

## **Class Certification Denied in Inverse Condemnation Case Against Port of Seattle Based on Flights Using Third Runway of Seattle-Tacoma International Airport**

The Third Runway of Seattle-Tacoma International Airport opened for service in late 2008. Three owners of residential properties west of the airport sued the Port of Seattle for inverse condemnation, alleging permanent diminution in property value caused by noise, vibrations and emissions from aircraft using the Third Runway. *Bearse, et al. v. Port of Seattle*, King County Superior Court No. 09-2-22569-9 KNT. The three named plaintiffs brought the action on behalf of themselves and thousands of allegedly similarly-situated property owners. The King County Superior Court recently denied class certification and ruled that property owners seeking to assert a claim must proceed individually.

Plaintiffs proposed two classes of property owners within two separate mapped areas—Class A and Class B. Plaintiffs also proposed the division of Class A into two subclasses: owners of properties subject to previously granted avigation easements in favor of the Port, and owners of properties that were not subject to avigation easements. The three named plaintiffs, who all owned property within the area mapped for Class A, were proposed as class representatives for Class A. No named plaintiff owned property within the area mapped for Class B, and no class representative was proposed for Class B.

The Hon. Bruce Heller’s Order Denying Plaintiffs’ Second Amended Motion for Class Certification found that the plaintiffs had failed to meet several requirements of Civil Rule (CR) 23 for class actions.

Most fundamentally, the Court concluded that, contrary to the requirements of CR 23(b)(3), the proposed class action would not be a superior method to adjudicate the claims of inverse condemnation because individual issues of fact would predominate over issues common to members of the class. Under applicable law, to establish inverse condemnation liability, each property owner would have to prove a permanent diminution of property value caused by aircraft noise, vibrations or emissions. Such proof necessarily would be individualized because it would differ for every property depending on the specific use, the spatial relationship to Third Runway aircraft operations, the nature and extent of noise, vibrations and emissions actually reaching each property, the presence or absence of avigation easements, the terms of such easements, and the history of the ownership of each parcel.

Judge Heller found that plaintiffs had “presented no methodology for proving a class-wide diminution of property values based on alleged increases in noise, vibrations or emissions attributable to the Third Runway.” Liability for inverse condemnation would depend on individualized “[p]roof of the noise reaching each parcel of property before and after the opening of the Third Runway, property-specific issues involved in appraising specific property values, and the inquiry of whether noise from the Third Runway caused a decrease in value of a particular property.” Additional individualized proof would also be required for properties that are subject to avigation easements, because each easement allows aircraft operations up to a certain specified noise level.

The Court further rejected the proposed class action because the named plaintiffs had interests in conflict with absent class members and would not adequately represent them. The proposed class representatives pursued only inverse condemnation claims for class members, forgoing personal injury or other property damage claims. If the class action were allowed to proceed, class members would be

precluded from later pursuing any other claims arising from the Port's operation of the Third Runway, even though two of the named plaintiffs and a number of other individuals had alleged personal injuries in other claims submitted to the Port.

Foster Pepper prosecutes and defends inverse condemnation cases, including actions relating to property taking through regulation or failure to issue land use permits, as well as noise and odor complaints. We also represent clients who need to acquire or use real property owned by private or other public entities. We focus on developing and executing the most time-efficient and cost-efficient property acquisition strategies for public entities.

*For more information about the Third Runway case, please contact [Tim Filer](mailto:filet@foster.com) ([filet@foster.com](mailto:filet@foster.com) / 206.447.2904), [Patrick Mullaney](mailto:mullp@foster.com) ([mullp@foster.com](mailto:mullp@foster.com) / 206.447.2815) or [Adrian Urquhart Winder](mailto:winda@foster.com) ([winda@foster.com](mailto:winda@foster.com) / 206.447.8972) of Foster Pepper PLLC.*