

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

FRIENDS OF THE EAST HAMPTON AIRPORT, INC.,
ANALAR CORPORATION, HELICOPTER
ASSOCIATION INTERNATIONAL, INC.,
HELIFLITE SHARES LLC, LIBERTY HELICOPTERS,
INC., and SHORELINE AVIATION, INC.,

No. CV-15-441 (JS) (ARL)

Plaintiffs,

-against-

THE FEDERAL AVIATION ADMINISTRATION and
MICHAEL P. HUERTA, FAA Administrator, in his
official capacity,

Defendants.

-----X

**TOWN OF EAST HAMPTON'S MEMORANDUM OF
LAW IN SUPPORT OF ITS MOTION TO INTERVENE**

TABLE OF CONTENTS

FACTUAL BACKGROUND.....2

ARGUMENT

I. The Town is Entitled to Intervention as of Right.....4

 A. The Town’s Motion is Timely Filed.....4

 B. The Town Has a Significant Interest in this Litigation.....5

 C. The Disposition of the Action Will Impair or Impede the Town’s Ability to Protest Its Interests.6

 D. FAA Does Not Adequately Represent the Town’s Interest in This Action.....7

II. The Court Should Grant the Town Permissive Intervention.....8

III. The Town Respectfully Requests That It Not be Required to File An Answer..9

CONCLUSION.....10

Plaintiffs filed this action as a preemptive challenge to then-anticipated efforts by the Town of East Hampton (“Town”) to adopt local laws to address a significant aircraft noise problem. Specifically, Plaintiffs challenged the FAA’s stated position that the FAA was bound by a 2005 Settlement Agreement not to enforce Grant Assurance 22(a) after December 31, 2014, and that the Town was not required to follow the procedures under the Airport Noise and Capacity Act of 1990, 49 U.S.C. §§ 47521 *et seq.* (“ANCA”), unless it desired to receive federal aviation grants in the future. After the Town adopted three local laws on April 17, 2015 (the “Local Laws”), adopting new limits on aircraft operations at East Hampton Airport (the “Airport”), Plaintiffs challenged those laws directly in a suit against the Town, *Friends of East Hampton Airport, et al, v. Town of East Hampton*, 15 Civ. 2246 (the “Town Action”), raising the same issues in that case as they had raised in this suit against the FAA.

The FAA’s position in both suits has been ambiguous. The FAA supported Plaintiffs’ request for a temporary restraining order (“TRO”) in the Town Action and stated that it was considering its position regarding the Local Laws. The FAA’s Amended Answer in this case is similarly ambiguous and does not clearly indicate whether or not the FAA intends to defend its prior positions.

Because the Town has relied on the FAA’s prior position to adopt the Local Laws, the Town has a clear interest defeating Plaintiffs’ claims in this case. Moreover, because Plaintiffs have raised the same issues in this case and in the Town Action, the Town has a clear interest in preventing a ruling in this case that may be adverse to its position in the Town Action. The FAA’s ambiguous position makes it necessary for the Town to intervene in this case to protect its interests to the extent that FAA fails to do so.

The Town anticipates that its involvement in this case would be limited to submitting a response brief, following the filing of FAA's brief, in order to ensure, to the extent necessary, that the Town's interests are adequately represented in this case. As described below, the Town satisfies the standards for intervention under both Rule 24(a) and (b) of the Federal Rule of Civil Procedure 24.

FACTUAL BACKGROUND

The facts relevant to this Motion are familiar to the Court from the Town Action and were summarized by the Court in its June 26, 2015, Memorandum and Order denying in part and granting in part Plaintiffs' Motion for a Preliminary Injunction (the "June Order"). For the Court's convenience, the Town summarizes the relevant facts.

For over a decade, the Town has been studying solutions to the problem of aircraft noise. Prior to 2012, the Town felt constrained by its understanding that conditions attached to its most recent federal grant limited the Town's ability to act. In 2012, FAA, in response to an inquiry from then-Congressman Bishop, stated that pursuant to a 2005 Settlement Agreement, FAA would not, as of December 31, 2014, "initiate or commence an administrative grant enforcement proceeding in response to a complaint from aircraft operators . . . or seek specific performance of Grant Assurances 22a, 22h, and 29," unless and until FAA awarded a new AIP grant to the Town. *See* Plaintiffs' Complaint, Exhibit C at 1 (the "Bishop Responses"). In addition, in the Bishop Responses, FAA also stated that "[t]he FAA's agreement not to enforce also mean[t] that unless the town wishe[d] to remain eligible to receive future grants of Federal funding, it [was] not required to comply with [ANCA] . . . in proposing new airport noise and access restrictions." *Id.*

Over the course of 2014 and early 2015, the Town engaged in a public analysis of the noise problem and developed solutions in light of FAA's legal clarifications. On January 29, before the Town adopted any noise measures, Plaintiffs filed this action against FAA challenging the legality of FAA's positions set forth in the Bishop Responses. On April 17, 2015, the Town adopted the following Local Laws to address the noise problem:

(1) a mandatory curfew prohibiting all aircraft from using the Airport between 11:00 p.m. and 7:00 a.m. (the "Mandatory Curfew"); (2) an extended curfew prohibiting "Noisy Aircraft" from using the Airport from 8:00 p.m. to 9:00 a.m. (the "Extended Curfew"); and (3) a weekly limit prohibiting "Noisy Aircraft" from using the Airport more than two times per week during the "Season"—i.e., the months of May, June, July, August, and September⁵ (the "One-Trip Limit").

June Order at 5–6.

On April 21, 2015, the Friends of East Hampton Airport and other airport users ("Friends") challenged the Local Laws on Constitutional grounds. Their arguments incorporated the issues Plaintiffs raise in this case. Specifically, they alleged that the Local Laws were preempted because they violate Grant Assurance 22(a), which Friends alleged the FAA was *required* to enforce under the Airport and Airway Improvement Act of 1982, 49 U.S.C. § 47107 ("AAIA"), despite the 2005 Settlement Agreement. Friends also alleged that the Local Laws violated ANCA, which Friends alleged applies to the Town despite FAA's previously-stated position. Friends sought a temporary restraining order ("TRO") to block enforcement of the Local Laws during the litigation. FAA submitted a letter supporting the TRO in which FAA indicated that it was considering whether it might take any enforcement action against the Town. *See* Town Action Document 34, FAA Letter to the Court dated May 4, 2015, attached as Exhibit A. The FAA also appeared at the TRO hearing on May 18, 2015, to argue in favor of the TRO. In its June Order, this Court issued a preliminary injunction enjoining enforcement of the One-

Trip Limit but denied the request to enjoin the Mandatory Curfew and the Extended Curfew. *See* June Order at 4-5.

The FAA filed its Answer in this case on July 22, 2015 and an Amended Answer on August 11, 2015. In neither the answers or any of FAA's statements in this case, nor in the Town Action, has FAA stated that it would defend the positions articulated in the Bishop Responses.

ARGUMENT

I. THE TOWN IS ENTITLED TO INTERVENTION AS OF RIGHT

Under Rule 24(a)(2), a motion to intervene must be granted whenever:

(1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the other parties.

MasterCard Intern. Inc. v. Visa Intern. Serv. Ass'n, Inc., 471 F.3d 377, 389 (2d Cir. 2006). This Court has stated that this is "a flexible test, and district courts generally look at all the factors together rather than focus narrowly on a single one." *Basciani Foods, Inc. v. Mid Island Wholesale Fruit & Produce, Inc.*, 2011 U.S. Dist. LEXIS 368, *7 (E.D.N.Y. Jan. 3, 2011). Also, district courts have considerable discretion in making this evaluation. *See Hoblock v. Albany County Bd. of Elections*, 233 F.R.D. 95, 98 (N.D.N.Y. 2005). As shown below, the Town meets the standards for intervention as of right.

A. The Town's Motion Is Timely Filed

The Town has monitored these proceedings to determine whether, and to what extent, FAA will defend its interpretation of the Town's legal obligations as set forth in the Bishop Responses. Despite its Amended Answer filed in August, FAA's position in this case remains

unclear. The Town's seeking intervention within a few weeks of the Amended Answer is reasonable and timely.

No briefing schedule has been set and no administrative record been submitted to the Court. *See Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk*, 101 F.R.D. 497, 501 (E.D.N.Y. 1984) (“[T]he argument of the motion’s untimeliness carries little force when one notes that discovery has yet to commence, nor motions to date decided . . .”). Moreover, the Court has not ruled on the pending Motion to Intervene by the Committee to Stop Airport Expansion. Requesting intervention now—rather than later in the proceeding when FAA may take a position on the merits—will avoid disrupting the briefing schedule set by the Court. Further, the Town does not intend to interject new or peripheral issues into these proceedings. It seeks only to participate to the extent FAA fails to defend the Town’s interests. There is “no indication that a final determination on the merits will be unduly delayed or that the original parties will be prejudiced by intervention at this time.” *Commack Self-Service Kosher Meats v. Rubin*, 170 F.R.D. 93, 106 (E.D.N.Y. 1996). Thus, this request for intervention is timely.

B. The Town Has A Significant Interest In This Litigation

The Town has a significant interest in this litigation. Plaintiffs seek to invalidate the FAA’s position that the Town is not subject to certain grant assurance requirements under the AAIA, (including Grant Assurance 22(a)), which would raise questions on the legality of the Local Laws; Plaintiffs also seek to invalidate FAA’s position that the Town is not required to comply with the procedural requirements of the ANCA before implementing the Local Laws. *See* Plaintiffs’ Complaint at 2–3. As recognized by this Court in the June Order, the Town relied on FAA’s legal position in enacting the Local Laws. *See* June Order at 14. Any ruling against FAA in this case would directly and significantly affect the Town’s Local Laws and would

disrupt the Town's operation of its airport. Thus, the Town has a substantial interest in the outcome of this proceeding.

C. The Disposition Of The Action Will Impair Or Impede The Town's Ability To Protect Its Interests

If the Town is not permitted to intervene, its ability to defend the legality of the Local Laws would be impaired. A decision against the FAA in this proceeding would undercut the legal basis for the Local Laws that were enacted based on FAA's positions in the Bishop Responses. It is clear "[w]here the relief sought is to set aside agency action that affects a proposed intereviewer, such relief could practically impair the proposed intervenor's interests since the proposed intervenor could no longer rely on the agency's announced decision and would need to restart the administrative process" *Atl. Sea Island Group, LLC v. Connaughton*, 592 F. Supp. 2d 1, 6-7 (D.D.C. 2008) (finding New Jersey had a right to intervene because it would be injured if plaintiffs received the requested relief vacating a government decision because state would lose the privileges associated with that decision). Here, a decision in favor of Plaintiffs would call into question the legality of the Local Laws, which is clearly contrary to the Town's interests. The Town has a clear interest in the outcome of this case.

Moreover, a decision in favor of Plaintiffs in this case would impair the Town's ability to defend the Local Laws in the Town Action. Courts recognize that the "stare decisis effect of a court's decision is sufficient to demonstrate the requisite impairment of an interest to support a motion to intervene" *Sackman v. Liggett Group*, 167 F.R.D. 6, 21 (E.D.N.Y. 1996) (citing *Oneida Indian Nation v. New York*, 732 F.2d 261, 265 (2d Cir. 1984)). Here, Plaintiffs have raised the same substantive issues regarding the applicability and enforceability of Grant Assurance 22(a) and ANCA in both this case and the Town Action. Thus, a ruling on the merits in this case that either upholds or rejects FAA's position, will invariably impact Town's ability to

defend the Local Laws in the Town Action. Indeed, the Court abstained from ruling on FAA's duty to enforce the grant assurances in its June Order until "FAA [had] an opportunity to be heard." June Order at 27. Although the Town could still raise the same defenses in Town Action, "the principle of *stare decisis* would undoubtedly impair [its] ability to protect its interest were it prevented from intervening in this action" *County of Suffolk*, 101 F.R.D. at 501.

D. FAA Does Not Adequately Represent The Town's Interest In This Action

The requirement of adequate representation is "satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *see also Windsor v. United States*, 797 F. Supp. 2d 320, 323–24 (S.D.N.Y. 2011) (There is a "'minimal' burden for demonstrating inadequacy of representation.").

FAA's position in this action remains uncertain. FAA's representations to this Court and the Town suggest the possibility that it may not vigorously defend its previously-stated positions on the 2005 Settlement Agreement and the applicability of ANCA.¹ Accordingly, it is possible FAA will seek to avoid taking a position on the merits by defending its position on procedural grounds leaving its positions undefended on the substance. If the Court were to reject FAA's procedural arguments, there would be no substantive defense of the Bishop Responses. Further, there is a possibility that FAA could take a position in this case adverse to the Town's interests. In fact, FAA suggested that it might do so when it supporting the injunction against the Town "so that the FAA can properly consider Plaintiffs' claims and the Town restrictions" and

¹ More than once, FAA has avoided answering whether it has changed its interpretation of the Town's legal obligations that was established in the Bishop Responses. During the TRO hearing, FAA counsel declined to provide the Court with its position on the matter. *See* May 18, 2015, Transcript at 15–16, attached as Exhibit B. And in discussions with the Town's counsel, FAA counsel has declined to state whether it will defend in this action its position set forth in the Bishop Responses.

determine whether “the Town restrictions are contrary to federal law(s) and/or FAA regulation(s)” *See* Exhibit A at 1–2.

In short, it remains entirely unclear whether, and to what extent, FAA will defend the Town’s interests in this action. That uncertainty is sufficient to demonstrate that FAA’s “representation of [the Town’s] interest ‘may be’ inadequate.” *Trbovich*, 404 U.S. at 538 n.10. Accordingly, FAA does not adequately represent the Town’s interests for purposes of Rule 24 (a)(2).

II. THE COURT SHOULD GRANT THE TOWN PERMISSIVE INTERVENTION

Alternatively, the Court should exercise its discretionary authority under Rule 24(b) and allow the Town to permissively intervene in this case. Rule 24(b) provides that, upon a timely motion, a court may permit intervention if the applicant “has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b). In exercising this discretion, the Court “must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” *Id.*

The standard for permissive intervention is more flexible than the standard for intervention as of right. The Town only must show that a question of law or fact in common with the action. *Id.* And although adequacy of representation may be considered as one factor in the court’s discretion, when considering permissive intervention, “adequacy of representation . . . is ‘a minor factor at most.’” *County of Suffolk*, 101 F.R.D. at 502 (quoting *United States v. Columbia Pictures Indus., Inc.*, 88 F.R.D. 186, 189 (S.D.N.Y. 1980)).

As detailed above, the Town’s motion is timely and will not prejudice Plaintiffs and FAA. The Town has a direct stake in the disposition of questions of law raised with respect to FAA’s statutory interpretation of ANCA and the Town’s legal obligations. If intervention is

granted, the Town will be able to defend its interests to the extent that the FAA does not defend against Plaintiffs' claim that FAA has violated its statutory duties under the AAIA and ANCA. Accordingly, if the Court denies intervention as a matter of right, the Court should grant the Town permissive intervention under Rule 24(b).

III. THE TOWN RESPECTFULLY REQUESTS THAT IT NOT BE REQUIRED TO FILE AN ANSWER

If intervention is granted, the Town requests the Court waive the Town's obligation to file an answer in this action. Under Rule 24(c), an intervenor is generally required to submit a pleading setting out "the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). But where "the position of the movant is apparent from other filings and where the opposing party will not be prejudiced, Rule 24(c) permits a degree of flexibility with technical requirements." *Windsor*, 797 F. Supp. 2d at 325 (quoting *Tachiona v. Mugabe*, 186 F. Supp. 2d 383, 393 n.8 (S.D.N.Y. 2002)). In *Windsor*, the district court granted applicant's request to waive its obligation to file an answer because the applicant's "position on the subject matter of the litigation [was] clearly articulated in its motion papers." *Id.* at 325–26.

Here, Plaintiffs, the FAA, and the Court are well-aware of the Town's interests and arguments in this action. In addition to this Motion, the Town has clearly articulated its position in the Town Action. *See Blesch v. Holder*, 2012 U.S. Dist. LEXIS 75999, *5 (E.D.N.Y. May 30, 2012) ("The Court agrees that waiver of the pleading requirement is justified here because the House's position on this litigation is clearly articulated in its motion papers."). The parties in this action would not be prejudiced if the Town did not file an answer. However, if the Court deems it necessary that the Town file an answer in this action, the Town will do so immediately.

CONCLUSION

For the foregoing reasons, the Town respectfully requests that the Court grant its motion to intervene.

Dated: September 1, 2015

Respectfully Submitted,

KAPLAN KIRSCH & ROCKWELL LLP

/s/

W. Eric Pilsk
Peter J. Kirsch
1001 Connecticut Ave., NW, Suite 800
Washington, DC 20036
Tel: (202) 955-5600
epilsk@kaplankirsch.com
pkirsch@kaplankirsch.com

Attorneys for the Town of East Hampton

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he has caused true and correct copies of this Memorandum of Law in Support of its Motion to Intervene to be served on September 1, 2015, via the Court's electronic filing system upon all counsel of record:

Dated: September 1, 2015

KAPLAN KIRSCH & ROCKWELL LLP

/S/

W. Eric Pilsk
1001 Connecticut Ave., NW
Suite 800
Washington, DC 20036
Tel: (202) 955-5600
epilsk@kaplankirsch.com

EXHIBIT A



U.S. Department of Justice

*United States Attorney
Eastern District of New York*

*610 Federal Plaza
Central Islip, New York 11722*

May 4, 2015

By ECF

The Honorable Sandra J. Feuerstein
United States District Judge
Eastern District of New York
100 Federal Plaza
Central Islip, NY 11722

Re: *Friends of the East Hampton Airport, Inc., et al. v. Town of East Hampton*, 2:15 Civ. 02246 (SJF)(ARL)

Dear Judge Feuerstein:

This office represents the Federal Aviation Administration (the "FAA"). On January 29, 2015, the Friends of the East Hampton Airport, Inc., among others ("Plaintiffs"), commenced an action against the FAA in connection with various noise and access restrictions for East Hampton Airport ("EHA") which have recently been adopted into local law by the Town of East Hampton (the "Town"). See *Friends of East Hampton Airport, Inc., et al. v. FAA*, 9:15-cv-0041 (the "FAA Action"). Specifically, in the FAA Action, Plaintiffs seek to compel the FAA to take action to ensure that the Town's restrictions comply with applicable federal laws and FAA regulations. The deadline for the FAA to respond to Plaintiffs' complaint is June 8, 2015.

As the Court is aware, on April 21, 2015, Plaintiffs commenced the above-referenced matter against the Town, challenging the same EHA restrictions at issue in the FAA Action (the "Town Action"). Plaintiffs have sought to consolidate the FAA and Town Actions and currently before the Court is Plaintiffs' application for a temporary restraining order seeking to enjoin the Town from enforcing the proposed EHA restrictions during the pendency of the FAA and Town Actions.

The FAA is currently reviewing Plaintiffs' claims and the Town's restrictions and, therefore, is not expressing any view on the merits of either the FAA or Town Action at this time. Notwithstanding, please be advised that the FAA believes that Plaintiffs' application to enjoin the Town from enforcing the EHA restrictions should be granted. Indeed, an injunction is necessary so that the FAA can properly consider Plaintiffs' claims and the Town restrictions, develop its position on the issues, and, should the FAA determine that the Town restrictions are

contrary to federal law(s) and/or FAA regulation(s)—and/or the Court rule in favor of Plaintiffs in the FAA Action— commence appropriate enforcement action.

Thank you for your consideration.

Respectfully submitted,

KELLY T. CURRIE
ACTING UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

BY: /s/ Robert W. Schumacher
Robert W. Schumacher
(631) 715-7871

cc: parties of record

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X
FRIENDS of the EAST HAMPTON:
AIRPORT, 15-CV-2246
Plaintiff, US Courthouse
-against- : Central Islip, NY
TOWN of EAST HAMPTON, May 18, 2015
Defendant 10 am

- - - - - X
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOANNA SEYBERT
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: LANKLER SIFFERT & WOHL LLP
500 Fifth Avenue
New York, New York 10110
BY: LISA ZORNBERG, ESQ.
MATTHEW COOGAN, ESQ.
JONATHAN LAMBERTI, ESQ.

For the Defendant: KAPLAN KIRSCH & ROCKWELL LLP
1001 Connecticut Avenue NW
Washington, DC 20036
BY: W. ERIC PILSK, ESQ.

FARRELL FRITZ
50 Station Road - Bldg 1
Water Mill, New York 11976
BY: ERIC BERGMAN, ESQ.

For FAA: US DEPARTMENT OF JUSTICE
US Attorney's Office
610 Federal Plaza
Central Islip, New York, 11722
BY: ROBERT W. SCHUMACHER II, ESQ.

AIR PEGASUS US LYNN GARTNER DUNNE & COVELLO LLP
330 Old Country Road - Ste 103
Mineola, New York 11501
BY: JOSEPH COVELLO, ESQ.
ROBERT P. LYNN, JR.

Court Reporter: Dominick M. Tursi, CM, CSR
US District Courthouse
1180 Federal Plaza
Central Islip, New York 11722
(631) 712-6108 Fax: 712-6124
DomTursi@email.com

Proceedings recorded by mechanical stenography.
Transcript produced by computer.

oOo

9 (Call to Order of the Court. Appearances stated
10 as indicated above.)

11 THE COURT: Please, when you can, speak into the
12 microphone so we have a clear record and I can actually
13 hear you.

14 If at any time you don't hear me, hold up your
15 hand and say: *Judge, I don't hear you.* It makes sense to
16 do it that way rather than guess what I said.

17 MS. ZORNBERG: Thank you.

18 MR. COVELLO: Your Honor, we had sent a letter.
19 We represent Air Pegasus. We are a proposed intervenor.

20 We are more than happy to make a motion, unless
21 of course your Honor wishes to grant the application right
22 now.

23 THE COURT: Is there any opposition to this
24 application of Air Pegasus?

25 MR. PILSK: We haven't seen, other than that

1 letter I really don't know what their interest is. So at
2 the moment I guess I would prefer to see a motion.

3 THE COURT: All right.

4 Can you put together a motion? I will allow you
5 to stay for the balance of the proceeding. Obviously, it
6 is a public proceeding.

7 It doesn't have to be a very lengthy motion.
8 Perhaps after this hearing you can speak to counsel for
9 the town and arrive at some understanding of what is
10 involved.

11 Air Pegasus is what type of company?

12 MR. COVELLO: We fly in and out approximately
13 100 times a day.

14 They own two of the three heliports in New York
15 City. It is a substantial business.

16 THE COURT: How many flights?

17 MR. COVELLO: Helicopter.

18 THE COURT: How many, helicopter or otherwise,
19 does it have into East Hampton Airport?

20 MR. COVELLO: In and out, approximately 100 a
21 day, your Honor.

22 THE COURT: 100 a day. Just into East Hampton?

23 MR. SCHUMACHER: Maybe it is a little less. It
24 is substantial, your Honor.

25 THE COURT: Thank you.

1 Let me ask the town. How many helicopter
2 flights are there into East Hampton during the busy
3 season?

4 MR. PILSK: Your Honor, during the busy season,
5 on the busiest days, 350 and upwards. Well over 300 on
6 the busiest days. I don't have exact information on what
7 the exact daily averages are. But it is over 100, I
8 believe.

9 THE COURT: You indicate in your papers that it
10 has increased 50 percent in the last year?

11 MR. PILSK: 47 percent, your Honor.

12 THE COURT: Close enough.

13 MR. PILSK: We will take 50. But 47 percent.

14 THE COURT: All right. Is there any particular
15 reason that you noticed this increase? Is it just demand?

16 MR. PILSK: Reasons for the increase?

17 I mean, I can't speak to why people are flying.
18 I assume that it is demand and the appeal of taking a
19 helicopter for personal convenience.

20 The town obviously notices it because of the
21 extreme noise and disturbances that those operations cause
22 to its residents.

23 THE COURT: Thank you.

24 MS. ZORNBERG: Your Honor?

25 THE COURT: Yes.

1 MS. ZORNBERG: If I may briefly just be heard on
2 the 50 percent increase figure that the court mentioned.

3 The plaintiff's position is that even that 50
4 percent figure, or 47 percent figure cited by the town, is
5 unreliable. The town's own records are inconsistent on
6 this issue. Its air traffic control tower records do not
7 match its vector system records. Those are issues later
8 on for discovery.

9 And in 2003 the weather was notoriously bad so
10 there were very much -- far fewer flights by helicopter in
11 2003 because of weather. And it is our view, as to that
12 47 percent figure, that the town only looked at 2003
13 versus -- 2013 versus 2014 in an attempt to maximize a
14 statistic which we do not think is reliable.

15 THE COURT: That is down the road. I just want
16 to get a general idea as to the urgency on both sides.

17 Let me direct my questions to the town for a
18 moment. The primary issue before the court is whether or
19 not the federal laws preempt the imposition of the
20 restriction. In other words, can the town pass laws that
21 restrict flights coming in and out, essentially.

22 The town has put itself in the position of a
23 proprietor of the airport. And this is proprietor
24 exception.

25 In terms of the proprietor exception, there is

1 very little law since the Antinoise and Capacity Act was
2 passed in 1990. There is only one case out of the Second
3 Circuit -- but that really didn't deal with it -- that you
4 cite in your papers.

5 That is the National Helicopter?

6 MR. PILSK: Yes, your Honor.

7 THE COURT: Whether it was raised by the parties
8 or not raised by the parties, it is pretty clear there was
9 no direct conflict there. And the case eventually did
10 allow for the imposition of curfews and it didn't mention
11 ANCA.

12 However, there is one case that counsel
13 represented on this issue, and that was *Trump v Palm Beach*
14 *County*.

15 MR. PILSK: Yes.

16 THE COURT: And that indicated that, at least in
17 the brief the position that was taken by defense counsel
18 was that one had to comply with the ANCA.

19 And the case, as I said, was settled, but in
20 that case your position was quite inconsistent with what
21 the position is this case. Fair to say?

22 MR. PILSK: Well, fair to say in one sense, your
23 Honor. But the context was completely different.

24 In that case the client was, first of all, a
25 different client. Different case. Different content. It

1 was 2010, before we got the benefit of the FAA's position
2 as articulated in the response of Congressman Bishop.

3 The main thing was in that case the airport very
4 much wanted to remain eligible for their federal grant
5 funding. So in that sense, ANCA was a very real
6 limitation on the airport's ability to act unilaterally.

7 And in the case of East Hampton, that is not the
8 case. The town is no longer accepting, currently, federal
9 grant funds and is willing to accept the lack of
10 eligibility going forward in order to exercise its
11 proprietary powers without having to go through the ANCA
12 process. That is the position that the FAA has now
13 articulated and that we have, the town has, followed.

14 THE COURT: When you say they have articulated:
15 back in 2005 they signed off on some type of settlement.
16 And there were responses from then Congressman Bishop
17 laying out what he believed was the airport's position in
18 terms of being able to have this ANCA no longer complied
19 with.

20 The FAA was saying it wouldn't enforce ANCA.

21 MR. PILSK: Well, two things.

22 THE COURT: At least, that is your position.

23 MR. PILSK: Two things.

24 The 2005 settlement agreement. The FAA agreed
25 that it would not enforce several grant assurances

1 including, critically, 22A and 22H. And because they
2 would effectively terminate -- they would terminate as of
3 December 31, 2014. So those were the issues at hand on
4 December 31, 2014.

5 THE COURT: But don't the assurances run until
6 2021?

7 MR. PILSK: Absent a modification, they would
8 have. Absent that agreement they would have.

9 And that was the way that the FAA and the DOJ
10 decided to settle that case, which challenged the
11 underlying validity of the 2001, I believe it was, grant
12 by agreeing to limit the duration of several specific
13 grant assurances. And that is perfectly within their
14 discretion. We can talk about that.

15 There is nothing in the statute that in any way
16 addresses or limits the FAA's discretion to limit the
17 duration of any agreement or obligation. It is completely
18 silent on that.

19 As a consequence of that, and in response to the
20 question from Congressman Bishop, the FAA responded in
21 2012 to the responses of Congressman Bishop and made it
22 clear, one, that the FAA was going to abide by the terms
23 of the 2005 settlement agreement; and, secondly, when
24 applied to the specific context of an airport that is no
25 longer seeking grant obligations, and the grant obligation

1 for 2022 will expire as of a certain time, the airport did
2 not have to go through the ANCA process unless it wanted
3 to retain eligibility for future grant funding.

4 That is the FAA's stated position. And they
5 stuck to it. The town met with them, with the FAA, with
6 senior officials, both legal and policy.

7 THE COURT: That is recently.

8 MR. PILSK: This was winter.

9 Briefed them in detail on what the town was
10 proposing to do. Explained to them that the town was
11 relying on the Bishop responses and the FAA's stated
12 position.

13 And the FAA has not said anything to the
14 contrary. It has not indicated that it was changing its
15 position, that it disagreed. And it hasn't taken any
16 enforcement action.

17 And I think maybe the best proof of the
18 importance and effect of those Bishop responses is what
19 plaintiff has said in their lawsuit against the FAA when
20 they say, in paragraph 66, and this is the case
21 15-Civil-441:

22 *"The Bishop responses have legal consequences to*
23 *the rights and/or obligation of the FAA, East Hampton, and*
24 *the users of East Hampton Airport, including but not*
25 *limited to aircraft operators."*

1 The town has followed the FAA's guidance and
2 instructions on what their compliance obligations were.

3 THE COURT: All right.

4 MR. PILSK: And just to finish the thought.

5 That is really not a question of preemption at
6 this point. It is a question of compliance. And the
7 question of compliance is an issue that plaintiffs need
8 the raise with the FAA; that they have already done in
9 their own lawsuit when they invoked the court's
10 jurisdiction on the basis of the finality of that
11 decision, the impact of that decision, and the lack of a
12 remedy against the town in any other way.

13 THE COURT: I think it is pretty much conceded
14 they have a lack of a remedy, whether they go against the
15 FAA or they go against the town, because they lay out a
16 pretty significant case in their papers, the Friends. We
17 will refer to the plaintiffs as the Friends. They lay out
18 a pretty significant evidentiary burden, if you will, as
19 their only relief is equitable.

20 Money damages are not going to be available to
21 them at the end of the day in terms of, it is more than
22 economic loss. It is loss of relationships. They can't
23 get the type of aircraft, if they even exist, the 1950s
24 aircraft, to run into and comply with the restrictions
25 that the town has imposed on the airport.

1 So I think that pretty much has to be conceded,
2 that their only relief, if they are entitled to any
3 relief, would be equitable.

4 MR. PILSK: Well, as we have said in our papers,
5 we believe that they do have or may have a legal remedy
6 under the commerce clause.

7 And furthermore, of course, as we briefed, the
8 economic impact doesn't rise to the same level as the
9 cases finding irreparable injury in an economic harm
10 situation because they are not restricted from operating
11 at any other airport, including airports relatively close
12 to the Hamptons. They can continue to conduct every other
13 aspect of their business, as courts have found, as we have
14 cited in our papers.

15 THE COURT: Yes.

16 MR. PILSK: So the only point is, they do have
17 other legal remedies. They can continue to pursue their
18 lawsuit against the FAA, and they can ask the FAA to
19 either seek an injunction or they can seek an injunction
20 in that case. There are administrative remedies which
21 they have chosen not to pursue with the FAA.

22 And, furthermore, the issue of the Bishop letter
23 only goes to the claim under ANCA and the AIA. The other
24 claims under the supremacy clause and the commerce clause
25 are separate. And although we don't think there is any

1 merit to them, they can continue to pursue those claims
2 independent of the Bishop response.

3 So the Bishop response narrows their claims that
4 they can pursue in this case because there are claims
5 against the decision by the FAA that need to be pursued
6 against the FAA. But there are other avenues to seek the
7 relief that they want here, although at the end of the day
8 we don't believe that they are entitled to that.

9 THE COURT: All right. Miss Zornberg.

10 MS. ZORNBERG: Thank you, your Honor.

11 First, your Honor is exactly correct to point
12 out the absence of case law addressing ANCA's application
13 since Congress enacted the statute in 1990.

14 That is really not an accident. It is a
15 reflexion of the fact that ANCA speaks in very plain,
16 mandatory terms and established a national noise policy
17 for aviation that all airports must comply with.

18 And so, since 1990, when Congress enacted ANCA,
19 no federally funded airport in the United States has been
20 permitted to impose access restrictions without complying
21 with ANCA.

22 No court has ever stated that an airport need
23 not comply with ANCA. We are aware of not a single
24 instance since 1990 where an airport has been allowed to
25 impose mandatory curfews. There were a few instances

1 where airports followed ANCA to try to impose mandatory
2 curfews, and the FAA said that to allow those curfews
3 would be unsafe.

4 And there is certainly no example of an airport
5 imposing severe restrictions like we are dealing with here
6 without the FAA even being given an opportunity to
7 determine whether the restrictions are safe.

8 I would note for your Honor that USA Robert
9 Schumacher, who represents the FAA, is in the courtroom
10 today.

11 THE COURT: I know.

12 MS. ZORNBERG: And I understand he is available
13 to address any questions on this.

14 Your Honor, no court in the United States has
15 ever permitted a local government that has knowingly
16 entered grant assurance obligations with the federal
17 government to pass laws that directly conflict with those
18 grant assurances.

19 The issues imposed by these restrictions are of
20 national significance. They represent a very serious
21 departure from federal law. And the FAA recognizes this.
22 And that is why we believe the FAA fully supports this
23 court's entry of a TRO and a preliminary injunction until
24 the merits have been decided.

25 That is not a small thing. That is not

1 something to disregard, as the town tries to do. That is
2 significant; I mean, even the basic fact that we don't
3 know if the restrictions are safe.

4 Our clients clearly think they are not. Others
5 in the town have spoken up who are not even affiliated
6 with plaintiffs, small recreational pilots. There is one
7 woman who recently, a few weeks ago, stood up at a hearing
8 and said to the town board these restrictions are not
9 safe. They will cause pilots to make bad decisions.

10 And so, your Honor, we really are dealing here
11 with an extraordinary, unprecedented situation of the town
12 in a way that represents opportunism more than reliance,
13 trying to seize on a mistake in an informal letter issued
14 by the FAA that, under Supreme Court precedent, is not
15 binding.

16 And the FAA has approached this court among
17 other things to say: Your Honor, you should enter a stay
18 so that the FAA has time to get this right. In our view,
19 we respectfully submit, that is enormously persuasive in
20 addition to the overwhelming evidence of irreparable harm;
21 the strong compelling substantial showing of likelihood on
22 the merits. The fact that the FAA is here supporting us
23 really underscores the point more than ever.

24 THE COURT: Thank you.

25 Mr. Schumacher? Come up. Tell us who you are

1 supporting in this instance.

2 MR. SCHUMACHER: Thank you for the kind
3 invitation.

4 For the record, Robert Schumacher, from the US
5 Attorney's Office, representing the FAA.

6 Obviously, we are not party to this action, but
7 we are party to an affiliated action and we have filed a
8 letter in support of the plaintiff's application for a
9 stay.

10 As we made clear in that letter, we are not in a
11 position to express any position on the merits of either
12 lawsuit. But that being said, the FAA is concerned about
13 the situation in East Hampton.

14 The issues, and they are complex legal issues,
15 are being reviewed at the highest levels of both the FAA
16 and the Department of Transportation, and the FAA simply
17 needs more time to evaluate whether or not these adopted
18 restrictions comply with the FAA's regulations. And we
19 think that an injunction with enforcement of these is the
20 prudent approach under these circumstances, your Honor.

21 THE COURT: That is more supportive than the
22 defendants have indicated.

23 Have you spoken with them lately?

24 MR. SCHUMACHER: The defendant just briefly,
25 your Honor. They know our position. They have read our

1 letter.

2 THE COURT: All right.

3 MR. SCHUMACHER: I would like to say also, just
4 for the record, your Honor.

5 One position the FAA is prepared to take today
6 is -- and I have heard counsel's argument with regard to
7 the Bishop responses -- the FAA disagrees with the
8 representations that are being made about the import and
9 the legal effect of those responses.

10 THE COURT: So you are not in agreement what the
11 defendants have proffered as to the effectiveness of the
12 Bishop responses.

13 MR. SCHUMACHER: Correct, your Honor. We don't
14 think those Bishop responses in any way waive the FAA's
15 ability to seek an injunction or to enforce anything under
16 the appropriate regulation. It is simply a response to a
17 hypothetical posed by Congressman Bishop.

18 And I think, if you look at actually the record,
19 in Mr. Pilsk's affidavit there is a cover email where
20 counsel for the town specifically says: *I understand that*
21 *we don't have to comply with ANCA if we don't want federal*
22 *grant. And counsel says: This is a surprise.*

23 And the response that FAA counsel gives him is:
24 *Well, this is likely being misunderstood. Let's talk.*

25 So this idea that they are in any way relying on

1 to the FAA's, quote-unquote, "*legal interpretation*" and
2 that this is definitive, I think that is disingenuous at
3 best.

4 THE COURT: Do you want to respond to that,
5 Mr. Pilsk?

6 MR. PILSK: I do.

7 First of all, the response back from the FAA's
8 chief counsel in that email was regarding the statements
9 that were made in the press about what the Bishop letter
10 meant; not a question of what it meant from my colleague
11 who wrote the email. Number one.

12 Number two. As Mr. Cantwell explains in his
13 declaration, the town has met with the FAA, briefed them
14 on what we were doing, and explained that we are relying
15 the Bishop responses going forward. And we have been
16 completely public about that in town meeting after town
17 meeting after town meeting.

18 And the FAA has not taken any action and has not
19 told us not to move forward. What are we supposed to do
20 with that? And I think the big problem that we have with
21 the FAA's position is that it is a sort of: *Waiting for*
22 *an injunction. We are thinking about it. We are*
23 *considering it. We are mulling it over.* And we just have
24 to sit and wait.

25 The town laws that we have been working on for

1 months to address a problem that has been festering for
2 years, we have to wait until the FAA figures it out.

3 And, frankly, how much longer do they really
4 need? We had a brief on it, I think it was in February.
5 They have known about it. The issues might be of some
6 complexity, but really, if there is a safety problem, the
7 FAA knows how to address a safety problem and they can
8 take action to do so. ANCA doesn't preclude them and the
9 Bishop responses don't preclude them from doing that.

10 There is no safety problem. There are curfews
11 in place and similar restrictions in airports all across
12 the country. There is not a safety issue with that. That
13 is really just a red herring issue.

14 And, as the Ninth Circuit has made clear, the
15 fact that some people may react to a rule in a way that is
16 unsafe does not make the rule, itself, a safety problem.
17 I mean, frankly, every rule creates an incentive to beat
18 it. If that were the case, then every rule, even rules
19 enacted for safety, would be deemed unsafe.

20 And I think the bigger point here is that one
21 reason why few airports that even try to adopt access
22 restrictions since ANCA was adopted is that most airports,
23 and certainly most large airports, want to keep their
24 federal funds and don't want to go through both the
25 expense of the process and risk losing their federal

1 funding. That is a powerful tool. That is the tool that
2 Congress gave the FAA to enforce ANCA, and the only tool.
3 That is one thing.

4 The second point is, this case does not have
5 national implications because of the very particular
6 circumstances at East Hampton, stemming primarily from the
7 2005 settlement agreement. That is different. No other
8 airport has an agreement like that in place that limits
9 the duration of grant assurances 22A and limits the FAA's
10 enforcement authority under the grant assurances, which is
11 broader than its enforcement under ANCA.

12 THE COURT: I was rather shocked that that was
13 your position in terms of the agreement, if you will. But
14 you are basically telling the court that East Hampton
15 Airport doesn't want federal funds?

16 What happens if there is a hurricane or, you
17 know, some need for funding? Do they go back and say:
18 Well, on these assures --

19 MR. PILSK: I should be more precise. There are
20 two aspects.

21 First of all, it is federal aviation grant
22 funding.

23 THE COURT: Right.

24 MR. PILSK: It wouldn't be FEMA funding or other
25 kind of funding if something truly disastrous happened.

1 Number one.

2 Number two, if I understand the FAA's position,
3 if the town subsequently were to rescind the restrictions,
4 it could restore its eligibility. That is not something
5 we are contemplating. But it isn't one way. I mean,
6 there is always that option, I suppose.

7 The main point is, that is the decision the town
8 has made now. And based on the FAA's instructions, the
9 guidance to date, that is permissible and means that we do
10 not have to go through the ANCA process in order to adopt
11 the access restrictions.

12 And I just want to touch briefly on National
13 Helicopter. And there is another case, the Sierra case,
14 the Southern District case, which, in a sense, counsel is
15 talking both ways, because they say ANCA applies across
16 the board and yet they distinguish those cases because
17 they weren't grant eligible. That seems to be their
18 position. ANCA applies whether or not you are grant
19 obligated or not.

20 The point here is that, as a result -- and that
21 is not how the FAA has articulated it, either. The FAA's
22 position, and the position the town has relied on, is that
23 ANCA applies if you want to retain and continue to get
24 federal aviation grant funding. The town does not.

25 And when you look at those cases, you have two

1 cases in district court that were litigated. One case
2 went up to the Second Circuit.

3 I'm not saying that is binding on anybody, but
4 it certainly is indicative that there are circumstances
5 when ANCA doesn't apply, and the FAA knows how to make
6 those decisions, as they have in this case.

7 THE COURT: All right.

8 Miss Zornberg, briefly.

9 MS. ZORNBERG: Thank you, your Honor. A few
10 things require response here.

11 First, it is clear that the town is relying on
12 one sentence in a letter that wasn't even signed in
13 response to Congressman Bishop. That is the total premise
14 for their argument for asking this court to create a sea
15 change in the law on ANCA and to become the first court
16 ever to say an airport doesn't have to comply.

17 East Hampton Airport was built with federal
18 funds. It has been funded through the years with federal
19 funds. There is no dispute that it is federally obligated
20 until 2021. There is no scenario. You look at the plain
21 words of Congress. There is no scenario under which this
22 airport need not comply. To reduce it to four words or
23 less, they must comply *because Congress said so*.

24 And they can try to rely on this one Bishop
25 sentence to upend Congress' clear dictate, but that

1 doesn't work. That is black letter law.

2 Your Honor, they also continue to rely heavily
3 on a meeting in February when they apparently sat down
4 with the FAA. The town requested that meeting when the
5 FAA was in the middle of active litigation, and they are
6 trying to now say, because the FAA was silent at that
7 meeting, it was fine for us to proceed.

8 The reality is, first of all, the town elected
9 to enact these restrictions after many of the same
10 plaintiffs in this suit had already filed the suit against
11 the FAA calling the FAA's attention to its error in that
12 Bishop sentence.

13 And the town did not prudently wait for that
14 legal issue to be decided. It did not prudently wait for
15 the FAA to even respond as to whether it would acknowledge
16 it had made an error. The town rushed forward, enacted
17 these local laws with no grace period for implementation.
18 That is not reliance.

19 If the town had complied with ANCA, as it is
20 required to do, just for restrictions on stage two
21 aircraft -- it proposed its restrictions on February 10,
22 under ANCA for stage two -- there would have been a
23 mandatory minimum wait period of 180 days, until
24 mid-August. Yet, the town, having not complied even with
25 square one of ANCA's requirements, is saying these have to

1 take effect right away, without giving the time to the FAA
2 to say if it is safe. Without complying with ANCA, in
3 violation of their grant assurances. No way.

4 Your Honor, the last thing I will briefly
5 address is, to the extent the town keeps referring to the
6 2005 settlement agreement, the town was not even a party
7 to that agreement.

8 THE COURT: I'm aware of that.

9 MS. ZORNBERG: Okay.

10 THE COURT: I understand.

11 MS. ZORNBERG: Okay. And, your Honor, in terms
12 of whether or not the town wants to seek federal
13 eligibility, federal airport funds in the future, which
14 your Honor posed, I would point out that, like many
15 communities near airports, there is nothing unique going
16 on here.

17 There are political winds in East Hampton.
18 Through 2011 many, including those in the town board,
19 wanted to seek federal funding. There is political
20 upset --

21 THE COURT: Federal funding for the airport.

22 MS. ZORNBERG: Yes, for the airport.

23 So, like politics that occur throughout the
24 country in various communities, there was a power shift.
25 And after 2012 there was a decision: We are not seeing

1 funding. We are disregarding the town counsel's advice
2 that we have to comply with ANCA. We are going forward at
3 all costs.

4 Your Honor, those political events that occur in
5 a community are precisely why Congress enacted ANCA. It
6 made findings that we cannot have a national airport
7 transportation system left up to the political winds of
8 local communities that are enacting patch-work
9 legislation.

10 And, your Honor, finally, to the extent that the
11 town is now again trying to rely on National Helicopter
12 and Sea Air, those cases did not address ANCA. And town
13 counsel, themselves, have previously said in the Trump
14 case, those are irrelevant to the analysis presently
15 before this court.

16 MR. PILSK: Just briefly, your Honor.

17 The town has been working on healing the noise
18 restriction for four years, and most intently over the
19 past year and a half.

20 This isn't a rush to judgment. We very
21 deliberately asked for a meeting with the FAA to brief
22 them on what we are doing, to get a read on their
23 position.

24 THE COURT: But they are in the middle of
25 litigation with plaintiffs in this case.

1 MR. PILSK: They met with us.

2 THE COURT: Yes.

3 MR. PILSK: And they didn't tell us there was a
4 compliance problem because at the moment they don't have a
5 compliance problem with what were doing. We had to rely
6 on that.

7 What the alternative for us is to, because the
8 plaintiff sued the FAA saying we disagree with something
9 that you did, we have to stop?

10 THE COURT: No. I'm not suggesting that.

11 MR. PILSK: I understand you are not, but that
12 is what they are suggesting.

13 And I think that put us in completely,
14 essentially usurps the authority of a town board to take
15 the action it deems necessary to protect its residents.

16 The fact that there are political changes, that
17 is what happens in this country. And the new town board
18 made a decision about what it thinks is in the best
19 interests of the community, with broad community support,
20 as it should. The fact that it may change, that it has
21 changed, is really completely irrelevant to the issues
22 here.

23 I think their biggest point here is that you
24 hear the plaintiffs mouthing what the FAA might do, could
25 do, and what they think the FAA should do. And all that

1 is really by the board because the FAA hasn't done
2 anything. To date the stated position of the FAA is that
3 the town does not have to comply, go through the ANCA
4 process, and is not bound by the restrictions in 22 and
5 22A.

6 That is how the town proceeded and that is its
7 position. And frankly, unless and until the FAA takes a
8 different position, I don't think anybody has the full
9 authority or the interest to say to the town it is
10 improper to do anything.

11 THE COURT: Let me ask Mr. Schumacher.
12 Is that your position?

13 MR. SCHUMACHER: No, your Honor.
14 Like I said -- let me -- we're --

15 THE COURT: Let me hear it again: No, that is
16 not your position.

17 MR. SCHUMACHER: And let me just say that, you
18 know, with regards to this February meeting, the FAA did
19 have a meeting with the town, and prior to that meeting
20 the town was specifically told this would be a
21 listening-only meeting and that the FAA would not give
22 either any legal opinion, would not communicate any
23 advice, that the FAA was looking at the issue.

24 And realize, your Honor, that the universe of
25 things that the FAA is looking into is greater than maybe

1 some of the regulations and statutes and issues in this
2 case. We have certainly the grant assurances, and we are
3 certainly aware of the settlement agreement, but the
4 settlement agreement potentially waived a handful of grant
5 assurances.

6 And the FAA is trying to evaluate, and is taking
7 its time to carefully evaluate, whether or not these
8 proposed or past restrictions violate any of those grant
9 assurances, in addition to looking at ANCA, in addition to
10 looking at their other regulations that maybe aren't a
11 part of this lawsuit and other federal laws.

12 But the FAA simply needs time to do that, your
13 Honor.

14 THE COURT: What period of time are we looking
15 at? This has been brewing since 2001, when the town first
16 took federal funding.

17 MR. SCHUMACHER: Understood.

18 But prior to April, when these regulations were
19 actually adopted by the town, this was all talk. There
20 were multiple additional proposals that weren't even
21 passed by the town. So had they even done anything prior
22 to April, I have a feeling that today the argument would
23 be: Well, this wasn't right. Why is the FAA trying to
24 bother us? Nothing has happened. We're just talking.
25 We're just considering.

1 So really, while it has, quote-unquote, been
2 brewing for a period of time, the FAA did tell them
3 exactly what we were doing, and we are not in a position
4 of taking past restrictions and get them through the town,
5 the federal regulations and federal laws. And we have
6 only been in a position of doing that over the last 30
7 days or so.

8 THE COURT: And you have an answer that is due
9 in the litigation?

10 MR. SCHUMACHER: We do, your Honor. June 8.

11 THE COURT: All right.

12 MS. ZORNBERG: Your Honor, if I may, I would
13 like to correct one thing Mr. Pilsk said.

14 He represented that the plaintiff's position is
15 tied to what position the FAA takes. That is not
16 accurate.

17 The plaintiff's position is based upon what
18 Congress has said. And if the FAA made a mistake at some
19 point in entering the 2005 settlement, as we contend, that
20 would have been the date the FAA, itself, twice said we
21 have no authority to do what happened in that settlement
22 agreement.

23 The FAA made a mistake in the Bishop sentence.
24 As we contend, there was no factual or legal support for
25 that sentence. The FAA's mistake does not govern this

1 court. It doesn't even govern the FAA. Our position is
2 that what rules at the end of the day are the clear
3 dictates of Congress.

4 MR. SCHUMACHER: And, your Honor, I would just
5 say I know we are in support of the plaintiffs here, but
6 what the FAA is doing is evaluating these restrictions.
7 Ultimately, we may wind up and say: You know what? We
8 don't see a violation here.

9 THE COURT: You may wind up saying they are
10 reasonable. There are not arbitrary. They are not
11 discriminatory.

12 MR. SCHUMACHER: Absolutely, your Honor.

13 So I want to make that clear. But we need time
14 to make that determination.

15 THE COURT: But right now we have two sides that
16 need an answer relatively soon based on the fact that this
17 is going into the height of the summer season in the
18 Hamptons.

19 MR. SCHUMACHER: Understood, your Honor.

20 And as I said, it is a serious question and the
21 FAA is taking it very seriously.

22 As I said before, it is being considered at the
23 highest level of both FAA and the DOJ.

24 MR. PILSK: The only closing point on that is
25 what your Honor I think put her fingers on, which is, what

1 kind of likelihood of success on the merits is there if
2 the FAA doesn't know what it is going to do, and they
3 could go either way.

4 That is the problem. They are asking
5 essentially for an injunction while the FAA makes up its
6 mind, which could go either way. On the basis of that,
7 there is no sense of urgency, from FAA's point of view.
8 And there is no likelihood of success on the merits
9 because no one knows, the FAA has not articulated any
10 basis to believe that the law is unlawful. They are still
11 thinking about it. I think that is the main point.

12 What I meant by the plaintiff taking the FAA's
13 position here is that they are really challenging the
14 FAA's earlier statement, which is all we have to go on at
15 the moment, and are challenging against the FAA, not
16 against the town.

17 THE COURT: Yes?

18 MR. BREGMAN: Eric Bregman. I am local counsel
19 for the town and I was also the town attorney in 2001.

20 THE COURT: That is a nice coincidence, isn't
21 it?

22 MR. BREGMAN: I just want to speak about the
23 timing and the FAA's response or, frankly, failure to
24 respond.

25 I can tell that you since 2001, when I was there

1 and they were first looking at this issue of noise as part
2 of the master plan update that they started back then,
3 they spent seven years doing it, the FAA knew exactly
4 where the town was going. It knew exactly what the issues
5 were. Not that the town was going to do restrictions, but
6 they knew that it was a possibility.

7 And that is what the political debate was about,
8 whether or not to give up future FAA funding in order to,
9 quote, take control of the airport.

10 And there was a lot of political back and forth.

11 THE COURT: No one can control an airport. We
12 live in a country that has a national system; an
13 international system, if you will.

14 MR. BREGMAN: Of course. But control in the
15 sense of imposing restrictions on operations for noise,
16 and only noise issues. And that is what the debate was
17 about. It was going back to.

18 And I can tell you, there were many meetings
19 from 2001 through the three years I was the town attorney.
20 I was at two meetings with the FAA, at all of which these
21 underlying issues were discussed. The town couldn't get
22 responses. Couldn't get responses saying this is okay or
23 that is not okay. It was only when there was a separate
24 lawsuit with the town, that I did not participate in.

25 THE COURT: It was the citizens to stop

1 expansion of the airport.

2 MR. BREGMAN: Yes. The town didn't even know
3 about that, frankly, at the time it was started. And it
4 was only when that was settled, with the settlement as we
5 know truncating some of the grant assurances, and the
6 other lawsuit that was just resolved in state court about
7 these issues, when the Bishop letter was written. All of
8 this.

9 So it is not as though the FAA didn't know that
10 these noise issues and the issued restrictions were in the
11 works from 2001. Now, the specifics obviously of the
12 restrictions are only recently.

13 THE COURT: Right. And you just passed the laws
14 in terms of what those restrictions would be, so now the
15 FAA wants time to render its decision.

16 However, the court doesn't necessarily have to
17 wait for the FAA to render its decision.

18 MR. BREGMAN: That is what I was focusing on.

19 The town has been waiting for the FAA for a very
20 long time for guidance about this, and it hasn't gotten it
21 except in the settlement of that other lawsuit and the
22 FAA's response to the Bishop questions.

23 So the town, my bottom line point is, has been
24 perfectly reasonable in relying upon it and has not been
25 avoiding it.

1 THE COURT: Thank you.

2 MS. ZORNBERG: Your Honor, if I may, just three
3 points in response.

4 First, to the extent that Mr. Bregman is
5 testifying here as a witness, we object and we think that
6 is improper.

7 Second, to the extent that the town keeps
8 repeating this claim that plaintiff's likelihood of
9 success depends on the FAA's decision, again, we are not
10 relying on the FAA. We are relying on Congress, which has
11 spoken clearly. We think it a good thing and a right
12 thing for the FAA to be involved and to take a holistic
13 look at these restrictions.

14 Frankly, on safety issues, at a minimum that is
15 critical. The New York Eastern Seaboard airspace is the
16 most dense, complicated airspace in the nation. And the
17 FAA, in the less complex airspace, has refused to approve
18 mandatory curfews on safety grounds.

19 And so, for a whole host of reasons but safety
20 has to be forefront among them, of course the FAA needs
21 time to get it right and to make its determination.

22 On safety, Congress has preempted, totally,
23 control over aviation safety, and the FAA is the final
24 arbiter on whether restrictions are safe. For town
25 counsel to stand up here and say it is not true these

1 things are safe, just highlights the ridiculousness.

2 THE COURT: I don't think he has said anything
3 that they are safe, necessarily.

4 MS. ZORNBERG: All right. Fine.

5 So, your Honor, when the town says the only
6 thing we have go on is the Bishop sentence, that is not
7 the only thing they have to go on. Their own counsel
8 advised them, based the express terms of Congress, that
9 the town had to abide by ANCA.

10 The FAA regulations, formally promulgated, say
11 ANCA applies to all airports. That is the quote. I can't
12 imagine clearer language.

13 So of course there is a lot for the court to go
14 on in finding that the town has to comply with ANCA. It
15 is Congress' plain terms, supported by the regulations
16 promulgated by the FAA.

17 THE COURT: Thank you.

18 If there is nothing else, I'm going to adjourn.
19 But let me first ask, before I do that, is the town
20 willing to continue not enforcing these laws?

21 MR. PILSK: For what period of time, your Honor?

22 THE COURT: Three weeks.

23 MR. PILSK: I would have to consult with my
24 client before I can answer that.

25 THE COURT: Why don't you do that. We will take

1 a short break and then you can get back to me with that
2 answer.

3 MR. PILSK: Thank you, your Honor.

4 (Recess taken from 10:45 am until 11 am.)

5 THE COURT: Were you able to contact your
6 client?

7 MR. PILSK: I was, your Honor. Thank you.

8 I want to say, first, we have obviously given a
9 lot of thought to your Honor's request and respect your
10 request for additional time to evaluate the issues and get
11 it right.

12 I do want to say that, from the town's point of
13 view, with Memorial Day weekend coming up, further delay
14 in implementation imposes an enormous burden and -- *cost*
15 is not the right word -- negative impact on the residents
16 of the community in terms of the hundreds of aircraft that
17 will be coming starting this weekend. I want to be clear
18 that this is a big ask for the town.

19 That said, the town appreciates your request.
20 The main question we have is, what happens after three
21 weeks?

22 THE COURT: I will render a decision.

23 MR. PILSK: Okay. That is what I want to get
24 at.

25 Maybe I'm reading the tea leaves too intensely

1 because my impression was you might be waiting for the
2 FAA's response.

3 THE COURT: No. I'm not waiting. I can say on
4 the record right now I don't need the FAA's response.

5 I see Mr. Schumacher smiling. He seems somewhat
6 relieved.

7 I certainly have the authority to determine this
8 dispute and I don't need their input. I appreciate it.

9 Obviously, if I get the decision wrong they will
10 be first to try to intervene and correct whatever I did in
11 error.

12 In any event, I will put it over for three
13 weeks. I appreciate the town's compliance or offering to
14 allow the court this time to decide the issue.

15 What is our three-week date? I will give you a
16 Monday return date and I will render the decision on that
17 date. I will have the time.

18 June 8 you should expect a decision from the
19 court.

20 MR. PILSK: I'm sorry. Do you want us to be
21 here?

22 THE COURT: No. I will issue the decision. You
23 do not have to come in.

24 MS. ZORNBERG: Your Honor, just for further
25 clarification of our own position.

1 Our order to show cause was styled as a motion
2 for a TRO. But clearly here --

3 THE COURT: It is a preliminary injunction, you
4 were seeking.

5 MS. ZORNBERG: Yes.

6 There are dispositive legal issues that apply,
7 and those dispositive legal issues, particularly under
8 ANCA and under the grant assurances under the AAIA, we do
9 not seek any fact discovery. And we think it would be
10 appropriate for the court to treat our argument on those
11 issues as one for a preliminary injunction as well as for
12 a TRO.

13 THE COURT: That is what I intend to do.
14 And I assume that defense counsel agrees with
15 that.

16 MR. PILSK: On the legal issues, yes, your
17 Honor.

18 THE COURT: Thank you. Have a good day, folks.
19 (Proceedings adjourned at 11:05 am.)

20
21 CERTIFICATE OF COURT REPORTER

22 I certify that the foregoing is a correct transcript from
23 the record of proceedings in the above-entitled matter.

24

25

Dominick M. Tursi, CM, CSR