . related to a price, route, or service of an air carrier that may provide air transportation . . . .

49 U.S.C. § 41713(b)(1). The FA Act preempts provisions of Resolution 1558 and the RFP that regulate a "route or service of an air carrier."

The City Council Resolution and implementing RFP regulate a "route or service of an air carrier" by:

- imposing a mandatory 47% reduction in the number of operations permitted at the Heliport;
- prohibiting tourist flights over Second Avenue;
- restricting north-south sightseeing traffic to the East and Hudson Rivers;

---

[9] See also Harrison, 572 A.2d at 529, 535(local ordinance requiring that take offs be separated by 15 minutes preempted); Gary Leasing, Inc. v. Town Bd. of the Town of Pendleton, 127 Misc.2d 194, 485 N.Y.S.2d 693 (Niagara Cty.1985) (ordinance limiting number of planes based at a local airport preempted); Blue Sky Entertainment v. Town of Gardiner, 711 F. Supp. 678 (N.D.N.Y. 1989) (ordinance restricting operations at a local airport on the basis of aircraft noise level preempted), Country Aviation v. Tinicum Township, 1992 WL 396782 (E.D.Pa. 1992), aff'd, 9 F.3d 1539 (3d Cir.1993)(same).

- restricting east-west corridors to those previously agreed upon by the FAA and the heliport operator; and

- requiring that "[a]ll helicopters [based at and] using the [Heliport] shall be clearly marked with numbers on their underside so that they can be identified easily and individually by the community in its efforts to monitor operations."

Resolution 1558 at 3.[10] The RFP further added that the EDC "reserves the right to approve the proposed markings prior to the aircraft's inaugural . . . Heliport flight." RFP at 7.

a. Restriction of Routes

Resolution 1558 and the RFP mandate that helicopters follow certain routes over Second Avenue and along certain east-west and north-south corridors in navigable airspace. Those requirements unambiguously "relate[] to a . . . route . . . of an air carrier . . . provid[ing] air transportation." They are preempted by the FA Act. United States v. City of Blue Ash, Ohio, 487 F. Supp. 135, 135-36 (S.D. Ohio 1978), aff'd, 621 F.2d 227 (6th Cir. 1980) (holding that a local ordinance which "dictates flight . . . in a defined navigable airspace" was preempted by the FA Act).

b. Reduction of Hours and Operations

The FA Act also preempts the sections of Resolution 1558 and the RFP that purport to regulate "services of an air carrier." "Service" of an air carrier includes access to flights because access is provided by an airline, affects air transportation, and is reasonably necessary to air travel. Rombom, 867 F. Supp. at 221-22. Access restrictions and mandatory reductions in the level of

---

[10] Although the requirement that National follow corridors agreed upon by the FAA is not inconsistent with FAA regulations, the City Council, by requiring National to follow certain routes, acted as if it has the power to mandate flight paths. Only the FAA Administrator has such power.

operations constitute regulation of a "service" provided by an air carrier and thus are preempted. American Airlines v. Wolens, ____ U.S. ____, 115 S. Ct. 817, 823 (1995) (service of an air carrier includes "access to flights"); Rombom, 867 F. Supp. at 221-22. Resolution 1558 and the RFP, which require a 47% reduction in flights and limit the hours and days of operation, restrict "access to flights" and accordingly are preempted.

c. Mandated Markings

The FA Act also preempts Resolution 1558's provision, modified by the RFP, that a helicopter based at the Heliport be marked in a particular manner. The FAA Administrator, not the community surrounding the Heliport or the landlord, has the power to enforce regulations concerning aircraft safety and efficient use of airspace. 49 U.S.C. § 40103(b)(1). Because the markings requirement was imposed to aid "the community in its efforts to monitor operations", it intrudes into the FAA's authority to regulate for safety purposes and is preempted. Id.; see Bank of Lexington v. Jack Adams Aircraft Sales, 570 F.2d 1220, 1224 (5th Cir. 1978) (holding that Congress preempted field of aircraft registration) and 14 C.F.R. § 45.23 and 27 (mandating location of aircraft insignia).

4. The Airport And Airway Improvement Act Conflicts With And Preempts Resolution 1558 and the RFP

The Airport and Airway Improvement Act, 49 U.S.C. § 47101, et seq. ("AAIA"), provides that

> It is the policy of the United States . . . that artificial restrictions on airport capacity -- are not in the public interest; should be imposed to alleviate air traffic delays only after other reasonably available and less burdensome alternatives have been tried; and should not discriminate unjustly between categories and classes of aircraft.

49 U.S.C. § 47101(a)(9) (emphasis supplied). Federal monies are distributed under AAIA programs only with written assurances that the airport receiving funding "will be available for public use under reasonable conditions and without unjust discrimination." Id. at § 47107(a)(1) (emphasis supplied). The City has received money under the AAIA or its predecessor statute and spent that money at the Heliport.[11] McGann Aff., ¶ 70.

Under the AAIA, unjust discrimination exists when aircraft meet noise or other standards yet are excluded from the airport without a factual basis. City and County of San Francisco v. FAA, 942 F.2d 1391, 1397 (9th Cir.1991), cert. denied, 503 U.S. 983, 112 S. Ct. 1665 (1992). Resolution 1558, as modified by the RFP, unjustly discriminates against categories of Sikorsky S-58T helicopters. Sikorsky S-58Ts can use the Heliport so long as they are not (1) engaged in sightseeing activity and (2) flown by the "Heliport-based sightseeing service provider." RFP at 7. Identical Sikorsky S-58Ts engaging in sightseeing operations and flown by the "Heliport-based sightseeing service provider" are excluded from the Heliport.

Resolution 1558 and the RFP also unjustly discriminate against categories of helicopters requiring markings. Resolution 1558, as modified by the RFP, requires sightseeing helicopters based at the Heliport to bear certain markings. However, identical sightseeing helicopters not based at the Heliport do not have to bear such markings.

---

[11] The AAIA's predecessor statute, the Airport and Airway Development Act of 1970, provided that "the airport to which the project for airport development relates will be available for public use on fair and reasonable terms and without unjust discrimination." 49 U.S.C. § 1718(1).

These criteria, being flown by "Heliport-based sightseeing service providers" and being based at the Heliport, exclude aircraft without a factual basis. Such an effort -- to single out for no reason a small number of aircraft to be subject to regulation -- constitutes discrimination under the AAIA. See San Francisco, 942 F.2d at 1397 and New York Air v. Dukes County, 623 F. Supp. 1435 (D.Mass.1985) (exclusion from airport without a reasonable basis states claim under AAIA).

Finally, the RFP permits the Heliport operator to "distribute the types of helicopter operation . . . at the Heliport as it sees fit," RFP at 7 (emphasis supplied), thus allowing the operator to discriminate among users of the Heliport. This grant of unfettered authority to the operator violates AAIA's ban on discrimination. City of Pompano Beach v. FAA, 774 F.2d 1529, 1541-44 (11th Cir.1985).

5. The Noise Control Act, As Applied To Airport Proprietors, Prohibits the Unreasonable Restrictions Contained In Resolution 1558 and the RFP

Assuming, arguendo, that the City of New York acted in its proprietary capacity in adopting Resolution 1558 and the RFP, which it did not, those measures are void under the NCA. The NCA mandates that restrictions on aircraft operations enacted by a proprietor be "fair, reasonable and nondiscriminatory." British Airways Bd. v. Port Authority ("Concorde I"), 558 F.2d 75, 82 (2d Cir. 1977); see British Airways Bd. v. Port Authority ("Concorde II"), 564 F.2d 1002, 1011 (2d Cir. 1977). Because the restrictions contained in Resolution 1558 and the RFP are unfair, unreasonable and discriminatory, they are void under the NCA.

To be "fair, reasonable and nondiscriminatory," proprietary restrictions must be reached through an impartial process -- "the vital importance of the aviation industry to the national economy and basic considerations of fairness, however, require[] that even the appearance of whim and caprice be eliminated from critical decisions concerning airport access" Id. at 1005 -- and must be "even-handed" with respect to aircraft seeking access to an airport. Id. at 1012.

The process followed in imposing the restrictions contained in Resolution 1558 lacked any indicia of procedural fairness. Unlike the Port Authority in Concorde I and Concorde II, which at least had some evidence concerning the Concorde's noise levels, the City Council imposed a 47% reduction in the level of operations and restrictions on the hours of weekday and weekend use with no evidence showing particularly high noise levels during the times when the City Council required the Heliport to close.[12] McGann Aff. ¶ 87. Like the Port Authority in the Concorde decisions, the City Council merely recited "the public interest" as a means to achieve its end -- reduction of aircraft operations.

Restrictions on the hours of operations regardless of accompanying noise lack procedural fairness and are per se arbitrary and discriminatory. United States v. County of Westchester, 571 F.

---

[12] To the extent the Final Environmental Impact Statement ("FEIS") prepared in connection with the application for the Special Permit addressed any of these issues, it made findings which do not support Resolution 1558's restrictions. For example, the data reflect that the peak passenger use of the Heliport is between the hours of 1:00 PM and 5:00 PM (FEIS at III.C-8, Table III.C-3); the noisiest times of the day, in terms of ambient noise, are between 3:00 PM and 7:00 PM (FEIS at III.E-13, Table III.E-8); and during tourist season, the busiest days of the week are Sundays and Thursdays (FEIS at II.B-8, Table II.B-5). McGann Aff. ¶ 105.

Supp. 786 (S.D.N.Y. 1983); United States v. State of New York, 552 F. Supp. 255 (N.D.N.Y. 1982), aff'd, 708 F.2d 92 (2d Cir. 1983).

In Westchester, a case directly on point, a ban on all except emergency operations at Westchester County Airport between the hours of midnight and 7:00 AM was overturned as violating the requirement that "local airport proprietors . . . are 'vested only with the power to promulgate reasonable, nonarbitrary, and non-discriminatory regulations that establish acceptable noise levels for the airport and its immediate environs.'" Westchester, 571 F. Supp. at 797 (citing Concorde I at 84). The curfew, imposed by the County of Westchester, the airport owner, applied to "all aircraft, regardless of the noise emission level or degree of noise produced." Id. at 789, 794.

Under Westchester, the restrictions imposed by Resolution 1558 and the RFP are void. Like the ban on night flights in Westchester, the City Council imposed limitations on the time of day, days of the week, and total number of operations without consideration for the accompanying emitted noise. Under Westchester, those restrictions are "an unreasonable, arbitrary, discriminatory and overbroad exercise of power by the C[ity]." Id. at 797; see also United States v. State of New York, 552 F. Supp. at 265 (proprietary curfew on all airport operations between the hours of 11:00 PM and 7:00 AM which "makes no reference to noise levels," held "overbroad, unreasonable and arbitrary [since it] extends to all aircraft, regardless of the degree of accompanying emitted noise").

Resolution 1558's restrictions also violate Concorde II's requirement of evenhandedness. Evenhandedness was violated because one type of helicopter, the Sikorsky S-58T or helicopters of a similar

or larger size flown by the "Heliport based sightseeing service provider," is prohibited from using the Heliport when engaged in one type of operation -- sightseeing -- but not in any other type of operation.

6. The Airport Noise And Capacity Act Preempts Resolution 1558 and the RFP

The Airport Noise and Capacity Act, 49 U.S.C. § 47521 et seq. ("ANCA"), mandates steps to follow before an airport operator may impose noise limitations on Stage 2 or Stage 3 aircraft. Resolution 1558, as modified by the RFP, imposes noise limitations on helicopters subject to ANCA coverage. Restrictions on these helicopters' operations may not be imposed without following ANCA's procedures. 49 U.S.C. § 47524 (b), (c). The restrictions imposed by Resolution 1558 and the RFP were not adopted in accordance with ANCA, McGann Aff. ¶ 86, and must be struck down.

Congress' purpose in passing ANCA was to create a national policy for aviation noise management. 49 U.S.C. § 47521.(2), (3). Under ANCA, to lawfully impose noise or access restrictions on Stage 2 aircraft, the airport operator[13] seeking the restriction must "prepare an analysis of the anticipated costs and benefits of the proposed restriction. . . [and] publish the proposed restriction. . . at least 180 days before its effective date." FAA, Notice of Proposed Rule Making ("FAA Notice"), 56 Fed. Reg. 8644, 8649 (Feb. 28, 1991); see also 49 U.S.C. § 47524(b). To lawfully impose noise or access restrictions on Stage 3 aircraft, an airport operator must follow even more exacting requirements. 14 C.F.R. § 161.305, 49 U.S.C. § 47524(c)(1) and (2).

[13] While the regulation refers to "airport operator", the regulation also encompasses an airport proprietor.

The restrictions contained in Resolution 1558 and the RFP are within the definition of a noise or access restriction. Noise or access restrictions are defined as

> restrictions (including but not limited to provisions of ordinances and leases) affecting access or noise that affect the operations of Stage 2 or Stage 3 aircraft, such. . . as. . . a limit, direct or indirect, on the total number of Stage 2 or Stage 3 aircraft operations, . . . a restriction imposing limits on hours of operations, . . .

14 C.F.R. § 161.5.

ANCA applies to National's aircraft. Some of National's helicopters regularly using the Heliport are Stage 2 aircraft.[14] McGann Aff. ¶ 41.[15] Additionally, some of National's helicopters regularly using the Heliport are Stage 3 aircraft within the intent of the FAA regulation, because they contain state-of-the-art noise abatement technology. Id., see also FAA Notice, 56 Fed. Reg. at 8661 ("Stage 3 aircraft ... represent state-of-the-art noise control").

The Administrative Record,[16] upon which the City Council and the City Planning Commission based their decisions, fails to reflect any effort on the City's part to comply with ANCA's requirement of a cost benefit analysis or its mandatory public notice procedures before imposing restrictions on Stage 2 and Stage 3 aircraft. See, for Stage 2 aircraft, 14 C.F.R. Part 201 or Part 150, as described in 14 C.F.R. §§ 161.203(b) and 201, 14 C.F.R. § 150.21(b), and for Stage 3 aircraft, 14 C.F.R. § 161.303(b). ANCA

---

[14] The definition of the term "aircraft" encompasses helicopters. 49 U.S.C. § 40102(a)(6).

[15] National's Bell 206-L4 helicopters are officially classified by the FAA as "Stage 2" helicopters. McGann Aff. ¶ 41.

[16] The Administrative Record is attached to the affidavit of Donald W. Stever, Esq., sworn to on May 23, 1996 ("Stever Aff.") at Exhibit "C."

conflicts with, and therefore preempts, Resolution 1558 as modified by the RFP.

C. Resolution 1558 And The RFP Violate The Equal Protection Clause

Resolution 1558 and the RFP violate National's right to equal protection of law under the Fourteenth Amendment. The Fourteenth Amendment prohibits economic regulations which lack a rational relationship to a legitimate governmental interest. Romer v. Evans, ___ U.S. ___, 1996 WL 262293 at *7 (May 20, 1996).

Resolution 1558, as modified by the RFP, creates a distinction between Sikorsky S-58T sightseeing helicopters that are and that are not permitted to use the Heliport. As long as such helicopters are not operated by the "Heliport based sightseeing service providers" they can use that facility. Yet when they are operated by a single, identified operator, they are prohibited from using the Heliport. Further, Resolution 1558, as modified by the RFP, identifies certain sightseeing helicopters that are required to bear markings. As long as such helicopters are not "based" at the Heliport, they are not required to have markings. Yet when they are "based" at the Heliport, they are required to bear such markings.

These distinctions are irrational. The identity of the operator or the base of a particular helicopter has no impact on noise, safety, or any other legitimate state interest. These distinctions concerning Sikorsky S-58Ts and helicopters requiring markings are unconstitutional.

D. Resolution 1558 And The RFP Violate The Commerce Clause

Curfews that have an adverse impact on the flow of interstate commerce by preventing efficient use of navigable airspace

are invalid under the commerce clause. Concorde I, 558 F.2d at 82-83; American Airlines v. Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967), aff'd, 398 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017, 89 S. Ct. 620 (1969); United States v. Westchester, 571 F.Supp at 797.

In Hempstead, the town passed a noise ordinance which would have prevented some of the aircraft approaching John F. Kennedy Airport from flying over Hempstead. Hempstead, 272 F. Supp. at 228. The court struck down the noise restriction, ruling that "[L]egislation, whatever its purpose, that denies access to navigable air space by local rule cannot but be regarded as a plain and forbidden exertion of the power to regulate commerce as such." Id., at 234.

Resolution 1558 and the RFP, by restricting access to the Heliport, threaten the integrity of the entire helicopter transportation system in New York, New Jersey, Connecticut and beyond. Like the ban in Hempstead, which barred aircraft that violated certain noise levels, Resolution 1558's sweeping elimination of 47% of all flights at the Heliport is an excessive burden on interstate commerce. As the Court noted in Hempstead, the danger in allowing such local power is apparent: "it could be used by a neighboring city to impose different and inconsistent rules, thereby undermining a unitary national transportation system." Id. at 234, see also Concorde I at 83 ("the likelihood of multiple, inconsistent rules would be a dagger pointed at the heart of commerce").

E. Enactment of Resolution 1558 Violated City And State Law

The City Council lacked jurisdiction over the application for a Special Permit at the Heliport. Enactment of Resolution 1558 violated state and city law.

The EDC in submitting an application for a Special Permit for the Heliport, the CPC in issuing a decision on the application, and the City Council in modifying the decision on the application, each relied solely upon Section 74-66 of New York City's Zoning Resolution as the jurisdictional basis for its action. McGann Aff. ¶¶ 73, 80-81. The Heliport lies within a manufacturing district. Id. at ¶ 75.

Section 74-66, in relevant part, states "In. . . any Manufacturing District, the City Planning Commission may permit the construction, reconstruction or enlargement of heliports and their facilities. . . ." Stever Aff. Ex. "B." The EDC application does not seek the construction, reconstruction or enlargement of the Heliport. Id. at ¶ 73. Neither Section 74-66 nor any other section of the Zoning Resolution requires a special permit to use property for Heliport purposes.

Enactment of Resolution 1558 violated the New York City Charter which vests exclusive authority to regulate all "airports. . . and heliports owed by the city" in the New York City Department of Business Services. New York City Charter § 1301. Stever Aff. Ex. "A." Enactment of Resolution 1558 also violated state law which requires a voter referendum for any local law "which abolishes, transfers or curtails any power of an elective officer." Municipal Home Rule Law § 23(2)(f) (McKinney's 1994), see also Neils v. City of Yonkers, 38 Misc. 2d 691, 237 N.Y.S. 2d 245 (Sup. Ct. Westchester Cty 1962). As no voter referendum was held to pass Resolution 1558, that enactment is a nullity. Matter of Yerchak v. Raymond, 63 A.D.2d 187, 407 N.Y.S. 2d 83 (3d Dep't 1978); 1986 N.Y. Op. Atty. Gen. (Inf.) 57

(failure to conduct a mandatory referendum invalidates a local law curtailing executive power).

III. THE BALANCING OF THE EQUITIES CLEARLY FAVORS NATIONAL

National has shown the equities are in its favor, "that the harm which [it] would suffer from the denial of [the] motion is decidedly greater than the harm [defendants] would suffer if the motion was granted." Buffalo Forge Co. v. Ampco-Pittsburgh Corp., 638 F.2d 568, 569 (2d Cir. 1981).

Should National's motion be denied and Resolution 1558 and the RFP enforced, National will be irreparably harmed. Should Resolution 1558 and the RFP not be enforced, the only result will be a continuation of the status quo, now in effect for over 23 years, with defendants facing no immediate injury. The equities favor issuance of the injunction.

CONCLUSION

For the foregoing reasons, National requests a preliminary injunction enjoining defendants and their agencies, officers, employees, agents and all persons acting in concert with them from enforcing Resolution 1558 and enjoining the EDC from taking any further action with respect to the RFP dated May 6, 1996.

Dated: New York, New York
May 23, 1996

DEWEY BALLANTINE

By: _____
Donald W. Stever (DS-8747)
Janis M. Meyer (JMM-3194)
A Member of the Firm

1301 Avenue of the Americas
New York, New York 10019-6092
(212) 259-8000

Attorneys for Plaintiffs

Of Counsel:
Eliza A. Dolin
Clarke Bruno

FISCHBEIN BADILLO WAGNER
& HARDING
Raymond B. Harding
Jonathan Young
909 Third Avenue
New York, New York 10022
(212) 826-2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

NATIONAL HELICOPTER CORPORATION OF AMERICA,

Plaintiff,

-against-

THE CITY OF NEW YORK, et al.,

Defendants.

96 Civ. 3574 (SS)

AFFIDAVIT OF SERVICE

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

WILLIAM D. HANCOCK, being duly sworn, deposes and says:

1. I am over the age of eighteen years and not a party hereto.

2. On May 23, 1996, I served the annexed MEMORANDUM herein on the Defendants by causing true copies thereof to be hand delivered them at the addresses indicated, as follows:

Paul A. Crotty
Corporation Counsel, City of New York
100 Church Street
New York, New York 10007

The Council of The City of New York
c/o City Council General Counsel
75 Park Place, 5th Floor
New York, New York 10007

The City Planning Commission
of the City of New York
Mr. Joseph Rose, Chairman
22 Reade Street 2N
New York, New York 10007

The New York City Economic
Development Corporation c/o
c/o Alan Ribera, General
Counsel
110 Williams Street
New York, New York 10038

William D Hancock
WILLIAM D. HANCOCK

Sworn to before me this
24th day of May, 1996

Lois J. McKenna
NOTARY PUBLIC

LOIS J. McKENNA
Notary Public, State of New York
No. 43-4507143
Qualified in New York County
Certificate Filed in Richmond County
Commission Expires Oct. 31, 1997

EXHIBIT B

ORIGINAL

21

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

NATIONAL HELICOPTER CORPORATION OF AMERICA,

Plaintiff,

- against -

THE CITY OF NEW YORK, THE COUNCIL OF THE CITY OF NEW YORK, THE CITY PLANNING COMMISSION OF THE CITY OF NEW YORK, and THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION,

Defendants.

----------x

96 CIV. 3574 (SS)

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

JEFFREY D. FRIEDLANDER
Acting Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street, Room 5-162
New York, New York 10007
(212) 788-0820

GABRIEL TAUSSIG
DEBORAH RAND
ALICIA M. GRACE
Of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

CASES **PAGE**

CASES **PAGE**

CASES **PAGE**

STATUTES AND REGULATIONS

TABLE OF CASES **PAGE**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

NATIONAL HELICOPTER CORPORATION OF AMERICA,

96 CIV. 3574 (SS)

Plaintiff,

- against -

THE CITY OF NEW YORK, THE COUNCIL OF THE CITY OF NEW YORK, THE CITY PLANNING COMMISSION OF THE CITY OF NEW YORK, and THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION,

Defendants.

----------x

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

This action concerns the future operation of the 34th Street Heliport. It was commenced by National Helicopter Corporation of America, Inc. ["National Helicopter"] alleging that the City of New York, the City Council of the City of New York, the City Planning Commission of the City of New York, and the New York City Economic Development Corporation [collectively "the City defendants"] violated National Helicopter's constitutional rights and that the City defendants violated, inter alia, the Supremacy Clause of the United States Constitution. Specifically, the plaintiff challenges the propriety of the issuance by the City Planning Commission ["CPC"] of Resolution No. C950635ZSM dated January 9, 1996, the enactment by the City Council of the City of New York ["City Council"] of Resolution No. 1558 on March 6, 1996, and the issuance by New York City Economic Development Corporation ["EDC"] of a Request for Proposal ["RFP"] on May 6, 1996 seeking qualified

Fixed Base Operators to operate the East 34th Street Heliport under a five-year Management Contract. Plaintiff also challenges these actions on state law grounds, alleging that the actions of the CPC and the City Council were ultra vires and arbitrary and capricious. In the action, National Helicopter seeks declaratory and injunctive relief.

In addition, National Helicopter has served a motion for a preliminary injunction enjoining the City defendants from taking any actions to enforce Resolution 1558 or to proceed with the RFP process during the pendency of this action. The motion was originally noticed for June 7, 1996 but the motion was adjourned until September 20, 1996 on consent.[1]

This memorandum of law is submitted in opposition to this motion for a preliminary injunction.

STATEMENT OF FACTS

The 34th Street Heliport ["the Heliport"] has been located on land owned by the City of New York ["the City"] at the waterfront adjacent to the FDR Drive, slightly south of the intersection of East 34th Street and the FDR Drive service roads, since in or about 1972. As its name implies, the Heliport has several parking spots for helicopters; no other aircraft can land there. There is no permanent terminal building although two construction-type trailers are used as passenger terminals. In addition, as there are no hangar nor maintenance facilities, no aircraft are based at the heliport, although helicopters may be parked between flights.

The Heliport opened in 1973 after the City successfully obtained a special permit pursuant to the New York City Zoning Resolution ["Zoning Resolution"], as heliports are not

---

[1] The plaintiff and the City defendants have agreed that the City defendants shall not enforce the conditions contained in Resolution No. 1558 and shall not take any further steps to proceed with the RFP process until this Court decides the plaintiff's preliminary injunction motion.

uses permitted as-of-right in any area of the City of New York.[2] After the Heliport opened, the City entered into a lease agreement with Island Helicopters, Inc. ["Island"], permitting Island to operate the Heliport for an initial term of ten (10) years, with an option to renew for another ten (10) years. This period has now come to a conclusion. A copy of that lease is annexed as Exhibit B to the Model Affidavit.

About nine years into the lease, the City of New York commenced an action against Island Helicopter alleging, among other claims, that Island owed rent arrears and other fees to the City. The action was settled by Stipulation dated October 14, 1985, the terms of which were expressly conditioned "upon Island Helicopter duly applying for and being granted a special zoning permit, issued by the New York City Planning Commission pursuant to Section 74-66 of the Zoning Resolution, application for which is presently pending...", the necessity of which is now being challenged. A copy of the Stipulation of Settlement is annexed as Exhibit C to Model Affidavit.

This was only the first of many stipulations and agreements that the City and Island would execute. Model Affidavit. In 1989, the City and Island entered into another agreement, establishing the cessation of all operations, i.e. either landing or taking off of helicopters, at the Heliport between 11:00 p.m. and 7:00 a.m. except for emergency flights and that Island would resume and diligently pursue its application for a special zoning permit necessary to maintain the Heliport. The Agreement incorporated the terms of a simultaneously executed Memorandum of Understanding ["MOU"] which contained an affirmative statement

---

[2] For a more complete discussion of the history of the Heliport See Affidavit of Justin Model, submitted in opposition to Plaintiff's Motion for A Preliminary Injunction ["Model Affidavit"].

that the parties "consider the adjusted Heliport's [sic] hours of operation to be reasonable." A copy of this 1989 Agreement and the MOU are annexed as Exhibit D to the Model Affidavit .

By 1993, Island had still not completed the final Environmental Impact Statement ["EIS"], necessary for completion of its special permit application. Island was again significantly in arrears on its financial obligations to the City. Another letter agreement dated April 1, 1993 was executed wherein it was agreed that EDC would take control of completing the EIS necessary to obtain a special permit and if National Helicopter and Island Helicopter were in compliance with the terms of the lease, the 1985 stipulation, the 1989 agreement and MOU, and the 1993 agreement, EDC would seek an extension of their occupancy of the premises until October 3, 1995. See Model Affidavit, Exhibit E.

Once again, problems developed. This time the City sent first a warning letter, and then, on or about July 2, 1993, a Notice of Termination of Agreement and Lease Default on the ground that National Helicopter and Island Helicopter had failed to make agreed-upon payments. In an effort to stay eviction, National Helicopter and Island commenced an action against the City; the City counterclaimed for a judgment of possession and damages. This action was settled by another agreement -- the Stipulation and Order of Settlement dated January 10, 1994 -- which provided, in part, that the City would be entitled to immediate possession of the Heliport and to a judgment of possession and an order of ejectment on October 4, 1995.[3]

The City's Application for A Special Permit

[3] Again, National Helicopter and Island failed to comply with the terms of a stipulation of settlement and, on or about July 1, 1994, the City served them with a Notice of Default. In an effort to settle the action, another stipulation, the terms of which are not relevant to this action, was entered into on or about August 10, 1994.

Meanwhile EDC's steps to obtain a special permit pursuant to Section 74-66 of the Zoning Resolution continued. On June 29, 1995, the Department of Business Services ["DBS"] and the EDC filed an application for a special permit and, review of the application, as required by law, commenced.[4] A Final EIS was completed; the Notice of Completion was issued on December 27, 1995, identifying several significant environmental impacts that would result from issuance of the special permit. Exhibits G and H to Model Affidavit.

On January 9, 1996, after receiving extensive comments from the affected Community Board, the Office of the Manhattan Borough President, representatives of NYU's medical facilities and Hospital, and community members, the CPC issued its decision. The CPC's Resolution approving the application was, therefore, made subject to certain terms and conditions. A copy of CPC's Resolution is annexed as Exhibit N to the Model Affidavit.

Shortly thereafter, in connection with continuing litigation between the City and Island Helicopter and National Helicopter, another Stipulation and Order of Settlement was executed on or about February 13, 1996. This stipulation provided for: (a) the immediate issuance of an Order of Ejectment which could be executed and enforced on or after July 31, 1996 without further notice to National Helicopter and Island Helicopter; (b) the agreement by National Helicopter and Island Helicopter not to commence any suit or proceeding or bring any order to show cause to vacate the judgment of possession or to stay execution thereof; (c) the City's agreement to permit the occupants to continue as month-to-month occupants until July 31, 1996; and, significantly in light of the claims in this action, (d) an agreement as follows:

> 6. Plaintiffs waive any and all claims, counterclaims and defenses they may have, including those which were raised or which could have been raised in this

---

[4] For a more complete description of the required ULURP process, see Model Affidavit.

> action, and Defendants' obligations relating to the Documents with respect to EDC's acts or omissions regarding the EIS (including any modifications), the ULURP application, or any conditions relating to the special permit required under the City's Zoning Resolution for operating the Heliport.

A copy of this Stipulation is annexed as Exhibit F to the Model Affidavit.

On March 6, 1996, after due notice and a public hearing, the City Council adopted Resolution 1558 approving the decision of the CPC to grant the application, with several modifications, responsive to the EIS, the full ULURP record, and concerns about the noise created by the operation of the Heliport, particularly on the weekends and when larger noisier helicopters were using the Heliport. A copy of Resolution 1558 is annexed as Exhibit O to Model Affidavit.

After approval of their application for a special permit authorizing the use of the land at 34th Street and the East River for a Heliport, EDC issued a Request for Proposals ["RFP"] on May 6, 1996 seeking "qualified Fixed Base Operators ["FBO"] to operate the East 34th Street Heliport under a five-year Management Contract"; that is, EDC is seeking an entity to operate the Heliport not as a lessee but as a manager.[5] A copy of the RFP is annexed as Exhibit Q to the Model Affidavit. Soon thereafter, this matter was commenced.

ARGUMENT

NATIONAL HELICOPTER HAS FAILED TO ESTABLISH THAT IT IS ENTITLED TO A PRELIMINARY INJUNCTION STAYING IMPLEMENTATION OF THE SPECIAL PERMIT ISSUED BY THE NEW YORK CITY

[5] The RFP process has not been completed, pending a determination of the plaintiff's motion.

COUNCIL AND THE CITY PLANNING COMMISSION OF THE CITY OF NEW YORK AND OF THE REQUEST FOR PROPOSALS ISSUED BY THE ECONOMIC DEVELOPMENT CORPORATION OF THE CITY OF NEW YORK.

Plaintiff National Helicopter has moved for a preliminary injunction seeking an order staying, during the pendency of this action, enforcement of the provisions of Resolution No. 1558 and the RFP process initiated by the EDC, acting on behalf of the City of New York as the proprietor of the site. National's motion should be denied since National (A) is bound by the terms of an earlier stipulation and has, thereby, waived any right to pursue the within claims and (B) cannot meet the three-pronged test for issuance of a preliminary injunction, in that it cannot establish that: (1) it will suffer irreparable harm should the injunction not be granted, or that (2) either (a) the action has either a likelihood of success on the merits, or (b) raises sufficiently serious questions going to the merits to make them a fair ground for litigation, or that (3) a balance of hardships tips in their favor. Chemical Bank v. Haseotes, 13 F.3d 569, 573 (2nd Cir. 1994) citing Jackson Dairy, Inc. v. H.P.Hood & Sons, Inc., 596 F.2d 70, 72 (2nd Cir. 1979). This second 'serious questions' prong of the test, often referred to as the 'fair grounds for litigation' standard, does not apply where the moving party is seeking to stay a governmental action made in the public interest pursuant to a regulatory or statutory scheme. NAACP v. Town of East Haven, 70 F.3d 219, 223 (2d. Cir. 1995). In such a circumstance, as is the case herein, plaintiff has the burden of proving both irreparable harm and a likelihood of success on the merits. Id. at 223.

POINT I: NATIONAL HELICOPTER LACKS STANDING TO SEEK A PRELIMINARY INJUNCTION SINCE IT WAIVED ANY RIGHT

IT MIGHT HAVE TO ASSERT THE CLAIMS INTERPOSED HEREIN.

National's assertions that the conditions included in the special permit violate federal and local law are improperly interposed in this action. To the extent that National may have had standing to interpose the claims set forth in its complaint with respect to these matters, both by its actions and by Stipulation, National has relinquished its standing and any right it may have had to challenge the provisions of the special permit (as set forth in the CPC's Resolution and Resolution 1558) and the subsequent RFP. Specifically, National or its purported subsidiary Island filed an application for a special permit in 1982 and, thereafter, when Island failed to complete the process and EDC took over the task of obtaining the special permit, Island and National agreed to pay for the Environmental Impact Statement and to cooperate in the process. See Model Affidavit and Statement of Facts, supra. In addition, the Stipulation and Order of Settlement dated February 13, 1996 ("Stipulation"), executed by both parties and so ordered by the Hon. Salvador Collazo of New York State Supreme Court provided, as set forth supra, that National would waive any claims it may have to the ULURP process (which included the City Council's adoption of Resolution 1558), to the EIS, and to the conditions in the special permit. As the Stipulation demonstrates, in resolving the underlying controversy between the parties, a carefully balanced agreement was negotiated: the City agreed to allow National to continue to conduct its operations at the Heliport despite the termination of its tenancy rights and the issuance of a judgment of possession; in exchange National agreed to forbear from litigation over the Environmental Impact Statement, the Uniform Land Use Review Procedure, and the terms of any special permit issued. The language of the Stipulation is clear and the terms of the bargain were obviously negotiated.

Despite its past actions repeatedly reaffirming the need to obtain a special permit and its affirmative agreement to forbear from commencing litigation over these issues, this action was filed in May 1996 challenging the RFP, the conditions set forth in Resolution 1558 and CPC's Resolution -- in effect the conditions in the special permit -- and even the propriety of requiring a special permit to operate the Heliport in compliance with the Zoning Resolution. This conduct is not merely disingenuous; it is barred legally. Plaintiff has no standing to commence this action and, by extension, to file a motion for a preliminary injunction.

To the extent that plaintiff contends that the agreement is not relevant to this action,[6] plaintiff's position is without merit. Here, plaintiff has repeatedly by Stipulation and by its or its purported subsidiary's actions, including filing an application for a special permit with CPC, acknowledged that a special permit is required to operate the Heliport. Thus plaintiff should be estopped from any allegation that the CPC does not have jurisdiction over an application for a special permit be issued to operate the Heliport. See Memorandum of Law in Support of Plaintiff's Motion for A Preliminary Injunction ["National Memorandum"], pp. 22-24. In addition, at the time that the February 1996 Stipulation was executed, the CPC had already issued its January 1996 Resolution approving the application for a special permit subject to conditions including a night curfew from 8 P.M. to 8 A.M., reduced hours on the weekends, a 47% reduction in operations, a requirement that tourist flights be prohibited over Second Avenue. Plaintiff challenges the inclusion of these very conditions in Resolution 1558 and the

[6] Correspondence between counsel for the parties in this action suggest that National will assert that the Stipulation is not relevant.

RFP.[7] Plaintiff should not be permitted to now argue that the special permit was improperly issued or that its conditions are improper. Moreover, the plaintiff has agreed not to challenge any portion of the ULURP process; the action of the CPC and of the City Council with respect to the application for a special permit were a part of the ULURP process.

Stipulations which are fairly entered into and clearly waive an issue or argument are binding. Nat. Union Fire Ins. Co. v. Woodhead, 917 F.2d 752, 757 (2nd Cir. 1990); Leuhsler v. C.I.R., 963 F.2d 907, 911 (6th Cir. 1992). The language of the Stipulation is unambiguous and establishes the respective rights and obligations of the parties thereto, including a requirement that National cannot challenge the conditions of the application for nor the issuance of the special permit; i.e., the CPC Resolution, Resolution 1558 or the RFP. Daigneault v. Yonkers Racing Corp., 735 F. Supp. 62, 64 (S.D.N.Y. 1989).

In circumstances very similar to that herein, where a franchisor bargained for a benefit with its franchisee, the court recognized the special status given a court-approved stipulation and bound the parties to its terms. Burger King Corp. v. Majeed, 805 F. Supp. 994, 1005 (S.D.Fla. 1992). Absent a court vacating the prior order approving a stipulation, the courts have a duty to enforce a stipulation. Sinicropi v. Milone, 915 F.2d 66 (2nd Cir. 1990). Moreover, there is a presumption that a stipulation is valid and, if a party regrets an earlier decision incorporated in a stipulation, that does not present satisfactory grounds for relief from the earlier choice. Geller v. Delta Air Lines, Inc., 717 F. Supp. 213, 215 (S.D.N.Y. 1989). In Geller, Delta moved for summary judgment based on a stipulation wherein plaintiff had

---

[7] The particulars of some are slightly different (for example the weekend limitation has been extended to mandate an end to tourist flights on Sundays on October 31, 1996); however, the nature of the conditions -- that they involve routes, reduction in total operations, hours -- are largely the same as those contained in Resolution 1558 and the RFP.

stipulated that she would not contest liability and that the law of plaintiff's domicile would govern. Some time thereafter, plaintiff realized that the law of her domicile would bar recovery but this Court nonetheless granted summary judgment based on the stipulation.

The facts herein are no different: National, at an earlier moment in time desirous of remaining at the Heliport, stipulated to forego bringing claims based on certain conditions included in any special permit for the Heliport or on the ULURP application, which stipulation it now wishes to avoid. National should clearly be barred from contesting these issues and certainly not permitted to now claim irreparable injury as a result of what it previously waived. Even if the plaintiff alleges that the agreement only applies to those conditions already established in February 1996, National's challenge here must fail; the CPC's January Resolution and the special permit application included the same conditions -- either in specifics or in general -- as the later City Council Resolution and the RFP.

POINT II: NATIONAL HELICOPTER HAS NOT ESTABLISHED THAT IMPLEMENTATION OF THE CONDITIONS SET FORTH IN RESOLUTION 1558 AND THE REQUEST FOR PROPOSALS ISSUED BY EDC WILL CAUSE IT IRREPARABLE INJURY.

National contends in support of its application, that it will suffer irreparable harm if the RFP is implemented because

> [i]ts access to federally regulated airspace will decrease. Its business will face major disruption [and] its revenues will plummet. Its customer goodwill will sour. Efficiency and safety of operations will deteriorate. At least 60% of its employees will lose their jobs.

National Memorandum, p. 6.

In support of this application for a preliminary injunction, National asserts that certain specific conditions in the City Council Resolution, which are incorporated into the EDC's RFP, will cause the company particular and irreparable injury. These include a requirement that the Heliport be open only from 8 A.M. to 8 P.M. on weekdays and from 10 A.M. to 6 P.M. on weekends, except for emergency operations (thereby requiring that it be closed for operations at night), the projected closing of the Heliport on Sundays as of the end of October 1996 and Saturdays as of the end of October 1998, the imposition of a mandatory 47% reduction in operations, a prohibition on tourist flights over Second Avenue and the restrictions of sightseeing routes to the East and Hudson Rivers and FAA approved east-west corridors, a requirement that helicopters of Heliport-based service providers, which are used for sightseeing be specially marked, and the prohibition against Sikorsky S-58T 14-seat helicopters or helicopters of similar or larger size used by such providers for sightseeing operations.

National has not and cannot support its allegation that these restrictions will cause it immediate and irreparable injury.[8] At the present juncture, no entity, other than the City, has any legal interest in the Heliport. As set forth above (see Statement of Facts, supra), pursuant to several court-ordered stipulations, National has agreed that it has "no right, title or interest" in the Heliport except as a month-to-month holdover occupant. Pursuant to these stipulations,

---

[8] In addition to other weaknesses in National's application for preliminary relief, the fact that Island, not National, has been the primary entity providing sightseeing services at the site raises an issue as to the standing of National to interpose many of the claims here. Apparently, the City has acknowledged that there is a relationship between the corporations in the past [see e.g., the Stipulations annexed as Exhibits E and F to Model Affidavit]; however, the nature of that relationship would obviously be an issue in this litigation. To the extent that there ever has been a landlord-tenant relationship with respect to the Heliport, it has been with Island, which executed the lease and lease extension for the Heliport.

the City has the right to execute a judgment of possession -- i.e., eviction -- against National and Island at any time as of July 31, 1996.

Consequently, as National has no present legal right to operate the Heliport or, indeed to be the Heliport-based sightseeing provider, it has no standing to challenge the conditions of which it complains, as the conditions of the RFP and the Resolution granting the EDC's application for a special permit largely affect only the Heliport-based service providers. Only after the RFP process is complete would there be a determination as to what, if any effect the particular conditions would have on National since only at that point would it be clear if National has indeed been the successful bidder or if it is a designated and approved subcontractor of the successful bidder. Thus, National's claim of injury is not ripe for adjudication.[9]

National's situation here is in sharp contrast to that of the successful applicants for injunctive relief in the cases upon which plaintiff relies. For example, in Semmes Motors Inc. v. Ford Motor Company, 429 F.2d 1197 (2nd Cir. 1970), the Court upheld grant of a temporary injunction against termination of Semmes Motors's longtime Ford dealership and against contacting Semmes's customers; however, in that case, Semmes had not stipulated to relinquish its rights as a Ford dealer. Thus, in Semmes, the Court was preserving the status quo which at least one party alleged was the appropriate legal relationship. Similarly, in Reuters Ltd. v. United Press International, 903 F.2d 904 (2nd. Cir. 1990), a preliminary injunction was issued compelling Reuters to continue to supply United Press International with newspictures during the pendency of an action where the propriety of Reuters's termination of UPI, which was unilateral and bitterly contested, was a litigation issue. In United States v. State of New

[9] Furthermore, in its February 1996 Stipulation and Order of Settlement with the City, National has waived any right it may have had to challenge most of the conditions set forth in the special permit and the RFP.

York, 552 F. Supp. 255 (N.D.N.Y. 1982), the applicant for the preliminary injunction was the current lessee of an airport at which the State had imposed a curfew.

In contrast to these situations, any special claim that National may have had to a preliminary injunction ended when National's lease was terminated, a termination which has been fully litigated and finally resolved in the City's favor. National's assertions with respect to its claim of irreparable injury nowhere acknowledge that the agreed-upon status quo, without implementation of the terms upon which the grant of the special permit and the RFP are conditioned, would be National's eviction from the Heliport site and the termination of National's and Island's status as the prior lessee of the Heliport.

National's harm is at best speculative and, if it were to suffer any harm, it would be the direct result of its own actions, not those of the City Defendants. Whether National should have entered into future contracts, if it did or if it has staked its reputation on the outcome of a future RFP was National's own business decision, which National seeks to insulate. Moreover, even aside from National's present lack of any legal status or expectation with respect to the Heliport, the affidavits submitted in support of National's claim for a preliminary injunction do not establish how National's situation will be adversely affected by implementation of the RFP. The affidavit of Peter McGann, sworn to May 23, 1996 submitted in support of National's motion for a preliminary injunction ["McGann Affidavit"] makes unsupported conclusory assertions with no documentary support concerning prospective irreparable harm that National would allegedly suffer. Thus, National alleges that

> [b]ecause the Heliport's operations will be forced to decline by 47%, National's revenues will plummet...These changes, requiring a 47% or greater reduction in National's sightseeing flights, will occur during the height of the tourist season.

> The required reduction in hours, the changed hours of operation and other restrictions on operations will cause National's revenues as a user of the Heliport to plunge.

McGann Affidavit ¶ 102. However, McGann provides no factual basis for this conclusion.

Preliminary injunctive relief is a drastic measure and requires more than a mere showing that the relative position of the applicant for injunctive relief will deteriorate. Sanders v. Air Line Pilots Association, 473 F.2d 244, 248 (2d Cir. 1972). In fact, National cannot establish that the particular items challenged will cause it irreparable injury. For example, in 1989, Island agreed to close the Heliport to operations (with the exception of emergencies) from 11:00 p.m. to 7:00 a.m. and stipulated that this night closure of the Heliport was reasonable. In light of this, the McGann Affidavit provides no documentation explaining why the proposed closure for an additional 3 hours at night (from 8:00 to 11:00 p.m.) and an additional 1 hour in the early morning (from 7:00 to 8:00 a.m.) is unreasonable and will cause National irreparable harm. In fact, according to material provided by National and Island and included in the Environmental Impact Statement, sightseeing operations are concentrated in daytime hours. See EIS, Table II.B-3 and II.B-7, annexed as Exhibit G to Model Affidavit. The effect of the 47% reduction in annual operations on a particular type of flight -- corporate or sightseeing or charter -- has yet to be determined since the RFP provides that entities submitting bids for Fixed Base Operator status "may distribute the Heliport's operations according to market conditions over the course of the contract year" and "may distribute the types of helicopter operations...at the Heliport as it sees fit" while striking a balance between these types of operations. RFP, pp.5-6. Thus, for example, the successful bidder may propose that the decrease in operations should be primarily in the winter months. The City envisions that traffic will shift to other City heliports

and, other than National's bald assertions, National has offered no support to explain why its flights could not be accommodated at the other heliports where sightseeing operations are currently being conducted. In the event that National is not the successful bidder or subcontractor to the successful bidder, those aspects of the special permit and the RFP which apply only to Heliport-based providers will not affect National.

Similarly, National's claim that, without the preliminary injunction, its "reputation for reliability and service" will be damaged is disingenuous. McGann Affidavit ¶ 104. Any immediate damage to its reputation that occurred because of its inability to provide certainty as to future flights would result from the eviction of National -- the propriety of which it cannot challenge – or from National's subsequent failure to be the successful bidder in the RFP process. The assertion that the change in hours of operation will cause tour operators and travel agents to cease dealing with National is unsupported by any reliable evidence. And, if National were to be the successful bidder, National has identified at most an organizational task requiring National to notify current tour operators and their clients of locational or scheduling changes.

Hence, National's claim of irreparable injury is unsupported by the facts here.[10]

POINT III: NATIONAL'S CHALLENGE TO THE CONDITIONS IN RESOLUTION NO. 1558 AND THE RFP IS WITHOUT MERIT.

Plaintiff's challenge to the conditions mandated by the special permit and included in the RFP is based on its claims that (1) the City's actions are preempted by federal law, particularly the federal statutes and regulations governing aviation, aircraft noise and airport

[10] In addition, as it set forth at pp.8-11, infra, National has waived any right it may have had to challenge the provisions of the special permit.

development, (2)violate the Equal Protection Clause of the Fourteenth Amendment and the Commerce Clause, and (3) violate City and State Law. Plaintiff's claims are without merit.

A. The City's Actions are Appropriate Exercises of their Proprietary Rights and Are Not Preempted.

In support of its claim of preemption, National argues that the Heliport-associated conditions relating to permissible routes, hours of operation, the level of operations, markings, use of Sikorsky S-58T and larger helicopters, are preempted by the Federal Aviation Act ["F.A.Act"], the Noise Control Act ["NCA"], the Airport Noise and Capacity Act ["ANCA"], and the Airport and Airway Improvement Act ["AAIA"][11]. National Memorandum, pp.6-21.

---

[11] Plaintiff alleges, [Amended Complaint ¶ 199 and National Memorandum at 14] that City Defendants' actions conflict with the AAIA and are, therefore, preempted. Of course, this Court has held that § 2210 of the AAIA provides no private right of action and cannot form the basis of a Supremacy Clause claim either. Western Air Lines v. Port Authority, 658 F. Supp. 952 (S.D.N.Y. 1986), aff'd 817 F.2d 222 (2d Cir. 1987). In addition, courts have recognized that bringing an AAIA claim in this forum is inappropriate. Congress intended to repose authority for enforcement of the AAIA exclusively in the Secretary of Transportation through a comprehensive administrative enforcement scheme. New England Legal Foundation v. Massachusetts Port Authority, 883 F.2d 157 (1st Cir. 1989); Arrow Airways v. Dade County, 749 F.2d 1489, 1491 (11th Cir. 1985). Contrary to National's claim, where Congress has provided for such a comprehensive administrative remedy, such a claim is not privately enforceable under 42 U.S.C. § 1983. Northeast Jet Center, Ltd. v. Lehigh-Northhampton Airport Auth., 767 F. Supp. 672, 686 (E.D. Pa. 1991). Aside from these clear infirmities of law, the provisions of the AAIA upon which National relies, have no factual basis in this action. 49 U.S.C.§ 47107(a) provides that

> The Secretary of Transportation may approve a project grant application under this subchapter for an airport development project only if the Secretary receives written assurances...
>
> (1) the airport will be available for public use on reasonable conditions and without unjust discrimination...

Since the City of New York has not received a grant for an airport development project at the 34th Street Heliport, no such assurance was sought from or provided by the defendants.

In fact, as the courts have recognized, these matters as set forth in the special permit and the RFP are appropriate matters for the proprietor of a public airport to address.

As plaintiff argues, the federal government has asserted its jurisdiction to regulate with respect to the use of navigable airspace and the control of aircraft noise. See e.g., F. A. Act, 49 U.S.C.§ 40101, et seq., N. C. A., 49 U.S.C.§ 44715, A.N.C.A., 49 U.S.C. § 47521. National appears to argue that field preemption, a brand of implied preemption, requires a finding that the NCA and F.A.Act preempt the City Defendant's actions.[12] National's Memorandum, pp.9-14. This is not a novel issue. Localities, faced with community concern about noise and other environmental problems, have often attempted to regulate the use of airports and related airspace within their territorial jurisdiction. Resolution of these issues has required the courts to balance the tension between the role of the federal government in the regulation of aviation and the concerns of localities and airport proprietors.

In general, the Courts have struck down those municipal and state regulatory schemes aimed at controlling the use of airspace and airports which were enacted solely pursuant to the locality's police power. However, the courts have simultaneously long recognized the special concerns of localities which are also proprietors of airports with respect to the control of noise and the use of their airports. In Griggs v. Allegheny County, 369 U.S. 84, 82 S.Ct.531 (1962), the Supreme Court recognized that airport proprietors may be liable in tort for damages based on property owners' claims of loss in property value because of airport-related noise. This recognition has led to bifurcated and clearly distinguishable lines of caselaw: one dealing with local ordinances passed with respect to airports by non-proprietary governmental entities

[12] The cases have differentiated the types of preemption as either express preemption, implied preemption or conflict preemption. Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 112 S.Ct. 2374, 2389 (1992).

which are often preempted; the other establishing the power of airport proprietors to regulate the use of their own airports.

In City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 93 S.Ct. 1854 (1973), since the locality had no proprietary interest in the airport, an ordinance banning operations at the airport between 11 p.m. and 7 a.m. was passed not in an effort to manage city-owned land but rather simply and completely in an effort to control airport noise pursuant to the locality's police power. The Supreme Court struck down the ordinance; however, of particular significance here, the Court acknowledged the recognized exception to federal preemption for airport proprietors, specifically noting that it was not concerned with an ordinance imposed by the City of Burbank as a proprietor of the airport but with the exercise of police power with respect to a privately owned airport. Accordingly, the Court did not consider "what limits, if any, apply to a municipality as a proprietor." 411 U.S. at 637, 93 S.Ct. at 1861, n. 14.

Here, in contrast to the situation in Burbank, the challenged conditions included within the City's RFP and the Resolution granting the special permit are an appropriate exercise of the City's proprietary power as the owner of the site at 34th Street and the East River.[13] Contrary to the plaintiff's contentions, the courts have regularly upheld restrictions similar to those at issue in this case, which are required by airport proprietors in connection with the use of their airports. The rights of local airport proprietors to control noise and other aspects of their airports have been consistently upheld as a necessary right stemming from the proprietor's liability established by Griggs and nothing in the legislative history of the F.A. Act or the NCA

[13] Indeed, the importance of the City's proprietary rights to waterfront property is recognized by the New York City Charter §383 which provides that the rights of the City to such property are inalienable.

has been found to alter the role of the airport owner in the federal regulatory scheme.[14] British Airways Board v. Port Authority of New York, 558 F.2d 75, 83-84 (2d Cir. 1977) ["Concorde I"].

In Concorde I, which involved a challenge by Air France and British Airways to the Port Authority's temporary exclusion of the supersonic Concorde from JFK Airport on noise abatement grounds, the Second Circuit recognized the validity of the Port Authority's concerns as the proprietor of Kennedy airport, reversing a lower court decision which had ruled that an order from the Secretary of Transportation establishing an operational test of the Concorde preempted the Port Authority's power to ban the Concorde. In Concorde I, Judge Kaufman, writing for the Court, affirmed that "Congress provided for the promulgation by airport

---

[14] In fact, none of the aviation statutes have expressed an intent to disrupt this balance. Although National's Amended Complaint [¶ 159- 174] and Memorandum at 19-21 recite in great detail the procedural requirements for imposing restrictions on "Stage II" and "Stage III " aircraft under the regulations implemented pursuant to ANCA, which act National alleges preempts the City's actions, National cites no authority for this proposition. Like the prior F.A. Act and NCA, ANCA did not alter the sphere of power consciously committed to airport owners, in an area which has been otherwise federally regulated. National conveniently overlooks that ANCA Section 47533 provides that nothing in the statute will affect "law in effect on November 5, 1990, on airport noise or access restrictions by local authorities". The FAA regulations implemented pursuant to ANCA echo the statute stating, "except to the extent required by the application of the provisions of the Act, nothing in this part eliminates, invalidates, or supersedes the following: (1) Existing law with respect to airport noise or access restrictions by local authorities". 14 C.F.R. § 161.7(d)(1). Significantly, when answering commentaries to their proposed regulations, the FAA in the preamble to the final rule stated that ANCA did not change the Griggs liability of an airport proprietor ("The Act did not change the liability normally borne by the airport operator under Griggs v. Allegheny County, 369 U.S. 84 (1962). Neither the Act nor Part 161 alter any of the remedies previously available under state or local law with respect to airport noise"). 56 F.R. 48661 (1991). As under the other federal statutes, there is no preemption under ANCA where the action taken is by a local airport proprietor.

proprietors of reasonable regulations to establish acceptable noise levels for the airfield and its environs." Id.[15] at 78.

Three months later, when the same court determined to lift the ban on the Concorde, it nevertheless reaffirmed the power of local government, that owns and operates an airfield, to impose a noise regulation. British Airways Board v. Port Authority, 564 F.2d 1002, 1011 (2nd Cir. 1977, Kaufman, J) ["Concorde II"]. Significantly, although the ban was lifted, the power of the Port Authority to promulgate "reasonable, nonarbitrary and nondiscriminatory noise regulation" was underscored. 564 F.2d at 1005, 1013.

This recognition of the rights of airport proprietors to establish noise-related regulations has been repeatedly restated. Even before the Concorde decisions, in National Aviation v. City of Hayward, 418 F.Supp. 417 (N.D.CA. 1976), a local ordinance which prohibited larger aircraft from landing or taking off from the City of Hayward's airport during nighttime hours was upheld on this basis. Not only did the district court reaffirm the relevance of Griggs,but it also noted the clear statement of Congress that passage of the Noise Control Act was "not designed to and would not 'prevent airport proprietors from excluding any aircraft on the basis of noise considerations'." 418 F.Supp. at 424.[16] See also, Air Transport Ass'n v. Crotti, 389 F.Supp. 58, 63-64 (N.D.CA. 1975) rejecting a challenge to a California regulation

---

[15] Indeed, the Court noted that the Federal Government's brief in that case denied that "existing legislation authorized the Executive under any circumstances to preempt airport proprietors from promulgating their own noise regulations." 558 F.2d at 82.

[16] In Hayward, as here, the City noted that enjoining the enforcement of the ordinance would "entail great social costs in the form of noise pollution affecting hundreds of residents living in the vicinity of Hayward Air Terminal, as well as possible financial liability for the city by way of a suit in inverse condemnation." 418 F.Supp. at 419.

establishing specific noise standards at State-owned airports in order to achieve a gradual reduction in airport noise.

The courts have broadly interpreted the appropriate scope of proprietary regulation in the area of noise control. In Santa Monica Airport Ass'n v. City of Santa Monica, 481 F.Supp.927 (C.D.CA.1979) aff'd 659 F.2d 100 (9th Cir. 1981), an association of pilots and owners of aircraft and aviation-oriented businesses challenged on several grounds, including preemption, municipal ordinances imposed by the City of Santa Monica which owned the airport and sought to regulate its use by establishing a night curfew, regulating operation of aircraft over the City, banning helicopter flight training, establishing noise guidelines for planes ascending from or descending to the airport, and banning jet aircraft. Both the district court and the appellate court rejected the preemption claim as to all of the regulations.[17]

This Circuit has more recently affirmed the proprietary power of the Port Authority to regulate noise-related matters at its airports in Global International Airways Corp. v. Port Authority, 727 F.2d 246 (2nd Cir. 1984) ["Global II"] rev'g 564 F.Supp. 795 (S.D.N.Y. 1983). There, the Court of Appeals rejected a facial preemption challenge to Port Authority rules requiring charter airlines to use specific percentages of planes defined as "noise compliant" at local airports, despite the fact that the federal noise abatement program established somewhat different specific phase-out procedures for the noisier planes.[18] See also, Alaska

---

[17] Although the both the District Court and the Circuit stated that the ban on jet aircraft was not preempted by federal law, they struck down the ban on equal protection grounds finding no rational basis to differentiate jets from the equally noise propeller planes permitted at the airport.

[18] The court discussed at some length the legislative history of the Aircraft Noise Abatement Act which amended the F.A.Act (49 U.S.C. § 1431(b)(1), recodified today at 49 U.S.C. § 44715) and the Part 36 regulations established thereunder, which National asserts "preempt state and local laws ... that control and abate aircraft noise and sonic boom". National (continued...)

Airlines, Inc. v. City of Long Beach, 951 F.2d 977 (9th Cir. 1991) rejecting a challenge to a municipal airport owner's ordinance establishing noise maximums and limiting individual aircraft noise and the number of air carrier jet flights at the municipality's airport, insofar as it was based upon claims of federal preemption or violation of the Commerce clause.[19]

(i) An Airport Proprietor's Powers Extend Beyond Noise

Indeed, while the proprietary powers of local governments with respect to their airports may have emanated from the noise control area, they have extended beyond noise control.[20] In Western Air Lines v. Port Authority, 658 F.Supp. 952 (S.D.N.Y. 1986) aff'd 817 F.2d 222 (2d Cir. 1987), the Court rejected a challenge, based upon the Commerce, Supremacy, Equal Protection and Due Process Clauses of the United States Constitution, to a Port Authority rule prohibiting airlines from operating long distance nonstop routes out of LaGuardia Airport.

---

[18] (...continued)
Memorandum at 7. Notably, the court observed with reference to the F.A.Act that "states and localities retain power in their capacity as airport proprietors to establish requirements as to the level of permissible noise created by aircraft using their airports. This power includes the right to deny use of airports to aircraft on the basis of non-discriminatory noise criteria". Global II, supra at 248. The court continued that "the noise levels specified in Part 36... [14 C.F.R. § 36] are not intended to substitute federally determined noise levels for those more restrictive limits determined to be necessary by individual airport proprietors" quoting 34 Fed. Reg. 18,355(1969).Global II, supra at 248.

[19] In Alaska, the Court found that portions of the ordinance were infirm on procedural due process grounds irrelevant to the issues raised herein.

[20] The Ninth Circuit in Alaska Airlines, supra, noted just how far Congress has gone in delineating the powers of airport proprietors ("After Burbank, Congress expressly provided that the proprietary powers and rights of municipal airport owners are not preempted by federal law. 49 U.S.C. § 1305(b)(1)"[recodified today at 49 U.S.C. § 41713(b)(3)]. 951 F.2d at 982. Section § 41713(b)(3) provides:

> This subsection does not limit a State, political subdivision of a State or political authority of 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

Western had argued that the Port Authority route restriction was directly preempted as a "route or service" pursuant to 49 U.S.C. § 1305(a)(1) [part of the F.A.Act recodified at 49 U.S.C. § 41713] and that the F.A.Act's express savings provision only gave airport proprietors the right to regulate very narrowly in the area of noise. This Court, however, concluded that "Section 1305(b)(1) does not expressly limit proprietary powers to the regulation of noise, although presumably Congress would have so limited the section if that is what it had in mind". Western Air Lines, 658 F.Supp. at 957. Finding no express conflict between the route and an FAA regulation, the Court concluded the restriction was a legitimate exercise of an airport owner's proprietary powers. Id. at 958.

Similarly, the restrictions upon which the City, in this case, conditioned its grant of the application for a special permit and the RFP relating to routes and reduction in operations and their hours do not conflict with any FAA regulation, respond to the complaints and concerns of the neighboring community which includes medical facilities, such as NYU Hospital, and residential apartment buildings, and may avoid potential liability for the proprietor of the Heliport. Accordingly, the City properly exercised its rights and fulfilled its obligations as proprietor of the site in taking the challenged actions.

Moreover, the decisions relied upon by National do not controvert this conclusion. In those cases, the factual circumstances are clearly distinguishable from the facts here. Cf. National's Memorandum, pp. 9-12.[21] For example, as noted supra, Burbank is inapposite since

---

[21] Cf. also, Harrison v. Schwartz, 572 A.2d 528 (Md. 1990) where the Maryland Court of Appeals struck down a Carroll County curfew imposed on a small privately-owned airport specifically noting that the facts before it did not involve the proprietary exception because the County did not own the airport. In Price v. Township of Fenton, 909 F.Supp. 498 (E.D.Mich. 1995), local restrictions on the frequency of flights were struck down but the case was brought in connection with a privately owned and operated airport; of course, here the municipality (continued...)

the Court clearly distinguished the situation in that case where the regulation was passed by a non-proprietary entity from that at issue here where the municipality is the proprietor of the airport. Burbank, 411 U.S. at 635, 93 S.Ct. at 1861, n. 14. Similarly, National's reliance on United States v. City of Blue Ash, 487 F.Supp. 135 (S.D. Ohio, W.D. 1978) aff'd 621 F.2d 227 (6th Cir. 1980) is misplaced. In Blue Ash, the Court struck down a local restriction dictating pilots to fly a specific airborne heading after take-off and a particular departure course from the Cincinnati-Blue Ash Airport. 478 F. Supp. at 136. This is not analogous to the City's contract limitation of routes of Heliport-based sightseeing providers' helicopters to the more general area over the East and Hudson Rivers, an airspace corridor designated by the FAA. Moreover, unlike the situation here, in Blue Ash as the court noted, the case did not involve a restriction placed by an airport proprietor as the airport was owned by the City of Cincinnati and operated by Hamilton County, not the City of Blue Ash.

In an even greater stretch, plaintiff suggests that the decisions in American Airlines v. Wolens, _____ U.S. ___, 115 S.Ct. 817 (1995) and Rombom v. United Air Lines,

---

[21] (...continued)
imposing the restrictions is the proprietor. See also, Blue Sky Entertainment v. Town of Gardiner, 711 F. Supp. 678 (N.D. N.Y. 1989) (successful challenge to regulations concerning use of small local airfields which were privately owned; the Court specifically distinguished Blue Sky from cases where the locality owns the regulated airport.

Again, in San Diego United Port District v. Gianturco, 651 F.2d 1306 (9th Cir. 1981), it was the San Diego Unified Port District, a political subdivision of the State and the proprietor of the San Diego International Airport, which challenged a state-imposed curfew. The Court there stated, citing Burbank, that:

> The district court held correctly that City of Burbank controls here. Here, as in City of Burbank, a governmental entity was attempting to impose a mandatory curfew on an unwilling airport proprietor.

651 F.2d at 1312. The Ninth Circuit reaffirmed the proprietor exemption but noted that the Port District, not the State was the proprietor.

867 F.Supp. 214 (S.D.N.Y. 1994) support its challenge to the requirement of a 47% reduction in flight operations and to limits on hours and days of operations as "services of an air carrier" under Section 1305(b). In Wolens, the Supreme Court found that the Airline Deregulation Act preempted Illinois' Consumer Fraud and Deceptive Business Practices Act with respect to the regulation of an airlines' frequent flier program although not with respect to state breach of contract claims; however, the decision is not relevant here as Wolens case did not involve regulation of any local airport or the interplay between federal regulation and the powers of local proprietors. In Rombom, in considering an airlines' motion to dismiss a passenger's state tort claim related to behavior by the flight crew aboard an aircraft, this Court found that federal law did not preempt all state tort claims, but rather, that a case-by-case approach was required to determine which claims were preempted; therefore, the Court carefully analyzed the challenged behavior in light of the language of the F.A. Act to determine which claims were preempted. Significantly, Rombom also did not involve regulation of a municipally-owned airport. Plaintiff's has failed to explain how the challenged actions involve "services" and "access" in the same context as Wolens or Rombom and has admitted that there is no conflict with an FAA regulation. National's Memorandum at 13, n.10. As this Court has noted, a preemption analysis requires a prerequisite finding that the connection to "services" is not tenuous, remote or peripheral. Rombom, 867 F. Supp. at 222.

Correspondingly, plaintiff's reliance on Bank of Lexington v. Jack Adams Aircraft Sales, 570 F.2d 1220 (5th Cir.1978) to support its challenge to the requirement that Heliport-based sightseeing providers place a marking (in addition to the FAA required markings) on their planes is mystifying. Jack Adams only held that Kentucky law in direct conflict with the F.A. Act concerning the recording and registration of title documents for aircraft would be preempted.

Here, the requirement concerning placing markings on certain helicopters has not been shown to be in conflict with federal law; nor can it be, because, the specific markings have not yet been determined (See RFP, p. 7) and, in any event, will be in addition to any federally-mandated markings and insignia.[22] Where an airport proprietor's regulation will further the purpose behind the FAA's regulatory framework and, there is no direct conflict, such a regulation has been upheld in this Circuit. Global II, 727 F.2d at 251-52.

(ii) The City's right to exercise the proprietor exception to preemption is intact.

As set forth above, proprietors actions with respect to their airports are not preempted so long as they are reasonable. Here, the City is clearly the proprietor of the Heliport and has been since it first opened. The conditions being placed on the Heliport's operations are set forth in EDC's RFP. EDC's management of the Heliport as an independent contractor on behalf of the City does not shield the City from liability, nor would the City be shielded if EDC in turn hired an independent contractor. Cf. Axtell v. Kurey, __A.D.2d __, 634 N.Y.S.2d 847 (3rd Dept. 1995). Currently, there is no lease in effect and the City has not yet entered into any new contract. Indeed, it is the terms of that proposed new management contract that National challenges. Generally, the indicia of a "proprietor" for preemption purposes have been ownership, promotion, operation and the ability to acquire required approach

[22] Lastly, the City's actions do not, as National intimates, give the community the power to enforce the FAA's air safety regulations; the insignia requirements facilitate the community's individual aircraft recognition by requiring somewhat larger, additional markings on the underside of the aircraft. This greater facility for citizens to recognize particular aircraft and, perhaps, lodge more precise complaints with the FAA could hardly be construed as an enforcement power.

easements. San Diego United Port District v. Gianturco, 651 F.2d 1306, 1317 (9th Cir. 1981). The City meets those criteria in relation to the Heliport.

Prospectively, the EDC's RFP contemplates hiring a fixed-base operator to operate the Heliport on behalf of the EDC and pursuant to EDC's imposed conditions, under a management contract for a five-year term. The precise terms of that contract have not yet been written. Moreover, the fact that the RFP implements Resolution 1558 does not affect the City's proprietary role; as a proprietor, the City sought a special permit to operate a Heliport. Here, the City acts in a proprietary and governmental capacity simultaneously. United States v. State of New York, 552 F.Supp. 255, 264 (N.D.N.Y. 1982)("It is well accepted that a state may act in both a proprietary capacity and a governmental capacity...).[23]

The City acting in its capacity as proprietor of the Heliport may, in some circumstances, be liable for noise as well as other aspects of the Heliport's operation; accordingly, the City's efforts to control its liability as well as to ensure that the Heliport does not adversely affect the surrounding community are clearly not preempted by any federal act.

---

[23] National speculates that the City has relinquished its proprietary capacity through its lease with National. As noted above, National has no present rights in the lease and, even if it did, this would not be dispositive. Undertakings to indemnify a city for noise at their airport have not been found to insulate a city from liability. Specifically, in Alaska Airlines, Inc. v. City of Long Beach, 951 F.2d 977, 982 (9th Cir. 1991), the Court of Appeals decided that the mere establishment of a right to recovery did not alter the city's ultimate liability. The situation cited by National in San Diego United Port District, supra, is also not instructive because there, the court found the state had ceded its authority to a political subdivision and, therefore, could no longer act as the proprietor. Finally, National relies upon Pirolo v. City of Clearwater, 711 F.2d 1006 (11th Cir. 1983), where a curfew imposed by the City of Clearwater was struck down. Although Clearwater owned the land upon which the airport was sited, it had a thirty-year contract with a private entity for the operation of the airport. Without discussing the terms of the thirty year contract, the Court found that, although the restrictions imposed by the City of Clearwater – a night curfew and control of air traffic patterns -- were reasonable restrictions on use of the land, the City had contracted away any right it had to impose them and could no longer avail itself of a proprietary exemption. 711 F.2d at 1008-1011.

B. The City's Actions Were Not Arbitrary or Unreasonable.

To the extent the plaintiff acknowledges the existence of the proprietary exemption and the fact that, pursuant to the Noise Control Act and subsequent case law, an airport proprietor may enact reasonable restrictions on aircraft noise, National asserts that the conditions established by the special permit and the RFP are nevertheless void because they are unreasonable. See e.g., First Amended Complaint ¶ 175-178 and National's Memorandum at 16. Contrary to plaintiff's assertions, the City's actions are fair and reasonable.

As discussed, supra, the City as proprietor of the airport has the authority not only to protect itself against inverse condemnation claims for noise, but also to enact noise regulations to enhance the quality of the human environment. Santa Monica Airport Ass'n v. City of Santa Monica, 659 F.2d at 104. It has been established for some time in this Circuit that so long as an airport proprietor's restrictions are "fair, reasonable and nondiscriminatory," courts will uphold them as valid proprietary actions. Concorde I, 558 F.2d at 82.

Plaintiff alleges that the City's restrictions on the E. 34 St. heliport ("Heliport") operations are unreasonable and arbitrary because: (1) there was not an impartial process; (2) the 47% reduction in operations and weekend and weekday hours restrictions were not supported by high noise levels or consideration of the particular accompanying emitted noise levels; (3) the restrictions unfairly discriminate against one particular aircraft, the S-58T and (4) it is unfair to require Heliport-based sightseeing providers to display large markings on their aircraft to facilitate their identification. National's Memorandum, pages 16-19.

These assertions of unreasonableness are unfounded. EDC, on behalf of the City, had prepared an Environmental Impact Statement ("EIS"),[24] filed an application for a special permit, and participated in the Uniform Land Use Review Procedure required by the City Charter. Public hearings were held by the community board, the Manhattan Borough President, the CPC and the City Council. The EIS reviewed tests which established high noise levels and analyzed the noise emitted from the Heliport. The reduction in the number of operations was also analyzed, as were changes in days and hours of operation.[25] The EIS identified the noisiest helicopters regularly using the Heliport as the Sikorsky S-58T's used for sightseeing. In an effort to regulate the noise at the Heliport, EDC, as proprietor, determined future restrictions should include restrictions on operations by sightseeing operators. The City considered its alternatives within the City heliport system and decided that a different distribution of heliport usage would be an appropriate way to accomplish the objective of reducing the noise at the heliport.[26]

The propriety and rationality of the type of regulations imposed here has been upheld. In the Court's decision in Global II, supra, the Second Circuit upheld an airport proprietor's rule regulating the cumulative level of noise at an airport, rejected the argument that

---

[24] As noted supra, prior to EDC's filing of the application for a special permit and completion of the EIS, National had filed an application for a special permit and commenced the environmental review process.

[25] Initially, EDC had proposed a different night curfew period and shorter hours on weekends as well as effectuating a proposed 47% reduction in helicopter activity by eliminating the Heliport's weekday sightseeing operations. See EIS, p.S-1. Modifications of particulars but not of the general thrust of the proposal occurred in response to community concerns during the review process before CPC and the City Council.

[26] During the special permit review process, a ban on Heliport-based providers' use for sightseeing of the Sikorsky S58-T was added as a restriction on the use of the site for a heliport.

a proprietor's discretion only extends to regulating with a standard that centers on the noise level produced by individual aircraft, and expressly found that limiting cumulative noise exposure was also a valid goal, reserved to airport owners under federal policy. Id. at 251.

A reduction in overall noise exposure is precisely what the City and EDC sought to achieve by reducing the number of aircraft operations by 47%, by reducing the hours of operation and by curtailing operations of the noisier aircraft using the Heliport. The rule upheld in Global II operated upon the number of aircraft operations during a given time period at the airport. 727 F.2d at 250. Similarly, the City defendants' actions herein operate upon the total number of takeoff and landings during any one year time period and the hours of airport operation to address the same objective as that addressed by the rule upheld in Global II, the amelioration of noise in the surrounding communities. EDC's EIS fully analyzed the noise levels around the airport over a several year period and considered the noise levels produced by all types of helicopters using the Heliport. The EIS found that, contrary to Plaintiff's allegations, the adverse noise effects from the Heliport in the community were significant.

The City's decision to reduce the hours and intensity of operations and limit the noisiest aircraft conducting based sightseeing operations was even-handed, impartial and involved frequent input from plaintiff. The City recognized that, as proprietor, it could limit Heliport-based-operators only and that the greatest use of the Sikorsky was for sightseeing by the based sightseeing provider. Moreover, the implementation of those decisions will be uniform and subject to prior review and approval by EDC during the Request for Proposals ("RFP") process and reviewed by EDC during the course of the management contract. Such rules of general applicability are valid restrictions. Arrow Air v. Port Authority of N.Y., 602 F.Supp. 314 (S.D.N.Y. 1985). As with the restrictions upheld in Arrow Air, here the City and EDC have

identified the noisiest aircraft using the Heliport (the Sikorsky S-58T) and will restrict operations of this helicopter and others with similar characteristics from conducting based sightseeing operations.

Similarly, the City and EDC's choice to resolve the Heliport's noise problem through a decrease in sightseeing operations at that location, with the goal of transferring these types of operations to other City heliports, is a legitimate proprietary goal previously recognized by this Court. See Western Air Lines v. Port Auth. of N.Y. & N.J., supra.

In Western, the Court held that defendant's distribution of air traffic within its three airport system was a reasonable means of advancing a legitimate proprietary interest to lessen ground congestion. 658 F.Supp. at 957. The City's goal here is identical: redistributing flights from one heliport and reducing sightseeing flights by the largest and loudest helicopter using the Heliport with the goal of shifting sightseeing flight operations to other City heliports. As part of that goal, a proprietor may impose a reasonable requirement to assist in its administration; for example, to require Heliport-based sightseeing operators to display large insignia markings on their aircraft. The Court in Western observed that regulating ground congestion was a legitimate goal and, like noise regulation, is an important proprietary function which a proprietor may undertake pursuant to 49 U.S.C. § 1305(b)(1), recodified today at 49 U.S.C. § 41713(b)(3).[27]

The critical inquiry in reviewing a restriction is not whether the discrimination is unjust, since all regulations will usually discriminate in some manner, but "whether the discrimination is reasonable in light of the legitimate objectives sought to be achieved." Id. at

[27] Section 41713(b)(3) provides that "[t]his subsection does not limit a State, political subdivision of a State or political authority ... from carrying out is proprietary powers and rights."

959. In the case of the Heliport, there are well-documented noise impacts and the City, at all levels, considered these impacts on the affected communities before acting and, thereafter, developed a reasonable means of meeting its goals. As a part of this review, the City considered comments by City agencies and citizen groups on ways to protect weekend hours from the noise of the Heliport's operation. The preservation of weekend tranquility and evening hours has been recognized as a legitimate public interest in other noise-related challenges. Santa Monica Airport Ass'n, 481 F. Supp. at 938.

Airport proprietors have been given considerable latitude in selecting a reasonable means of achieving a legitimate goal, even if other means exist. The law does not require proprietors to have selected the best means, only a reasonable means. Western, 658 F.Supp. at 960. In Alaska Airlines v. City of Long Beach, 951 F.2d 977 (9th Cir. 1991), the Ninth Circuit undertook a similar reasonableness analysis of an airport proprietor's rule which reduced the daily number of air carrier flights at an airport. Here, the City and EDC's choice to positively control airport operations through restrictions on based sightseeing providers under contract with the City using Sikorsky 58T helicopters is a reasonable means of reaching a lawful objective under the laws which control noise at airports.[28]

---

[28] Importantly, in Alaska Airlines, the Court found that even though a reduction in the total number of carrier flights would have differing effects on noise depending on the type of aircraft used, this reduction was not arbitrary because "it is not unreasonable to believe that the number of times the disturbance occurs could be as relevant as the cumulative noise created by the total number of disturbances." Id. at 985. This is exactly what the City and EDC's restrictions address. Not only does the special permit and the RFP address the total number of aircraft operations but also the time of day of operations and they seek to reduce the number of operations by the noisiest aircraft that habitually use the Heliport. These actions are clearly legitimate and fall within the category of actions repeatedly found by courts to be reasonable in reducing cumulative noise.

Accordingly, it is clear that the City of New York acted properly in its proprietary capacity in establishing the conditions that are set forth in the special permit and the RFP. Despite plaintiff's suggestion that they are much more drastic than any challenged in the cases discussed supra, in fact, the regulations are reasonable, regulate an airport which is primarily devoted to transient sightseeing and corporate traffic, have no significant effect on the national transportation system, and primarily affect those providers who enter into a management contract or a subcontract to become Heliport-based service providers.[29]

C. The Special Permit and The RFP Do Not Violate The Commerce Clause of The United States Constitution.

National has failed to allege facts that establish that the conditions contained in special permit and RFP will have any impact on interstate commerce. The Heliport has been closed during the nighttime hours for more than six (6) years. Little, if any, non-sightseeing traffic has used the Heliport during weekends for a considerable period of time and, in fact, the majority of flights are local sightseeing flights. Despite the broad claim that the Heliport is used by interstate flights, no facts establishing the numbers of such flights have been provided and, most significantly in terms of National's claim of irreparable injury, no evidence as to how many of such flights originating at the Heliport are made by National's helicopters.

In any event, in view of the fact that the conditions challenged are being implemented by the proprietor, that most of the conditions would only affect sightseeing service-

---

[29] National attacks the requirements in the special permit and the RFP with respect to Heliport based sightseeing service providers mandating special markings on their helicopters and barring their use of Sikorsky S-58T or larger helicopters because National alleges the requirements violate the provisions of the Airport and Airway Improvement Act ["AAIA"]. However, AAIA is not applicable here as the City has not accepted development grants for the Heliport. In any event, as has been fully discussed, the complained-of conditions are not "discriminatory" within the meaning of the AAIA.

providers that are Heliport-based, and that the regulations generally serve to reduce cumulative noise exposure at the Heliport and are non-discriminatory, the plaintiff has failed to meet its burden to establish that the claim has sufficient merit to support a preliminary injunction application. In addition, here the restrictions are imposed by the proprietor of a site used exclusively by helicopters and largely for local travel; here, the restrictions will have no effect on the national air transportation system, and they serve an important local purpose. Rejecting a challenge under the commerce clause in British Airways' challenge to the Port Authority's ban on the supersonic transport plane, the Concorde, the Second Circuit noted:

> Under the commerce Clause, Congress has the power, in order to promote a nationwide transportation system and to control interstate and foreign air traffic flow, to dictate what aircraft should be permitted to land and take-off from airports. See City of Burbank v. Lockheed Air Terminal, supra. But it is manifest from our scheme of aviation management that Congress has consciously committed to airport owners the responsibility of determining permissible levels of noise for the facility and its environs.

Concorde I, 558 F.2d at 83, n.2. Cf. American Airlines v. Hempstead, 272 F.Supp. 226 (E.D.N.Y. 1967) aff'd 398 F.2d 369 (2nd Cir. 1968) cert. denied 393 U.S. 1017, 89 S.Ct. 620 (1969) (striking down local regulation of flight paths approaching a major international airport, Kennedy, by a locality with no proprietary interest); and United States v. Westchester, 571 F.Supp. 786 (S.D.N.Y. 1983) (where a night curfew imposed by the proprietor, Westchester County, at one of the five major airports in the New York metropolitan area, which was unrelated to any information concerning emitted noise, had a serious impact on air traffic at LaGuardia and other area airports, violated grant assurances provided to the federal government and was unreasonable in the circumstances, was struck down).

Moreover, this Court has upheld an airport proprietor's noise-based regulation against a Commerce Clause challenge where there was only an incidental effect on commerce and, further opined, that where local action is authorized by Congress, it will be upheld even if it interferes with interstate commerce. Arrow Air, Inc. v. Port Authority of New York, 602 F. Supp. 314, 322 (S.D.N.Y. 1985). The Court observed that Congress had purposefully given airport proprietors the responsibility to determine acceptable noise levels and that the airport owner's regulation pursued "an important local interest in 'protecting the local populace from airport noise' ". 602 F. Supp. at 322, quoting Concorde II, 564 F. 2d 1010. Not only has National failed to establish even an incidental effect on interstate commerce but where restrictions, such as those challenged herein, are facially neutral, they will be upheld unless the asserted benefits of the regulations are greatly outweighed by the burdens on interstate commerce so as to make them irrational. Alaska Airlines, 951 F.2d 977, 983 (9th Cir. 1991). In this case, the proprietor is taking action to reduce airport noise for the local community and itself, with a design and plan to manage the other heliports within its heliport system.

National also alleges a violation of the equal protection clause based on distinctions between the conditions of the RFP and the Resolution 1558 as well as different requirements for helicopters operated by Heliport-based sightseeing providers. First, the RFP implements the conditions of the Resolution and clarifies the means by which the requirements will be carried out so that there are no actual differences between the conditions being imposed under either. Second, the rationality of imposing these types of conditions in similar circumstances has withstood equal protection scrutiny. The Heliport-based sightseeing providers would use the Heliport more others; thus, regulation of their larger noisier helicopters would achieve a predictable benefit for a legitimate public purpose. Alaska Airlines, 951 F.2d at 986. The goal

of the City, as a proprietor, to control airport noise, particularly during weekend and leisure hours, serves a legitimate purpose and the conditions imposed through the RFP on helicopters operated by Heliport-based sightseeing providers are rationally related to the achievement of that goal.

D. The City Planning Commission and The City Council Had Jurisdiction Over EDC's Application For A Special Permit.

Finally, National argues that it is entitled to a preliminary injunction because it alleges that Section 74-66 of the Zoning Resolution does not require a special permit for use of the site as a Heliport and, therefore, the enactment of Resolution 1558 by the City Council is not a proper exercise of its power pursuant to New York City Charter § 197-d but rather an improper regulation of the Heliport in violation of New York City Charter § 1301. Not only is this argument absurdly convoluted, but it is also completely without merit.

As is noted in Point I A. supra, plaintiff and its subsidiary Island Helicopter repeatedly reaffirmed their commitment to obtain a special permit to enable the 34th Street Heliport to operate. In fact, as noted, the 1982 application for a special permit was filed by Island and only refiled by EDC because Island and National unreasonably delayed completing the special permit application. Thus, by its actions and numerous agreements, National is estopped from claiming that a special permit is unnecessary to operate the Heliport.

In addition, the Zoning Resolution permits the siting of Heliports in the City -- including manufacturing districts such as at issue here -- only if a special permit has been granted. Zoning Resolution §§32-32 and 42-32. Thus, from a zoning standpoint, without a special permit the Heliport is not legally operating. Accordingly, in order to operate the Heliport, the applicant must apply for a special permit, pursuant to Zoning Resolution § 74-66,

to operate the Heliport.[30] After years of seeking such a special permit, plaintiff now disingenously claims none is necessary as the Heliport is not being "constructed, reconstructed or enlarge"; however, from a zoning perspective, under Section 74-66 of the Zoning Resolution, in the absence of a special permit, no heliport can exist.

Indeed, in dicta, the courts of New York have recognized the necessity for a special permit. In dismissing a community challenge to the continued operation of the Heliport without a special permit, the Appellate Division noted that "there has been considerable delay in the operator's prosecution of its application for the permit" and that at some point the failure to complete the process may require the Court to act. The Rivergate Co.et al. v. The Board of Standards and Appeals et al., 144 A.D.2d 266, 533 N.Y.S.2d 868 (1st Dept.) app. den'd 74 N.Y.2d 605, 543 N.Y.S.2d 398 (1988). Pursuant to § 197-c, applications for special permits within the jurisdiction of the CPC are subject to the ULURP process. Pursuant to City Charter § 197-d, the City Council's power to review decisions of the CPC and to approve, approve with modifications, or disapprove such applications is clear. Accordingly, plaintiff's claim that Resolution 1558 violated the City Charter is completely without merit.

POINT III: A BALANCING OF THE EQUITIES FAVORS THE CITY DEFENDANTS.

---

[30] § 74-66 provides in relevant part

> In...any manufacturing District, the City Planning Commission may permit the construction, reconstruction, or enlargement of heliports and their facilities....
>
> The Commission may prescribe appropriate additional conditions and safeguards to minimize adverse effects on the character of the surrounding area.

Here, if a preliminary injunction is imposed, the implementation of the special permit and the RFP process will be stayed for a considerable period of time. During that time, the Heliport will either continue to be operated in violation of the Zoning Resolution under an interim arrangement to keep the Heliport open or it will be closed. The City, as proprietor, will be unable to appropriately "protect the local population from airport noise" as envisioned by the regulatory scheme. Concorde I, supra at 83. In contrast, if the preliminary injunction is not issued, none of National's legal obligations will be affected: National has no legal right, title or other legal claim to continued operation of the Heliport and National's subsidiary, Island, has no legal right to continue as the Heliport-based provider with all of the privileges that the status entails.

In sharp contrast to National's claim that the only result of granting of the preliminary injunction "will be a continuation of the status quo, now in effect for over 23 years, with defendants facing no immediate injury," the issuance of the preliminary injunction will sharply transform the status quo -- requiring one of several less desirable options: the closure of the Heliport, a stay of the long scheduled eviction of National and National obtaining permission to remain as an operator despite the long outstanding judgment of possession,[31] or installation of a new operator to run the Heliport on an interim, short-term basis without a mechanism to enter into an appropriate longer-term contract for management of the facility.

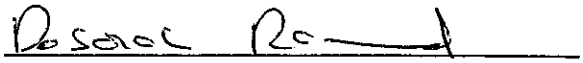
[31] Clearly National is hoping to continue its very profitable operations during the life of any preliminary injunction issued by this Court.

CONCLUSION

BY REASON OF THE FOREGOING, DEFENDANTS RESPECTFULLY REQUEST THAT THIS COURT ISSUE AN ORDER DENYING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION.

Dated: New York, New York
August 9, 1996

JEFFREY D. FRIEDLANDER
Acting Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street, Room 5-162
New York, New York 10007
(212) 788-0820

By: 
DEBORAH RAND (DR1474)
Assistant Corporation Counsel

On the Memorandum,
GABRIEL TAUSSIG
DEBORAH RAND
ALICIA M. GRACE

EXHIBIT C

ORIGINAL

DEWEY BALLANTINE
Donald W. Stever (DS-8747)
Janis M. Meyer (JM-3194)
1301 Avenue of the Americas
New York, New York 10019-6092
(212) 259-8000
Attorneys for Plaintiff

Of Counsel:
FISCHBEIN BADILLO WAGNER & HARDING
Raymond B. Harding
Jonathan Young
909 Third Avenue
New York, New York 10022
(212) 826-2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL HELICOPTER CORPORATION OF AMERICA,

Plaintiff,

-against-

96 Civ. 3574 (SS)

THE CITY OF NEW YORK, THE COUNCIL OF THE CITY OF NEW YORK, THE CITY PLANNING COMMISSION OF THE CITY OF NEW YORK, and THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION,

Defendants.

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT
OF MOTION FOR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Cases **Page**

Cases **Page**

Cases **Page**

Statutes **Page**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL HELICOPTER CORPORATION OF AMERICA,	:	
Plaintiff,	:	
-against-	:	96 Civ. 3574 (SS)
THE CITY OF NEW YORK, THE COUNCIL OF THE CITY OF NEW YORK, THE CITY PLANNING COMMISSION OF THE CITY OF NEW YORK, and THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION,	:	
Defendants.	:	

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

Defendants cannot refute the core arguments in National's Moving Brief[1] that the restrictions contained in Resolution 1558 and the RFP are preempted by federal law and thus resort to an attempt to defeat National's motion by arguing that National is not injured by the restrictions and that National waived its right to bring this action. Defendants' position has no legal or factual support and must fail[2]. Specifically,

- Defendants ignore the fact that National will suffer irreparable harm not only as the operator of the Heliport but as its single largest user.
- The parties' legal obligations with respect to the Heliport demonstrate that the City is not a proprietor, but, even if it were acting as a

[1] Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction, dated May 23, 1996.

[2] National disagrees with Defendants' version of the facts set forth in their Memorandum of Law ("Opposition Brief") and supporting affidavits but will address herein only those factual inaccuracies relevant to the issues on this motion.

proprietor, the restrictions imposed by Resolution 1558 and the RFP are unreasonable, arbitrary, and discriminatory.

- National did not waive its right to bring this action, either by its actions or by the February 13, 1996 Stipulation.

ARGUMENT

I. National Did Not Waive Its Right To Challenge Resolution 1558 And The RFP

Defendants' assertion that National "lacks standing"[3] to bring this action on the ground that it allegedly waived its right to challenge Resolution 1558 and the RFP in Paragraph 6 of the February 1996 Stipulation[4] is simply wrong. The origin and language of the February 1996 Stipulation demonstrate that the parties did not and could not have intended that Paragraph 6 would apply to claims arising after the execution of that Stipulation. Moreover, even if Paragraph 6 could be interpreted as a waiver, public policy would prevent its enforcement to bar the claims asserted in this action.

---

[3] The City often refers to National's alleged lack of standing to bring this action, Opposition Brief at 12, 13, and in so doing appears to confuse the criteria for having standing to bring an action, the standard for obtaining a preliminary injunction and the defense of waiver. These concepts are distinct. To have standing,

> the plaintiff must have suffered an 'injury in fact' -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual and imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

United States v. Hays, ___ U.S. ___, ___, 115 S.Ct. 2431, 2435 (1995). To obtain a preliminary injunction, plaintiff must show irreparable injury and either a likelihood of success on the merits or serious questions going to the merits and a balance of hardships in its favor. Waiver is a defense, not an assertion that there is no justiciable issue between the parties. Plaintiff has standing to bring this action, will suffer irreparable injury (see discussion at 10-13 infra), and has not waived its claims.

[4] Opposition Brief at 7-11. The February Stipulation is attached as Exhibit G to the Second Affidavit of Peter McGann, dated September 16, 1996 ("Second McGann Aff.").

A. The Negotiating History And The Language Of The February Stipulation Demonstrate That It Was Not Intended To Bar National's Claims

Defendants cannot show that National has "knowingly and voluntarily"[5] waived its right to challenge Resolution 1558 or the RFP. Resolution 1558 was passed on March 6, 1996. The RFP was issued on May 6, 1996. Neither existed at the time the February 1996 Stipulation was signed, which was no later than February 13, 1996. Absent a clear waiver of future rights,[6] Paragraph 6 of the February 1996 Stipulation could not have waived National's rights to challenge Resolution 1558 and the RFP.[7]

1. Most Of The February 1996 Stipulation, Which Settled a Landlord-Tenant Dispute, Was Negotiated Prior To August 1994

The meaning of a contract "must be determined upon consideration of the words employed, read in the light of attending circumstances."[8] Defendants conveniently ignore the fact that the February 1996 Stipulation is virtually identical to a stipulation

---

[5] "A waiver is 'the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it.'" City of New York v. State of New York, 40 N.Y.2d 659, 669, 389 N.Y.S.2d 332, 340 (1976)(citation omitted). A waiver should not be presumed: it requires a "clear manifestation of intent" to waive a known right. Gilbert Frank Corp. v. Federal Insurance Co., 70 N.Y.2d 966, 968, 525 N.Y.S.2d 793, 794 (1988). A waiver cannot be inferred from "doubtful or equivocal acts or language." East 56th Plaza v. Abrams, 91 A.D.2d 1129, 1130, 458 N.Y.S.2d 953, 955 (3d Dept. 1983). The party asserting waiver bears the burden of proving that defense. City of New York v. State of New York, 40 N.Y.2d at 669, 389 N.Y.S.2d at 340.

State law governs the interpretation of the February Stipulation. Middle East Banking Company v. State Street Bank Int'l, 821 F.2d 897, 905 (2d Cir. 1987); Skylon Corp. v. Guilford Mills, 901 F. Supp. 711, 712 (S.D.N.Y. 1995).

[6] See Cahill v. Regan, 5 N.Y.2d 292, 299, 184 N.Y.S.2d 348, 354, (1959) (release's "meaning and coverage necessarily depend . . . upon the controversy being settled and upon the purpose for which the release was actually given. Certainly, a release may not be read to cover matters which the parties did not desire or intend to dispose of").

[7] The February 1996 Stipulation plainly indicates that it was intended to "settle . . . all outstanding disputes." Second McGann Aff. Ex. G at 2 (emphasis supplied).

[8] Fidelity & Deposit Co. of Maryland v. Pink, 302 U.S. 224, 229, 58 S.Ct. 162, 164 (1937).

executed in August 1994 (the "August 1994 Stipulation")[9] in the same state court action, which involved a dispute between National as tenant and the City and EDC as landlord. At issue in that suit were National's obligation to pay rent and EDC's purported termination of the lease. National was also concerned about EDC's delay in preparing the EIS and applying for a special permit.[10]

The August 1994 Stipulation provided that National could remain at the Heliport through October 3, 1995.[11] The August 1994 Stipulation and the February 1996 changes were drafted by Defendants. The August 1994 Stipulation settled a landlord-tenant dispute concerning the amount and due date of payments. National also agreed not to bring claims which related to that landlord-tenant dispute and claims concerning EDC's acts or omissions during the time that EDC or its predecessor and National were jointly responsible for preparation of the EIS, ULURP procedures, and application for the special permit.[12] It is inconceivable that National -- or Defendants -- knew or could have known of the conditions ultimately to be imposed by Resolution 1558 and the RFP more than 18 months before those documents came into existence.[13]

In the fall of 1995, EDC and National agreed to extend National's right to occupancy of the Heliport to July 31, 1996 and agreed to increase National's rent. The

---

[9] Second McGann Aff. Ex. F.

[10] Id. ¶¶ 8-11.

[11] Id. Ex. F, ¶ 3.

[12] Second McGann Aff. ¶¶ 18-24.

[13] See, Gettner v. Getty Oil, ___ A.D.2d ___, 641 N.Y.S.2d 73, 74 (2d Dept. 1996)(release does not bar suit on claim that parties had no knowledge of on date of execution of release); Xerox v. Town of Webster, 204 A.D.2d 990, 612 N.Y.S.2d 734, 734 (2d Dept. 1994) (settlement agreement resolving "pending litigation" concerning tax assessments does not bar Section 1983 claim concerning tax assessments).

parties executed the stipulation months later, in February 1996.[14] The February 1996 Stipulation changed the date until which National could remain at the Heliport and increased National's rent. Otherwise, the February 1996 Stipulation is identical to the August 1994 Stipulation.[15]

In February 1996, Paragraph 6 was boilerplate, lifted word-for-word from the August 1994 Stipulation. Paragraph 6 was not negotiated in connection with the February 1996 Stipulation.[16] To the extent that it forms part of a "carefully balanced agreement," as Defendants assert,[17] that agreement was struck in the summer of 1994 and executed on August 11, 1994. Indeed, the intent of the February 1996 Stipulation was to duplicate the August 1994 Stipulation, and National agreed in Paragraph 6 to nothing more than it had agreed to in August 1994, eighteen months earlier.[18]

2. The Language Of Paragraph 6 Demonstrates That It Does Not Apply To This Action

The language of Paragraph 6 makes clear that it was not intended to apply to the claims asserted in this action[19]. National, in Paragraph 6, demonstrated a "clear

---

[14] Second McGann Aff. ¶ 29.

[15] For a description of the circumstances surrounding the registration and execution of the August 1994 and February 1996 Stipulations, see Second McGann Aff. ¶¶ 15-30.

[16] Second McGann Aff. at ¶¶ 27-32.

[17] Opposition Brief at 8.

[18] The parties intended that the February 1996 Stipulation duplicate the August 1994 Stipulation because the only negotiating points for the February Stipulation were (1) the date by which National must surrender the premises and (2) National's rent. Second McGann Aff. at ¶ 27.

[19] If the Court nevertheless concludes that the parties' intent concerning Paragraph 6 is unclear, its provisions may not be enforced against National in this action. Bank of New York v. Amoco Oil, 35 F.3d 643, 662 (2d Cir. 1994) (courts do not apply broader of two possible interpretations of a settlement, absent a "clear manifestation of intent"); Accord, O'Brien v. Town of Mamaroneck, 20 N.Y.2d 587, 594, 285 N.Y.S.2d 843, 848 (1967); Mandia v. King Lumber & Plywood, 179 A.D.2d 150, 159, 583 N.Y.S.2d 5, 10 (2d Dept. 1992); Kraker v. Roll, 100 A.D.2d 424, 438, 474 N.Y.S.2d 527, 536 (2d Dept. 1984).

manifestation of intent" to decline to assert certain claims related to a pending state court action, a landlord-tenant dispute concerning the parties' legal and financial obligations.[20] A plain reading of Paragraph 6 makes clear that the parties intended it to apply to matters involving their disputes at the time -- not claims which might arise in the future.[21]

Paragraph 6 reads:

> Plaintiffs waive any and all claims, counterclaims, and defenses they may have, including those which were raised or which could have been raised in this action, and Defendants' obligations relating to the Documents with respect to EDC's acts or omissions regarding the EIS (including any modifications), the ULURP application, or any conditions relating to the special permit required under the City's Zoning Resolution for operating the Heliport. ¶ 11 of the April 1st 1993 Agreement is modified to the effect that Defendants hereby waive any claim for rent based upon imputed landing fees from sight seeing operations[22].

Paragraph 6 thus refers to two types of claims: Claims (1) which "were raised or could have been raised in this action", and (2) relating to "Defendants' obligations relating to the Documents" (defined as the Lease, a prior stipulation and letter agreement and the February 1996 Stipulation)[23] with respect to EDC's acts or omissions (a) concerning the EIS, (b) the ULURP application, or (c) conditions relating to the special permit.

The claims National asserts here could not have been raised in the state court action, because the stipulation discontinued the state court action effective February 13, 1996 while the City Council passed Resolution 1558 on March 6, 1996 and the EDC issued the

---

[20] See discussion at 3-5, supra.

[21] Defendants concede that the stipulation does not apply to every claim National asserts in this action: "Furthermore, in its February 1996 Stipulation and Order of Settlement with the City, National has waived any right it may have had to challenge most of the conditions set forth in the special permit and the RFP." Opposition Brief at 13 n.9.

[22] Second McGann Aff. Ex. G, ¶ 6.

[23] Documents is a defined term meaning "[t]he (expired) Lease, the 1985 Stipulation, the April 1st, 1993 Agreement, and th[e] [February] Stipulation." Id., ¶ 1.

RFP on May 6, 1996.[24] Because a party may not bring an action challenging administrative decisionmaking until the agency has reached a final decision,[25] National could not have asserted in the state court action the claims that it brings here.[26]

Further, Paragraph 6 refers to known claims concerning Defendants' obligations relating to the Lease and other documents setting forth National's financial obligations for the payment of rent and relating to EDC's acts or omissions in connection with the preparation of documents necessary for completion of the environmental review process, ULURP, and obtaining the special permit.[27] There is simply no indication in the Stipulation that National or Defendants intended that National waive claims that had not yet arisen or claims other than those relating to EDC's acts or omissions.[28]

---

[24] See Brooks v. Bates, No. 89 Civ. 4478, 1994 WL 121851 at *10 (S.D.N.Y. April 7, 1994) (Sotomayor, J.) (noting that a release executed as part of a settlement "does not bar suit on claims unrelated to the settlement").

[25] Williamson Cty. Regional Planning Comm'n. v. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 105 S. Ct. 3108, 3116 (1985) (holding that because applicant "ha[d] not yet obtained a final decision regarding the application of the zoning ordinance . . . to its property . . . [its] claim [wa]s not ripe."); Church of St. Paul and St. Andrew v. Barwick, 67 N.Y.2d 510, 520, 505 N.Y.S.2d 24, 30, cert. denied, 479 U.S. 985, 107 S.Ct. 574 (1986) (claim not ripe where harm may be ameliorated by further administrative action).

[26] Under such circumstances, a claim that National waived its rights fails. Werking v. Amity Estates, Inc., 2 N.Y.2d 43, 52, 155 N.Y.S.2d 633, 642 (1956) (no waiver effected because plaintiff had no knowledge of violation of law).

[27] The recital paragraphs confirm this understanding; they demonstrate that the parties intended to settle a landlord/tenant dispute and payments related to that dispute. See Second McGann Aff. Ex. G at 1-3.

[28] To the extent that Defendants argue that, because National originally sought a permit, it is estopped from asserting that the City Council does not have authority to regulate the Heliport, Opposition Brief at 37, Defendants misstate the law. Colonial Sand & Stone v. Johnston, 20 N.Y. 2d 964, 966, 286 N.Y.S 2d 855, 856 (1987) see, infra at note 98.

B. Even If Paragraph 6 Applied To The Claims Asserted Herein, Public Policy Would Bar Its Enforcement

Even if National had waived its rights to assert a claim regarding Defendants' future actions, public policy bars enforcement of a waiver against a party asserting public, rather than personal, rights. "Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate."[29]

In Summit School v. Neugent,[30] the Court rejected enforcement of a waiver where it conflicted with New York State education law and usurped the authority of the Department of Education. In Summit School, a private school applied for a zoning variance and a special permit to operate in a residential neighborhood.[31] The zoning board of appeals granted the variance and special permit, but imposed fourteen conditions on the operation of the school.[32] The Appellate Division held that the school's earlier written agreement to abide by the conditions was void, because the conditions contradicted provisions of New York State education law and thus "could not be the subject matter of a waiver."[33]

The instant circumstances are as compelling as those of Summit School. As in Summit School, where the school's waiver affected its rights and those of its students,

---

[29] Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 704, 65 S. Ct. 895, 900-01 (1945); see Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 302, 105 S. Ct. 1953, 1962 (1985) (rejecting private individuals' claim that they waived their rights because to do so would subvert statutory goals).

[30] 82 A.D.2d 463, 442 N.Y.S.2d 73 (2d Dept. 1981).

[31] Id., 442 N.Y.S.2d at 75.

[32] Id.

[33] Id. at 77.

National's purported waiver would have an immediate effect on all users of the heliport and threaten the unimpeded flow of air traffic, essential to the national air transportation system.[34] Moreover, the rights National allegedly waived, inter alia, the right of access to airspace under federal jurisdiction, the right to safeguards concerning the imposition of noise controls guaranteed by statute, regulation, and case law, were created by Congress and the courts for the benefit of the public.[35]

Finally, just as rejection of the waiver in Summit School was necessary to preserve the authority of the State Department of Education and the education law itself, so too is rejection of the purported waiver here necessary to uphold the power of the federal government over airspace and maintain the authority of the FAA.[36]

---

[34] See discussion infra at 17-21.

[35] See United States v. Northrop Corp., 59 F.3d 953 (9th Cir. 1995), cert. denied, ____ U.S. ____, 116 S.Ct. 2550 (1996) (holding that release of qui tam claim pursuant to the False Claims Act unenforceable because enforcement would violate public policy); Ricke v. Armco, 882 F. Supp. 896 (D. Minn. 1995)(holding that releases of claims under the Single Employer Pension Plan Amendments Act of 1986 would contravene statute's purpose); Redel's Inc. v. General Electric, 498 F.2d 95 (5th Cir. 1974)(holding that release operating to bar private antitrust actions under the Clayton Act void as against public policy); Caravaggio v. Retirement Bd., 36 N.Y.2d 348, 368 N.Y.S.2d 475 (1975)(right to change designations of beneficiary in teachers' retirement system not subject to waiver owing to policy underlying retirement system); Estro Chemical v. Falk, 303 N.Y. 83, 87 (1951)(tenant's release to landlord barring claim for excessive rent unenforceable because it violates public policy); E. Fougera & Co. v. City of New York, 224 N.Y. 269, 278-79 (1918) (Cardozo, J.) (declining to enforce a stipulation defining the purpose of a statute, ruling that "[l]aws are not to be declared invalid upon the consent of the parties"); cf. Jennings Water v. City of North Vernon, 682 F. Supp. 421 (S.D. Ind. 1988), aff'd, 895 F.2d 311 (7th Cir. 1989) (holding that equitable estoppel cannot be invoked to bar a claim pursuant to Agricultural Act of 1961; to do so would subvert goals of statute enacted to benefit the public).

[36] An integrated system of national air transportation, and federal control of this system, would be threatened by parties seeking to impose restrictions on aircraft operations via settlements when those same restrictions would be barred by statute or regulation. See Tony and Susan Alamo Found., 471 U.S. at 302, 105 S.Ct. at 1962, Brooklyn Sav. Bank v. O'Neil, 324 U.S. at 704, 65 S.Ct. at 900-01, (declining to enforce waiver of rights because to do so would contravene statutory goals); Midstate Horticultural v. Pennsylvania R.R., 320 U.S. 356, 361-62, 64 S. Ct. 128, 130-31 (1943) (rejecting waiver to uphold the "conformity and equality of treatment, as between carrier and shipper" mandated by the Interstate Commerce Act).

II. National Meets The Test For Issuance Of A Preliminary Injunction

A plaintiff seeking a preliminary injunction must show "irreparable harm ... and either a likelihood of success on the merits, or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of the hardships tipping in the applicant's favor."[37] National has clearly made this showing.

A. National Will Suffer Irreparable Injury

National brings this action not only as the operator of the Heliport, but also in its capacity as a user of the Heliport. Users of airports facing the imposition of curfews have the requisite degree of irreparable injury[38] to assert challenges to noise-based regulations.

Irreparable injury to National is patent. In addition to the injuries described in National's Moving Brief and supporting affidavits[39], the restrictions in Resolution 1558 and the RFP will irreparably injure National as a user.[40] This injury is not speculative.

---

[37] Chemical Bank v. Haseotes, 13 F.3d 569, 573 (2d Cir. 1994)(emphasis supplied). Defendants are wrong in stating that the "serious questions" prong of the preliminary injunction test cannot apply here. Where both parties have a claim in the public interest, the "serious questions" prong applies. Haitian Centers Council v. McNary, 969 F.2d 1326, 1338-39 (2d Cir. 1992), vacated as moot, 509 U.S. 918, 113 S. Ct. 3028 (1993). Further, Defendants' statement of the proper standard, Opposition Brief at 7, is doubly wrong. The balancing of the equities is only reached if the "sufficiently serious questions" prong is employed. Chemical Bank, 13 F.3d at 573. Defendants cannot have it both ways.

[38] As shown in National's Moving Brief and herein, National will be injured by Resolution 1558 and the RFP such that it not only has "standing", see note 3 supra, but has met the "irreparable injury" standard.

[39] Moving Brief at 5-6, Affidavit of Peter McGann, dated May 23, 1996 ("First McGann Aff.") at ¶¶ 102-113.

[40] National, in its own name, is responsible for 8% of the operations at the Heliport. Together National and Island are the largest users of the Heliport, responsible for 84% of operations. Second McGann Aff. ¶¶ 35, 36.

The specific injuries alleged by National -- loss of right of access to federal airspace,[41] loss or major disruption to an aviation business, loss of goodwill, curtailment of flight operations -- are precisely those which have been held to constitute irreparable injury. In United States v. County of Westchester, Judge Ward held that plaintiffs had shown irreparable injury sufficient to obtain a preliminary injunction against imposition of a curfew on night operations.[42] The two plaintiff associations had demonstrated irreparable injury because their members were users of the airport, flew approximately 70% of the hours logged, and demonstrated a negative impact on airspace use and injury to business and private operations at the airport.[43]

National is in a virtually identical position.[44] Its flights to or from the Heliport in federally controlled airspace, constituting 84% of the total traffic at the Heliport, will be subject to restriction; its revenues will plummet; its customers will go elsewhere.[45] It

---

[41] See Aircraft Owners and Pilots Ass'n v. Port Auth. of New York, 305 F. Supp. 93, 104 (E.D.N.Y. 1969)(noting "individual rights of free access to the federal airways and navigable airspace . . . have been abridged"); Midway Airlines v. County of Westchester, 584 F. Supp. 436, 437, 438 (S.D.N.Y. 1984) (Weinfeld, J.) (air "carriers, which, under law have equal rights of access to the airport facilities").

[42] 571 F. Supp. 786, 798 (S.D.N.Y. 1983).

[43] Id. at 788, 798. The air carrier plaintiff also had demonstrated sufficient injuries to obtain preliminary relief because a portion of its operations was conducted during the hour of the proposed curfew. Id.

[44] Defendants appear to argue that Island, not National, is the user and thus Island should be the plaintiff. Opposition Brief at 12 n.8. National is a user in its own name, see note 40 supra. Moreover, National is Island's parent and can bring an action asserting Island's rights. Vincel v. White Motor Corp, 521 F.2d 1113, 1118-19 (2d Cir. 1975).

[45] First McGann Aff. at ¶¶ 102, 103; Second McGann Aff. at ¶¶ 33-46. National's customers have indicated they will have to find an alternative to National if Resolution 1558 and the RFP are enforced. Affidavits of several of those customers are attached to the Affidavit of Clarke Bruno dated September 16, 1996 ("Bruno Affidavit") submitted herewith.

is difficult to imagine what else National must show in order to demonstrate that it will suffer irreparable injury.[46]

Defendants' argument has been rejected in a virtually indistinguishable setting. In United States v. State of New York[47], Defendants alleged that, because only 2.6% of operations occurred during the curfew, "Beechcraft cannot claim that its viability as a business entity will be irreparably harmed if it is unable to realize revenues from its servicing of [a] few aircraft. . . ."[48] The Court rejected this contention, noting that "[t]here is no requirement in this Circuit that a party wait until near-extinction before moving for a preliminary injunction. The law, like the Constitution, is not a suicide pact."[49]

National alleges injuries that will directly and inexorably result from provisions contained in Resolution 1558 and the RFP. The provisions of Resolution 1558 and the RFP are certain to apply to National, any other user of the Heliport, and to National or any other entity selected as an operator in the RFP process.[50] Because the statute and RFP procedure are "sure to work the injury alleged" National has demonstrated irreparable injury and may challenge such measures.[51]

---

[46] See United States v. County of Westchester, 571 F. Supp. at 798; Aircraft Owners and Pilots, 305 F. Supp. at 104; see National Aviation v. City of Hayward, 418 F. Supp. 417, 419 (N.D. Cal. 1976)(holding air carriers had necessary injury to enjoin a night curfew because their businesses required them to operate during the hours of the proposed curfew, and they had incurred "increases in their costs of operation").

[47] 552 F. Supp. 255 (N.D.N.Y 1982), aff'd, 708 F.2d 92 (2d Cir. 1983).

[48] 552 F. Supp. at 262.

[49] Id. (footnote omitted).

[50] First McGann Aff. Ex. M, RFP at 1, 5 (operator "will be required to adhere to strict regulations concerning heliport operations and flight patterns" and "[t]he Heliport shall have no more than 27,886 operations annually for the duration of the management term contract.")

[51] Alaska Airlines v. City of Long Beach, 951 F.2d 977, 987 (9th Cir. 1991); Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 99 S. Ct. 2301, 2308 (1979) ("A plaintiff who

(continued...)

B. National Has Demonstrated a Likelihood of Success on the Merits

1. Federal Law Preempts Resolution 1558 and the RFP

Defendants seek to justify their actions by arguing that they acted in their proprietary capacity. They did not. However, Federal law preempts Resolution 1558 and the RFP regardless of whether the City acted in its police or its proprietor capacity.[52]

a. The City Did Not Act As A Proprietor

Burbank[53] and its progeny preempt the police-power noise-based restrictions enacted in Resolution 1558 and implemented in the RFP.[54] However, because Burbank left open an exception for noise-based restrictions for proprietors, Defendants claim that the City acted as proprietor of the Heliport, based on the argument that the lease with National has expired, and that National has no "right, title, or interest" in the Heliport.[55] Defendants also argue that the indemnification clause in the lease does not deprive the City of its powers as a proprietor.[56] These assertions are mistaken.

---

[51](...continued)
challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. But '[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.'" (citations omitted)); cf. Aircraft Owners and Pilots, 305 F. Supp. at 104 (persons "whose individual rights of free access to the federal airways and navigable airspace . . . have been abridged" have standing to vindicate their rights).

[52] As discussed at 22-23 infra, underscoring the strength of National's position, the Federal Aviation Administration ("FAA"), wrote to the City, agreeing with the arguments set forth by National. Letter of Nancy LoBue, Assistant Chief Counsel, FAA, to Hon. Peter F. Vallone, Speaker and Majority Leader, The City Council, dated August 8, 1996 ("FAA Letter"). Affidavit of Deborah Rand, dated August 12, 1996 ("Rand Aff.") Ex. 1.

[53] 411 U.S. 624, 93 S.Ct. 1854 (1973).

[54] For discussion of this point, see Moving Brief at 9-12. Defendants conceded: "[i]n general, the Courts have struck down those municipal and state regulatory schemes aimed at controlling the use of airspace and airports which were enacted solely pursuant to the locality's police power." Opposition Brief at 18.

[55] Id. at 12-13 and 27-29.

[56] Id. at 28 n.23.

Defendants cannot contest that the City Council enacted Resolution 1558 pursuant to the City's purported zoning power, which is quintessentially a police power.[57] The best Defendants can argue is that the City also acted pursuant to its proprietary power.

The proprietary exception to Burbank turns on whether the municipality faces liability for operation of the airport.

> The rationale for this [proprietary] exception is clear. Since airport proprietors bear monetary liability for excessive aircraft noise under Griggs v. Allegheny County, 369 U.S. 84, 82 S. Ct. 531 . . . (1962), fairness dictates that they must also have the power to insulate themselves from that liability. But before an entity may possess this power, it must bear the responsibility, either actual or potential, for excessive aircraft noise.[58]

If the City bears no liability for claims relating to the operation of the Heliport, as is clearly the case, it is not a proprietor. The text of the Lease's broadly worded indemnification and hold harmless clauses[59] makes clear that the City bears no liability of any kind, actual or potential, for operation of the Heliport.[60] Since the execution of the Lease, liability for operations at the Heliport has rested and continues to rest solely with National. Defendants' argument that the Lease does not insulate the City from all liability is disingenuous to say the

---

[57] Town of Islip v. Caviglia, 73 N.Y.2d 544, 550, 542 N.Y.S.2d 139, 141 (1989); see Berman v. Parker, 348 U.S. 26, 32, 75 S. Ct. 98, 102 (1954).

[58] San Diego Unified Port Dist. v Gianturco, 651 F.2d 1306, 1316-17 (9th Cir. 1981), cert. denied, 455 U.S. 1000, 102 S. Ct. 1631 (1982).

[59] The language of these clauses is found at First McGann Aff., Ex. C, at 18, 26.

[60] First McGann Aff. ¶ 11.

least.[61] In such circumstances, the City has lost its ability to invoke the proprietary exception to enact noise-based regulations.[62]

As a matter of law and fact, the terms of the Lease are still in effect. At common law, a holdover tenancy is governed by the terms of the expired instrument.[63] Thus, even if National were deemed a holdover tenant, and the terms of the original lease have expired, "pursuant to common law, there is implied a continuance of the tenancy on the same terms and subject to the same covenants as those contained in the original instrument."[64] Thus, the provisions of the Lease, including the indemnification clause, remain in effect.[65]

Further, the City has continually reaffirmed the Lease. National and EDC executed a letter agreement on April 1, 1993 ("1993 Letter Agreement")[66] providing that "all payments to . . . EDC shall be deemed rental under the Lease" and "all terms of the existing instruments [referring to, inter alia, the lease] shall remain in full force and effect and enforceable in accordance with their terms."[67] The 1993 Letter Agreement is

---

[61] It is doubtful that Defendants would take the same position if required to invoke the indemnification clause against National. Further, although the RFP does not address the issue, there is no reason to believe that Defendants would not require such protection from future operators of the Heliport.

[62] San Diego Unified Port Dist., 651 F.2d at 1318 n.33 ("For purposes of federal proprietorship, the key factor is Griggs liability") and 1319 (loss "[of] any potential aircraft noise liability" extinguishes the proprietary power to regulate).

[63] City of New York v. Pennsylvania R.R., 37 N.Y.2d 298, 300, 372 N.Y.S.2d 56, 58 (1975); Kennedy v. City of New York, 196 N.Y. 19, 23 (1909).

[64] City of New York v. Pennsylvania R.R., 37 N.Y.2d at 300, 372 N.Y.S.2d at 58.

[65] See Lynch v. Savarese, 217 A.D.2d 648, 649, 629 N.Y.S.2d 804, 805-06 (2d Dept. 1995) (plaintiff could assert claim based on indemnification clause in lease because lease still in effect, notwithstanding holdover tenancy).

[66] Second McGann Aff. at ¶¶ 8-9.

[67] Id. Ex. C, 1993 Letter Agreement at ¶¶ 13, 15.

"incorporated . . . by reference and made a part of [the February 1996] Stipulation"[68], and the payments National continues to make to the City reaffirm the Lease.[69]

Thus, the terms of the Lease insulate the City from any liability. In Alaska Airlines[70], the authority relied upon by Defendants, the "ordinance merely establishe[d] a right of recovery for damages actually awarded against the city. The city [was] thus still liable for the noise . . . ."[71] In contrast, here the City contractually transferred all liability to National through the Lease between the City and National's subsidiary. Thus, the City was divested of its right to rely on the proprietor exception to regulate aircraft noise.[72]

b. Even If The City Acted As A Proprietor, The Restrictions It Imposed Are Unreasonable, Arbitrary and Discriminatory

Even if the City had acted in a proprietary capacity, which it did not, the hour of day and weekend restrictions were imposed without reference to the noise emitted and thus are unreasonable and/or discriminatory under the Concorde I and Concorde II decisions.[73] The relevant question in this Circuit is: Did the government "promulgate a reasonable, nonarbitrary and non-discriminatory noise regulation that all aircraft are afforded an equal

---

[68] Id. Ex. G, February 1996 Stipulation at ¶ 5.

[69] Akivis v. Drucker, 177 A.D. 2d 349, 350, 576 N.Y.S. 2d 119, 120 (1st Dept. 1991); 1400 Broadway Assoc. v. Henry Lee & Co., 161 Misc. 2d 497, 499 614 N.Y.S. 2d 704, 705 (Civil Ct. New York Cty. 1994)

[70] 951 F.2d 977 (9th Cir. 1991).

[71] Id. at 982.

[72] See San Diego Unified Port Dist., 651 F.2d at 1316-1317 (because statute transferred all liability to the San Diego Port District, the State of California Department of Transportation could not rely upon proprietor exception).

[73] British Airways Bd. v. Port Auth. of New York and New Jersey, 558 F.2d 75 (2d Cir. 1977) ("Concorde I"); British Airways Bd. v. Port Auth. of New York and New Jersey, 564 F.2d 1002 (2d Cir. 1977) ("Concorde II"). For a fuller discussion of the Concorde decisions, see Moving Brief at 16-19.

opportunity to meet."[74] In Concorde II, the Second Circuit required a tight "fit" between the evidence for a noise-based restriction and the provisions of that restriction. "[B]asic considerations of fairness . . . required that even the appearance of whim and caprice be eliminated from critical decisions concerning airport access."[75] The time-of-day and day-of-week curfews at issue here were "imposed regardless of accompanying emitted noise," and are unreasonable, arbitrary and are preempted.[76]

Defendants' bare assertion that the restrictions at issue are fair and reasonable[77] is devoid of a factual basis and is supported only by the self-serving statements of the EDC.

---

[74] Concorde II, 564 F.2d at 1005. National does not argue that the goal of noise control is itself unreasonable. Thus, Defendants' claims that the purported goals of Resolution 1558 and the RFP are reasonable under the deferential equal protection standard of review applied by the Ninth Circuit, Alaska Airlines v. City of Long Beach, 951 F.2d 977, 905 (9th Cir. 1991)(standard of "furthering legitimate governmental goals") and in Santa Monica Airport Ass'n v. City of Santa Monica, 481 F. Supp. 927, 938 (C.D.Cal. 1979) ("rationally related to a legitimate state interest"), are irrelevant.

[75] 564 F.2d at 1005 (emphasis supplied). Defendants make no effort to distinguish United States v. County of Westchester, 571 F. Supp. 786 (S.D.N.Y. 1983), which is directly on point. In Westchester, this Court applied the Second Circuit precedent to hold that a curfew "imposed . . . regardless of accompanying emitted noise is an unreasonable, arbitrary, discriminatory and overbroad exercise of power . . . ." Id. at 797.

The single Second Circuit decision cited by Defendants, Global Int'l Airways v. Port Auth. of New York and New Jersey, 727 F.2d 246 (2d Cir. 1984), does not address the reasonableness of any noise-related statute, does not cite to the Concorde II decision and does not involve the Noise Control Act. The district court decisions cited by Defendants, Western Air Lines v. Port Auth. of New York and New Jersey, 658 F. Supp. 952 (S.D.N.Y. 1986), aff'd, 817 F.2d 222 (2d Cir. 1987), cert. denied, 485 U.S. 1006, 108 S.Ct. 1467 (1988); Arrow Air v. Port Auth. of New York and New Jersey, 602 F. Supp. 314 (S.D.N.Y. 1985), do not discuss reasonableness under the Noise Control Act or under Concorde II.

[76] Westchester, 571 F. Supp. at 797; see also United States v. State of New York, 552 F. Supp. at 265; aff'd, 708 F.2d 92 (2d Cir. 1983)(a curfew, imposed by a proprietor, which "extends to all aircraft, regardless of the degree of accompanying emitted noise" held preempted under the Noise Control Act")(emphasis supplied); Concorde II, 564 F.2d 1005.

[77] Opposition Brief at 29-34.

Indeed, a review of the FEIS shows that Defendants used arbitrary and unreasonable means to justify the restrictions they sought.[78] As is fully described in the Affidavit of Mark R. Johnson, an expert in the field of aircraft noise, the FEIS rests on a biased analysis. Mr. Johnson stated that

- The FEIS rejected a noise model recommended by the FAA and by the City's environmental quality review procedure (CEQR) because use of this model would have shown the Heliport has no significant impact on its surroundings.
- The FEIS rejected the technique developed by the FAA and recommended by CEQR to measure heliport noise. Instead, it relied on three days of measurements performed in 1984, a statistically insignificant sampling.
- Even the noise sampling used in the FEIS was unreasonable, because it measured noise based on a single departure and arrival route for each helicopter type, rather than measuring the noise generated by a range of routes.
- Even assuming the correctness of the FEIS' conservative approach, the FEIS determined that the noise generated by the Heliport has no impact inside adjacent apartment buildings.
- The FEIS never considered the effect of the restrictions on the noise generated by the Heliport.[79]

There is nothing in the record to show that the restrictions contained in Resolution 1558 or proposed in the RFP are based on valid data or that the noise from the Heliport even has a significant impact on noise levels in the vicinity.

---

[78] Defendants claim, without support, that they imposed the restrictions with "frequent input from plaintiff." Opposition Brief at 31. To the contrary, the April 1993 Agreement makes clear that EDC retains "all final decision-making power" with respect to the FEIS. Second McGann Aff. Ex. C ¶ 2. Indeed, EDC did not consult with National about the special permit and never provided National with a copy of its application for the special permit. Second McGann Aff. ¶ 14.

[79] Affidavit of Mark R. Johnson, AICP, dated September 16, 1996 at ¶¶ 27-28, 29-34, 35-37, 38-46, and 49.

c. Even If It Acted As A Proprietor, The City Failed To Comply With The Procedural Requirements of the Airport Noise And Capacity Act

The Airport Noise and Capacity Act ("ANCA") preempts Resolution 1558 and the RFP to the extent that those measures restrict operations of Stage II and Stage III aircraft.[80] Such restrictions were imposed without regard to ANCA's procedures. Defendants' argument that ANCA's requirements for imposing restrictions on Stage II and Stage III aircraft do not affect its powers as a proprietor[81] misses the point. ANCA imposes procedural restrictions on entities seeking to impose restrictions on Stage II and Stage III aircraft regardless of that entity's power to impose noise-based controls. ANCA sets forth a procedural mechanism through which proprietors can exercise such power. The City imposed restrictions on Stage II and Stage III aircraft without following ANCA's procedures. Those restrictions are invalid unless, inter alia, the City follows the procedures mandated in ANCA.

d. A Proprietor Cannot Designate Routes

Federal law preempts Resolution 1558 and the RFP regardless of the City's alleged status as a proprietor.[82]

(i) Exclusive Federal Sovereignty Over Navigable Airspace Preempts The Designation Of Appropriate Routes Contained in Resolution 1558 and the RFP

The exclusive federal sovereignty over navigable airspace prohibits Defendants from defining the routes that National -- or any other user of the Heliport -- can fly.[83]

---

[80] For a discussion of ANCA restrictions and procedural requirements, see Moving Brief at 19-21.

[81] Opposition Brief at 20 n.14.

[82] Defendants argue that the Airport and Airway Improvement Act does not preempt Resolution 1558 and the RFP because the City received planning grants, not development grants, for activities at the Heliport. That would appear to be a correct interpretation of the law. However, National has not had the opportunity to conduct discovery to determine if the City received development grants for the Heliport or if its receipt of planning grants contained unusual conditions.

[83] For a discussion of federal sovereignty over navigable airspace, see Moving Brief at 8.

Defendants attempt to distinguish United States v. City of Blue Ash,[84] on the ground that the route in Blue Ash is not analogous to the routes at issue herein and that the mandate in Blue Ash to follow a certain route was not imposed by a proprietor.[85]

This ignores federal aviation law. The type of route is irrelevant; the issue is whether New York City or the federal government has authority over navigable airspace. Blue Ash held that the regulation mandating a noise abatement turn after takeoff, "on its face, exercise[s] control over aircraft in flight, i.e., it dictates flight in a given course in a defined navigable airspace."[86] Likewise, Resolution 1558 and the RFP facially control aircraft in flight by prescribing flight routes over the East and Hudson rivers and prohibiting flights over Second Avenue.[87]

Defendants also imply that a contractual limitation of routes is permissible.[88] If the City, even if it were acting as a proprietor, prescribed and prohibited routes by contract, those acts remain beyond the power of the City. Congress has decided that "the Administrator of the [FAA] shall . . . assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace."[89] The FAA, not the City, is vested with control over aircraft in flight.

---

[84] 487 F. Supp. 135 (S.D. Ohio 1978), aff'd 621 F.2d 227 (6th Cir. 1980).

[85] Opposition Brief at 25.

[86] United States v. City of Blue Ash, 487 F.Supp. at 136.

[87] First McGann Aff. Ex. M, RFP at 6-7.

[88] Opposition Brief at 25.

[89] 49 U.S.C. § 40103(b)(1); see Concorde I, 558 F.2d at 83 ("legitimate concern for safe and efficient air transportation requires that exclusive control of airspace management be concentrated at the national level") (emphasis supplied).

(ii) Resolution 1558 And the RFP Are Preempted By Exclusive Federal Jurisdiction Over Aircraft Safety and Efficiency

Defendants' most peculiar argument is that federal law does not preempt the requirement that all Heliport-based sightseeing helicopters have markings large enough to be seen from the ground when the aircraft are at an altitude of 1400 feet. This requirement on its face conflicts with the express statutory requirement that the Administrator of the FAA is empowered to promulgate regulations concerning aircraft safety and efficient use of airspace and the regulations mandating the locations of aircraft insignia.[90]

2. The FAA Agrees With National

National's preemption claims are particularly compelling because the FAA, the agency responsible for administering these statutes and promulgating the regulations thereunder, agrees with them.

The FAA, in a letter to Peter Vallone, Speaker of the City Council, dated August 8, 1996 (the "FAA Letter")[91] states that:

> (1) the requirement that helicopters using the Heliport be clearly marked to facilitate identification by the community is preempted by Part 45 of Title 14 of the Federal Aviation Regulation (14 C.F.R. § 45);
>
> (2) the ban on the Sikorsky S-58T is preempted by the Federal Aviation Act and the Noise Control Act;
>
> (3) the ban on the Sikorsky S-58T violates the procedural guarantees of the Airport Noise and Capacity Act;

---

[90] 49 U.S.C. § 40103(b)(1), 14 C.F.R. §§ 45.23 and 27; see also, Banner Advertising v. City of Boulder, 868 P.2d 1077, 1084 (Colo. 1994)(en banc)(City's more stringent aircraft safety regulation preempted by less stringent federal regulation). Perhaps implicitly recognizing that the markings requirement is preempted, Defendants respond by stating that the precise markings have not been determined yet and that they would be in addition to any markings required by the FAA. Opposition Brief at 27. Leaving aside the fact that it is questionable whether all of these markings would fit on a helicopter, Defendants cannot avoid the fact that this requirement is preempted.

[91] Rand Aff. Ex. 1, FAA Letter, 1-2.

(4) the total bans on certain types of aircraft and weekend operations are unreasonable, arbitrary and discriminatory and thus violate federal law;

(5) such bans also are preempted as they constitute a prohibited local regulation of "prices, routes or services of an air carrier"; and

(6) the restrictions may have a potential adverse impact on safe and navigable airspace around New York City.

The letter is clear. In an exceedingly polite communication urging the City Council to explore other methods to achieve noise abatement goals, the FAA informed the Council that its legislation is preempted. The FAA's views on aviation statutes and regulations are entitled to deference.[92]

To sidestep the FAA's written interpretation of its statutes and regulations, Defendants assert that (1) the FAA letter "does not take a position with respect to the matters before this Court. . . ." and (2) the letter is somehow deficient because it "was based solely upon 'the information available to the FAA at the time.'"[93]

The first assertion ignores the fact that the FAA Letter six times refers to provisions of Resolution 1558, matters before this Court, and concludes that such provisions, if enforced, violate federal law. The second assertion, that the FAA Letter is somehow lacking because it "was based solely upon 'the information available to the FAA at the

---

[92] "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." New York State Dept. of Social Services v. Dublino, 413 U.S. 405, 421, 93 S.Ct. 2507, 2516-17 (1973); see Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565, 100 S. Ct. 790, 797 (1980); Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 164 (1944); Britton v. Weiss, 89 Civ. 143, 1989 WL 148663 at *3 (N.D.N.Y. Dec. 8, 1989) (giving weight to opinion letter by Federal Trade Commission staff attorney).

[93] Rand Aff. ¶¶ 7-8.

time'"[94] is a red herring. Defendants are silent concerning information in their possession that would yield a different result, if submitted to the FAA. There is no such information.[95]

3. The City Council Does Not Have The Authority To Regulate The Operation Of A Heliport

The regulation of the operation of heliports within the City is expressly delegated to the New York City Department of Business Services ("Business Services"), an administrative body whose Commissioner is appointed by the Mayor.[96]

The sole statutory exception to Business Services' exclusive jurisdiction over heliports is the City Council's authority, pursuant to Section 74-66 of New York City's Zoning Resolution, to regulate "the construction, reconstruction or enlargement of heliports."[97] Because there is no claim that the heliport was being constructed, neither the City Planning Commission, nor the City Council had power to enact Resolution 1558.[98]

---

[94] Id. at ¶ 8.

[95] Defendants cite to a letter dated August 9, 1996, from Nicholas G. Garaufis, Chief Counsel FAA, to Speaker Vallone stating that he is looking forward to getting additional information. National is at a loss as to what that information may be. Rand Aff. Ex. 2. Moreover, the FAA Letter establishes the materials it considered in reaching its conclusion: Resolution 1558, the FEIS and the City Planning Commission decision of January 9, 1996 -- documents that the City Council considered before enacting Resolution 1558.

[96] City Charter §§ 6, 1300, 1301. Attached as Exhibit A to the Bruno Affidavit.

[97] Pursuant to section 74-66 of the Zoning Resolution ("Section 74-66") the City Planning Commission may regulate the "construction, reconstruction or enlargement of heliports." Section 74-66 is attached as Exhibit B to the Affidavit of Donald W. Stever, dated May 23, 1996.

[98] The City's claim that estoppel prevents National from asserting this argument because it originally applied for a special permit fails. Cf., Arverne Bay Constr. v. Thatcher, 278 N.Y. 222 (1938)(permitting challenge to a zoning ordinance after denial of application for a variance); Ramapo 287 Ltd. Partnership v. Village of Montebello, 165 A.D.2d 544, 548, 568 N.Y.S.2d 492, 494-95 (3d Dept. 1991)(challenge to zoning statute not barred by "unclean hands" where developer stipulated to "work cooperatively, in harmony with the laws" [of the town] in connection with settlement of previous action).

Further, National sought the permit solely because it was directed to do so by Defendants' representatives. Second McGann Aff. ¶ 3. Defendants should not now be permitted to argue that applying for the permits estops National from challenging it.

That measure, therefore, is without legal effect. For all of the foregoing reasons, National has shown a likelihood of success on the merits.[99]

C. The Balancing Of The Equities Favors National

The equities favor issuance of a preliminary injunction.[100] Defendants face no irreparable harm should the injunction issue. Failure to issue the injunction will threaten National's rights, as a user and as an operator of the Heliport, to navigable airspace and result in immediate and major financial losses to its business. Defendants will suffer no injury if the status quo is maintained during this action. The Heliport can continue to operate, Defendants will continue to receive rent, and the injunction will protect National's and all users' right to federally regulated navigable airspace.

[99] The foregoing analysis also shows that there are sufficiently serious questions going to the merits to make them a fair ground for litigation.

[100] Because National has shown a likelihood of success on the merits, it is not necessary to reach this issue. See note 37, supra. Nevertheless, a balancing of the equities favors National.

CONCLUSION

For the foregoing reasons, National requests that its motion for a preliminary injunction be granted.

Dated: New York, New York
September 16, 1996

DEWEY BALLANTINE

By: _____
Donald W. Stever (DS-8747)
Janis M. Meyer (JMM-3194)
A Member of the Firm

1301 Avenue of the Americas
New York, New York 10019-6092
(212) 259-8000
Attorneys for Plaintiffs

Of Counsel:
Clarke Bruno

FISCHBEIN BADILLO WAGNER
& HARDING
Raymond B. Harding
Jonathan Young
909 Third Avenue
New York, New York 10022
(212) 826-2000

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

TYRONE McBRIDE, being duly sworn, deposes and says:

1. I am over the age of 18 years and am not a party hereto.

2. On the 16th day of September, 1996, I served the annexed REPLY MEMORANDUM upon the attorneys listed below by personally delivering a true copy thereof to them at the address designated for service of papers, as follows:

CORPORATION COUNSEL OF
THE CITY OF NEW YORK
100 Church Street
New York, NY 10007

Tyrone McBride

Sworn to before me this
20th day of September, 1996

William D. Hancock
Notary Public

WILLIAM D. HANCOCK
Notary Public State of New York
No. 31-4647870
Qualified in New York County
Commission Expires Aug. 30, 1997