

Question and Answers about East Hampton Airport (HTO)
for the Eastern Region Helicopter Council (ERHC)
January 31, 2013

Q: What are the “grant assurances” applicable to East Hampton Airport?

A: When an airport accepts airport improvement grants from the FAA, the airport is required to comply with a set of 39 “assurances”. These assurances typically remain in effect for 20 years and address a wide range of subjects, ranging from compliance with federal civil rights laws to ensuring compatible land uses on nearby property. The assurance of greatest interest to ERHC and its members is #22, which requires airports to be open to all types of aeronautical activities (including helicopters) “on reasonable terms and without unjust discrimination.”

Q: If an airport is non-compliant, how are grant assurances enforced?

A: An airport user that is affected by its non-compliance can file a complaint with the FAA; the FAA can also initiate an investigation itself. Assurances can only be enforced by the FAA; they cannot be enforced directly by private parties. The FAA typically withholds improvement grants until an airport is again in compliance with the grant assurances. The FAA also can – but rarely does – impose additional penalties. But the FAA cannot award damages to an airport user based on the airport’s non-compliance, and also cannot enforce requirements unrelated to the grant assurances, such as the terms of private contracts and state laws.

Q: What is the status of the grant assurances at East Hampton Airport?

A: East Hampton last received an airport improvement grant in 2001, so as a general matter the assurances will remain in effect until 2021. But, as part of an agreement to settle a lawsuit with a third party, the FAA agreed not to enforce certain requirements after December 31, 2014.

Q: What grant assurances will no longer be enforced at HTO after December 31, 2014?

A: The agreement provides that the FAA will not enforce assurances #22(a), #22(h), and #29 (with a limited exception not relevant here). Assurance #22(a) includes the requirement, noted above, that an airport be open to all types of aeronautical activities. Assurance #22(h) is a closely related requirement, namely that conditions for the use of an airport be reasonable and not unjustly discriminatory. Assurance #29 requires an airport to maintain a layout plan showing current and proposed facilities.

Q: What will actually happen at HTO after December 31, 2014?

A: The airport (in coordination with the Town of East Hampton) is not required to make any changes to its rules after December 31, 2014. The airport simply will have an opportunity to make changes that previously would have been prohibited by grant assurances #22(a) and #22(h).¹ Some town residents have vocally supported the adoption of restrictions that would affect helicopters, but no formal proposals have yet been made. Additionally, even if the above

¹ Also, if HTO accepts new improvement grants from FAA, all of the assurances will be included; in that case, the airport would be required to comply with #22(a) and #22(h).

sections of the grant assurances will not be enforced by the FAA, the airport will still need to comply with the other grant assurances, and with other legal standards.

Q: What other legal standards will apply to HTO after December 31, 2014?

A: As an initial matter, most of the grant assurances will remain in effect at HTO through 2021. Some of those assurances may be of interest to ERHC and its members. For example “exclusive rights” generally are prohibited at airports; e.g., an airport cannot provide that only one FBO will be allowed to sell fuel, or prohibit users from fueling their own aircraft in-house.

In regard to the access issue that is of primary concern to ERHC and its members, the federal government (including the FAA) has primary responsibility for “interstate commerce”, including aircraft operations – but courts have recognized a “proprietor’s exemption” that allows an airport (assuming that it is not bound by the assurances discussed above) to regulate noise. However, local noise regulations must be “reasonable, nonarbitrary, and non-discriminatory”.

There are no clear guidelines as to what restrictions would be “reasonable, nonarbitrary, and nondiscriminatory”. The issue rarely has arisen, because most public airports regularly accept improvement grants from the FAA. But the FAA – in response to an inquiry from Congressman Tim Bishop – has warned that if HTO imposes restrictions which did not meet this standard, affected airport users would be entitled to file a lawsuit against the Town of East Hampton, and the FAA itself would also consider filing a lawsuit. Additionally, any restrictions would be limited to airport facilities; the town could not dictate flight routes beyond the airport.

Based on the above standard, if a blanket ban applicable only to helicopters was adopted – with no explanation of why helicopters alone were prohibited, given that many other types of aircraft operate at HTO – a court likely would find that the ban was impermissible. Likewise, a restriction that purported to limit the routes helicopters could operate to/from HTO would exceed the bounds of the proprietor’s exemption, and likely would be struck down. But if a more limited ban on helicopters was adopted – and/or if a study was prepared that purported to explain why only helicopters should be regulated – it is more difficult to predict how a court might respond.

Q: What restrictions are under consideration by the Town of East Hampton?

A: The town has hired both a law firm and a consulting firm that have previously performed studies for airports interested in imposing noise-based restrictions. No formal proposals have been made public at this time, but general suggestions have included a nighttime curfew and bans on specific aircraft types. They also have suggested that other measures – such as voluntary curfews and capital projects that would limit noise on neighboring properties – should be considered.

Q: What is a “Part 161” study and how is it related to the grant assurances?

A: An airport that is bound by grant assurances #22(a) and #22(h) also must comply with the Airport Noise and Capacity Act of 1990, which generally prohibits local noise restrictions. But Part 161 of the FAA’s regulations establishes a procedure by which such an airport can propose noise restrictions. To restrict Stage 1-2 aircraft (which currently include all helicopters), a study justifying the ban must be prepared, and the FAA given the opportunity to object; to restrict

quieter Stage 3-4 aircraft, a study justifying the ban must be prepared and affirmatively approved by the FAA.

In the case of HTO, a Part 161 study potentially could enable restrictions on helicopters to be imposed before December 31, 2014. Additionally, a Part 161-based study possibly could be used for an additional purpose, to try to show that restrictions after December 31, 2014 were “reasonable, nonarbitrary, and nondiscriminatory”. However, only two Part 161 studies ever have been finalized and submitted to the FAA. A study for Burbank (BUR) that proposed Stage 3 restrictions was rejected by the FAA. The FAA also objected to a study for Naples (APF) that proposed Stage 2 restrictions; the airport ultimately prevailed in a lawsuit filed by the FAA and thus was allowed to impose the restrictions, but only after a lengthy and costly fight.

Q: What should ERHC and its members be doing at this time?

At this time, it is up to East Hampton to decide what it will do next; for example, it could start work on a Part 161 study with an eye towards imposing restrictions before December 31, 2014; it could start work on restrictions based on the “proprietor’s exemption” to be imposed after December 31, 2014; or it could do nothing at all. But it will be important for ERHC and its members to monitor developments, because East Hampton could choose to pursue proposals that would restrict or ban helicopter operations at HTO; and if it does so, it would be best for ERHC and its members to be engaged and oppose such proposals from the beginning.

* * * *

Any additional questions may be directed to Jol Silversmith, (202) 973-7918, jasilversmith@zsrlaw.com, or Jim Calderwood, (202) 973-7905, jacalderwood@zsrlaw.com,