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GRANT FUNDING = A MATERIAL DIFFERENCE

Kirsch's PowerPoint presentation includes a table that lists the differences between two scenarios: action by the Town to impose a noise or access restriction on Stage 2 aircraft (specifically helicopters) when it has extant grant obligations and when it does not. In his oral presentation, Kirsch states that while there are a few differences the differences are not material given the strategy he has proposed to the Town.

There are material differences. And those differences should be considered by the Town Board when it is deciding whether to seek any additional grant funding. Whether the Town has to comply with Part 161 or not is a material difference. If, as Kirsch noted, the Town is "grant obligated," it has to comply with Part 161when it develops its Stage 2 restriction. Part 161 requires the airport to determine the compatibility of the land surrounding the airport property with the noise generated by operations at the airport using the criteria in Appendix A to Part 150. Appendix A establishes the following standard: all land uses are presumptively compatible with noise less than 65 DNL dB. Thus, under the FAA's regulatory regime, there is no basis for noise or access restrictions if the noise level outside the boundaries of the airport is less than 65 DNL dB unless the airport can prove that its community is different from the "norm." This is the situation in East Hampton. The 65 DNL dB and above noise contour does not exist outside of the boundaries of the airport.

By contrast, as Kirsch noted, if the Town is not "grant obligated" it does not have to comply with Part 161 when it develops its Stage 2 restriction. Therefore, there is no presumptive compatibility standard. The compatibility standard will be developed based on the characteristics of the community. There is no need to "justify" addressing noise at a lower sound level.

This is a material difference. If the Town is grant obligated and it fails to persuade the FAA that its community is quieter than the "norm" the FAA will conclude that the Town has proposed a restriction that violates the unjust discrimination grant assurance (also known as grant assurance 22). This is what occurred in the Naples Florida case.

In the second paragraph of the response to Congressman Bishop's Question 5, the FAA states it "has continuously, consistently, and actively encouraged a balanced approach to address noise problems …. It is a longstanding FAA policy that all possible measures to reduce noise should be considered before airport noise restrictions are proposed to provide noise relief….The ability of an airport operator to attain the benefits of an access restriction through the exercise of land use control powers may be a factor to be considered in determining the reasonableness of a restriction." (Emphasis added) The FAA's highest priority after safety is preserving existing access to airports and

increasing access where it can. This policy preference is expressed in Part 161. In the case of Stage 2 restrictions, the airport must include in its Part 161 analysis a description of alternative measures that do not include aircraft restrictions and a comparison of the costs and benefits of the "alternative measures" to the costs and benefits of the proposed noise/access restriction. 40 CFR §161.205(a). The Town does not have to select an alternative measure in order to comply with Part 161. But it does have to identify and consider such alternatives. Failure to do so constitutes a violation of Part 161. In addition and perhaps more importantly, the Town identifies other measures that the FAA can then use to try to persuade the Town to adopt in lieu of its proposed restriction.

By contrast, if the Town does not have to comply with Part 161, it is at liberty to decide how much weight or priority to assign to having a quiet community versus aircraft access to the airport 24/7. Thus, it can elect to impose the restriction that will result in the greatest noise reduction assuming it is otherwise reasonable and not impermissibly discriminatory. This is a material difference.

As Kirsch notes in his table, if the Town is grant obligated, the FAA has the authority to initiate an administrative action against the Town. Kirsch never explains the basis for such an administrative action. The basis for such an action is an allegation that the Stage 2 restriction does not comply with the unjust discrimination grant assurance. The purpose of such an administrative action is to decide if the restriction violates the requirements of the grant agreement, e.g., the grant assurances. Parenthetically, this is exactly what happened to Naples Florida when it adopted its Stage 2 restriction.

If the final decision of the FAA is that the restriction is unreasonable, arbitrary or unjustly discriminates or otherwise violates the grant agreement, the grant recipient has to appeal the administrative ruling of the FAA if it wants to enforce its restriction. That means a lawsuit in federal court initiated by the grant recipient (the Town). In such an action, the issue before the Federal court is whether the FAA's decision is arbitrary, capricious or otherwise not in accordance with law or is unsupported by substantial evidence. Once again, this was the procedural posture of the Naples case before the federal court.

As a consequence of the procedural posture of the case, the grant recipient has the burden of proving that the FAA's decision is arbitrary, capricious or otherwise not in accordance with law or that is it is not supported by substantial evidence in the record of the proceeding. The legality of the Stage 2 restriction is clearly relevant. But the grant recipient must prove that, on balance, the evidence in the administrative record developed in the proceeding before the FAA, demonstrates that the FAA's decision is arbitrary, capricious, or otherwise not in accordance with law.

By contrast, if the airport proprietor has not taken grant funding, the FAA must sue the airport proprietor in federal court. It does not have any other option. The issue before the federal court is whether the Town's regulation or ordinance is reasonable, nonarbitrary and not

impermissibly discriminatory and does not violate federal law. The burden is on the FAA.

The material difference relates to litigation risk. The risk is higher if the Town has to sue the FAA to overturn a FAA decision than it is if the FAA sues the Town challenging the restriction.

The bottom line:

1) There is a material difference between a situation where the airport proprietor is "grant obligated" and a situation where the airport proprietor is not.

2) A grant obligated airport proprietor has to comply with Part 161. Part 161 imposes procedural and substantive requirements on the airport proprietor that are not otherwise applicable to a local government evaluating and selecting measures to control or reduce noise impacts from airport operations.

3) There also is a material difference if a legal action is commenced in federal court concerning the proposed restriction. Who has the burden of proof? And what is the issue to be decided by the court? The answer depends on whether the FAA initiated the litigation by commencing an administrative enforcement action based on an alleged violation of the grant agreement. If it did and all other things are equal, the airport proprietor/grant recipient's litigation risk in federal court is
higher than it would be if the FAA foregoes the administrative enforcement action and sues the airport proprietor in federal court.

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