

March 5, 2013

Court Enforces Avigation Easements, Dismisses Claims Based On Flights On Third Runway At Seattle-Tacoma International Airport

A recent order dismissed claims by 126 property owners against the Port of Seattle. The property owners claimed that noise, vibration, and emissions from aircraft operations increased after the Third Runway at Sea-Tac Airport opened in November 2008. The Port sought dismissal of the claims based on express avigation easements that the Port owns over the properties. The court ruled that the avigation easements are valid and enforceable and barred the property owners' claims for inverse condemnation, nuisance, and trespass.

Easements Conveyed

Over the last two decades, the Port of Seattle's Noise Remedy Program has provided noise-reducing improvements (insulation, windows, doors, etc.) to more than 9,500 residential properties in areas around Sea-Tac Airport. The program is part of the Port's overall noise compatibility program that is approved by the Federal Aviation Administration. The Port paid for installing noise-mitigating improvements at eligible properties including upgraded windows, doors, and insulation. As required by Washington state law, participating property owners must grant the Port of Seattle an easement on the properties in return for the improvements. The easements relate to operations at Sea-Tac Airport, and are referred to as "avigation easements."

Contract Formation Defenses Rejected

The court rejected all of the plaintiffs' arguments that the avigation easements were invalid based on various contract formation defenses. Specifically, the court held that:

- the property owners' voluntary participation in the Noise Remedy Program, which allowed them to withdraw and did not impose undue time constraints for granting the easements, defeated plaintiffs' claim that the process was unfair;

AUTHORS:

[Tim J. Filer](#)

[Adrian Urquhart Winder](#)

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- the bargain represented by the terms of the avigation easements was not substantively unconscionable or unfair; and
- there was no evidence that the Port misrepresented the terms of the easements or subjected the plaintiffs to duress in order to obtain agreement.

The court also held that the plaintiffs who did not personally sign the easements ratified the easements when they purchased their homes because the easements were recorded against title to the properties and provided notice to potential purchasers.

Claims Dismissed

The Port moved for summary judgment dismissal of the claims of 126 plaintiffs whose properties were subject to avigation easements. In granting the Port's motion, the court first held that the Port's use did not exceed the scope of use permitted by the easements. Most of the easements at issue prescribed a limit on the average annual noise exposure that could be experienced at the property. Undisputed facts showed that the noise levels at the plaintiffs' properties were significantly below the limits prescribed by the easements. In addition, all of the easements specifically contemplated operations being conducted at future additions to the airport's facilities. The court found that the avigation easements are valid and enforceable and that current operations did not exceed the scope allowed under the easements. Accordingly, it dismissed these plaintiffs' claims for inverse condemnation, nuisance, and trespass and terminated their participation in the lawsuit.

Class Action Previously Rejected

The ruling is the latest development in this lawsuit, which was initially filed by three homeowners as a putative class action on behalf of themselves and thousands of allegedly similarly-situated property owners. The lawsuit originally asserted only a claim for inverse condemnation, alleging permanent diminution in property value caused by noise, vibrations, and emissions from aircraft using the Third Runway. After several attempts by the plaintiffs to certify the case as a class action, the Court definitively denied class certification in April 2012 and ruled that property owners seeking to assert claims against the Port must proceed individually. The plaintiffs subsequently amended their complaint to name 291 plaintiffs and added new claims for nuisance and trespass seeking damages other than permanent diminution in the value of their real property.

Foster Pepper PLLC is representing the Port of Seattle in this lawsuit. Additional motions seeking dismissal of additional plaintiffs are pending. The case is set for trial in October 2013.

View the PDF of the Court's memorandum opinion [here](#). The Court's Order dismissing these plaintiffs' claims can be seen [here](#).

For more information about the Third Runway case, please contact [Tim Filer](mailto:filet@foster.com) (206.447.2904) or [Adrian Urquhart Winder](mailto:winda@foster.com) (206.447.8972) of Foster Pepper PLLC.

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Foster Pepper has extensive experience with eminent domain and inverse condemnation disputes, representing the state, port districts, counties, cities, and other municipal clients and property owners. Our experience includes actions involving claims of property taking through regulation or failure to issue land use permits, as well as noise and odor complaints. We also represent clients who find it necessary to acquire public and/or private property for public projects.

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