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MEMORANDUM

PRIVILEGED AND CONFIDENTIAL
ATTORNEY – CLIENT COMMUNICATION

TO: Laura Molinari, Esq., Town Attorney
TOWN OF EAST HAMPTON

FROM: KAPLAN KIRSCH & ROCKWELL

DATE: January 8, 2008

SUBJECT: Strategy for Addressing Impacts of Helicopter Operations at East Hampton Airport

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I. Introduction

The Town of East Hampton (the "Town") owns and operates the East Hampton Airport (HTO). In recent years, there has been a marked increase in helicopter operations at HTO, many of which are private or charter operations for weekend visitors and homeowners traveling from New York City.

The Town has asked us to assist in developing a strategy for minimizing the adverse impact from helicopter operations at HTO. In order to effectively craft a strategy for the Town Board's consideration, it is important to understand the Town's legal authority to regulate helicopter operations and the range of options that reasonably could be considered. This memorandum provides background on the Town's legal authority and proposes the design of a strategy that addresses impacts of helicopters incrementally, i.e., imposes increasingly greater restrictions on helicopter in which each successive step is implemented only if the prior step was not successful in achieving the Town's objectives.

II. Legal Background

As a threshold matter, it is useful to review the difference between regulation of helicopter operations at HTO and the regulation of helicopter flight tracks. While both are important to the Town, its authority is entirely different in the regulation of these two components of helicopter impacts.

The law on Town regulation of helicopter routes is simple. *The federal government has entirely preempted the Town's authority to regulate any helicopter flight tracks directly or indirectly.* The Town's authority is limited to informal or political efforts in cooperation with the Federal Aviation Administration (and potentially in cooperation with users).

The law is fundamentally different when it comes to regulation of the use of Airport by helicopters. While the law in this area is complex, the Town does have authority to regulate use of HTO by helicopters but *the Town's authority is extremely limited* and is subject to considerable federal regulatory supervision. If the Town were to attempt directly to impose restrictions on the use of HTO by limiting access to the Airport by helicopters, any such action would be subject to review by the Federal Aviation Administration (FAA), and, might (in certain limited circumstances) also be subject to FAA approval under the Airport Noise and Capacity Act (ANCA). *The Town has limited authority to impose restrictions on whether, helicopters can use HTO.* The Town has greater – but still not unlimited – authority to regulate *how and where* helicopters may have access to the Airport.

The path to a lawful regulation of helicopter operations is neither simple nor legally clear. Nevertheless, as the following discussion will demonstrate, there are actions that the Town lawfully can take that could have a significant effect on helicopter operations and could substantially reduce adverse impacts from helicopter operations.

A. Overview of Applicable Law

In order to understand the limits of the Town's authority, it is important to review the general legal structure for regulation of flight of aircraft – which includes the flight of helicopters. The federal government "regulates aircraft and airspace pervasively" thereby preempting[1] regulation of these areas by state and local governments.[2] For example, the Airline Deregulation Act expressly prohibits states (and thereby municipalities) from enacting or enforcing a law or regulation "related to a price, route, or service of an air carrier."[3] In addition, the Federal Aviation Act expressly states: "The United States has exclusive sovereignty of airspace of the United States."[4] Congress, however, reserved to states and local governments the authority to carry out their "proprietary powers and rights."[5] A proprietor's[6] role in regulation however is "extremely limited" and only extends to rules that are "reasonable, non-arbitrary and not unjustly discriminatory" and that "advance the local interest."[7] This standard has been subject to considerable judicial and regulatory interpretation but, in summary, state and local airport proprietors are not preempted by federal law from adopting rational regulations that address local concerns such as noise and environmental impacts.[8]

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[1] Under the constitutional doctrine of preemption, states and localities are prohibited from enforcing laws and regulations that "interfere with or are contrary to, the laws of congress." Nat'l Helicopter Corp. of Am. v. City of New York, 137 F.3d 81, 88 (2d Cir. 1998).

[2] City and County of San Francisco v. FAA, 942 F.2d 1391, 1394 (9th Cir. 1991).

[3] 49 U.S.C. § 41713(b)(1) (2000).

[4] 49 U.S.C. § 40103(a)(1) (2000).

[5] 49 U.S.C. § 41713(b)(3) (2000).

[6] The owner or operator of an airport is often interchangeably called an airport proprietor or an airport operator. For the purpose of this memorandum, the Town is the proprietor or operator of HTO.

[7] American Airlines, Inc. v. DOT, 202 F.3d 788, 806 (5th Cir. 2000).

[8] Nat'l Helicopter, 137 F.3d at 88.

Even though federal law legally allows an airport proprietor like the Town to restrict access to its airport facilities, states and local governments have no authority "to assign or restrict routes" for aircraft.[9] The law makes this clear distinction because such regulation would have the effect of controlling flight paths through navigable airspace and the FAA has completely preempted all regulation of airspace.[10]

Overlaying these general constitutional principles, Congress enacted the Airport Noise and Capacity Act (ANCA) in 1990 which further limits airport proprietors even in the exercise of their proprietary powers. Since the enactment of ANCA, airport proprietors are prohibited from exercising their proprietary authority to regulate access to their facilities without first preparing a study on the effects of a proposed restriction. ANCA imposes a series of procedural hurdles for any local noise or access restriction that affects Stage 2 aircraft. If a proposed local restriction would affect Stage 3 aircraft, the proprietor must also obtain approval from the FAA.[11] Such approval is only authorized if the FAA affirmatively finds that the proposed restriction (1) is reasonable, nonarbitrary and nondiscriminatory; (2) does not create an unreasonable burden on interstate or foreign commerce; (3) is not inconsistent with maintaining safe and efficient use of the navigable airspace; (4) does not conflict with any other federal law or regulation; (5) is made available to the public for adequate comment; and (6) does not create an unreasonable burden on the national aviation system.[12] As a result of ANCA, even though proprietors are not preempted from implementing rational regulations under their proprietary power, the attempt to impose such restrictions can trigger significant procedural and substantive hurdles. In the 18 years since the enactment of ANCA, only one airport has successfully implemented a restriction using the ANCA procedures. A few more airports are in the process of complying with ANCA (and the FAA regulations implementing that statute).

B. Regulation of Helicopters Specifically

While these general principles apply to any restrictions on aircraft, the federal courts have also addressed the degree to which state and local governments can regulate helicopter use in particular. At the outset, it is clear that, just as they are preempted from regulating other aircraft routes, state and local governments are preempted from enforcing rules that "assign or restrict" helicopter routes.[13] The law is similar in other respects to that governing fixed-wing aircraft: while states and municipalities are not constitutionally prohibited from regulating helicopters for

[9] Nat'l Helicopter, 137 F.3d at 92.

[10] Id. (enjoining, on preemption grounds, a municipal ordinance restricting certain helicopter sightseeing routes). See also City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 626-7 (1973) (recognizing the federal government's possession of exclusive national sovereignty in U.S. airspace); British Airways Bd. v. Port Auth. of N.Y., 558 F.2d 75, 83 (2d Cir. 1977) ("legitimate concern for safe and efficient air transportation requires that exclusive control of airspace management be concentrated at the national level").

[11] 49 U.S.C. § 47524 (2000); 14 C.F.R. pt. 161(C)-(D) (2007).

[12] 49 U.S.C. § 47524(c)(2) (2000); 14 C.F.R. § 161.305 (2007).

[13] Nat'l Helicopter, 137 F.3d at 92.

the purposes of advancing a legitimate local interest,[14] regulations imposed after 1990 could be subject to ANCA.[15]

The U.S. Court of Appeals for the Second Circuit has held explicitly that a local government can limit helicopter traffic in order to address local noise or environmental concerns. In National Helicopter, the court upheld New York City ordinances that: (1) limited helicopter traffic to certain times during the day or the week;[16] (2) limited overall levels of helicopter traffic;[17] and (3) regulated helicopter noise levels directly.[18]

While the National Helicopter case is important, it has often been misread and misinterpreted to provide greater authority for regulation of helicopters than for regulation of other aircraft. This misinterpretation is the result of certain factual peculiarities of the case which limit its applicability to the Town. First, neither the heliport at issue nor even the proprietor (New York City) was subject to federal grant assurance obligations. As a result, there was no need for the court to address questions of compliance with grant assurances. Pursuant to those grants, an airport operator like the Town commits to making its airport facilities available to the public on a nondiscriminatory basis.[19] The grant assurances allow the FAA to make the determination in the first instance of whether a particular use restriction is nondiscriminatory and otherwise complies with a proprietor's grant assurances.[20] Since the proprietor in National Helicopter was not subject to grant assurances, the court did not need to address the considerable case law and FAA legal opinions which severely limit the ability of an owner of a federally-assisted airport to impose use restrictions. The Town is subject to grant assurances.[21]

Secondly, the court never addressed the issue of ANCA compliance.[22] The FAA has taken the position that helicopters are subject to ANCA just as are fixed-wing aircraft;[23] the legal bases for the FAA's view on the applicability of ANCA is discussed in the next section.

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[14] American Airlines, Inc., 202 F.3d at 806.

[15] 49 U.S.C. § 47524.

[16] Nat'l Helicopter, 137 F.3d at 89 (upholding a nighttime curfew for helicopters as a reasonable means of alleviating undesirable noise); id. at 90 (upholding the phase out of weekend helicopter operations as a reasonable means of protecting residents from noise intrusion during times when they are at home).

[17] Id. at 90-1 (upholding a regulation reducing helicopter operations by 47% as a reasonable means of eliminating excessive noise).

[18] Id. at 88 (Congress specifically delegated to state and local proprietors the authority to adopt rational regulations with respect to the permissible level of aircraft noise in order to protect local populations).

[19] 49 U.S.C. § 47107(a)(1) (2000).

[20] See 14 C.F.R. pt. 16 (2007) (procedures for investigation of potential violations of grant assurances).

[21] The applicability of certain grant assurances is a complex issue because of the settlement involving litigation over the Town's obligations to the federal government. Committee to Stop Airport Expansion v. Dep't of Transp. (E.D. N.Y. Civ. Action CV-03-2634) (Settlement Agreement, Apr. 29, 2005). For the purposes of this memorandum, however, the provisions of the settlement agreement are not relevant because, at least through 2014, the Town is subject to the FAA grant assurances and this memorandum assumes that the Town is interested in seeking relief from helicopter impacts before 2014. See also, East Hampton Airport Prop. Owners Ass'n v. Town Bd. Of East Hampton, 72 F. Supp.2d 139 (E.D.N.Y. 1999) (concerning applicability of grant assurances).

[22] It is unclear whether the absence of ANCA analysis in Nat'l Helicopter is a mere oversight by the court or whether the issue was simply not briefed. While the court did not so state, it is also arguable that the case stands for the proposition that ANCA is not applicable to airports that are not federally-assisted, a proposition that is consistent

Despite these limitations, National Helicopter does stand for the proposition that the legality of a local restriction on helicopter use will be analyzed using the same legal standards as those generally applicable to fixed-wing aircraft.

C. Applicability of ANCA to Helicopters

The applicability of ANCA to helicopters is a complex and unresolved legal issue. Because any strategy to control helicopter operations at HTO will be fundamentally affected by whether ANCA applies to such efforts, we provide a detailed explanation of the legal landscape.

ANCA and the FAA's implementing regulations at 14 CFR Part 161 (also known as Federal Aviation Regulation or FAR Part 161) make a distinction between use restrictions that only affect Stage 2 aircraft and those that also affect newer Stage 3 aircraft. Fixed wing aircraft are classified by federal regulation as Stage 1, 2, 3 or 4. All new fixed-wing aircraft being manufactured today are Stage 4. In essence, the higher the Stage of a fixed-wing aircraft, the newer and quieter the aircraft.

Simply stated, airport use restrictions that affect only Stage 2 (or even older) aircraft do not require FAA approval before implementation while use restrictions that affect Stage 3 (and newer) aircraft do require such approval. There are no Stage 3 or Stage 4 helicopters. Therefore, if ANCA applies to restrictions on helicopters, only the less-onerous statutory requirements applicable to Stage 2 restrictions would apply.

Neither ANCA nor the Part 161 regulations, however, define Stage 2 and Stage 3 aircraft independently but instead define the terms with reference to FAR Part 36. For example, although the statute does not provide any definition of Stage 2 aircraft, ANCA defines "stage 3 noise levels" to mean "the stage 3 noise levels in part 36 of title 14, Code of Federal Regulations, in effect on November 5, 1990."[24] Part 161 defines "Stage 2 aircraft" to mean "an aircraft that has been shown to comply with the Stage 2 requirements under 14 CFR part 36."[25]

Part 36 does not use the phrase "Stage 2 aircraft" but instead uses two separate terms: "stage 2 airplane" and "stage 2 helicopter." "Stage 2 airplane" is defined to mean "an airplane that has been shown under this part to comply with stage 2 noise levels prescribed in section C36.5 of appendix C of this part (including use of the applicable tradeoff provisions) and that does not comply with the requirements for a Stage 3 airplane."[26] "Stage 2 helicopter" is defined as "a helicopter that has been shown under this part to comply with Stage 2 noise limits (including applicable tradeoffs) prescribed in section H36.305 of appendix H of this part, or a helicopter

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with the approach taken in Tutor v. City of Hailey. Again, since HTO is a federally-assisted airport, this issue has no applicability here. Tutor, No. CIV-02-475-S-BLW (D. Idaho, Jan. 20, 2004).

[23] It is clearly FAA's policy that helicopters are subject to ANCA. Letter from James Erickson, FAA Director of Environment and Energy to Glenn Rizner, Helicopter Association International Vice President 1 (July 7, 1997).

[24] 49 U.S.C. § 47522 (2000).

[25] 14 C.F.R. § 161.5 (2007).

[26] 14 C.F.R. § 36.1(f)(4) (2007).

that has been shown under this part to comply with the Stage 2 noise limit prescribed in section J36.305 of appendix J of this part."[27]

The question, therefore, is whether "Stage 2 aircraft" in ANCA and Part 161 should be interpreted synonymously with "Stage 2 airplane" under Part 36 or should be interpreted to capture *both* Stage 2 airplanes and Stage 2 helicopters.

Several factors suggest that the latter interpretation would be proper. First, although neither ANCA nor Part 161 define "aircraft," the term is defined in the Federal Aviation Act of 1958 as "any contrivance invented, used, or designed to navigate, or fly in, the air."[28] The term similarly is defined by regulation as "a device that is used or intended to be used for flight in the air."[29] In contrast, an "airplane" is defined by regulation to mean "an engine-driven fixed-wing aircraft heavier than air, that is supported in flight by the dynamic reaction of the air against its wings."[30] These definitions indicate that aircraft is a more inclusive term than airplane and includes both airplanes and helicopters.

The FAA's actions concerning Part 36 suggest that the agency is aware of the distinctions among these terms and uses the terms deliberately. Part 36 was promulgated in November 1969 pursuant to an amendment of the Federal Aviation Act of 1958. The relevant provision of the statute provides:

> In order to afford present and future relief and protection to the public from unnecessary *aircraft* noise and sonic boom, the Administrator of the Federal Aviation Administration, after consultation with the Secretary of Transportation, shall prescribe and amend standards for the measurement of *aircraft* noise and sonic boom and shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards, rules, and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title.[31]

Part 36, as promulgated in 1969, applied to "subsonic transport category airplanes" and "subsonic turbojet powered airplanes."[32] In 1988, the FAA amended Part 36 to include noise limits and testing methods for civil helicopters.[33] The FAA cited as authority for this rule the 1968 amendment to the Federal Aviation Act, indicating that the FAA recognized that the term

[27] Id. § 36.1(g)(4).

[28] 49 U.S.C. § 40102(a)(6) (2000).

[29] 14 C.F.R. § 1.1 (2007).

[30] Id.

[31] Pub. L. No. 90-411 § 611(a), 82 Stat. 395, 395 (1968) (emphasis added).

[32] 34 Fed. Reg. 18,355, 18,364 (Nov. 18, 1969).

[33] See 53 Fed. Reg. 3,534 (Feb. 5, 1988).

aircraft under the Act included helicopters. More significantly, the FAA deliberately amended references in Part 36 from "airplane" to "aircraft" to cover both airplanes and helicopters.[34]

Further, the definition of Stage 2 aircraft in Part 161 refers to the Stage 2 noise standards contained in Part 36 without any more specific reference, such as to the noise standards contained in Appendix C (for Stage 2 airplanes). Therefore, the applicable Stage 2 noise standards could be those identified in Appendix C, Appendix H or Appendix J, and thus the subject aircraft could include airplanes or helicopters.

The FAA has opined that ANCA and Part 161 apply to helicopters. In a July 1997 letter to the Helicopter Association International, the FAA stated, "The plain statutory language of ANCA, Part 161, and other relevant data support applicability of ANCA and part 161 to helicopters."[35] The FAA presented several arguments in support of this conclusion. The first argument was that the definition of "airport" under Part 161 includes heliports.[36] The FAA's second argument referred to the fact that Part 36 includes helicopters, as discussed above. The third argument was that "aviation user class" under Part 161 is defined to include air carriers operating under FAR parts 127 and 135, which include helicopter operators.

Under Chevron v. Natural Resources Defense Council,[37] courts must conduct a two-step analysis to determine whether to defer to an agency's interpretation of a statute. First, the court must determine whether the law reflects the unambiguously expressed intent of Congress.[38] If so, both the court and the agency must abide by the plain language. However, if the statute is silent or ambiguous on the specific question at issue, then the court will defer to the interpretation of the agency entrusted to administer the statute if permissible and reasonable.[39]

Here, a reviewing court might conclude either that use of the term "aircraft" in ANCA and Part 161 unambiguously covers both airplanes and helicopters or that, although ambiguous, the FAA's interpretation should be accorded deference because the agency has been entrusted to implement the national noise policy reflected in ANCA and the agency's interpretation is reasonable.

Notwithstanding normal judicial deference to FAA interpretation of its regulations, a compelling argument could be presented that the FAA's interpretation is unreasonable. First, the plain language of the statute and regulations do not appear to answer the question definitively. Neither ANCA nor Part 161 contain an independent definition of "Stage 2 aircraft" and the term does not comport with the phrases used in Part 36: "Stage 2 airplane" and "Stage 2 helicopter." Moreover, the reference to heliports in the definition of "airports" and the inclusion of certain

[34] Id.

[35] Letter from James Erickson, FAA Director of Environment and Energy, to Glenn Rizner, Helicopter Association International Vice President 1 (July 7, 1997).

[36] See 14 C.F.R. § 161.5.

[37] 467 U.S. 837 (1984).

[38] Chevron, 467 U.S. at 843.

[39] Id. at 844.

helicopter operators in the definition of "aviation user class" do not speak directly to the question.

Further, there is no indication from the legislative history that either Congress or the FAA initially intended to subject helicopters to ANCA and Part 161. A review of the legislative history of ANCA reveals no reference to helicopters in relevant bills, congressional floor debates, or committee hearings. Indeed, of the several dozen speakers during the four-day hearing of the House Aviation Subcommittee in September and October 1990, none appeared to represent a helicopter industry group or heliport operator. Similarly, the regulatory preamble to Part 161 contains no reference to helicopters and, again, helicopter industry groups and heliport operators were not among the commenters. Although helicopters are mentioned in the study prepared by the FAA to consider the applicable standards for restricting Stage 2 aircraft weighing less than 75,000 pounds, the study does not indicate that the FAA intended to include helicopters in the recommendation that the same requirements should apply for restricting Stage 2 aircraft above and below 75,000 pounds.

It also may be significant that the provisions of ANCA and its implementing regulations requiring the phase-out of Stage 2 aircraft weighing more than 75,000 pounds refer specifically to airplanes. 49 U.S.C. Section 47528 refers to "civil subsonic turbojets." The implementing regulations, at 14 C.F.R. part 91, refer to "Stage 2 airplanes", which are defined to mean "a civil subsonic turbojet airplane with a maximum certificated weight of 75,000 pounds or more that complies with Stage 2 noise levels as defined in part 36 of this chapter."[40] Although these references to airplanes may reflect the fact that there were no civil helicopters weighing 75,000 pounds or more at the time ANCA was enacted, and therefore no reason to subject them to this part of the statute, it nevertheless seems clear that Congress' and FAA's attention clearly was focused on fixed-wing airplanes and not helicopters.

The structure and content of Part 36 also suggests that Stage 2 aircraft under ANCA should be interpreted synonymously with Stage 2 airplanes. Although a detailed history of Part 36 is beyond the scope of this memorandum, the division of airplanes into stages 1, 2 and 3 was initiated in March 1977 with the introduction of stricter noise standards for new airplane designs (i.e., Stage 3 noise levels). Prior to that time, airplanes were divided between those airplanes subject to the Part 36 noise standards adopted in November 1969 and those that were not.

Noise certification standards for helicopters were not promulgated until February 1988. At that time, helicopters also were divided between those subject to the new standards (Stage 2 helicopters) and those that were not (Stage 1 helicopters). A new section on helicopters, Appendix H, was added to identify specific noise limits and testing methods for helicopters, and a second set of noise limits and testing methods, for light helicopters, was added in 1992.[41] No further noise limits for helicopters have been proposed or adopted. As a result, *there are no helicopters that are classified as Stage 3 or 4.*

[40] 14 C.F.R. § 91.851 (2007).

[41] See 53 Fed. Reg. at 3,534; 57 Fed. Reg. 42,846 (Sept. 16, 1992).

Although a technical comparison of the noise characteristics of Stage 2 airplanes and Stage 2 helicopters also is beyond the scope of this memorandum, it is important to recognize that the noise limits and testing methods under Appendix C (applicable to Stage 2 airplanes) are different than the limits and methods under Appendices H and J (applicable to Stage 2 helicopters). In adopting the noise standards and testing methods for helicopters, the FAA recognized, but downplayed, these differences.[42]

It accordingly can be argued that "Stage 2" is an unfortunate and inapt adjective to describe airplanes and helicopters since the two types of aircraft have little in common. Indeed, the FAA likely could have avoided labeling helicopters by stage level altogether and simply distinguished between those helicopters that were subject to the noise standards and those that were not (as the FAA did with airplanes prior to the promulgation of Stage 3 noise levels in 1977). In light of these material differences and in the absence of any direct evidence that Congress intended to subject helicopters to ANCA, it would not be reasonable to assume that Congress intended to combine Stage 2 airplanes and Stage 2 helicopters for purposes of regulation under ANCA.

This discussion should demonstrate that there is no legal certainty that ANCA applies to helicopters but, should the Town wish to pursue a cautious course, it should assume that ANCA does apply. As explained elsewhere in this memorandum, moreover, the constitutional standards for permissible local regulation of operations at a public-use airport are remarkably similar to the ANCA standards. Therefore, the Town would in any event need to satisfy those constitutional standards even if it did not have to comply with the procedural requirements of ANCA and FAA's Part 161 regulations.

D. Scope of Town's Authority

With the preceding legal background in mind, it is useful to examine the scope of the Town's authority in two principal arenas – the authority to *influence* helicopter flight tracks and the authority to *regulate* the use of the Airport.

1. Authority to Regulate Helicopter Routes

As the prior discussion illustrates, it is clear that the Town has no authority to regulate directly the routes that helicopters would use to arrive at or depart from HTO.[43] The Town's actions, therefore, are limited to those which have no binding legal authority on helicopter operators, the FAA or any other potentially affected party.

2. Appropriate Role in Defining Helicopter Routes

Although the Town is preempted from direct regulation of its preferred helicopter routes, the Town has several options by which to exert influence over the selection and enforcement of helicopter routes.

(A) Informal Agreement With FAA

[42] See 53 Fed. Reg. at 3,535 ("With exceptions necessary to account for the unique operating characteristics of helicopters, the rule applies the specifications currently applicable to tests of transport category large airplanes and turbojet-powered airplanes under Appendices A and B of Part 36.").

[43] See Nat'l Helicopter, 137 F.3d at 92; 49 U.S.C. § 41713(b)(1), (b)(3).

As recent experience demonstrates, the FAA must, and will, at least consider the Town's concerns when setting helicopter routes in the vicinity of HTO and eastern Long Island. As a general principle, the Secretary of Transportation is expressly required to "consult and cooperate with State and local governments . . . and other interested persons."[44] Internal FAA practice adheres to this principle, though the degree to which the agency considers input from local governments varies considerably. Although FAA is not statutorily obligated to accept any recommended helicopter routes offered by the Town, the Town could seek to secure an informal agreement from the FAA to implement the Town's desired helicopter tracks.

As a matter of policy and law, the FAA will not enter into an agreement that would have the effect of binding the agency to use particular helicopter routes because the federal government will not bargain away its sovereign powers.[45] As a policy matter, moreover, the FAA has long taken the position that the control of navigable airspace is a matter entirely governed by its air traffic control function. The FAA's position is that air traffic and safety concerns are the only legitimate bases for regulating routes and procedures and that the agency will not, therefore, constrain its flexibility by agreeing to adhere to particular procedures or routes, even if it believes that such routes are safe and otherwise meet the criteria for acceptable air traffic procedures.

Despite that apparently bright-line position, the FAA in recent years has been amenable to working closely with airport proprietors to accommodate local concerns in the design of air traffic procedures and routes. The FAA's willingness to consider local input is directly tied to the ability of the airport proprietor to demonstrate that a proposed procedure is technically feasible, does not increase air traffic controller workload, would not generate new local controversy and would improve air traffic efficiency. For that reason, airport proprietors have been most successful when the basis for a proposal is technical rather than political. For example, the agency will be more amendable to a proposed helicopter route that improves air traffic efficiency, reduces controller workload, or enhances safety than a proposal that is designed only to address local noise concerns. Therefore, if the Town can demonstrate that certain helicopter routes not only have beneficial effects on overflight of residential areas but also are more efficient or safe, it is more likely to be able successfully to convince the FAA to direct pilots to adhere to such tracks.

(B) Part 150 Program

The Town could also promote its objectives by including appropriate recommendations in a Part 150[46] airport noise compatibility program. The Part 150 noise compatibility program could identify preferred helicopter flight tracks as a measure designed to reduce land use incompatibility in the vicinity of the Airport. While proposal of a measure in a Part 150 program does not guarantee FAA approval and while the FAA is not required to implement flight track

[44] 49 U.S.C. § 301(8) (2000).

[45] U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 21 & 45 (1977) (Brennan, J., dissenting) ("nothing would so jeopardize the legitimacy of a system of government that relies upon the ebbs and flows of politics to 'clean out the rascals' than the possibility that those same rascals might perpetuate their policies simply by locking them into binding contracts").

[46] 14 C.F.R. Pt. 150 (2007).

measures even if it approves the Part 150 Program,[47] the FAA has shown greater willingness to consider the noise impacts (and benefits) of particular local flight tracks when those routes are examined as part of a Part 150 noise compatibility program. As a matter of policy, the FAA will generally not even consider the adoption of flight tracks designed for noise control unless such a proposal is included as a component of a Part 150 program. Even in that instance, the FAA will not approve the flight tracks unless the Part 150 program demonstrates that the proposed flight tracks will not (1) reduce the level of aviation safety provided; (2) reduce the requisite level of protection for aircraft, their occupants and persons and property on the ground; (3) adversely affect the efficient use and management of the Navigable Airspace and Air Traffic Control Systems; or (4) adversely affect any other FAA powers and responsibilities.[48]

(C) Local Regulation

While its proprietary power is very limited and does not extend to control of helicopter routes or flight tracks, the Town can regulate helicopter traffic for the purpose of addressing legitimate local concerns. The U.S. Court of Appeals for the Ninth Circuit has held that Congress did not entirely preempt "any state regulation purporting to reach into the navigable airspace" and has left open the possibility for state and local governments to regulate in tangential areas – for example, a prohibition of aerial advertising or provisions prohibiting discrimination when providing employee travel benefits and discounts.[49] The key inquiry is whether a local ordinance "actually reach[es] into the forbidden, exclusively federal areas, such as flight paths, hours or altitudes."[50] A local law is prohibited if it binds a carrier to a particular price, route, or service, but will be upheld if its effect on navigable airspace is "tenuous, remote or peripheral."[51]

Accordingly, the Town could issue regulations/ordinances that would limit helicopter traffic to certain times during the day (e.g., through a curfew) or the week;[52] limit certain levels of helicopter traffic;[53] prohibit certain types of helicopter use altogether, based on noise and safety concerns.[54] While the Town could not adopt regulations that would directly or indirectly affect the *flight tracks* for helicopters using the Airport, the Town could use its limited authority to control the impacts from operations at the Airport. Regrettably, the line between permissible regulation of local impacts and impermissible regulation of flight tracks is not clearly defined and, as demonstrated by the National Helicopter case, the validity of such regulation will be highly fact-specific.

[47] 14 C.F.R. § 150.5 (approval of a noise compatibility program is not a commitment by FAA to implement the proposed measures which can come only after appropriate environmental review.)

[48] 14 C.F.R. § 150.35(b)(3))

[49] Skysign Int'l Inc. v. City and County of Honolulu, 276 F.3d 1109, 1116 (9th Cir. 2002) (emphasis added) (state regulation of aerial advertising is not federally preempted); see also Air Transport Assn. of America v. City and County of San Francisco, 266 F.3d 1064, 1071 (9th Cir. 2001) (ordinance requiring that city contractors not discriminate when providing employee travel benefits and discounts was not preempted by Airline Deregulation Act because it did not bind carriers to particular prices, routes or services).

[50] Air Transport Assn., 266 F.3d at 1117.

[51] Id. at 1071-2.

[52] Nat'l Helicopter, 137 F.3d at 89-90.

[53] Id., at 90-1.

[54] Santa Monica Airport Ass'n v. City of Santa Monica, 481 F. Supp 927, 940 (C.D. Cal 1979).

Were the Town to attempt to exercise the type of limited authority to regulate helicopter traffic that the court found permissible in National Helicopter, it would have to do so with great caution. The law in this realm is complex and a detailed analysis of the permissible bases for proprietor-imposed restrictions is beyond the scope of this memorandum. Any restrictions would have to meet a reasonableness and non-discrimination standard and be based upon data supporting the need for the restriction. More importantly in the context of operations at HTO, the Town would increase the risk that such regulations would be held invalid if the regulations were effectively tied to the use of the Airport (e.g., if regulations only affected operations to and from the Airport and not operations that merely overfly the Town), because in that instance a court could easily find that the regulation was effectively an impermissible restriction of navigable airspace.

In addition to the constitutional and statutory limitations on the ability of an airport proprietor to restrict helicopter operations, the proprietor of a federally-assisted airport (like HTO) also would need to consider FAA policy restrictions promulgated to implement the FAA's Airport Improvement Program.[55] The agency has historically been aggressive in its opposition to use restrictions at existing facilities and has challenged such restrictions through both administrative and judicial actions.

(D) Regulating Through Fee Structure

One manner in which some airport proprietors have attempted indirectly to regulate flight operations is through the imposition of differential fees. The Town has authority to set fees – so long as they are reasonable – for use of the Airport. The Town would need to exercise great caution, however in using fees as a vehicle for controlling access to the Airport. For example, while the Town could impose certain departure fees during high-traffic periods for the express purpose of managing congestion,[56] it does not have the authority to impose a fee structure created specifically to benefit helicopters following its preferred routes or to impose a landing fee structure that has the effect of invading federal control of navigable airspace.[57]

Because the Town cannot directly or indirectly regulate helicopter flight routes, the Town could not use preferential lease terms as a vehicle for forcing compliance with desired flight tracks. The principles underlying this prohibition are simple: airports must be available to the public without unjust discrimination[58] and accordingly any local regulation must be rationally related to a legitimate governmental interest.[59] While the imposition of disparate lease rates would not be

[55] See FAA Order 5190.6A, "Airports Compliance Handbook" (1989).

[56] Aircraft Owners & Pilots Ass'n v. Port Auth. of N.Y., 305 F. Supp. 93 (E.D.N.Y. 1969) (upholding a takeoff fee that was imposed for the purposes of diverting air traffic during the busiest periods of the day as a legitimate basis for regulation).

[57] New England Legal Found. v. Mass. Port Auth., 883 F.2d 157, 175 (1st Cir. 1989) (striking a landing fee structure that preferred certain "essential air service hub operations").

[58] 49 U.S.C. § 47107(a)(1). The requirement that an airport be made available without unjust discrimination applies only to federally assisted airports – airports that have received federal grant funding under the Airport Improvement Program. The Town has received federal grants for the Airport.

[59] Mass. Port Auth., 883 F.2d at 162; W. Air Lines Inc. v. Port Auth. of N.Y. & N.J., 658 F. Supp 952, 959 (S.D.N.Y. 1986) (the critical inquiry is whether the discrimination is reasonable in light of the legitimate objectives sought to be achieved).

a per se violation,[60] a rate structure designed to favor operators who used certain preferred flight tracks is likely to be found to constitute "unjust discrimination" because it would constitute an impermissible regulation of navigable airspace.[61]

(E) Regulating Through Management of Airport Facilities

There are opportunities for indirect regulation of routes and helicopter operations through imposition of restrictions on use of the Airport. Restrictions that have the effect of foreclosing access to the Airport would be subject to the applicable ANCA and the constitutional requirements on access restrictions. But there are other restrictions that could have beneficial value to the Town without completely prohibiting access to HTO by helicopters. For example, the Town could designate certain areas of the Airport for helicopter operations and prohibit landings or takeoffs at other areas. The Town could also impose overflight restrictions on helicopters over Airport property designed to ensure safety of runway operations (and, not incidentally, with the effect of making certain arrival and departure routes more practical).

3. Authority to Monitor Routes

While there is no mechanism under which the Town can enforce certain helicopter routes, federal law would not prevent the Town from monitoring helicopter routes. Such information gathering can be useful for public information and to pressure the agency to comply with certain routes if they are officially designated by the FAA.

4. Authority to Regulate Airport Operations

As the initial discussion about the legal principles governing airport operations makes clear, it is important to distinguish between the absence of authority for the Town to regulate routes and the Town's authority to regulate use of its Airport.

The Town retains authority to regulate use of the Airport, subject to applicable constitutional and ANCA requirements. Regardless of whether ANCA would apply to restrictions on helicopters, the Town could regulate the use of the Airport by helicopters only if it could demonstrate that its rules are "reasonable, non-arbitrary and not unjustly discriminatory" and "advance the local interest."[62] Meeting this constitutionally-based requirement would require that the Town (a) conduct a technically defensible study that defines the problem that the regulation is designed to solve; (b) demonstrate that the regulation addresses the problem and (c) implement a regulation in a manner that is not more restrictive than necessary to address the problem. If ANCA were to apply (or if the Town decided voluntarily to comply with its requirements), the Town would also need to adhere to strict procedural requirements for notice and opportunity for comment before implementing the restriction.

One of the challenges in developing a precisely tailored local regulation is ensuring that the regulation does not inadvertently over- or under-regulate. For example, if the Town were to define the problem as excessive noise levels, it may be challenging to impose a regulation on helicopters that does not also encompass fixed wing aircraft with similar noise levels. The

[60] Penobscot Air Servs. Ltd. v. FAA, 164 F.3d 713, 726 (1st Cir. 1999).

[61] New England Legal Found., 883 F.2d at 175

[62] American Airlines, Inc., 202 F.3d at 806.

Town's noise consultant would be able to help define the problem (and the regulatory solution) in an appropriately precise manner.

III. Current Efforts

A. Master Plan Report

The Town has engaged in numerous efforts to address the impacts of helicopters on the Town's residents. The Master Plan Report, which was prepared in 2007 but has not yet been approved by the Town Board, describes existing helicopter flight patterns and procedures and sets forth several proposed options for new preferred helicopter routes. Most importantly, the Master Plan Report emphasizes that all helicopter routes are "advisory in nature" and "can only be recommended not enforced."[63]

The Master Plan Report outlines several different approach and departure paths, but with only one exception, "none were found to have significantly lower population exposure."[64] That Report describes the one path that would reduce noise exposure as follows:

> This approach/departure path would branch off from the offshore helicopter route. On approach, helicopters would over-fly Georgica Pond and thence over the currently undeveloped land adjacent to the Runway 34 threshold and then land in the terminal area.[65]

The Report also observes that one strategy for addressing helicopter noise would be the establishment of a new heliport facility closer to the shore. The Report does not study this option in detail beyond noting that a new facility is likely to be opposed by nearby shoreline communities.[66]

B. Agreement with Helicopter Operators

Most recently, the Airport Manager signed an agreement with the Eastern Regional Helicopter Council to increase the effectiveness of voluntary measures to reduce the impact of overflights on nearby residents. The December 17, 2007 agreement asserts that the Town and the Helicopter Council have convinced the FAA to "establish a new, recommended helicopter route" that will "divert a portion of pre-existing North Shore traffic over the Long Island Sound rather than over land."[67] The letter agreement states that the FAA has committed to this new route and will

[63] East Hampton Airport Master Plan Report (Draft April 24, 2007) at III-116.

[64] Id. at IV-230.

[65] Id.

[66] Id. at IV-230-231.

[67] Letter to Senator Charles Schumer from D. Nuss (Eastern Regional Helicopter Council, Inc.), J Brundige (East Hampton Airport Manager) and A. Ceglio (Gabreski Airport Manager) (Dec. 17, 2007), *available at:* http://www.erhc.org/Portals/6/Notams/Schumer%20Letter_FINAL.pdf

publish it in a revised helicopter route chart in spring of 2008.[68] We have not been able independently to confirm the FAA's plans to publish the route and have not seen any analysis of the noise benefits to the Town of the planned new route.

The "Continued Cooperation and Compliance Agreement" with the Helicopter Council contains a number of additional provisions that generally all relate to commitments to monitor and regularly report helicopter operations, educate helicopter operators and enhance the ability to report complaints about helicopter noise. As far as we can determine, the FAA has not formally signed the agreement.

C. Congressional Efforts

Both Senator Charles Schumer and Congressman Bishop have been active recently in efforts to find a legislative solution to the problems of helicopter noise in the Town. Schumer was instrumental in securing the Helicopter Council agreement on voluntary flight patterns. In addition, Schumer has been working with Bishop to insert language into the pending FAA Reauthorization Act to direct the FAA to study helicopter flights over Long Island. The provision requires the FAA to issue a report within 6 months of passage of the Reauthorization Act on issues concerning the effect of helicopter operations on residential areas, the feasibility of diverting helicopters from residential areas, and the feasibility of establishing specific flight patterns for helicopters.

The Bishop proposal was included in the version of the bill that passed the House; Senate action is pending and not expected until Congress reconvenes after the holidays.

IV. Strategic Options

Based on the previous discussion of the Town's legal authority, it should be clear that the Town's unilateral ability to regulate when, how and where helicopters use HTO is limited. Notwithstanding the legal constraints, however, the Town can take actions that could be highly effective in controlling helicopter impacts.

We believe that the Town would be best served by taking steps with regard to helicopter operations based on a comprehensive but incremental strategy. We recommend this approach for the following reasons.

- A comprehensive strategy is necessary to ensure the careful creation of a coherent public record. Such a record will be needed to minimize litigation risks in the event that the Town decides to implement a mandatory restriction on helicopters. In this realm of the law, the Town's intent and will as the practical effect of its actions are both legally critical.

[68] Id.

- Presenting actions as part of an overall plan would demonstrate to both helicopter operators and Town residents that individual steps taken by the Town are part of a thoughtful and incremental effort to address (and resolve) helicopter concerns. Outlining a comprehensive plan would give users an incentive to participate in voluntary efforts if they understood that participation could forestall the need for regulatory or mandatory restrictions at a later date.

- Only an overall strategy can balance some of the potential tensions that any actions may have in terms of promoting or deterring cooperation from FAA and helicopter operators.

- A comprehensive strategy will enable the Town Supervisor and the Town Board to assess the success of incremental efforts before embarking upon a complex, costly regulatory strategy of formally restricting helicopter operations. The law requires that the Town regulate only to the extent necessary to address the problem and if the Town has already tried less-restrictive measures, its legal position will be considerably stronger.

- Litigation is possible (some might assert that it is certain) in the event that the Town imposes a mandatory restriction on operations. Both the likelihood of litigation and the likelihood of success would be affected if the Town has established that mandatory restrictions are being imposed only after less restrictive measures have unsuccessfully been attempted.

- A public announcement of a comprehensive strategy will send an important signal to all interested parties (e.g., Town residents, helicopter operators, industry trade groups and the FAA) that the Town is serious in its commitment to address the adverse impacts of helicopter operations but that it does not intend to act rashly or irresponsibly. Knowing that there is a coherent strategy for addressing helicopter impacts should also blunt any criticism of the Town Board if its initial steps are not perceived to be sufficiently aggressive or regulatory.

Throughout this process, the Town should continually assess the effectiveness of its program. The assessment will serve two functions. First, it will reassure the community that the implementation of the successive stages of the program will be based upon data and not politics. Second, it will provide the legal foundation for a decision to impose a mandatory restriction because the Town will be able to demonstrate that less restrictive measures have been ineffective at achieving the Town's objectives.

For the strategy to be effective, the Town will need to establish clear and practical objectives for the program. These objectives will be the benchmark against which success of each step in the strategy is assessed. They will also provide the legal basis for a Town Board decision to implement each successively more restrictive measure.

This memorandum does *not* intend to propose the specific steps or provide the outline for each individual regulation. Instead, we outline here the architecture or structure for a stair-step approach; the details of each step, the specific regulatory consequences for non-compliance, and the technical justification for each regulation will need to be developed with the assistance of the Town's technical economic and noise experts. We have worked with both SH&E (Peter Stumpp) and HMMH (Ted Baldwin) on precisely such a stair-step approach at other airports with considerable success.

The following stair-step approach illustrates how this strategy could be implemented. The Town should establish a timeline for each step of the program to provide certainty to the public and to the operators that the Town is serious about assessing each step before proceeding to the next step. The overall architecture for the recommended approach is illustrated in the chart attached to this memorandum. (We do not purport to advise on the substantive elements of each step – that will be the responsibility of your economics and noise consultants.)

1. ***Announce Program.*** The Town should announce the initiation of the helicopter mitigation program through resolution or similar legislative enactment by the Town Board. The announcement should stress the significance of the problem to the Town, the Town Supervisor and Town Board's commitment to resolving the problem and the steps that the Town will implement to address the problem. The announcement should emphasize that voluntary, cooperative action by helicopter operators will be essential to avoid implementation of mandatory regulatory restrictions on helicopter operations. The announcement should build upon the December 17 letter agreement and indicate that the program is intended to help ensure the success of the voluntary program. It is important that the announcement indicate the Town Board's willingness to implement mandatory restrictions in the event that voluntary measures are not successful. The announcement should also include a preliminary definition of the problem (see step #3, below) but indicate that it intends to collect data to refine the definition.

2. ***Data Collection***. Using existing on-call expertise or by retaining appropriate consultants, the Town should assemble data that characterizes the nature and magnitude of the *existing* helicopter problem. (The data in the Master Plan Report is an excellent beginning but it is not sufficiently precise to present the problem of helicopter noise with the precision necessary to justify implementation of specific measures. The data in the Report, however, provides valuable baseline data which, when used in combination with data available from AirScene will be useful in assessing current conditions.) It is critical that this effort be designed to produce reliable, defensible (legally and politically) data on the number of helicopter operations, helicopter flight patterns, the time-of-day and frequency of operations and the noise impacts from these operations. While this data need not be assembled in strict compliance with the FAA's preferred methodologies, it is important to recognize that the principal reason for assembling data is to provide the necessary factual predicate for regulatory action. The Town should prudently assume that the reliability and credibility of the data will be challenged so the accuracy of the data will be important.

3. ***Problem Definition***. Upon completion of the data collection phase, the Town Board should adopt a resolution (or similar legislative vehicle) defining with specificity and precision the problem that the Town will be seeking to solve. This phase is important because of the legal requirement that any regulatory measure be carefully tailored to the problem. This will be the Town's first opportunity to identify for itself what objectives it hopes to accomplish with the program. The resolution should set forth the problem that the Town is seeking to solve and the measures that it is willing to consider. Because of the legal deference that is accorded to legislative actions and findings, this statement of the Town's objectives will set the basis for any subsequent decision that a particular action does, or does not, solve the problem.

4. ***Seek Legislative Relief***. This phase of the program is not strictly sequential in that a legislative strategy should be an on-going component of the program. The Bishop-Schumer legislation requiring an FAA study of helicopter routes is a useful starting point but it is limited in what it can achieve. If past experience is any lesson here, the FAA study will show that voluntary measures are highly effective, that it is important for operators and air traffic personnel to have flexibility, that operators are always willing to adapt flight procedures to meet community needs, and that any mandatory restrictions are inadvisable. (That is the approach that FAA generally takes to similar issues.) The legislative approach recommended by the Noise Abatement Advisory Committee (i.e., that Congress dictate that the Town can restrict helicopter operations at HTO without the need to comply with other federal laws such as ANCA) is unlikely to be successful but the uncertainty of the federal legislative process makes the attempt worthwhile. We can work with you and the Congressional offices to develop a proposal that has a greater likelihood of passage.

   The Town should continue to seek *substantive* legislative relief through the New York delegation. While the likelihood of success is slim, it will be useful for the later phases of this program to demonstrate that the Town has sought Congressional assistance. And, of course, should this avenue be successful, it could foreclose the need for any further regulatory measures by the Town.

   One important point on timing for legislative relief: the most opportune times to seek legislative relief are (a) when Congress is considering the triennial reauthorization legislation; (b) when a new FAA Administrator is under consideration for confirmation by the Senate, and (c) during the annual appropriations process. Two of the three of those Congressional actions are pending right now. *The best time to seek legislative relief may be in the next few months*.

5. ***Publish Preferred Helicopter Routes***. The recently-announced agreement with the Eastern Regional Helicopter Council establishes recommended preferred flight routes for helicopters using both HTO and Gabreski. It is critical to note, however, that these are

voluntary measures and, as the Master Plan Report observes, voluntary measures are more likely to be successful for based operators than for itinerant or transient operators.[69]

This step should include an aggressive publicity program. The Town should publish and distribute widely the recommended helicopter routes and should actively encourage compliance. The program should include affirmative steps that the Town will take to report and publish compliance (and non compliance). Symbolic incentives (or non-punitive recognition of non-compliance) should be included.

6. ***Implement Voluntary Curfew***. The Town should next implement a voluntary curfew program designed to limit (if not halt) certain nighttime activity. The curfew program need not be designed to stop all nighttime activity but could be tailored to the results of the prior step. For example, helicopter operators could be asked not to land at night unless they follow specified procedures and flight patterns.

   Like the prior step, this phase of the program should include an aggressive publicity program.

7. ***Adopt Differential Fees***. The Draft Master Plan Report notes that the Town has some regulatory authority to set landing fees at HTO so long as those fees are not punitively high. The Report also observes that higher landings during the nighttime hours or landing fees based upon noise levels are options for the Town to consider.[70] While it would be impermissible (without compliance with ANCA) for the Town to impose differential fees for the purpose of restricting access to HTO at certain times of day, the Town may determine that it is more expensive to operate the Airport at nighttime (i.e. to provide staffing and security) and that nighttime costs should properly be borne by nighttime operators.

   A thorough explanation of the legal impediments and risks associated with a differential fees program is beyond the scope of this memorandum. It will be important for the Town to adopt a reasonable fee structure and one that can be justified independently of any effect it might have on nighttime operations. We can discuss with the Town Board in closed session the various legal risks and opportunities that a differential fees program would present.

8. ***Adopt Facility Use Restrictions***. The data collected from earlier phases of this program will help the Town determine whether restrictions on how the Airport is used could be effective at achieving the Town's objectives. These restrictions would not be *use* or *access* restrictions but would be limitations on where helicopters can land, how they can traverse the airfield and how they operate on the airfield (i.e., whether they are allowed to rotate their propellers while passengers are present, etc.). The Town would need to prepare a report explaining the official bases for any restrictions (e.g., safety, efficiency,

[69] Master Plan Report at IV-231-232.

[70] Master Plan Report at IV-229.

operational convenience) to avoid any charge that the restrictions are effectively disguised access restrictions.

9. ***Initiate Part 161 Study to Restrict Helicopter Operations***. The final step in this multi-phase program would be to begin the formal Part 161 process. (If the Town takes the position that ANCA does not apply to helicopters, a formal Part 161 study would not be required but much of the same substantive data would need to be collected and reported. This step applies regardless of whether the Town follows the formal part 161 process.) A detailed description of the Part 161 process and the steps that the Town must take to implement a mandatory restriction on operations is beyond the scope of this memorandum. It is important to recognize, however, that this is a lengthy and legally complex process that is also wrought with uncertainty because of the dearth of successful precedents. We can discuss with the Town Board the more delicate litigation and legal strategic considerations inherent in this approach.

   The initial stages of the Part 161 process can – and perhaps should – be started simultaneously with some of the earlier phases of this program. The issuance of an RFP, selection a competent consultant team (of which there are only a small handful in the nation) and definition of the scope of work for a Part 161 study could all be initiated earlier in this program even if the formal, public initiation of the process is not announced until or unless the voluntary measures prove unsuccessful.

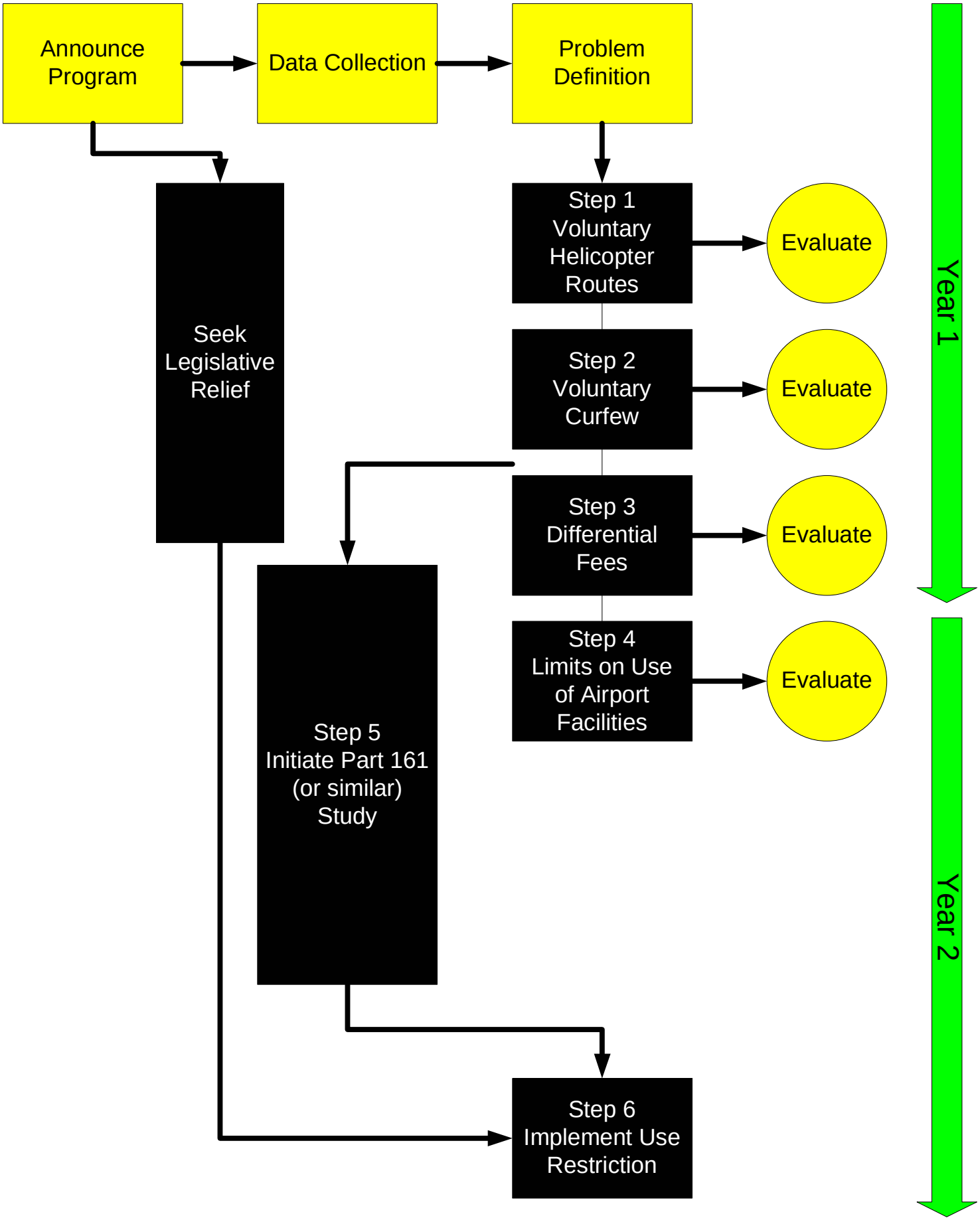
V. CONCLUSIONS

The law on the authority of the Town to limit access to the Airport by helicopters is complex and wrought with legal uncertainty. While the Town has virtually no authority to dictate the flight patterns for helicopters that overfly the Town, it does have authority to implement a program that can effectively limit adverse impacts by helicopters that use the Airport. Eventually, it may prove necessary for the Town to adopt a formal access restriction to minimize the adverse impacts from helicopters on the Town's residents. But, in order to make such a restriction as legally bullet-proof as possible, the Town should implement a stair-step program of progressively more restrictive (and more formally regulatory) measures to address the impacts of helicopters. In many communities, this type of approach has proved successful without the need to pursue the federal process for implementation of a formal access restriction. If that does not prove true here, the progressive approach will help ensure that the Town has a record to withstand litigation challenge.

The precise steps in the progressive approach need to be developed in coordination with the Town's noise and economics consultants. This memorandum (and the accompanying chart) illustrate t possible approach and illustrates how the recommended approach would work in practice.

Much of the law in this area depends upon both the effect and the intent of the Town's approach. It is important, therefore, to maintain strict confidentiality of the strategy. This is particularly important because the publicly stated purpose of various steps in this program may not be

consistent with the confidential or strategic objective. We would be pleased to brief the Town Board or your office on how best to announce publicly a program without compromising confidentiality.


Announce Program
Data Collection
Problem Definition
Seek Legislative Relief
Step 1 Voluntary Helicopter Routes
Evaluate
Step 2 Voluntary Curfew
Evaluate
Step 3 Differential Fees
Evaluate
Step 4 Limits on Use of Airport Facilities
Evaluate
Step 5 Initiate Part 161 (or similar) Study
Step 6 Implement Use Restriction
Year 1
Year 2