ZUCKERT SCOUTT RASENBERGER

888 Seventeenth Street, NW, Suite 700
Washington, DC 20006-3309
Phone 202.298.8660
Fax 202.342.0683
www.zsrlaw.com

April 25, 2018

BY ELECTRONIC MAIL AND HAND DELIVERY

Office of the Chief Counsel
Attention: FAA Part 16 (Airport Proceedings Docket)
AGC-610
Federal Aviation Administration
800 Independence Ave. S.W.
Washington, D.C. 20591
9-AWA-AGC-Part-16@faa.gov

Re: ***National Business Aviation Association, Inc., Shoreline Aviation, Inc. (Connecticut); PlaneSense, Inc.; Fly the Whale, Inc.; Eastern Air Express, Inc.; FL Aviation Corporation; Tuckaire, Inc.; Autonomic Controls, Inc.; Shoreline Aviation, Inc. (Massachusetts); Wes Rac Contracting Corporation; Eagle Air, Inc.; and JETAS, Inc.*** **v.** ***Town of East Hampton, New York, FAA docket no. 16-15-08***

Notice of Appeal and Brief

Pursuant to 14 C.F.R. § 16.33, the Complainants in the above-captioned docket respectfully submit this appeal of the Director's Determination dated March 26, 2018, for reasons including that the conclusions made therein were not in accordance with law, precedent, and policy. Accordingly, the Associate Administrator should issue a final decision which reverses the agency's initial decision – i.e., specifically finding that the airport sponsor conduct at issue in this proceeding constitutes revenue diversion, and that corrective action in the form of reimbursement, with interest, is required.

Introduction

At issue in this proceeding is what should be a relatively simple matter of law, precedent, and policy: Does the prohibition on revenue diversion – as set forth in grant assurance #25 for Airport Improvement Program ("AIP") grants (as mandated by 49 U.S.C. § 47107(b)), as well as more generally by 49 U.S.C. § 47133(a) – foreclose an airport sponsor (in this case, the Town of East Hampton, New York) from utilizing airport revenue to fund unsuccessful litigation specifically intended to perpetuate illegal restrictions on aeronautical operations at an airport?

None of the material facts in this proceeding – as set forth in prior pleadings and in the Director's Determination – are in serious dispute:

- The Town, by virtue of its prior acceptance of AIP grants, is subject to grant assurance #25 and Section 47133(a).

- In 2015, the Town took the position that it was not subject to the Airport Noise and Capacity Act of 1990 ("ANCA"; 49 U.S.C. § 47524) nor the implementing regulations promulgated by 14 C.F.R. Part 161, and adopted three ordinances which purported to restrict aeronautical operations at East Hampton Airport ("HTO"). Those ordinances were facially non-compliant with – and did not even attempt to utilize the procedures for FAA review available under – the statute and regulations.

- Various tenants and users of HTO – including some of the Complainants – challenged the validity of the ordinances in federal court. One of the ordinances was held to be invalid by the Eastern District of New York (Friends of the East Hampton Airport v. Town of East Hampton, 152 F.Supp.3d 90 (E.D.N.Y. 2015)), and all three subsequently were held to be invalid by the Second Circuit (841 F.3d 133 (2d Cir. 2016)), which explained that ANCA and Part 161 were indubitably applicable:

  > ANCA's text and context unambiguously indicate Congress's intent for the § 47524 procedural mandates to apply to all public airport proprietors regardless of their funding eligibility. … Even if text and context did not speak unambiguously to the question, statutory findings, legislative history, and implementing regulations would confirm the conclusion that § 47524(b) and (c) apply comprehensively and mandatorily to all public airport proprietors.

  Id., at 149-50.

- The Town incurred significant legal costs in its doomed crusade – hundreds of thousands of dollars, based on the prior record alone. All were paid out of HTO accounts, not general municipal funds.[1]

At the time that the complaint in this proceeding was filed, the federal litigation was still at an early juncture. But now that it has been definitively concluded (a petition for a writ of certiorari to the U.S. Supreme Court was denied, 137 S.Ct. 2295 (June 17, 2017), and a permanent injunction against the enforcement of the ordinances was entered by the District Court on August 7, 2017; see Exhibit 1 to this filing),[2] there is no doubt that the legal arguments advanced by the Town were unfounded.

[1] Recently, the Town acknowledged that its overall legal expenses related to HTO, incurred since 2014, have exceeded $2 million, although it has not specifically broken out the litigation costs. See http://easthamptonstar.com/Government/20171005/Town-Bows-FAA-Airport-Noise. To the extent necessary, the FAA can and should audit the Town to identify the relevant expenditures.

[2] That exhibit – and other exhibits to this filing, primarily records from judicial proceedings – is subject to notice, and there is good cause for its consideration on appeal pursuant to 14 C.F.R. § 16.33(f). The decisions of the federal courts – and the underlying record – are directly relevant to the matter on appeal. Notably, the Town previously urged that any Part 16 ruling should "wait for the resolution of those lawsuits." See the Town's motion to dismiss, at 3 (July 8, 2015).

Moreover, there should be no doubt that the airport dollars spent by the Town in litigation seeking to perpetuate the illegal restrictions accordingly constituted an improper use of airport revenue. This is not a case in which an airport sponsor was called upon to mount a defense to an unanticipated agency or court challenge. The Town explicitly adopted an anti-airport agenda; declined to utilize FAA administrative procedures; and represented to its taxpayers that – even though litigation would almost inevitably result from its campaign – the consequences would be cost- and risk-free (i.e., because no matter what the outcome, it would be directly paid for by HTO – and ultimately burden airport users). And in the meantime, the airport has been starved of needed improvements that could have been funded with those diverted funds. The Town now should be required to make HTO whole.

Further, the Associate Administrator should consider the implications of the Director's Determination, which extend far beyond the confines of this proceeding. As a predicate, the purposes of the prohibition on airport revenue diversion include "promot[ing] the national policy of providing a safe and efficient nationwide system of public-use airports with adequate capacity and capabilities to meet the present and future needs of civil aeronautics." In the Matter of Revenue Diversion by the City of Los Angeles at Los Angeles International, Ontario, Van Nuys and Palmdale Airports, FAA docket no. 16-96-01, Record of Determination, at 15 (March 17, 1997). See also Policy and Procedures Concerning the Use of Airport Revenue: Proceeds from Taxes on Aviation Fuel, 78 Fed. Reg. 69789, at 69790 (November 21, 2013) ("[t]he purposes of the revenue use requirements are to prevent a 'hidden tax' on air transportation, and to ensure that Federal airport grants are used to supplement funding for airport projects").

In other words, the national interest in airport revenue compliance certainly is not limited to HTO; it implicates thousands of public-use airports. But the Director's Determination provides a road map for sponsors across the country to utilize airport revenue in support of efforts to restrict or shutter airports, not to improve them. That development certainly will be welcomed by anti-airport activists, who now have been effectively informed by the FAA that they can pursue their agendas at zero risk, with the legal costs borne by the very aviation communities that they seek to limit or banish. But that message is transparently at odds with the fundamental purposes of grant assurance #25 and Section 47133(a), and of the FAA itself. As discussed in greater detail below, the Director's Determination is contrary to agency precedent; amounts to bad policy; and is plainly at odds with Congressional instructions and thus is illegal.

I. The Director's Determination Is Inconsistent with FAA Precedent

The Director's Determination does accurately summarize law, precedent, and policy to the extent that it recounts that airport revenue may only be used for the capital and operating costs of an airport, and that airport revenue may be used for attorney fees "to the extent these fees are for services in support of … operating costs that are otherwise allowable." Id., at 6, quoting Airport Compliance Manual, FAA Order 5190.6B, § 15.9(d). Nor do Complainants dispute that, as a general proposition, legal costs are common cost centers for business, including airports. Id.

However, Complainants strongly dispute the Director's Determination assertion that "the presumptive rule is that fees related to airport legal issues may be paid with airport revenue,"

without any consideration of the purposes of or motivations for those expenditures. Id. In other words, the Director's Determination postulates that by default legal-related expenditures are compliant with grant assurance #25 and Section 47133(a) so long as they are loosely related to operating an airport – even if they manifestly do not benefit the airport.

That postulate lacks any support in – and actively contradicts – FAA precedent. Notably, the Director's Determination cites no authorities in support of its findings. Presumably that is because the FAA repeatedly has advised that to comprise a permissible use of airport revenue, an expenditure must actually benefit an airport – and further has specifically advised that legal costs which fail to meet that test are impermissible. Even if the circumstances under which airport revenue cannot be used for legal costs may not have been fully explicated by the FAA – and could benefit from further agency guidance – in this case East Hampton clearly had crossed far over any line that reasonably could be delineated. The Town deliberately required airport users to shoulder the costs of a plan specifically designed to limit their operations – a plan which even by the Town's own reasoning would only generate off-airport benefits – and that plan was rejected by the courts.

A. FAA Precedent Is Already Extensively Documented in this Docket

Complainants in their pleadings cited many of the relevant FAA precedents. Yet the Director's Determination does not even try to distinguish them, much less justify a complete reversal of agency policy. Indeed, most are not even acknowledged in its summary of the pleadings; and the few that are cited in that section of the Director's Determination are simply ignored in the brief "analysis" which follows. That, simply put, is arbitrary and capricious agency decision-making, and a violation of basic administrative law principles.

To re-emphasize some of the most significant precedents previously cited, regarding both benefit to an airport generally and legal costs specifically:

- In its Notice of Investigation in In the Matter of Compliance with Federal Obligations by the City of Chicago, FAA docket no. 16-04-09 (October 1, 2004), the FAA stated that "costs related to the deactivation of Meigs as an airport … were not incurred for airport purposes and are not capital or operating costs of an airport." Id., at 2.

- In its Director's Determination in Boca Airport, Inc. d/b/a Boca Aviation v. Boca Raton Airport Authority, FAA docket no. 16-00-10 (April 26, 2001) (affirmed March 20, 2003, affirmed on other grounds 389 F.3d 185 (D.C.Cir. 2004)), the FAA stated that: "[a] payment of airport revenue to a private firm can be considered unlawful revenue diversion if it is not for an airport purpose (i.e. for general economic development)." Id., at 42.

- In the Record of Determination in In the Matter of Revenue Diversion by the City of Los Angeles at Los Angeles International, Ontario, Van Nuys and Palmdale Airports, the FAA stated that: "airport revenues are used for airport purposes, i.e., to support the development, maintenance and operation of aeronautical facilities at the airport." Id., at 12.

- The DOT Inspector General, in its Report on Diversion of Airport Revenue, Augusta-Richmond County Commission, no. AV-1998-093, at 8 (March 12, 1998), opined that an airport sponsor could not pay, out of airport revenue, legal fees for the acquisition of land that could not be used for airport purposes and the purchase of which had violated 49 U.S.C. § 47107(b)(1). The FAA concurred. Id., Appendix A, at 2.

Further, the primary authority previously cited by the Town – the Second Los Angeles International Airport Rates Proceeding, Final Decision, Order 95-12-33 (December 22, 1995) – actually confirms that the FAA, for decades, has taken the position that an airport sponsor does not have a "blank check" to pay legal costs out of airport accounts:

> While we agree that legal fees paid for facilitating the diversion of airport funds to the City's general fund cannot be legitimate expenses of the airport, we do not view the overall defense of the police department charges as equivalent to diversion. We have found that most of the police department charges are reasonable. Based on our reasoning, the payment of a relatively small part of the police department charges might be considered diversion, but we need not address that issue here. Given the relatively small amount of the disallowed charges, the amount of legal fees incurred in defending those charges is likely to be de minimis.

Id., at 49. In other words, although in the LAX II proceeding the FAA did not demand the reimbursement of certain legal costs that were deemed de minimis, the FAA was clear that as a general proposition if legal costs had been incurred in the defense of impermissible expenditures, those legal costs were themselves impermissible expenditures.[3]

B. Additional FAA Precedent Also Supports Complainants' Position

The previously-cited authorities were only exemplary, not comprehensive. The principle has been well-established by the FAA that expenditures of airport revenue (including but not limited to the payment of legal costs) must actually be beneficial to the airport; a loose connection is not enough. Further, an airport sponsor's compliance will not merely be assumed by the FAA, even if expenditures are for a common cost center. For example:

- In Grayson v. DeKalb County, Georgia, FAA docket no. 16-05-13, Director's Determination, at 13 (February 1, 2006), the FAA – utilizing language that had appeared in many prior Part 16 decisions – observed that: "operating the airport for aeronautical use is not a secondary obligation; it is the 'prime obligation' of an airport sponsor" as well as that "managerial processes, that unnecessarily limit the airport's aeronautical utility … [are] inconsistent with the City's Federal obligations."

[3] Additional relevant authorities were cited in the Complainants' prior pleadings. See, e.g., their reply to the Town's motion to dismiss, at 6 fn.9 (July 20, 2015), and their reply to the Town's answer, at 6 fn.13 (October 19, 2015).

- In the bulletin entitled Best Practices – Surface Access to Airports (September 2006) (https://www.faa.gov/airports/resources/publications/reports/media/bulletin_1_surface_access_best_practices.pdf), the FAA advised that in the context of ground access projects, "[a]irport funds cannot be used for portions of the project that are not necessary for the purpose of serving airport passengers."

- In the previously-cited Augusta-Richmond County Commission audit report, the DOT Inspector General additionally held that the costs of an audit of revenue diversion at the airport should not be reimbursed from airport funds because the audit did not comprise an airport operating cost; the FAA concurred. Id., at 9-10.

- In an audit of revenue diversion by the Dade County Aviation Department, no. R4-FA-7-035 (June 25, 1997), the DOT Inspector General noted that the FAA had taken the position that "building permit fees for airside projects were not appropriate"; the fact that they were incurred in connection with construction at an airport was not sufficient, because such fees "add little or no value to the project(s)." Id., at 9.

- In Monitoring of Airport Revenues at Arlington Municipal Airport, no R0-FA-7-005, at 6-7 (January 15, 1997), the DOT Inspector General observed that although it is "common" for sponsors to provide police/fire services to their airports, there is no presumption of compliance; expenditures must be justified. The FAA concurred that only "bona fide costs" could be paid from airport revenue. Id., at 12-14.

- In Airport Revenues: McMahon-Wrinkle Airpark, Big Spring, Texas, no. AV-1998-026, at 4-6 (November 21, 1997) the DOT Inspector General concluded that although a fire station was located on-airport, the majority of its calls were off-airport, and thus reimbursement to the airport for capital and operating expenses that had not benefited the airport was required. The FAA generally concurred. Id., at Appendix II, at 3-4.

- In another audit involving protective services, FAA Oversight Is Inadequate to Ensure Proper Use of Los Angeles International Airport Revenue for Police Services and Maximization of Resources, no. AV-2014-035 (April 8, 2014), the DOT Inspector General specified that expenditures of airport revenue were conditioned "on adequate documentation that demonstrates the funds were expended for the benefit of the airport." Id., at 6. The FAA concurred. Id., at 24-25.

- An Associate Administrator previously advised an airport sponsor that even if the FAA allowed it to transfer to its general fund proceeds from the condemnation of a portion of the airport, an act which normally would be impermissible (and which the FAA ultimately did not allow), any expenses associated with that transfer – including "legal fees" – would not "be a capital or operating cost of the airport, and such expenses could not, therefore, be paid with airport revenue." Letter from Cynthia Rich to Theodore O. Stein, at 2 (February 28, 1995), reprinted in Airport Revenue Diversion, S.Hrg. no. 104-629, at 62.

Additionally, the position taken by the Director's Determination is not only inconsistent with – and an inexplicable departure from – past precedent, but also appears to be in conflict with contemporary statements of the FAA. In particular, in a September 26, 2017 letter to the Peninsula Airport Commission ("PAC"), the FAA contended that $43,208.73 in legal costs expended by the PAC to obtain a line-of-credit on behalf of a prospective air carrier – an impermissible subsidy to that carrier – were likewise impermissible and required reimbursement. See Exhibit 2 to this filing, at 1.

C. The Analogy to ANCA Is Misplaced

The Director's Determination in passing states that ANCA and 14 C.F.R. Part 161 provide a process for airports to propose noise-based access restrictions, and that the FAA is not aware of any argument that airport revenue cannot be used to pursue a Part 161 determination. Id., at 6. As an initial matter, this statement is misplaced, because the crux of this proceeding is that East Hampton utilized airport revenue in support of its claim that it was not subject to ANCA and not required to pursue a Part 161 determination.

Moreover, to the extent that ANCA may be understood to authorize sponsors to utilize airport revenue for legal costs necessary to propose noise-based access restrictions under Part 161, that only demonstrates that the use of airport revenue for otherwise impermissible legal costs can be specifically authorized by statute. In other words, an ANCA/Part 161 study represents a Congressionally-authorized exception to the prohibitions of grant assurance #25 and Section 47133(a), not a general rule allowing revenue diversion for any legal costs.

And the fact that East Hampton in 2015 had available the option of an ANCA/Part 161 study, which potentially can utilize airport revenue for legal costs (and even AIP grants under certain circumstances, see 61 Fed. Reg. 48727 (September 16, 1996)) – but the Town specifically declined to do so and instead openly defied ANCA/Part 161 requirements – amounts to evidence of East Hampton's bad faith, as well as that this is a "unique" case of "abuse" which, even based on the incredibly deferential standards set forth in the Director's Determination (id., at 6), requires FAA enforcement and the Town's reimbursement of airport accounts.

II. The Director's Determination Represents Bad Policy

The Director's Determination rationalizes its refusal to address the misappropriation of airport funds by the Town because, as a general consequence, "FAA would be burdened to determine the merits of a particular legal argument or grant assurance compliance issue." Id., at 6. Essentially, the Director's Determination holds that because the regulatory problem at hand – i.e., prohibiting revenue diversion – might be difficult, the FAA declines to regulate at all.

That is simply not an appropriate response. By definition, it is the FAA's job to regulate.

Complainants are not aware of any prior case – airport-related or otherwise – in which, when confronted with potential complexity, the FAA simply has thrown up its hands and given up. "Federal agencies routinely must interpret and apply the statutes they are charged with administering." In the Matter of Compliance with Federal Obligations by the Naples Airport

Authority, Naples, Florida, FAA docket no 16-01-15, Director's Determination, at 52 (March 10, 2003), vacated and remanded on other grounds, 409 F.3d 431 (D.C.Cir. 2005). See also Rules of Practice for Federally Assisted Airport Proceedings, 59 Fed. Reg. 29880, at 29880 (June 9, 1994) (the FAA has "the authority and responsibility to receive complaints and adjudicate matters of compliance").

It is indisputable that in carrying out its duties, the FAA periodically must confront and resolve challenging questions. But it also is unquestionably capable of doing so. Complainants previously have acknowledged that the principle here at issue, although well-established, may not always be straightforward to apply in practice, and that airports and their users potentially could benefit from supplemental guidance, in this docket as needed or in another venue to refine its broader implications. See, e.g., BMI Salvage Corporation v. Miami-Dade County, Florida, FAA docket no. 16-05-16, Final Decision and Order on Remand, at 23 (April 15, 2011) (because issue was essential to decision on remand, the FAA provided elaboration regarding whether aircraft salvage and demolition constituted an aeronautical activity).[4]

Notably, while this proceeding was in progress, the FAA issued its final policy for the non-aeronautical use of airport hangars (81 Fed. Reg. 38906 (June 15, 2016)). That was the product of an extended and hotly-contested process – but the FAA specifically rejected comments which argued that the agency should take no action to enforce airport assurances and give unfettered discretion to airport sponsors. In the end, the FAA acknowledged that airport sponsors should have "some flexibility to adapt compliance to local conditions" but emphasized that:

> The FAA has a contract with the sponsor of an obligated airport. …. Each sponsor of an obligated airport has agreed to these terms. … To maintain a standardized national airport system and standardized practices in each of the FAA's nine regional offices, the agency issues guidance on its interpretation of the requirements. … The agency continues to believe that FAA policy guidance is appropriate and necessary.

Id., at 38907-08. Nor is the hangar policy unique. The FAA has adopted overall standards for the use of airport revenue (64 Fed. Reg. 7696 (February 16, 1999)); general guidance for grant-, deed-, and statute-based airport obligations (FAA Order 5190.6B); and specialized guidance for specific revenue diversion issues, such as Guidance on the Extraction of Oil and Gas at Federally Obligated Airports, Advisory Circular 150/5100-20 (March 23, 2016); Policy and Procedures Concerning the Use of Airport Revenue; Proceeds from Taxes on Aviation Fuel, 79 Fed. Reg. 66282 (November 7, 2014); and Air Carrier Incentive Program Guidebook (September 2010) (https://www.faa.gov/airports/airport_compliance/media/air-carrier-incentive-2010.pdf).

[4] For example, the FAA might solicit public input and after due consideration publish further policy guidance, advising on issues such as whether any obligation to reimburse airport revenues should arise only at the conclusion of a dispute, and whether there should be a safe harbor if an airport sponsor makes legal arguments that do not prevail but were advanced in good faith.

Additionally, the FAA under appropriate circumstances already has an obligation to evaluate whether a litigating position was "substantially justified" – and thus whether the legal costs of an administrative litigant should be reimbursed – pursuant to the Equal Access to Justice Act ("EAJA"; 5 U.S.C. § 504, as implemented by 14 C.F.R. Part 14). See, e.g., Green Aviation Management v. FAA, 676 F.3d 200 (D.C.Cir. 2012), on remand FAA Order no. 2012-9 (October 11, 2012). Thus, the implication in this proceeding that the FAA could not handle similar tasks – e.g., "to determine the merits of a particular legal argument or grant assurance issue" in order to resolve its financial consequences for the sponsor (Director's Determination, at 6) – is not only unsupported by any authority, but absurd on its face. See also Implementation of Equal Access to Justice Act, 54 Fed. Reg. 46196, at 46196 (November 1, 1989) (describing as "factitious" the argument that the FAA could not make objective decisions on EAJA applications).

Of further note is that other federal agencies, when presented with similar questions, have not dodged them; they have resolved them. And those agencies routinely have concluded that federal grant conditions and principles prohibit the payment of legal costs if they were incurred in connection with expenditures that were themselves unallowable, and thus did not constitute ordinary costs of doing business. See, e.g., Humanics Associates, no. DAB 860, 1987 WL 343380, at *2 (HHS Departmental Appeals Board May 1, 1987) ("[b]ut for the Appellant's own improper claiming, the investigation would not have occurred and the legal expenses would not have been incurred"); Illinois Department of Public Aid, no. DAB 964, 1988 WL 486136, at *5 (HHS Departmental Appeals Board June 30, 1988) ("Illinois, without consulting with federal authorities, took actions which it should have known would not be considered within the scope of Title IV-D. Thus, we uphold OCSE's determination that the costs of attorneys' fees resulting from these actions are not legal expenses required for program administration").

The FAA itself consistently has emphasized that revenue diversion is among the most important airport oversight issues. See, e.g., Clarke v. City of Alamogordo, New Mexico, FAA docket no. 16-05-19, Director's Determination, at 14 and fn.8 (September 20, 2006) (FAA will investigate allegations of revenue diversion regardless of whether complainant has standing). Congress concurs; its guidance – and mandates – are discussed further below. Thus, as a matter of policy, it should be clear that the FAA has both the mission to address, and is fully capable of addressing, the compliance issues raised in this proceeding – and should do so.

III. The Director's Determination Violates Federal Law

The enforcement of the prohibition on revenue diversion, as has occurred at HTO (i.e., using airport funds to pay for lawyers to work on issues contrary to the airport's interest) is not just a matter of FAA precedent and policy, or even of Congressional policy, but rather a matter of Congressional commands.

Congress has been clear that it expects the FAA to be strict in its enforcement of grant assurance #25 and Section 47133(a); FAA vigilance is not discretionary. For example, when the statute was added to the revenue diversion enforcement regime, in 1996, Congress explained that:

> The Committee continues to have significant concerns about the diversion of airport revenues for non-airport purposes and the failure of the FAA to take timely and firm action in some cases. … In previous reauthorization legislation, provisions have been included to enforce the revenue diversion prohibition. Nevertheless, there still appear to be some who are seeking avenues around the law.

Federal Aviation Authorization Act of 1996, H.Rpt. 104-714, at 37-38 (July 26, 1996). See also FAA Oversight Is Inadequate to Ensure Proper Use of Los Angeles International Airport Revenue for Police Services and Maximization of Resources, no. AV-2014-35, at 9 (noting "congressional intent that FAA focus compliance efforts on the lawful use of airport revenue").

Further, while the 1996 legislation was pending, Senator John McCain, in discussing the problems that required attention from the FAA, included in his list of "blatant" examples of revenue diversion that mandated agency attention "lobbyist fees for work on issues contrary to the airport's interest." Airport Revenue Diversion, S.Hrg. 104-629, at 2-3. The DOT Inspector General, appearing before the subcommittee, added that the costs of "lawyers" were among the forms of revenue diversion "that FAA certainly has not done enough to stop." Id., at 7.[5]

The FAA itself previously has been clear and specific in its Part 16 rulings that it fully understands its overall mission – and that the FAA cannot simply decline to enforce airport obligations embodied in the grant assurances and statute. For example, the FAA cannot:

> waive its statutory enforcement jurisdiction … FAA is the Federal agency assigned responsibility by Congress for enforcing the … grant obligations ... The FAA did not and could not abdicate that responsibility.

In the Matter of Compliance with Federal Obligations by the City of Santa Monica, California, FAA docket no. 16-02-08, Director's Determination, at 25 (May 27, 2008). See also Platinum Aviation v. Bloomington-Normal Airport Authority, docket no. 16-06-09, Final Decision and Order, at 15 (November 28, 2007) ("FAA is required to enforce the federal statutes to protect the federal interest in the Airport"); Centennial Express Airlines v. Arapahoe County Public Airport Authority, FAA docket no. 16-98-05, Director's Determination, at 3 (August 21, 1998), affirmed 242 F.3d 1213 (10th Cir. 2001) ("[a]s an expert administrative agency, the FAA … is charged with interpreting and implementing the Federal aviation statutes, including the airport grant program").

Indeed, in virtually every decision rendered under Part 16 since it was adopted more than twenty years ago, FAA has stated that: "Pursuant to 49 U.S.C. § 47122, the FAA has a statutory

[5] The DOT Inspector General further criticized "using airport funds to lobby to convince officials that the city can divert airport money." Id., at 18. Senator McCain concurred that there was "just no doubt" that expenditures for consultants and lobbying to repeal a municipal prohibition on revenue diversion ("Proposition K") amounted to revenue diversion. Id., at 38.

mandate to ensure that airport owners comply with their Federal grant assurances." See, e.g., In the Matter of Revenue Diversion by the City of Los Angeles at Los Angeles International, Ontario, Van Nuys and Palmdale Airports, FAA docket no. 16-96-01, Record of Determination, at 11 (emphasis added). And the same is explicitly true for the statutory prohibition on revenue diversion: "[T]he obligation to enforce compliance with [Section 47133], using available sanctions for noncompliance, is not only logical but is required as part of the FAA's statutory responsibility." 79 Fed. Reg. at 66285 (emphasis added).

The same reasoning applies with equal force to the matter before the FAA in this proceeding; the FAA not only should not, but cannot, decline to act to address the revenue diversion issues at HTO; the ultimate principle at stake may be intricate (even if the facts before the FAA are not), but a resolution is not just important but also compulsory.

Conclusion

As stated above, FAA precedent is clear that airport sponsors do not have carte blanche to utilize airport revenues to pay legal costs. Expenditures must benefit airports – it is not enough that expenditures have a vague airport connection, and the FAA specifically has condemned legal costs incurred in support of impermissible expenditures. Additionally, even if the principle implicated in this proceeding could benefit from further explication, that does not mean that the FAA should – or can – decline to rule upon the specific and basic facts in the present docket.

The Town proactively sought to restrict access to HTO, and the federal courts now have conclusively rejected that endeavor. This is not a case in which an airport sponsor was required to make legal expenditures to defend the status quo. This is no longer a case in which litigation is still in progress and the outcome potentially uncertain. And this is not a case in which the outcome was anything less than definitive.

But this is a case in which the Town had an explicit anti-airport and bad-faith agenda:

- The Town openly refused to utilize the opportunities provided by, much less comply with, ANCA and Part 161.

- The Town specifically promoted its strategy of legal confrontation to its citizens as being cost-free and thus risk-free. See, e.g., Exhibit J to the Complainants' reply to the Town's answer (October 19, 2015) ("that defense does not cost the taxpayers a dime! It is paid for entirely by airport users").

- The prefaces of the ordinances make explicit their anti-airport impetuses, including assertions such as that "noise from aircraft overflights has disrupted outdoor activities and diminished the quality of life in the Town" and the "increasingly strong demands by the public that the Town take action to reduce the disruptive and harmful effects of aircraft noise." See Exhibits 1-3 to the complaint (May 20, 2015).

- The Town openly conceded – in its memorandum in support of its October 8, 2015 answer in this proceeding – that the motivation behind the ordinances was to restrict

aircraft operations for the purported general benefit of the Town and its residents, not for any benefit to HTO and its users. Id., at 5.

- In the federal litigation, the Town Supervisor openly conceded its anti-airport agenda: "The Town cannot wait one more season to implement meaningful noise relief. If East Hampton were to lose its reputation as place of peace and quiet, a place where people can enjoy the natural beauty of the area uninterrupted by urban and industrial noises, the loss would be irreparable." See Exhibit 3 to this filing, at 8.[6]

- Other declarations submitted by the Town in the federal litigation further establish that its restrictions and legal defense thereof in no way sought to benefit HTO. A real estate agent – also a member of the Town's airport noise committee – endorsed the restrictions because of the airport's alleged negative effect on property values. Another resident and Town committee member also endorsed the restrictions, asserting that "[e]ach noise event infringes on the peace and quiet you should be entitled to enjoy." See Exhibit 4 to this filing, at 2-3, and Exhibit 5 to this filing, at 2.

- The Town was aware that the ordinances would significantly restrict access, affecting up to 23% of HTO operations. See Exhibit 11 to the complaint, at 4 (May 20, 2015).

- The Town's own expert counsel – an experienced aviation practitioner – repeatedly advised that East Hampton was obligated to comply with ANCA and Part 161. See, e.g., Complainants' reply to the Town's answer, Exhibit E, at 25-27 (October 19, 2015); Exhibit 6 to this filing, at 2; and Exhibit 7 to this filing, at 3.[7]

[6] See also Exhibit 10 to the complaint, at 2 (May 20, 2015) (Town press statement in response to filing of federal litigation – asserting that "it is sad that these airport users are now going to force the Town to spend scarce airport funds to defend these restrictions").

[7] That same counsel previously asserted that ANCA applied to all restrictions that an airport might adopt – and that a contention that airports could unilaterally adopt access restrictions was "facially preposterous." Brief of Palm Beach County, Trump v. Palm Beach County, 2011 WL 10068524 (Fla. Cir. Ct. March 4, 2011). The Town may assert that its litigating position was justified based on an unattributed Q&A subsequently provided to Congressman Tim Bishop. But counsel for the FAA – appearing in open court – stated that "the FAA disagrees with the representations that are being made about the import and the legal effect of those responses. … We don't think those Bishop responses in any way waive the FAA's ability to seek an injunction or to enforce anything under the appropriate regulation." See Exhibit 8 to this filing, at 1. Additionally, a former Associate Administrator attested that "because the Town did not comply with Part 161 … the FAA's established policy and practice would require rejection of the [r]estrictions. … [S]uch severe restrictions could not be approved without a radical departure from established FAA policy and procedures." See Exhibit 9 to this filing, at 13-14.

- The hundreds of thousands – if not millions – of dollars that the Town deliberately diverted to its anti-airport crusade instead could have been used to pay for long-overdue airport improvements and/or reduce user fees. As the FAA is aware, other pending Part 16 complaints allege both unjustifiable fees and insufficient maintenance at HTO. See FAA dockets nos. 16-14-07, 16-15-02.

The FAA is unlikely to ever have before it, in its own words, a clearer "unique" case of the "abuse" of airport accounts to fund impermissible legal expenditures, in violation of grant assurance #25 and Section 47133(a). The FAA should now require their reimbursement, with statutory interest.

And as now promulgated, the Director's Determination sends an entirely inappropriate message to and sets an appalling new precedent for airport sponsors generally – i.e., that absent the undefined "abuse" or "unique" circumstances (id., at 6) the FAA will look the other way if an airport sponsor utilizes airport revenues to pay for legal efforts to illegally restrict access to that very airport, no matter what the facts or outcome, or how implausible the theory. But that pronouncement is simply irreconcilable with the FAA's mission and mandate: "The Airport Compliance Program is designed to protect the public interest in civil aviation. Grants and property conveyances are made in exchange for binding commitments (federal obligations) designed to ensure that the public interest in civil aviation will be served. The FAA bears the important responsibility of seeing that these commitments are met." FAA Order 5190.6B, § 1.5.

Moreover, that pronouncement puts at risk far more than the dollars currently at stake at HTO; indeed, it could jeopardize the integrity of the national system of airports. As the FAA is certainly aware, many airport sponsors are under recurring political pressure to restrict operations at their airports. Yet the Director's Determination has provided them a tool by which to pursue such efforts with the costs being allocated by airport users, not the public fisc. That is not what is intended or allowed by grant assurance #25 and Section 47133(a) – the decision now on appeal twists precedent, policy, and the law beyond recognition, requiring airports and their users to pay for the costs of efforts directed at their own circumscription. So no matter what the outcome, anti-airport activists win; even if they lose in court, in the process they will have struck a financial blow against aviation. That is bad policy; inconsistent with precedent; and illegal. Accordingly, the final decision can and must reach a different conclusion.

Respectfully submitted,

Jol A. Silversmith

Certificate of Service

I hereby certify that I have this day caused the foregoing pleading to be served on the following persons at the following addresses by first class mail, postage prepaid, and by electronic mail:

- Peter Van Scoyoc, Supervisor, 159 Pantigo Road, East Hampton, NY 19937, pvanscoyoc@ehamptonny.gov;
- Michael Sendlenski, Town Attorney, 159 Pantigo Road, East Hampton, NY 19937, msendlenski@ehamptonny.gov;
- W. Eric Pilsk and Catherine Van Heuven, Kaplan, Kirsch & Rockwell, LLP, 1001 Connecticut Avenue, N.W., Suite 800, Washington, DC 20036, epilsk@kaplankirsch.com, cvanheuven@kaplankirsch.com; and
- William O'Connor, Cooley LLP, 4401 Eastgate Mall, San Diego, CA, 92121, woconnor@cooley.com.

Dated this 25th day of April, 2018.

Jol A. Silversmith