East Hampton Airport and FAA Grant Assurances

Current Legal Posture.

In a settlement of a lawsuit brought by the Committee to Stop Airport Expansion against the FAA, the FAA agreed that the following three grant assurances, applicable to the East Hampton Airport for grants issued prior to the date of the Stipulation of Settlement, will not be enforced beyond December 31, 2014:

- It will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport (grant assurance 22.a.).

- The sponsor may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport (grant assurance 22.h).

- It will keep up to date at all times an airport layout plan of the airport showing (1) boundaries of the airport and all proposed additions thereto, together with the boundaries of all offsite areas owned or controlled by the sponsor for airport purposes and proposed additions thereto; (2) the location and nature of all existing and proposed airport facilities and structures (such as runways, taxiways, aprons, terminal buildings, hangars and roads), including all proposed extensions and reductions of existing airport facilities; and (3) the location of all existing and proposed non-aviation areas and of all existing improvements thereon. Such airport layout plans and each amendment, revision, or modification thereof, shall be subject to the approval of the Secretary which approval shall be evidenced by the signature of a duly authorized representative of the Secretary on the face of the airport layout plan. (grant assurance 29.a)

  The sponsor will not make or permit any changes or alterations in the airport or any of its facilities which are not in conformity with the airport layout plan as approved by the Secretary and which might, in the opinion of the Secretary, adversely affect the safety, utility or efficiency of the airport. b. If a change or alteration in the airport or the facilities is made which the Secretary determines adversely affects the safety, utility, or efficiency of any federally owned, leased, or funded property on or off the airport and which is not in conformity with the airport layout plan as approved by the Secretary, the owner or operator will, if requested, by the Secretary (1) eliminate such adverse effect in a manner approved by the Secretary; or (2) bear all costs of relocating such property (or replacement thereof) to a site acceptable to the Secretary and all costs of restoring such property (or replacement thereof) to the level of safety, utility, efficiency,

and cost of operation existing before the unapproved change in the airport or its facilities. (grant assurance 29.b)

With respect to assurance 29 only, there is a caveat that the FAA may continue to enforce the assurance for the purpose of safety.

These are the provisions that limit the town's authority, under the 2nd Circuit Court of Appeals case, *National Helicopter v. City of New York*, to regulate airport access to protect the community from noise, or to modify the airport so that unwanted aircraft cannot use it. This is the very reason why these particular provisions, and no others, were singled out by the settlement to expire early. There are many other assurances of different kinds, but these are the assurances that bear on the power of the town to control airport access. The Court of Appeals for the 2nd Circuit is the final arbiter of Federal law in East Hampton, as we are within its jurisdiction. There is no state or local government, private party, or Federal agency or court that has the power to override the judgment of the 2nd Circuit within its jurisdiction other than the Congress of the United States or the United States Supreme Court. What the 2nd Circuit declares is the binding and controlling law in East Hampton.

Once these assurances are no longer binding, then the town has the authority, as airport proprietor, to control airport access for the explicit purpose of protecting the community from noise. Under *National Helicopter*, the town can prohibit aircraft deemed too noisy, impose curfews or even close on week-ends or specific days, and set a numerical limit on the total amount of noise to be permitted, rationing airport access accordingly. The limitations on the town's power are that the access controls must be non-arbitrary and reasonable. For example, the court would not permit the City to discriminate amongst aircraft based on their weight as that had only a tangential and arbitrary relationship to the noise output. But the City was specifically invited to discriminate directly on the basis of noise. This opens the way for the town to restrict or prohibit altogether helicopter access and access by other similarly noisy aircraft, provided that the town makes the effort properly to document the noise contribution of these aircraft and the reasons why they in particular are being limited. The town must treat similarly noisy aircraft the same way. Otherwise, there is no apparent barrier to the town's full exercise of its proprietary powers.

In the course of deciding in its new Airport Master Plan that it wants to take more FAA money and do the very airport expansion projects prohibited by the 1989 Airport Master Plan, the Town asked its aviation lawyer, Peter Kirsch, whether the settlement obtained by the Committee was enforceable. Shorn of the details, Kirsch's e-mailed response to Laura Molinari, then the Town Attorney, was that a contract with the Federal government cannot be "specifically enforced." This means that when someone sues the Federal government on a contract, they can only obtain money damages, not an order that the Federal government perform the contract. In this case, money damages would be meaningless. Hence, Kirsch concluded that the settlement is unenforceable. For some peculiar reason, Kirsch mentioned the question whether the settlement is a third party beneficiary contract for the benefit of the Town, but then said nothing further about it.

He simply concluded that the Committee could not go to Federal court to enforce the settlement. However, everything that Kirsch discusses is, under the circumstances, completely irrelevant.

This less-than-a-legal memorandum by Kirsch is an astonishing piece of work because it assumes a state of affairs that does not exist and can never exist. The grant assurances are embodied in a contract, the grant agreement, between the town and the FAA. Federal law might have been written differently, so that the grant assurances are automatically imposed as regulations, but it is not written that way. The assurances are covenants made by the grantee, the airport operator, to the grantor, the FAA, in consideration for the grant. The covenants impose upon the grantee, the town, what in legal terms is called a liability -- the town loses the power it would otherwise have to control airport access; its powers are burdened for a term of years by the liability of the covenants with the FAA. The settlement between the Committee and the FAA relieves the Town of this liability. It is as if the town owed the FAA a debt and the FAA had agreed in the settlement that the debt was extinguished. The liability is thus gone, unenforceable by the FAA, after December 31, 2014. It is not necessary for the Committee or the town ever to seek to enforce anything *against* the FAA or to force the FAA to do something or refrain from doing something. Hence, the rule that a Federal court will not compel a Federal agency to perform a contract is completely irrelevant under the circumstances.

There was never any possibility of anyone going to court to "enforce" the settlement. It does not operate that way. The meaning of the settlement is that, if the FAA were to try to enforce the relevant grant assurances past December 31, 2014, the Town can simply answer that they are no longer enforceable. They are gone. Indeed, the only legal context in which this could arise is that, hypothetically, the FAA has taken the Town to Federal court to enforce the assurances. No one goes to court to prevent the assurances from being enforced any more than you would go to court to prevent someone from trying to enforce a debt that no longer exists. If the party who no longer has the power to enforce the obligation attempts to do so, you simply respond that you no longer have any legal liability.

What renders this so remarkable is not so much the conclusion that Kirsch reached, that the Committee cannot "enforce" the contract, but that he did not even mention or discuss the actual circumstances in which the effect of the settlement could arise. Molinari asked the wrong question. Kirsch, instead of pointing out to her that it was the wrong question, proceeded to answer it. Both the question and the answer are completely irrelevant.

The answer to that relevant question that Kirsch posed but did not make any effort to answer is that the settlement cannot possibly be anything other than a third-party beneficiary contract for the benefit of the town. In law, the question turns on whether the town is the "intended beneficiary" of the settlement. The town is not only the intended beneficiary, it is the only possible beneficiary. The assurances exist only as a contract between the town and the FAA. It is settled law that only the FAA can enforce them. There is no private right, by a pilot for example, to enforce the assurances. They are "personal" to the FAA. On the other side, the only party on earth who is bound by the

assurances is the town. They do not apply to anyone else. Therefore, the only person that could be relieved of the assurances, and the only person that can be considered to benefit from relieving the assurances, is the town.

The settlement imposes absolutely no obligation of any kind on the town. The town does not have to do anything or agree to do anything to have the benefit of the settlement. The settlement simply relieves the town of the liability of specific grant assurances after December 31, 2014. Indeed, the settlement in no way restricts the town from obtaining new grants and extending the assurances for a new term of 20 years. If, however, the town does not take any new grants and then chooses to regulate airport access after December 31, 2014 and should the FAA try to enforce the assurances to prevent that, the town need merely answer that, per agreement, the assurances are no longer enforceable. It need not do anything else.

Even if there were a question whether the liability of these assurances is successfully relieved by the settlement, the town has absolutely nothing to lose by taking this position if it desires to control airport access to protect the community from noise. It is highly unlikely that the FAA would attempt to breach the settlement agreement as this could lead to the revival of the lawsuit that the FAA very much wanted to settle. But, even if the FAA did attempt to enforce these assurances after December 31, 2014, the worst that could happen would be that a Federal court agrees that they may be enforced despite the settlement and that any access restrictions imposed by the town are therefore voided. There is no other adverse consequence.

Background

In 2001, the town wanted to build a jet apron, that is an apron designed and engineered to accommodate business jets, for fixed-base operator Sound Aircraft, in order to settle an outstanding lawsuit brought by Sound Aircraft. Sound had agreed to accept the construction of this apron in settlement. The lawsuit arose from events in 1997 when the town went for bids on an unused hangar, abandoned because the operator went bust. The hangar lease went to Ben Krupinski, the low bidder, rather than to Sound Aircraft, the high bidder. Krupinski's company operates out of that hangar today. Sound Aircraft sued the town. The town's anxiety to settle this suit was very high because the town's motions to dismiss had failed and they were at the point where Sound would have been able to start using discovery procedures to investigate the facts. It is not difficult to infer just why people in and out of town government who had participated in these events were eager to prevent any investigation.

The problem the town faced was that the outstanding and never-amended 1989 Airport Master Plan had specifically declined to adopt business jet standards. The 1990 Airport Layout Plan written in accordance with the Airport Master Plan had of course followed suit. When the town widened the main runway in 1998, it relied instead on a 1995 Airport Layout Plan. That plan was designed for jets but had never been adopted and

could not be without SEQRA compliance. The New York Supreme Court, in a suit about the main runway project, had positively determined that the 1995 plan had never been adopted. So, in 2001, the Town was stuck. Without an adopted Airport Layout Plan to support the project, the FAA could not issue a grant.

It desperately wanted to build the jet apron to settle the lawsuit, but it did not have what it needed to obtain FAA funds to pay for it. The town did not want to spend the money out of pocket because the public would have been outraged at the ultimate cost of giving the hangar lease to Krupinski. From the town's point of view, the settlement was a perfect solution. The FAA pays the cost of the settlement and there is no pre-trial investigation. But the town could not move forward on the basis of the existing 1990 Airport Layout Plan that did not provide for airport infrastructure built to jet standards.

What to do? When the FAA informed the town that it did not have an ALP supporting the project, the town claimed that it could not find a signed copy of the 1990 ALP. It said it had unsigned copies and would re-sign it. However, the supposedly unsigned copies differed from the real, signed 1990 ALP in just the manner needed to undertake the project -- an increase in the load-bearing strength of the aviation pavements to 65,000 pounds, the jet standard. Supervisor Jay Schneiderman signed this supposed true copy of the original and submitted it to the FAA.

Pat Trunzo, who had overseen the 1989 Airport Master Plan as a Town Board member and had been the signer of the 1990 ALP as Deputy Supervisor, wrote to the Town Board and testified to the Town Board that the document Schneiderman was submitting was not a bona fide copy of the original, but had been altered in just the manner needed to allow the project. He based this on his own specific recollection (having worked on the Airport Master Plan for four years), on the fact that he would not have signed an ALP inconsistent with the Airport Master Plan, and on something much more important and irrefutable: Months after the 1990 ALP was submitted, the FAA wrote back with comments. Among the comments was that the FAA wanted the design load-bearing strength of pavements increased to 65,000 pounds, the jet standard. That letter is in the Town's files. Self-evidently, if the 1990 ALP had already stated 65,000 pounds, as the Town was claiming in 2001, the FAA would not have been writing to the Town in 1991 to request that it be changed to 65,000 pounds. The documentary record made the Town's claim that it was signing a true copy preposterous.

The response of Eric Bregman, then the Town Attorney and now the lawyer representing the Town in the current airport lawsuit, was to call Pat Trunzo a liar.

Not long afterwards, the US Attorney, the Federal prosecutor for this area, convened a Federal grand jury to investigate these matters. The grand jury subpoenaed the town for documents. In response to the subpoena, the airport manager (miraculously) discovered in his files at the airport an original signed copy of the 1990 ALP, signed by Deputy Supervisor Pat Trunzo. Exactly as Trunzo had told the Town and Eric Bregman, the 1990 ALP stated a much lower figure for pavement strength, consistent with the Town's 1989 decision NOT to design the airport for jets. It seems that in trying to find a copy of

the signed 1990 ALP, the Town had forgotten to look in the airport's files and records.

Although various town officials were questioned by the FBI, and Eric Bregman resigned as Town Attorney at about that time, no one was ever indicted. We don't know why because the US Attorney never comments. However, the actions of the Town in knowingly submitting a false document and the FAA in accepting it -- both having been so informed by its author supported by documentary evidence that the document was false -- were made the basis of several legal actions by the Committee to Stop Airport Expansion against the FAA. The Town was not a party to any of them and made no effort to intervene in any of them.

The actions were ultimately settled by an agreement with the FAA (technically an agreement with the Department of Transportation) that several of the FAA grant assurances would not be enforced against East Hampton Airport beyond December 31, 2014. The critical provisions no longer to be enforced are the ones that require public access to the airport without discrimination and that require the Town to have an up-to-date ALP and not to alter the airport from what appears on the ALP without FAA consent.

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to Committee to Stop Airport Expansion