

United States Court of Appeals  
for the First Circuit

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SAFEGUARDING THE HISTORIC HANSCOM AREA'S  
IRREPLACEABLE RESOURCES, INC.; SAVE OUR HERITAGE, INC.;  
CONCORD HISTORICAL COMMISSION; LYNN VANACORE BLOOM;  
THE WALDEN WOODS PROJECT,  
Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION,  
Respondent,

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MASSACHUSETTS PORT AUTHORITY,  
Intervenor.

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ON PETITION FOR REVIEW OF AN ORDER  
OF THE FEDERAL AVIATION ADMINISTRATION

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**PETITIONERS' REPLY BRIEF**

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Matthew F. Pawa  
Court of Appeals No. 98995  
Law Offices of Matthew F. Pawa, P.C.  
1280 Centre Street, Suite 230  
Newton Centre, MA 02459  
(617) 641-9550

Jonathan S. Klavens  
Court of Appeals No. 31245  
Klavens Law Group, P.C.  
420 Boylston Street, 5th Fl.  
Boston, MA 02106  
(617) 266-2879

*Attorneys for Petitioners*

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
ARGUMENT .....	2
I.    FAA VIOLATED SECTION 4(f). .....	2
A.    FAA Misstates the Legal Standard. ....	2
B.    FAA’s 4(f)(1) Determination Was Arbitrary and Capricious. ....	5
1.    FAA Has Never Meaningfully Identified “Transportation Needs” .....	5
2.    FAA Has Not Established That a New FBO Is Required .....	7
3.    The East Ramp Alternative Is Prudent .....	12
4.    The Reuse Alternative Is Prudent .....	18
C.    FAA Failed To Conduct All Possible Planning To Minimize Harm to Historic Sites .....	19
II.   FAA VIOLATED SECTION 106. ....	20
A.    Limiting the Area of Potential Effect (“APE”) to the Footprint of Hangar 24 Was Arbitrary and Capricious. ....	20
B.    FAA’s Decision That Hangar 24 Is Not Eligible Under Criterion C Was Arbitrary and Capricious. ....	26
CONCLUSION .....	29

## TABLE OF AUTHORITIES

Page(s)

### **Federal Cases**

<u>Alaska Center for the Environment v. Armbrister</u> , 131 F.3d 1285 (9th Cir. 1997).....	3, 4, 11
<u>Citizens to Preserve Overton Park v. Volpe</u> , 401 U.S. 402 (1971) .....	2, 5, 13, 25, 27
<u>City of Grapevine v. Dep’t of Transportation</u> , 17 F.3d 1502 (D.C. Cir. 1994).....	3
<u>Committee to Preserve Boomer Lake Park v. Dep’t of Transp.</u> , 4 F.3d 1543 (10th Cir. 1993).....	10
<u>Davis v. Mineta</u> , 302 F.3d 1104 (10th Cir. 2002).....	3, 6, 10
<u>Druid Hills Civic Association v. Federal Highway Admin.</u> , 772 F.2d 700 (11th Cir. 1985).....	10
<u>Eagle Foundation, Inc. v. Dole</u> , 813 F.2d 798 (7th Cir. 1987).....	10
<u>Hickory Neighborhood Defense League v. Skinner</u> , 893 F.2d 58 (4th Cir. 1990).....	14, 15
<u>Hickory Neighborhood Defense League v. Skinner</u> , 910 F.2d 159 (4th Cir. 1990).....	4, 13, 17
<u>Nat’l Wildlife Fed’n v. Coleman</u> , 529 F.2d 359 (5th Cir. 1976).....	28
<u>Neighborhood Ass’n of the Back Bay v. Fed. Transit Admin.</u> , 463 F.3d 50 (1st Cir. 2006) .....	2, 3
<u>SEC v. Chenery Corp.</u> , 332 U.S. 194 (1947).....	7, 8
<u>Save Our Heritage, Inc. v. FAA</u> , 269 F.3d 49 (1st Cir. 1985).....	11
<u>Stop H-3 Ass’n v. Dole</u> , 740 F.2d 1442 (9th Cir. 1984).....	5

Valley Community Preservation Comm’n v. Mineta, 373 F.3d 1078  
(10th Cir. 2004).....24, 26

**Federal Statutes and Regulations**

16 U.S.C. § 470f.....20

16 U.S.C. § 470h-2.....24

49 U.S.C. § 303(c) .....3

14 C.F.R. Part 150.....21

36 C.F.R. § 800.4 .....27

36 C.F.R. § 800.5 .....27

## INTRODUCTION

The volume of business handled by Hanscom airport is in decline, yet its owner wants to demolish a historic structure to build an FBO. FAA has approved. FAA now contends that a new FBO is absolutely necessary because corporate jet traffic at Hanscom is increasing, even if overall traffic is not. But the administrative record reveals that FAA has denied the link between traffic and FBO use, and also has never attempted to forecast the increase in demand for a jet-specific FBO. The record also shows that FAA has never shown, never asked about, indeed has actively denied that Hanscom's existing facilities lack capacity to accommodate increases in demand. (FAA appears to say this because it needs to argue that the FBO will not generate additional traffic and noise that would affect sensitive properties.)

But even if there were a need for a new FBO hangar, FAA has rejected plausible alternative sites at Hanscom (and elsewhere) simply because they are less "efficient," a rationale that does not comply with Section 4(f) and that would green-light just about any proposal to raze parks and historic properties. And in point of fact the record here belies the arguments of FAA and Massport about those alternative sites and demonstrates that Massport had previously identified at least one such site as appropriate.

Whatever the merit of the historic structure at issue in this case – which FAA

and Massport assail at length even though its protected status is undisputed – such an analysis is not sound administrative procedure. The EA is invalid.

## **ARGUMENT**

### **I. FAA VIOLATED SECTION 4(f)**

#### **A. FAA Misstates the Legal Standard**

The Supreme Court held in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 412-13 (1971), that, under Section 4(f) of the Transportation Act, an alternative that does not impair a protected site can be rejected only if “there were truly unusual factors present ... or the cost ... reached extraordinary magnitudes.” FAA points out (FAA Br. 29) that the “unusual factors/extraordinary magnitudes” requirements are not applicable to alternatives that do not meet “the transportation needs of the project,” citing Neighborhood Ass’n of the Back Bay v. Fed. Transit Admin., 463 F.3d 50, 65 (1st Cir. 2006).<sup>1</sup> FAA also argues that other courts have upheld agency actions under 4(f) even in cases where the agency has not recited the “magic words” from Overton Park. FAA Br. 28. Petitioners do not dispute these points. But there are four important additional principles that FAA ignores or misapplies.

First, both the agency’s definition of “transportation needs” and its determination of whether a project meets those needs are subject to regular “hard

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<sup>1</sup> Massport is “trouble[ed]” that Petitioners did not cite this case to the Court, Massport Br. 31 n.26, but it appears in Petitioners’ opening brief on page 26.

look” review. FAA cites to NEPA cases for the proposition that it was required under 4(f) to give “substantial weight” to Massport’s definition of “transportation needs.” FAA Br. 27 n.7. But these cases are premised on the absence in NEPA of a substantive limit on a developer’s prerogatives. See, e.g., City of Grapevine v. Dep’t of Transportation, 17 F.3d 1502, 1506 (D.C. Cir. 1994). Section 4(f) is different. It authorizes projects only where they “require[e] the use” of the protected site. 49 U.S.C. § 303(c). FAA’s determination that destruction of a historic site is “required” must be reviewed like any other agency conclusion, for whether it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” and for whether it is supported by “substantial evidence.” See APA § 706; see also Alaska Center for the Environment v. Armbrister, 131 F.3d 1285 (9th Cir. 1997) (“ACE”) (determination that project did not meet transportation needs was reviewed under arbitrary and capricious standard); Davis v. Mineta, 302 F.3d 1104, 1119 (10th Cir. 2002) (rejecting agency’s statement of transportation needs).

Second, the cases discussing the “transportation needs” exception to Overton Park all involved projects that were manifestly impractical or even illegal; minor disadvantages have not been enough to invoke the exception. For example, in Back Bay the court held that an alternative that would have violated the Americans with Disabilities Act did not meet the transportation needs of the project. 463 F.3d

at 65. And in ACE, much relied on by FAA and Massport, the proposal was to connect Whittier, Alaska to the outside world by means of briefly transferring residents' cars to a flat-bed train. Notwithstanding the manifest absurdity of this alternative, its drawbacks were not a matter of speculation or even assertion; instead the agency relied on several studies and "thoroughly considered the relevant factors and alternatives." 131 F.3d at 1288. If the exception for projects failing to meet "transportation needs" were expanded to encompass less fundamental or well-founded objections – for example the assertions about marginal costs and inconveniences that FAA has adduced to reject putting an FBO on the East Ramp or in a remodeled Hangar 24 – it would be too easy for agencies to characterize any practical disadvantage as a failure to meet transportation needs, and Overton Park would be a dead letter. See Section I.B.3, below. Indeed, FAA and Massport barely conceal their hostility to Overton Park and effectively invite this Court to disregard this binding Supreme Court precedent.

Third, while FAA cites cases establishing that "magic words" need not be recited in the EA, that is beside the point. These same cases make it clear that the EA must still be conducted consistent with Overton Park: the agency must start with a "strong presumption" against using protected sites and must adduce a "strong" or "powerful" reason to overcome this presumption. See, e.g., Hickory Neighborhood Defense League v. Skinner, 910 F.2d 159, 164 (4th Cir. 1990)

(citations and quotation marks omitted) (“Hickory II”). It is FAA’s substantive, actual failure to meet either of these requisites that is at issue here, not the semantics of the EA.

Finally, FAA makes much of the Petitioners’ citation (Pet. Br. 28, 35) of Stop H-3 Ass’n v. Dole, 740 F.2d 1442 (9th Cir. 1984), a case FAA contends has been limited by subsequent cases. FAA Br. 27. But Stop H-3 still stands for the point established by the Supreme Court in Overton Park: that the “protection of [parks and historic sites] was to be given paramount importance . . . and were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes.” 401 U.S. at 412-13. For all the reasons that follow, FAA’s analysis was not consistent with this standard.

**B. FAA’s 4(f)(1) Determination Was Arbitrary and Capricious**

**1. FAA Has Never Meaningfully Identified “Transportation Needs”**

FAA claims in its brief that it rejected all three alternatives to destroying Hangar 24 (do nothing, develop the East Ramp, re-develop Hangar 24), because these alternatives did not meet “transportation needs.” FAA Br. 29. FAA does not argue that its analysis of any alternative would meet the higher Overton Park standard that applies to alternatives consistent with transportation needs, and consequently it relies primarily on cases like ACE and Back Bay, where

alternatives were rejected based solely on their failure to meet transportation needs. But the problem with FAA's argument is that FAA has never meaningfully identified these "transportation needs."

The primary transportation need cited in the EA is the need to "replace Hangar 24 with a modern hangar facility that would provide service ... for general aviation aircraft, particularly larger aircraft." FAA Br. 21 (quoting EA). This is not a formulation of a problem to be solved, but rather a "Jeopardy!" clue, a question with only one answer: no alternative save the preferred alternative could possibly meet such a need. See, e.g., Davis, 302 F.3d at 1119 (agency "could not define the project so narrowly that it foreclosed a reasonable consideration of alternatives"). One might try to reformulate this definition to eliminate its obvious bias, for example by defining the transportation need as the need to expand Hanscom's FBO services for larger aircraft. Yet, strangely, FAA says this would not be a proper definition of transportation need: "Petitioners argue that FAA failed to demonstrate the need for a hangar specifically to service larger jets that cannot fit in the other FBOs. ... [H]owever, the purpose of the project was never so limited." FAA Br. 26 (citations omitted).<sup>2</sup> FAA never says anything more about what the "transportation need" really is if it is not to service larger jets.

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<sup>2</sup> The reason FAA rejects this definition of transportation needs may be that this definition would undercut its argument (FAA Br. 29) against the East Ramp alternative.

All this leaves Petitioners genuinely puzzled. It is impossible to evaluate the alternatives against FAA's chosen yardstick, because FAA will not say what that yardstick is. In this situation, the only alternative is to remand the decision to the agency so that it may clarify its analysis to permit adequate review. SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (“We may not supply a reasoned basis for the agency's action that the agency itself has not given.”).

## **2. FAA Has Not Established That a New FBO Is Required**

FAA's next problem is that its analysis of the no-build alternative fails to make the case that the status quo is problematic, and that a new FBO needs to be built. As noted above, Section I.A, FAA's analysis here is subject to standard “hard look” review. FAA's argument has four parts: (1) use of Hanscom by corporate jets is expected to increase, (2) “the majority of FBO activity involves servicing corporate general aviation activity,” (3) “it is incorrect to assume that a new FBO is not needed until other FBOs are at maximum capacity,” because the FBO hangars are specialized and because a “number of aircraft already based” at Hanscom have expressed an interest in the facility. FAA Br. 22-24, 26, 30.

There are several problems with FAA's argument. First, the estimate of future jet activity is based on an extrapolation of historic increases. Supp. App. 55. The estimate comes from a 2005 environmental review that predates the recession and is not based on any forward-looking data, such as a survey of the relatively

small number of large local businesses that would be the primary customers of a new FBO. Id.; see also Massport Br. 17 (listing businesses by name).

Second, even assuming the increases materialize, there is no substantial evidence – no evidence at all, in fact – for the proposition that increased corporate jet activity at Hansom will lead to increased demand for FBOs by these jets. It is simply an assertion. In fact, it is an assertion that FAA elsewhere rejects, because its basic position on NEPA is that FBO use and flight activity are not linked. FAA Br. 42. Petitioners made this point in their opening brief, Pet. Br. 33, and FAA and Massport have not responded to it.

Third, even if one were to assume additional demand for FBO services by large jets, FAA never asserts that Hanscom’s existing facilities are inadequate to meet this demand. In fact, FAA’s consultant admitted that the agency “did not even ask the two existing FBOs about their capacity,” App. 70, and in its brief FAA eventually denies that the relevant facilities are inadequate. FAA Br. 42 (“Hangar 24 redevelopment would not likely cause any induced growth because Hanscom is not presently capacity-limited”) (emphasis added); see also App. 32 (comment attesting to adequacy of existing FBOs).<sup>3</sup> Moreover, it is not simply a

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<sup>3</sup> Massport claims that the record establishes increasing demand for service and storage of corporate jets at Hanscom. Massport Br. 17 (citing Supp. App. 58). But its record cite merely establishes that Massport expects jet traffic to grow. See Supp. App. 58. Massport also claims that the relevant facilities are in poor condition, but its own record cite shows that the two existing FBOs are in excellent

question of whether existing facilities can meet demand, because Massport is planning significant new developments in the East Ramp and Terminal Areas. See, e.g., FAA Br. 40-41; Supp. App. 202 (proposals to put in six to eight new hangars in the East Ramp area, totaling 320,000 to 400,000 s.f); 2005 ESPR (A.R. 5) at 4-9 (proposal to replace 20,300 s.f. hangar with 30,000 s.f. hangar in the Terminal Area). The EA itself concedes that these and other developments will meet aviation demand: “While a ‘do nothing’ alternative takes no action with regard to replacing Hangar 24, it assumes that MassPort provides for other improvements elsewhere on the airport that respond to aviation demand.” See App. 11.

FAA tries to prove the need for an FBO by saying the record establishes several vague and, indeed, utterly bland propositions – i.e., that “the majority of FBO activity involves servicing corporate general aviation activity,” that “some FBOs specialize in servicing particular brands of aircraft,” that it is “it is incorrect to assume that a new FBO is not needed until other FBOs are at maximum capacity,” and that a “number” of aircraft based at Hanscom have expressed an interest in a new facility. FAA Br. 23, 24 (internal quotation marks omitted). Yet cautioning against unwarranted assumptions is not the same as asserting (much less establishing with substantial evidence) that the current and already planned

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condition. Compare Massport Br. 18 (“outmoded and obsolete”) with A.R. 5 at 2-3 to 2-4 (FBOs in “excellent” condition).

facilities either cannot serve corporate jets or lack the capacity to accommodate whatever increases in demand might occur for corporate jet services. It is also obvious that lack of capacity cannot be proved by vague, unsubstantiated references to inquiries from planes that are already based at Hanscom. See, e.g., Davis, 302 F.3d at 1122 (rejecting agency’s “conclusory and perfunctory” 4(f) analysis); Committee to Preserve Boomer Lake Park v. Dep’t of Transp., 4 F.3d 1543, 1553 (10th Cir. 1993) (“Unsubstantiated determinations or claims lacking in specificity can be fatal for an EA/4(f) statement”); Druid Hills Civic Association v. Federal Highway Admin., 772 F.2d 700, 718 (11th Cir. 1985) (“we cannot evaluate the reasonableness of these conclusions because the EIS does not provide the predicate facts on which to make a reasoned judgment”); cf. Eagle Foundation, Inc. v. Dole, 813 F.2d 798, 803 (7th Cir. 1987) (courts’ 4(f) review cannot be based on “superficial beliefs and assumptions”).

The inadequacy of FAA’s analysis can be illustrated by comparing it to the analysis used to reject the rail-line alternative in ACE. There, all parties agreed that the existing train service to Whittier did not meet transportation needs. The agency used “several studies” to quantify exactly how much each alternative means of getting to and from Whittier would be used. The studies determined that loading cars onto flat-bed trains would not and could not respond to nearly as much demand as the proposed road – in fact the road would generate almost ten

times as much use as the rail proposal. 131 F.3d at 1288. The court upheld the project because the agency “thoroughly considered the relevant factors and alternatives and reasonably determined the improved rail system is not a prudent alternative.” Id. Here, by contrast, FAA has never measured the demand for the proposed FBO, or compared it to the supply of relevant FBO services already planned or in existence. Instead, FAA instead merely relies on an outdated and simplistic projection of flight activity – a metric that it later says is irrelevant to demand for FBOs. If FAA does not accept this evidence in other contexts, indeed if FAA is unwilling even to assert that the existing and already planned facilities are inadequate to meet whatever the anticipated extra demand might be for FBOs, its determination that a new facility is “require[ed]” under section 4(f) must be arbitrary and capricious.

FAA’s failure to identify a “transportation need” also has repercussions on its analysis of all alternatives. FAA and Massport argue that, because the alternatives to destroying Hangar 24 fail to meet the transportation need for the project, the case law does not require FAA to meet the otherwise “quite restrictive” 4(f) test. Save Our Heritage, Inc. v. FAA, 269 F.3d 49 (1st Cir. 1985); FAA Br. 27-28; Massport Br. 31-32. But FAA’s argument depends on the tautology that the “need” for razing Hangar 24 to build an FBO is to raze Hangar 24 to build an FBO. Its argument also depends on there being some real problem with the status quo.

When FAA's self-fulfilling prophecy and flawed assumptions are set aside, FAA's decision cannot stand.

### **3. The East Ramp Alternative Is Prudent**

Even if the Court were at liberty to redefine for FAA the project need along potentially more rational lines (such as the alleged need for an FBO hangar of a certain size), and even if such a need were established by the record, the EA would still fail to satisfy Section 4(f).

FAA argues that the East Ramp alternative is "imprudent" because (1) the taxiing distance between the terminal and an East Ramp FBO is 2,000 feet longer than the distance between the terminal and Hangar 24, (2) planes using an East Ramp FBO would have to taxi through smaller parked aircraft, (3) the East Ramp is less attractive to developers, (4) the East Ramp is needed for new general aviation hangars, and (5) the East Ramp would not be efficient for passengers because access to the East Ramp is through the Air Force base. FAA Br. 31-33. FAA argues that these objections show that these alternatives do not meet "transportation needs." FAA Br. 29.

The initial problem with FAA's argument is that these objections, even if taken at face value, are marginal "efficiency" disadvantages – not the sort of serious impracticality or illegality that undercut "transportation needs" in Back Bay and ACE. See Section I.A, above. Moreover, it is impossible to evaluate

whether these disadvantages have any effect on “transportation needs,” because FAA has never defined those needs. See Section I.B.1, above. FAA also never asserted in its EA that these objections constituted a failure to meet transportation needs; this is counsel’s post-hoc rationale. They bear on which site is the ideal location for an FBO, but they cannot possibly establish that the alternative fails to address the basic problem that supposedly exists at Hanscom, which is the lack of FBO services for corporate jets. Indeed, if these objections were credited as demonstrating these alternatives’ threshold inadequacy, then the searching review required by Overton Park would never occur and the statutory presumption against development of protected sites could be endlessly gamed by FAA’s ability to characterize any imperfection as a failure to meet “needs.”

And once it is conceded that putting a new FBO on the East Ramp and/or in Hangar 24 is not about “transportation needs” but rather is subject to the broader Overton Park inquiry into “prudence,” then the EA’s defects becomes manifest. The EA never demonstrated that the pedestrian objections cited above are “truly unusual factors” or “unique problems,” 401 U.S. at 413, or that they constitute “strong” or “powerful” reasons sufficient to overcome the “strong presumption” against destroying a historic site, Hickory II, 910 F.2d at 164. Nor does FAA so much as contend that this showing has been made in its brief. Thus FAA has applied the incorrect standard in its evaluation of the East Ramp and Hangar 24

alternatives. For this reason alone its analysis is arbitrary and capricious, and should not be upheld here. See Hickory Neighborhood Defense League v. Skinner, 893 F.2d 58, 61-62 (4th Cir. 1990) (record must disclose whether agency weighed 4(f) impacts using the appropriate standard).

Moreover, the objections to the East Ramp do not withstand scrutiny. For example:

- One of the main reasons FAA says that an East Ramp FBO would be improper is because jets would have to taxi through smaller parked aircraft. FAA Br. 31. But the only record cite for this contention is a reference to an aerial photo. Supp. App. 31. The objection was never made in the EA and the photo in any event is too illegible to illustrate the alleged problem. The objection is a post-hoc rationale based solely on counsel's attempt to eyeball a picture.
- FAA complains about the extra 2,000 feet of taxiing that would be required between an East Ramp FBO and the terminal. One informed comment described this distance as "minimal" by civil aeronautics standards, Pet. Br. 38 – an argument FAA has never answered. FAA also complains about the distance between the East Ramp and the other FBOs. FAA Br. 31-32. Yet in the very same paragraph of its brief, FAA cites an FAA Advisory Circular to the effect that FBOs and administrative buildings should be "sufficiently

separated to preclude conflict between airplanes operating from these areas.”

Id. Moreover, Petitioners pointed out in their opening brief that taxiing from Hangar 24 is arguably more dangerous than taxiing from the East Ramp, because from Hangar 24 aircraft would have to cross a runway and a runway protection zone – an argument FAA has never answered. Pet. Br. 37-38. It thus appears that the location of the East Ramp is an advantage, not a disadvantage.

- FAA also notes that an East Ramp FBO would not be “efficient” for public passengers, because access would be through an Air Force base. App. 12. But FAA never says why passengers would need to embark at the FBO, where the plane is serviced, instead of at the terminal. Moreover, Massport’s 2005 ESPR targets the East Ramp for an array of general aviation and cargo facility development, without any indication that access is a crippling problem. Instead, the 2005 ESPR treats access as a routine matter. See 2005 ESPR (A.R. 5), 6-84 to 6-85. FAA argues that corporate jet users differ from all the current occupants of the East Ramp; supposedly corporate jet users are “itinerant” whereas others are “local” and thus “better situated to acquire security badges.” FAA Br. 32 n.10. But FAA cites no evidence for the proposition that the corporate jets likely to use an FBO are more “itinerant” and this argument cannot be squared with its argument that

the demand for the third FBO is driven by corporate jet use by local businesses that “already operate at Hanscom.” See Massport Br. 17; FAA Br. 30-31.

- FAA says that the East Ramp alternative would “preclude construction of needed facilities” for general aviation aircraft. FAA Br. 33; see also App. 12 (general aviation aircraft). This objection is listed last in FAA’s brief, and is not listed at all in Massport’s brief. But in the EA it is described as “[p]erhaps the greatest disadvantage” associated with putting an FBO on the East Ramp. App. 12. This issue may well be the crux of the matter, i.e., Massport may well be trying to reserve the East Ramp for general aviation development by razing Hangar 24. The obvious problem with this analysis is that Massport concedes that general aviation operations at Hanscom are falling through the floor. See Supp. App. 54 (showing rapid decline in general aviation since 2000). Indeed, FAA’s position here is that this project is not based on Massport’s expectation that this long-term decline in general aviation will be miraculously reversed. See FAA Br. 24, see also Supp. App. 55 (forecasting massive increase in general aviation through 2020). But at bottom it turns out that the “greatest” reason an FBO cannot be put on the East Ramp is that Massport is vapor-locked on expanding its capacity at

the East Ramp to service the very same GA sector that is rapidly disappearing.

- Finally, and perhaps most surprisingly, FAA’s attack on the suitability of the East Ramp is contradicted by Massport’s own ESPR, which says that additional facilities could be developed in the East Ramp, including “a series of GA/corporate hangars that could be approximately 30,000 to 40,000 square feet each in size.” 2005 ESPR (A.R. 5), at 4-33 (emphasis added). Indeed, the ESPR identified the East Ramp area (and also the terminal area) as the most suitable areas for “corporate hangars,” but did not identify the Hangar 24 area as suitable for this purpose – the area that FAA now says is the only suitable area. See ESPR (A.R. 5) at Figure 4-4; compare FAA Br. 32; Massport Br. 28, 34 (Hangar 24).

In sum, FAA’s criticisms of the “efficiency” of an East Ramp FBO are picayune, sometimes irrational, sometimes absent from the record, and sometimes directly contradicted by the record. They do not establish that an FBO in the East Ramp would fail to satisfy the relevant “transportation need” (whatever that is exactly), and they certainly do not amount to “strong” and “powerful” reasons sufficient to overcome the statute’s “strong presumption” of preservation, Hickory II, 910 F.2d at 164. They should be rejected.

#### 4. The Reuse Alternative Is Prudent

FAA makes three arguments against re-using Hangar 24 as an FBO: (1) Hangar 24 is too small to accommodate all the demand for corporate jet hangar space, (2) remodeling the building “may or may not be structurally feasible,” and (3) “the cost of refurbishing the building for use as a hangar would be more than constructing a new hangar.” FAA Br. 33-34. It contends that these objections go to Hangar 24’s ability to meet transportation needs.

The first objection of course depends on whether FAA’s expectations of FBO demand will not only come true, but require the 30,000 to 60,000 s.f. footprint planned by Massport. For all the reasons cited in Section I.B.2, there is no basis for supposing that any new FBO is needed, still less than such an FBO must have the dimensions planned by Massport. This is another instance of the problem being defined in terms of the preferred solution.

The feasibility objection is defective because it is completely inconclusive. FAA says remodeling the building “may or may not be structurally feasible,” but this punts its obligation under 4(f) to decide whether -- bearing in mind the strong presumption in favor of preserving historic sites -- it is feasible. If anything the EA suggests that with modifications the building could be converted into a jet-ready FBO. App. 12. Finally, FAA’s cost objection clearly has nothing to do with transportation needs, but see FAA Br. 29, which means that the extra cost must be

“outrageous” under Overton Park to justify rejecting the alternative on this basis.

But here, as FAA acknowledges, the cost differential is exceptionally modest: \$2.5 million versus \$3 million. FAA Br. 12.<sup>4</sup>

**C. FAA Failed to Undertake All Possible Planning to Minimize Harm**

Petitioners’ opening brief argued that FAA’s duty to minimize harm required it to postpone demolition of Hangar 24 until after completion of the design, permitting and financing of the new FBO. Pet. Br. 44. Petitioners also argued FAA should have required a developer to incorporate parts of Hangar 24 into whatever new building replaces it. Pet. Br. 45.

FAA responds by repeating the argument that a new FBO is needed, FAA Br. 38. But FAA must undertake “all possible planning” to minimize or avoid harm. By failing to require even the design of a new facility, FAA has abandoned any pretence of engaging in “all possible planning.” Indeed, it is at least possible that by the time Massport is ready to build the new FBO, circumstances may have changed – financing may have dried up, the demand for jet FBO services may be

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<sup>4</sup> FAA and Massport also argue that FAA properly rejected the Worcester alternative, because the proposed Hanscom FBO “is designed to serve larger general aviation aircraft that already operate at Hanscom” and that want an FBO near “their place of business or residence.” FAA Br. 30-31. But this argument raises once again the whole problem that need for the FBO has never been quantified or even defined, so it is impossible to say whether a Worcester FBO would be useful or not.

lower than what Massport expects, other buildings may become vacant. But by then Hangar 24 will be gone. The first sensible move in any realistic plan to minimize harm would be to make demolition contingent on the elimination of the contingencies affecting the new building. But FAA has authorized Massport to shoot first and ask questions later. FAA also has never responded to Petitioners' partial incorporation argument, thus evidencing again the lack of "all possible planning."

Petitioners acknowledge that the memorandum of agreement among FAA, Massport and the Massachusetts Historical Commission involves some mitigation measures, but Section 4(f)(2) calls for "all possible planning."

## **II. FAA VIOLATED SECTION 106**

### **A. Limiting the Area of Potential Effect ("APE") to the Footprint of Hangar 24 Was Arbitrary and Capricious**

FAA's response makes clear that it did not "take into account" the full range of potential effects on historic sites that could result from the construction and operation of a much larger facility at the Hangar 24 site. 16 U.S.C. § 470f. Instead of identifying all such historic properties, assessing potential impacts from the proposed action and mitigating those impacts, FAA narrowly defined the APE as the footprint of Hangar 24, evaluated noise impacts from a completely different development proposal in a different part of the airport, decided that those would

not be significant, and simply stopped there. This truncated approach violated Section 106.

With respect to potential noise effects, FAA fails to respond to Petitioners' contention that by establishing an exceedingly narrow APE, the FAA failed to follow its own order. Under this order, “[s]pecial consideration needs to be given to the evaluation of the significance of noise impacts on noise sensitive areas within national parks, national wildlife refuges and historic sites,” where the FAA’s threshold of significance (i.e., 1.5 dB increase at or within the 65 dB DNL contour) may not be sufficiently protective. FAA Order 1050.1E, App. A §14.3 (A.R. 3). Indeed, FAA acknowledges that its own guidelines (at Appendix A of 14 C.F.R. Part 150) regarding land uses compatible with the 65dB DNL threshold “are not sufficient to address the effects of noise on some national parks or some parts of national parks.” Id. at §14.4b (emphasis added); see also Order 5050.4B, Table 7.1 (AR 4) (“The DNL 65dB threshold may not adequately address noise effects on visitors to these areas.”). FAA acknowledges that Minute Man Park and Walden Pond, for instance, are “potentially sensitive sites.” FAA Br. 52.<sup>5</sup> Yet,

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<sup>5</sup> FAA argues that the Minute Man is not a “quiet setting” and thus not deserving of any special consideration. FAA Br. 51. But FAA’s orders state that a quiet setting is an *example* of a “unique and sensitive” property to which the policy thresholds should not be automatically applied. It would be hard to contend that a park commemorating an event vital to the founding of our nation is not a “unique and sensitive” property or that quiet is unimportant to its purpose.

rather than identify the special consideration it gave to parks and historic properties, FAA simply sticks with the default threshold. See FAA Br. 41-42.

Massport's suggestion that "Hanscom is getting quieter" ignores two important facts. Massport Br. 55. First, "[i]ncreases in general aviation jet activity" – which is exactly the trend that FAA and Massport expect to continue and is the basis for the proposed project – "partially offset these decreases in noise levels." 2005 ESPR at 7-1 (A.R. 5). Second, and more importantly, Massport's own analysis shows that noise-sensitive receptors around Hanscom are expected to experience increases in the time they are exposed to noise levels above the 55dB and 65 dB thresholds. See id., App. D at Tables D-9 through D-16 (showing increases in both levels for all noise sensitive properties). The importance of this consideration is reflected in the administrative record, which shows that Minute Man's whole reason for being already is threatened by noise from Hanscom – not the average noise measured by the FAA's day-night average sound level (DNL), but the temporary, overwhelming roar of planes coming into or out of Hanscom. Specifically, the Minute Man Park superintendent told FAA that "there is already a serious noise impact that renders impossible the quiet reflection that visitors to the park are seeking," and that the Park Service's survey "has conclusively shown that noise levels from jet aircraft take-offs directly over the park frequently make it impossible to for park visitors to hear the presentations of the Park Rangers." App.

49, 118; see also App. 174-75 (Minute Man is among the “Eleven Most Endangered Places” because of activities at Hanscom).<sup>6</sup> Rather than give special consideration to the actual time that noise sensitive properties will suffer excessive noise, FAA obfuscates these important facts by relying on its generic policy threshold that averages noise over the entire day.

In response to Petitioners’ criticism that FAA contrived a 0.2 dB number for the Hangar 24 project and then arbitrarily added that to its noise analysis for the East Ramp project, FAA makes no attempt to defend the number. Instead, FAA argues that it did not need to perform any site-specific analysis since the East Ramp proposal is “a reasonable benchmark” because it involves hangars and is larger. FAA Br. 43. However, FAA and Massport remain silent regarding the fact that the Hangar 24 site is not merely intended “to shelter aircraft that are already stored at Hanscom” as is the East Ramp project, id., but to service larger and hence louder jets. See 2005 ESPR at 7-1 (“These trends in activity levels continue in both the 2010 and 2020 scenarios, with the increases in Stage 3 general aviation jet activity driving a projected increase in overall noise levels”). Further compounding the lack of empirical foundation for FAA’s 0.2 dB number is that FAA ignored relevant noise-related comments, including that FAA’s study should

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<sup>6</sup> Petitioner SHHAIR pointed out in its comments on the EA that the DNL metric relied on by FAA does “not realistically and adequately gauge how receptors perceive the impact of discrete noise events and noise events at particular times of day.” Pet. Add. 85-86. FAA ignored this comment. Id. at 110.

have assumed an increase in air traffic noise proportional to the new hangar capacity, and that FAA's analysis improperly "assume[d] selectively quiet aircraft." App. 64, 65, 105.

The record is thus abundantly clear that Hanscom's noise impairs nearby sensitive properties. FAA was obliged by Section 106 to establish an APE that considered those effects and its refusal to do so was arbitrary and capricious. The practical consequence of FAA's failure was not harmless, since as the foregoing record evidence suggests, FAA could not have supported a finding of no significant noise impact within a properly defined the APE. At the very least, FAA could not have dismissed any effort to identify and implement additional mitigation measures. This is so particularly with respect to Walden Pond, whose status as a national landmark triggered Section 110(f)'s requirement that FAA "to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark." 16 U.S.C. § 470h-2. Neither FAA nor Massport responded to Petitioners' Section 110(f) argument.

In addition to noise, FAA sidestepped any evaluation of Petitioners' viewshed and fire concerns. FAA does not dispute that it never established an APE with respect to potential viewshed impacts. Cf. Valley Community Preservation Comm'n v. Mineta, 373 F.3d 1078, 1091 (10th Cir. 2004) (affirming agency decision to establish "variable APEs" for different resources and categories

of potential effects). FAA argues that Hanscom is visible from few locations beyond the airport, see FAA Br. 44, but the record does not establish where those locations are and whether a larger facility at the Hangar 24 site will expand the airport's visibility. That FAA ignored such a basic matter exemplifies the lack of meaningful, site-specific analysis. FAA contends further that the new facility will not be the tallest building at the airport and that it will "fit within the profile of other existing hangars at Hanscom." FAA Br. 45. However, there is no data in the record regarding the heights of other structures and from where outside the airport they may be visible. Thus, this is a post hoc argument that should be ignored by the Court. See Overton Park, 401 U.S. at 419 (1971) (rejecting "'post hoc' rationalizations").<sup>7</sup> The Court should also reject FAA's attempt to impose on Petitioners the impossible burden of identifying sites from which the facility would be visible in the absence of an actual design.

With respect to potential fire hazards, FAA deems it sufficient that hazardous materials "would be regulated by the State Fire Marshall's Office." FAA Br. 45-46. But this is not a meaningful analysis of potential effects. Moreover, what the EA actually states is that "[w]ithout demolition design details

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<sup>7</sup> Massport erroneously claims that the project's potential visual impact was not raised in Petitioners' brief or during the administrative process. It was. See Pet. Br. 50; App. 61, 93, 191.

or more precise details of particular users of the new facility, it is not practical to quantify this impact.” App. 14-15.

FAA not only failed to give special consideration to parkland and historic properties and to analyze potential visual and safety concerns raised during the administrative process, it also has not provided any assurance these potential effects will ever be evaluated before a new facility is actually built. Compare Valley Community, 373 F.3d at 1089 (upholding agency decision where it “provided for the contingency” to address discovery of new historic properties or new impacts as the project design and construction progressed). Section 106 demands more. FAA’s determination must be overturned.

**B. FAA’s Decision That Hangar 24 Is Not Eligible Under Criterion C Was Arbitrary and Capricious**

In April, 2009, the Concord Historical Commission’s consultant provided to FAA a report that detailed several significant architectural features of Hangar 24, including its trusses, V-shaped profile and novel radiant floor heat system, all of which made it eligible for listing on the National Registry of Historic Places under Criterion C. See App. 117. FAA responds, as it did during the administrative process, that the structural engineering report prepared by its consultant described these features and thus FAA “was aware of the trusses at the time it made its original decision.” FAA Br. 47.

Of course, the law required FAA not merely to be aware of the architectural features but to evaluate their historical significance and then to assess impacts and identify appropriate mitigation. See 36 C.F.R. §§ 800.4, 800.5. In any event, the engineering report made no findings regarding the historical significance of Hangar 24's architectural features and is therefore irrelevant to the determination of whether Hangar 24 is eligible under Criterion C. And beyond FAA's statement that "[t]here is no information in [CHC's new] documents that would cause us to revise our conclusion that Hangar 24 is eligible for inclusion on the National Register under Criteria A and B, but not C," Supp. App. 195, the record is silent regarding any actual assessment of Hangar 24's "final 'gull-wing' form . . . [which] is believed to be unique," and the fact that it "is also said to have had the first seismic pads to isolate the building's equipment from any earthquake-related shockwaves." A.R. 117.

FAA adds that Hangar 24 cannot meet Criterion C because "additions (e.g., auxiliary buildings) and modifications over the years compromise the integrity of the original hangar." But FAA cites only to a letter written by Massport and not to any professional historical evaluation of the structure. Such blind reliance on the project proponent falls short of FAA's obligation to make its own independent judgment. See Overton Park, 401 U.S. at 413 ("the Secretary is not to limit his consideration to information supplied by state and local officials but is to go

beyond this information and reach his own independent decision.”); cf. Nat’l Wildlife Fed’n v. Coleman, 529 F.2d 359, 369 (5th Cir. 1976) (under §4(f) “Secretary must go beyond the information supplied by state and local officials to reach his own independent judgment”) (quotation omitted). For the same reason, FAA’s defects are not cured by the fact that the State Historic Preservation Officer concurred with its decision.

Massport argues that eligibility under Criterion C “is irrelevant” since Hangar 24 is already eligible under other criteria. Massport Br. 49; see Supp. App. 195-96 (FAA, same). This argument is unsound. Even FAA acknowledged that the finding that Hangar 24 is not eligible for listing under Criterion C “is significant in terms of mitigating for adverse effects, since there may be an opportunity to commemorate for the event and the person but no practical alternative to avoid destruction of the building.” Supp. App. 176; see App. 75 (“As John Silva observed during the February 9, 2008 consulting parties meeting, Hangar 24 would be eligible for listing on the National Register regardless of which criteria it satisfies but, as he also noted, the reasons for its listing would be a factor in determining appropriate mitigation measures.”).

Because FAA failed to properly consider the facts bearing upon Hangar 24's eligibility under Criterion C its decision must be overturned.<sup>8</sup>

### CONCLUSION

Petitioners respectfully request that the Court hold the Environmental Assessment invalid.

Dated: March 29, 2011

THE LAW OFFICES OF MATTHEW  
F. PAWA, P.C.

/s Matthew F. Pawa  
Matthew F. Pawa

Respectfully submitted,

KLAVENS LAW GROUP, P.C.

/s Jonathan Klavens  
Jonathan Klavens

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<sup>8</sup> On FAA's failure to comply with NEPA, Petitioners rest on their 106 arguments and on the arguments in their opening brief. In any event, FAA's brief merely denies the noise impacts of taxiing aircraft on nearby homes by pointing out that the runway is far away, but this is a non sequitur if the problem is the taxiing itself. FAA also fails to respond adequately to Petitioners' segmentation analysis – *i.e.*, it has no answer as to why it could not have told Massport that an EA was impossible without a more concrete proposal for the building itself.

## **CERTIFICATE OF SERVICE**

I hereby certify that on March 29, 2011, I electronically filed the foregoing Petitioners' Reply Brief with the United States Court of Appeals for the First Circuit by using the Appellate Case Management / Electronic Case Filing (CM/ECF) system. All counsel for Petitioners, Respondent and Intervenor who are registered with CM/ECF will be served by that system.

s/ Matthew F. Pawa  
Matthew F. Pawa  
Court of Appeals No. 98995  
Law Offices of Matthew F. Pawa, P.C.  
1280 Centre Street, Suite 230  
Newton Centre, MA 02459  
617-641-9500

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(s) Matthew F. Pawa

Attorney for Petitioners

Dated: March 29, 2011

**CERTIFICATION**

I hereby certify that the paper copies of Petitioners' Reply Brief which was filed with the Clerk are identical to the electronic copy of Petitioners' Reply Brief which was filed via the Court's ECF system on March 29, 2011.

Dated: April 1, 2011

s/ Matthew F. Pawa  
Matthew F. Pawa  
Court of Appeals No. 98995  
Law Offices of Matthew F. Pawa, P.C.  
1280 Centre Street, Suite 230  
Newton Centre, MA 02459  
617-641-9500