Court of Appeals No. 70220-3-I

SUPREME COURT OF THE STATE OF WASHINGTON 91379-1

KEBEDE ADMASU, *et al.*,

Petitioners,

v.

THE PORT OF SEATTLE, a municipal corporation,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioners ask this Court to review Division One's decision to affirm the trial court's order on class certification. Remarkably, their Petition for Review does not even mention the applicable standard of appellate review – "manifest abuse of discretion." *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 47, 905 P.2d 338 (1995). Division One applied this standard and ruled the trial court did not abuse its discretion when it denied certification.[1] This ruling presents no issues justifying review under RAP 13.4. The Petition should be denied.

Division One cited and followed this Court's instruction that the standard of review is "paramount" in reviewing class certification orders. Opinion at 4 (citing *Schnall v. AT & T Wireless Servs.*, 171 Wn.2d 260, 266, 259 P.3d 129 (2011)). Such a decision "is afforded a substantial amount of deference." *Schnall*, 171 Wn.2d at 266. If the trial court considered the record, applied the CR 23 criteria, and reached a decision that is "not manifestly unreasonable" and is based on "tenable grounds," the appellate court will affirm. *Id*; *Lacey Nursing Ctr.*, 128 Wn.2d at 47.

The trial court carefully considered the CR 23 issues in this case. Petitioners brought three motions for class certification. CP 37-62, 219-48, 1256-85. At the end of the hearing on the second motion, Petitioners'

[1] The published opinion, found at 340 P.3d 873, 2014 WL 7338741 (Division I, Oct. 27, 2014), is attached as Appendix 1.

counsel conceded they had not shown that the case satisfied CR 23's requirements. RP 49; CP 897. The trial court identified the evidence Petitioners had to provide on any future certification motion. CP 897-98.[2]

Months later, Petitioners filed a third motion, supported by lay and expert declarations and exhibits. CP 1000-1287. Respondent opposed the motion and, in addition to previously filed lay witness declarations, filed six expert witness declarations, extensive exhibits, and deposition excerpts from Petitioners' experts. CP 1293-1833. On reply, Petitioners filed expert declarations, depositions, and additional evidence. CP 1844-1968. At the trial court's request, the parties filed supplemental briefing and exhibits. CP 1969-2036. On the third motion alone, the court considered six briefs spanning over 125 pages and over a 1,000 pages of evidence.[3]

The trial court held hearings over two days. CP 2057; RP 76-172. After the hearings, the parties provided separate proposed findings of fact and conclusions of law. CP 2057. The trial court subsequently issued a 15-page order detailing facts from the extensive record and applying the CR 23 criteria in light of those facts. CP 2055-69 (App'x 3).

The trial court denied class certification, ruling that (1) the named plaintiffs did not adequately represent the class, (2) plaintiffs had not

[2] A copy of this Order is attached as Appendix 2.
[3] CP 1256-87, 1772-1831, 1832-33, 1944-68, 1969-76, 2037-48. For all three motions, the court considered nearly 2,000 pages of briefing and supporting evidence. *Id.*; CP 37-79, 191-213, 219-313, 319-896.

prepared a statistical model that could address their proof requirements on a class-wide basis, (3) individualized issues of fact necessary to resolve liability, damages, and the Port's defenses on a property-by-property basis predominated over common issues, and (4) a class action was not a superior method of resolving the inverse condemnation claims. *Id.* Put bluntly, the trial court gave Petitioners more than ample opportunity to meet their burden under CR 23 and found that Petitioners had failed.

The Court of Appeals unanimously held that the trial court did not abuse its discretion by denying certification. Opinion at 9. The Court of Appeals gave appropriate deference to the trial court's thorough review of the record and application of well-established class certification principles to this inverse condemnation claim. The decision is in harmony with decisions by this Court, does not conflict with decisions from other Divisions, and does not present any other basis for this Court's review under RAP 13.4. This Court should deny review.

II. IDENTITY OF ANSWERING PARTY

The Port of Seattle, Respondent, asks this Court to deny the Petition for Review filed by Petitioners Kebede Admasu, *et al.*

III. RESPONDENT'S COUNTER-STATEMENT OF THE CASE

Three property owners sued the Port of Seattle in June 2009 asserting a claim for inverse condemnation. They alleged a permanent

decrease in their property values caused by an alleged increase in noise, vibrations, and emissions from operations on the Third Runway at Seattle-Tacoma International Airport ("Sea-Tac"), which commenced operations in November 2008. CP 1-18.

A. Planning And Noise Mitigation For The Third Runway.

Since the 1980s, the Port has maintained a noise remedy program to address noise impacts from the then-existing two runways. In that program, the Port has spent approximately $300 million providing homeowners with no-cost improvements to mitigate airplane noise, such as improved windows, doors, and insulation. CP 333.

Around 1988, the Port, the Federal Aviation Administration ("FAA"), and regional planners recognized the need for a new runway at Sea-Tac. CP 517-18. The Port spent nearly 20 years planning, comprehensively reviewing potential impacts such as noise and emissions, obtaining FAA authorization, and constructing the Third Runway. *Id.*

The FAA required the Port to expand its existing noise remedy program to mitigate for the impacts of the Third Runway *before* it was built. CP 518-19. The Port spent approximately $36 million in acquiring properties and installing noise insulation at residences expected to be affected by noise from operations on the Third Runway. CP 334-35, 519.

B. Airport Noise Around Sea-Tac Decreased.

The Port has conducted multiple studies of noise exposure around Sea-Tac. FAA regulations (14 C.F.R. Part 150) set forth the FAA's process for measuring noise around airports. The FAA requires airport operators to use the Integrated Noise Model to measure noise exposure using a metric called Day Night Average Sound Exposure Level ("DNL"). CP 385-86, 3868-69. Under FAA rules, aircraft noise below 65 dB DNL is compatible with residential use. CP 3869.

The area around Sea-Tac experiencing airplane noise at levels incompatible with residential use has decreased dramatically since the late 1990s. CP 384. In 1998, more than 15 square miles around Sea-Tac experienced noise at or above 65 dB DNL. CP 393. In 2010, only 5.4 square miles had that noise level, a reduction of 63 percent. *Id*; *see also* App'x 4. Much of that area is owned by the Port. CP 410, 496.

Airport noise decreased due to two main factors. First, jet engine technology has improved significantly.[4] CP 2162-63. Second, total aircraft operations at Sea-Tac went down in the decade prior to the Third Runway opening. The September 11, 2001 terrorist attacks, changes in the airline industry, and negative economic conditions led to decreasing

[4] Sea-Tac eliminated older, noisier "Stage 2" aircraft from its fleet of planes by the mid-1990s. CP 517. Upgraded and newly manufactured "Stage 3" and later aircraft are much quieter than prior generations. CP 384, 386.

operations. CP 386-87. Operations at Sea-Tac peaked in 2000 at 445,677 operations per year. CP 520. By 2008, the year in which the Third Runway opened, operations had fallen to 345,241. *Id.* In 2009, the year after the Third Runway opened, total operations at Sea-Tac declined again to 317,873, down by approximately 28.7 percent from peak levels. *Id.* Consistent with these trends, uncontested testimony from the Port's noise expert demonstrated that noise around Sea-Tac decreased or stayed the same after the Third Runway opened. CP 1297-1303, 1315; *see* App'x 5.

C. Plaintiffs' First Two Motions For Class Certification.

Plaintiffs filed their first motion for class certification in May 2010. CP 37-62. Before the motion was heard, plaintiffs filed an amended certification motion in October 2010. CP 219-48. The trial court held a hearing on the amended motion in January 2011. RP 1-56. Near the end of the hearing, plaintiffs' counsel conceded that they had not presented evidence sufficient to satisfy their burden of showing that the case met the requirements of CR 23. RP 49; CP 897. The trial court denied the amended motion and instructed plaintiffs that if they filed a third motion, they were required to provide (1) subclasses based on varying degrees of noise impact; (2) a methodology for assessing the impact of allegedly increased noise on property values; and (3) a detailed trial plan for managing the case. CP 897-98 (App'x 2).

D. Plaintiffs' Third Motion For Class Certification.

Plaintiffs filed their third motion for class certification in April 2011. As explained at pages 1-2, *supra*, the parties submitted extensive evidence and briefing. Key points are summarized below.[5]

1. Plaintiffs' Valuation Experts Did Not Provide A Class-Wide Model For Causation And Damages.

Plaintiffs' valuation experts admitted in their depositions they had not created a valuation model that could prove, on a class-wide basis, whether allegedly increased Third Runway-related aircraft noise affected particular property values. *E.g.*, CP 1691, 1713, 1679-80, 1687. Nor did they know how the plaintiffs were going to address the wide variation in aircraft noise levels experienced in the proposed class area. CP 1697. Instead of offering a specific methodology as the court had directed, plaintiffs offered only vague assurances that their experts *could* develop a model after a class was certified. CP 1457-58, 1504-06, 2067.

2. The Theories Of Plaintiffs' Noise And Valuation Experts Were Wholly Disconnected.

Plaintiffs' valuation experts made clear that an assessment of noise levels before and after the Third Runway opened was critical to assessing whether allegedly increased noise had negatively affected the values of

[5] A more detailed discussion of the shortcomings of plaintiffs' third motion is contained in the Port's briefing on appeal. Br. of Respondent at 18-40; *see also* CP 1772-1831 (the Port's trial court briefing in opposition to plaintiffs' third certification motion).

any properties in the class area. They erroneously believed that Dr. Fidell would be providing them with this critical information. CP 1713, 1679.

Dr. Fidell did not conduct any before-and-after analysis of aircraft noise levels in the class area because no one ever asked him to do so. CP 1667. Although he was designated as plaintiffs' "noise" expert, Dr. Fidell testified to having "*no empirical information about noise levels*" and that his opinion on whether noise had increased in the class area "*would be speculation.*" CP 1667, 1635. Instead of assessing noise, Dr. Fidell relied on his one-of-a-kind "Community Tolerance Level" ("CTL") analysis, which looks at annoyance.[6] CTL is not a substitute for measuring noise. CP 1640. Dr. Fidell's CTL model had not been used in any context to quantify aircraft noise impacts on property values, *or in any condemnation proceeding.* CP 1631, 1644, 1663.

"None of the studies relied upon by Plaintiffs' valuation experts used Dr. Fidell's CTL index or an analysis of noise complaints to assess the effect of airport noise on property values." CP 2061. Plaintiffs' valuation experts did not understand what CTL measured or how it could

[6] CTL purportedly provides a snapshot of the DNL level at which one-half of the survey respondents characterized themselves as "highly annoyed." CP 1038-1213, 1304-10, 1349-68, 1400-55. According to Dr. Fidell, this "annoyance" is caused by a combination of acoustic (sound energy) and non-acoustic factors (*e.g.*, distrust of government, feelings about the airport's operator, fear of aircraft crashes, etc.). CP 1638. He conceded the increased annoyance at a lower DNL level reported in his 2009 study was exclusively *due to non-acoustic factors*, not aircraft noise. CP 1308, 1653-59. His survey also failed to segregate the impact of the Third Runway from total airport operations. CP 1357-58.

affect their valuation analysis and had never done appraisals where "annoyance" was a property attribute. CP 1713-14, 1687.

3. Plaintiffs' Valuation Experts Conceded The Case Required Thousands Of Individualized Analyses.

Plaintiffs' proposed class area was geographically broad and contained residential properties with widely varying values, value influences, noise environments, proximity to Sea-Tac, and noise attributable to the Third Runway. CP 1510-13. Plaintiffs' experts admitted they would need to further divide the class area, but could not say into how many subdivisions, how they would be defined, or whether multiple, unique valuation analyses would be needed. CP 1460, 1678-80, 1697-98, 1706, 1708, 1710, 1715. All they could say was that they were going to "*carve up some areas.*" CP 1710. Plaintiffs' experts also anticipated using hundreds, if not thousands, of individual property appraisals, owner interviews, and property drive-bys to account for the myriad of individual characteristics of the properties. CP 1691.

4. The Port's Experts Established That Valuation Involved A Predominance Of Individual Issues.

The Port engaged three property valuation and real estate economic experts. They comprehensively examined census and assessors' data and made site visits to plaintiffs' proposed class area. CP 1349, 1365-68, 1400-55, 1457-62, 1507-13, 1521-61. Residential property fell

into multiple categories (raw land, modest homes, multi-million-dollar estates, and multi-family dwellings) located at varying distances from Sea-Tac and subject to a myriad of differing land use regulations. CP 1508-13.

The Port's experts determined that "parsing" the alleged impact of the Third Runway would be extremely difficult on a class-wide basis because (1) the properties were at different locations in relation to Sea-Tac; (2) for decades the properties were influenced by aircraft operations from Sea-Tac's original two runways; and (3) plaintiffs were making a claim for property value loss at a time when the residential real estate market was experiencing its worst drop in value since the Great Depression for reasons wholly unrelated to aircraft noise. CP 1367-68, 1457-61, 1463, 1504-05, 1513, 1516-18.

E. The Trial Court Denied Certification.

The trial court held hearings on the third motion on February 3 and February 6, 2012. RP 76-172. Following review of the parties' proposed findings and conclusions, the trial court issued a 15-page order denying certification on April 9, 2012. CP 2055-69 (App'x 3). The court ruled that (1) the named plaintiffs did not adequately represent the class; (2) plaintiffs had not prepared a model that could address their proof requirements on a class-wide basis; (3) individualized issues of fact necessary to resolve liability, damages, and the Port's defenses on a

property-by-property basis predominated over common issues; and (4) a class action was not a superior method of resolving the claims. *Id.*

F. Division One Affirmed Denial Of Class Certification.

The Court of Appeals unanimously held that the trial court did not abuse its discretion in denying class certification. The court affirmed the trial court's determinations regarding predominance, agreeing that "although the Port's general actions may be common to all, liability can likely be established only after examination of the circumstances surrounding each of the affected properties." Opinion at 6. Further, the plaintiffs' proposed method for demonstrating class-wide diminution in value was not sufficiently concrete to persuade the court that common issues would predominate. *Id.* at 6-8.

Division One also upheld the trial court's "highly discretionary determination" that a class action was not a superior method for adjudicating the controversy, and noted the wealth of authority that class actions are often not appropriate in inverse condemnation cases for aircraft noise. *Id.* at 8-9. Because plaintiffs' failure to establish predominance and superiority under CR 23(b)(3) was "fatal" to certification (Opinion at 9 n.27), Division One did not address adequacy of representation.[7]

[7] The Court of Appeals affirmed the trial court's subsequent order dismissing the 126 plaintiffs with avigation easements on their properties. Opinion at 10-13. It also affirmed dismissal of 111 plaintiffs' noise-based claims under the noise exposure map

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

Petitioners identify no persuasive reason why this Court should accept review under RAP 13.4(b). The Court of Appeals gave the appropriate substantial deference afforded to class certification decisions and applied well-established law on class certification and inverse condemnation. The decision does not conflict with authority from this Court or the Court of Appeals. Nor does this case present an issue of substantial public interest requiring a determination by the Supreme Court.

A. Class Certification Orders Are Affirmed Unless They Constitute A Manifest Abuse Of Discretion.

Appellate courts in Washington review decisions on class certification for "manifest abuse of discretion." *Lacey Nursing Ctr.*, 128 Wn.2d at 47. As this Court has explained: "The standard of review is paramount in this case: it is not our place to substitute our judgment for that of the trial court." *Schnall*, 171 Wn.2d at 266. The trial court's decision to deny class certification "is afforded a substantial amount of deference." *Id.* If the record indicates the court properly considered all CR 23 criteria, the appellate court must affirm. *Lacey Nursing Ctr.*, 128 Wn.2d at 47. Petitioners do not dispute this deferential standard of review, which the Court of Appeals applied. Opinion at 4.

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statute and remanded certain other claims for further proceedings on procedural grounds. *Id.* at 13-16. No party seeks review by this Court of those rulings.

B. Plaintiffs Have The Burden Of Showing That The Case Meets All Of The Requirements Of CR 23.

Class actions are an exception to the usual rule that litigation is conducted by the individual named parties. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432, 185 L. Ed. 2d 515 (2013). Strict conformity with each element of CR 23 is required, and plaintiffs bear the burden of proving the case meets all of CR 23's requirements. *DeFunis v. Odegaard*, 84 Wn.2d 617, 622, 529 P.2d 438 (1974); *Weston v. Emerald City Pizza LLC*, 137 Wn. App. 164, 168, 151 P.3d 1090 (2007). The plaintiffs must "prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2251, 180 L. Ed. 2d 374 (2011) (emphasis in original); *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 18-19, 65 P.3d 1 (2003). Statistical or damages models must be presented and tested, must match the asserted theory of liability, and must produce results on a class-wide basis. *Oda v. State*, 111 Wn. App. 79, 94, 44 P.3d 8, *review denied*, 147 Wn.2d 1018 (2002); *see also Comcast Corp.*, 133 S. Ct. at 1433-35.

C. The Court Of Appeals' Ruling On Predominance Grounds Does Not Conflict With Other Decisions.

To meet the predominance requirement, a plaintiff must prove that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." CR 23(b)(3). The

Court of Appeals' decision on predominance in this case does not conflict with the decisions in *Smith*, *Sitton*, or *Moeller* upon which Petitioners rely.

1. The Court Of Appeals Applied The Proper Predominance Standard.

Petitioners first focus on the predominance standard referenced in *Smith* and *Sitton* that there be a "common nucleus of operative facts." Petition at 13-14. The Court of Appeals here specifically cited to *Sitton* and *Smith* and quoted this language in its decision. Opinion at 5 nn.12-13. It also acknowledged the overarching premise that "the proposed class [be] sufficiently cohesive to warrant adjudication by class representation." *Id.* at 5; *accord Schwendeman,* 116 Wn. App. at 20. The Court of Appeals did not disregard relevant precedent. To the contrary, it acknowledged and applied long-held class certification standards. The Court of Appeals simply found no abuse of the trial court's discretion on predominance.

Each of Petitioners' three cited cases involved situations where the trial court *granted* class certification and the reviewing courts deferred to the trial courts' determinations that CR 23 was satisfied. *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 280-81, 267 P.3d 998 (2011); *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 250, 63 P.3d 198 (2003); *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 322-23, 54 P.3d 665 (2002) (trial court did not abuse "its considerable discretion" in

finding predominance satisfied). Similarly here, the Court of Appeals deferred to the trial court's carefully considered decision to deny certification on predominance grounds. Opinion at 7-8.

2. The Courts' Predominance Decision Follows Washington Inverse Condemnation Authority And Cases From Across The Country.

Petitioners ignore that their cited cases presented facts and claims completely different from those presented here.[8] *Smith* involved claims that Behr's products were defective and that Behr's product labeling was inadequate. 113 Wn. App. at 323. *Sitton* involved claims of breach of contract, bad faith, and breach of fiduciary duty, where the overriding issue was whether State Farm had a practice of implementing utilization reviews in bad faith. 116 Wn. App. at 249, 254. *Moeller* was also a breach of contract case that involved construction of uniform insurance policy language. 173 Wn.2d at 269.

This case involves a claim of inverse condemnation arising from airplane noise. Such a claim requires a plaintiff to prove a permanent, measurable diminution in the market value of the plaintiff's property that is caused by the aircraft operations. *Martin v. Port of Seattle*, 64 Wn.2d 309, 318-20, 391 P.2d 540 (1964). Diminution in value of a particular

[8] Indeed, Petitioners' own authority recognizes that a predominance analysis must be based on the specific facts and claims asserted in a particular case. *Sitton*, 116 Wn. App. at 254 n.18.

parcel is not simply the measure of damages in an inverse condemnation case; it is the benchmark for whether a taking has occurred at all. *Id.*

Inverse condemnation raises a multitude of individualized issues. It is a "fundamental maxim that each parcel of land is unique." *City of San Jose v. Superior Court*, 525 P.2d 701, 711, 115 Cal. Rptr. 797 (Cal. 1974). Assessing how much noise from Third Runway operations reaches a particular parcel requires consideration of its relation to the flight tracks, altitude, direction, and types of planes taking off and landing, other sources of noise, and topography. CP 384. Assessing whether that noise caused a diminution in value involves many factors, including location, zoning, and quality of improvements. CP 1507-08, 1535-40.

Here, the Port's expert testimony demonstrated that evidence of value would necessarily be specific to each property. Every acquisition of a property right is unique in terms of property value, the highest and best use for the property, the specific influence of the governmental activity, and the extent of the taking. CP 1504. The properties located within the proposed class had completely different values, value influences, noise environments, proximity to the Airport, and noise attributable to the Third Runway. CP 1507-13. Similarly, the Port's noise expert found nothing "common" about the noise exposure levels experienced by plaintiffs'

properties.[9] "No wonder courts routinely decline to certify classes in airport-noise cases." *Bieneman v. City of Chicago*, 864 F.2d 463, 465 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989).[10]

3. The Court Of Appeals' Decision On Valuation Methods Does Not Conflict With *Moeller*.

Petitioners also compare their proposed methodology for determining class-wide diminution in property value to the methodology presented in *Moeller*, citing extensively to *Moeller*'s dissenting opinion. Petition at 16-17. First, the plaintiff's provision of a workable model in *Moeller* (not an inverse condemnation case) says nothing about the viability of Petitioners' incomplete description of what a model might do in this case. *See* Opinion at 6-8. Second, in *Moeller*, this Court again made clear that appellate courts must defer to the trial court's determinations when it has heard "days of oral argument on this issue and considered extensive briefing." 173 Wn.2d at 280. There was no abuse of

[9] CP 1296. For example, the Third Runway's contribution to noise exposure varied from as much as 52% directly north of the Third Runway to as little as 1% for areas to the west. CP 1297-98, 1317.

[10] *See, e.g., Testwuide v. United States*, 56 Fed. Cl. 755, 761, 765-66 (2003) (rejecting proposed sub-classification of properties based on noise contours and explaining that "[t]he results may differ based on the specific factual circumstances and variables affecting each group that go to the root of the question of whether a taking occurred"); *Virginians for Dulles v. Volpe*, 344 F. Supp. 573, 575 (E.D. Va. 1972), *aff'd in relevant part*, 541 F.2d 442 (4th Cir. 1976); *Town of East Haven v. Eastern Airlines, Inc.*, 331 F. Supp. 16, 18 (D. Conn. 1971), *aff'd*, 470 F.2d 148 (2d Cir. 1972); *Ursin v. New Orleans Aviation Bd.*, 515 So.2d 1087, 1089 (La. 1987); *Ario v. Metro. Airports Comm'n*, 367 N.W.2d 509, 514-16 (Minn. 1985); *City of San Jose*, 525 P.2d at 710-12; *Alevizos v. Metro. Airports Comm'n*, 216 N.W.2d 651, 668 (Minn. 1974) (inverse condemnation claim from airport operations is "incompatible with a class action since there are a multitude of individual issues and an absence of common issues").

discretion in deciding that the multitude of individualized issues overwhelmed common issues on plaintiffs' inverse condemnation claims.

D. The Court Of Appeals Properly Affirmed The Trial Court's Ruling On Superiority.

CR 23(b)(3) further requires a class action to be *superior, not just as good as*, other available methods for adjudicating the asserted claims. *Schnall*, 171 Wn.2d at 275. "If each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not 'superior.'" *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1192 (9th Cir. 2001).

Superiority problems are especially prevalent in inverse condemnation cases relating to airport operations. *E.g.*, *Ario*, 367 N.W.2d at 514-16; *City of San Jose*, 525 P.2d at 710-12. Not only do such cases present a multitude of property-specific issues concerning liability, causation, and damages, but there is an inherent overlap between the liability and damages determination. *Martin*, 64 Wn.2d at 318-20; *Ario*, 367 N.W.2d at 515 ("Diminution in market value is so wedded to noise invasion that the former cannot be proved without again proving the latter."). As the *City of San Jose* court observed:

> Given the many recognized factors combining to make up the uniqueness of each parcel of land, the number of subclassifications into which the class would be required to be divided to yield any meaningful result would be

> substantial. ... The result becomes a statistical permutation, and the requisite number of subclassifications quickly approaches the total number of parcels in the class. Under such circumstances, there is little or no benefit in maintaining the action as a class.

525 P.2d at 711 (denying certification in an airport noise case).

The trial court found the same issues present here. The superiority decision is best left to the trial court, as repeatedly emphasized in *Sitton*, 116 Wn. App. at 256 (case management problems were "a matter best determined by the trial court") and 260 n.38 ("We emphasize that management of the action is for the trial court."). *Accord Moeller*, 173 Wn.2d at 280 (deferring to the trial court's decision on the trial plan). Petitioners provide little analysis and no persuasive support for requesting review of the courts' superiority determination.

E. There Is No Issue Of Substantial Public Interest Raised In The Petition That Requires This Court's Review.

This case involves the straightforward application of the rules of class certification. It also involves long-settled law on proving claims for inverse condemnation based on aircraft noise. *See Martin*, 64 Wn.2d 309. Petitioners' speculation, based on six-year-old data, that future airport expansion projects may present similar claims provides no reason to review this case. Petition at 19-20. Requiring these plaintiffs' claims to proceed individually or as a consolidated action is not a novel approach in

Washington. Rather, it is how such claims have historically proceeded, as noted by the Court of Appeals. Opinion at 9 n.26 (citing cases). Denial of certification here is also consistent with the overwhelming authority from other jurisdictions. This case simply does not require further review.

V. CONCLUSION

Petitioners have not demonstrated any conflict with a decision of this Court or the other Court of Appeals Divisions and have not identified any issue of substantial public interest requiring this Court's review. The trial court denied class certification because Petitioners failed, after ample opportunity, to show that this case meets all of the requirements of CR 23. The Court of Appeals affirmed that decision. The Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 19th day of February, 2015.

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DECLARATION OF SERVICE

Adrian Urquhart Winder declares:

I am a citizen of the United States of America and a resident of the State of Washington. I am over the age of twenty-one years. I am not a party to this action, and I am competent to be a witness herein. On Thursday, February 19, 2015, I caused Respondent's ANSWER TO PETITION FOR REVIEW to be served as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED in Seattle, Washington, this 19th day of February, 2015.

Adrian Urquhart Winder

Appendix 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

KEBEDE ADMASU, et al., Appellants, v. PORT OF SEATTLE, a Washington municipal corporation, Respondent.	)	No. 70220-3-I ORDER GRANTING MOTION TO PUBLISH OPINION

Respondent filed a motion to publish the court's opinion entered October 27, 2014. Appellant filed a response taking no position. After due consideration, the panel has determined that the motion should be granted.

Now therefore, it is hereby

ORDERED that the Respondent's motion to publish the opinion is granted.

Done this 18th day of December, 2014.

FOR THE PANEL:

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

KEBEDE ADMASU, et al., Appellants, v. PORT OF SEATTLE, a Washington municipal corporation, Respondent.	)	No. 70220-3-I PUBLISHED OPINION FILED: October 27, 2014

VERELLEN, A.C.J. — A group of property owners seek compensation for the diminished value of their properties due to the Port of Seattle's operation of the third runway at the Seattle-Tacoma International Airport (Sea-Tac Airport).[1] The property owners appeal from the trial court's order denying class certification and two orders granting summary judgment in favor of the Port. The trial court did not abuse its discretion in denying class certification because the plaintiffs failed to demonstrate that common issues would predominate over individual issues and that a class action was a superior method of adjudication of the controversy. The trial court also properly granted summary judgment in favor of the Port for claims brought by plaintiffs whose properties are burdened by an avigation easement[2] and for claims for

[1] This case involves the claims of over 200 parties. Including each name in the caption would take several pages. In the interest of brevity, we order abbreviation of the caption to that set forth above for purposes of this opinion and any post-opinion pleadings in this court.

[2] An easement allowing aircraft flights over the servient estate.

damages caused by noise brought by plaintiffs who acquired their properties after a noise exposure map was submitted under federal law. But the trial court erred by granting summary judgment on claims for damages caused by toxic discharge, fumes, and vibrations (whether or not related to low frequency noise) because the Port's motion for summary judgment did not clearly extend to those claims. Accordingly, we affirm in part and reverse in part.

FACTS

In November 2008, the Port began operations on its third runway. In June 2009, three property owners (Class Plaintiffs) filed an inverse condemnation action[3] against the Port, alleging that they and thousands of other property owners in the proximity of the Sea-Tac Airport have suffered diminished property values as a result of airport operations on the Port's third runway.

In 2010, the Class Plaintiffs moved for class certification. Following a hearing in January 2011, the trial court denied the motion without prejudice. In April 2011, the Class Plaintiffs again moved for class certification. Following a two-day hearing, the trial court denied class certification in April 2012.

After the trial court denied class certification, the plaintiffs filed a third amended complaint asserting the consolidated claims of 291 individual plaintiffs. In addition to asserting inverse condemnation, the complaint included trespass and nuisance claims.

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[3] "A party alleging inverse condemnation must establish the following elements: (1) a taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal proceedings." Phillips v. King County, 136 Wn.2d 946, 957, 968 P.2d 871 (1998).

The Port brought its first motion for summary judgment against 126 plaintiffs (Easement Plaintiffs) who each owned property burdened by an avigation easement granted to the Port. Property owners participating in the Port's noise remedy program under RCW 53.54.030 conveyed such easements primarily in exchange for soundproofing.[4] The Port argued that the easements precluded all of the claims asserted by the Easement Plaintiffs. The trial court granted summary judgment in favor of the Port.

The Port brought its second motion for summary judgment against 111 plaintiffs (NEM Plaintiffs) who purchased their property after the Port published notice of its Federal Aviation Administration-approved noise exposure maps pursuant to the federal Aviation Safety Noise Abatement Act of 1979, 49 U.S.C. 47506. The relevant noise exposure maps were submitted in 1993 and in 2001. The Port argued that federal law precluded damages claims based on noise unless particular noise levels are reached. In April 2014, the trial court granted the motion in favor of the Port, dismissing all of the NEM Plaintiffs' claims.

Subsequently, the trial court granted the 25 remaining plaintiffs' motion for voluntary dismissal and entered a final judgment.

The property owners appeal, challenging the order denying class certification, the order granting summary judgment in favor of the Port on the Easement Plaintiffs' claims, and the order granting summary judgment in favor of the Port on the NEM Plaintiffs' claims.

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[4] Some property owners also received transaction assistance, while others, in places where soundproofing would not be effective, received monetary compensation.

DECISION

Class Plaintiffs

The Class Plaintiffs contend that the trial court abused its discretion in denying class certification.[5] We disagree.

We review a trial court's class certification decision for manifest abuse of discretion.[6] As our Supreme Court has noted, "The standard of review is paramount in this case: it is not our place to substitute our judgment for that of the trial court. When this court reviews a trial court's decision to deny class certification, that decision is afforded a substantial amount of deference."[7] We will uphold the trial court's decision if the record shows that the court considered the CR 23 criteria and that the court's decision is based on tenable grounds and is not manifestly unreasonable.[8]

CR 23(a) enumerates four prerequisites that a plaintiff seeking class certification must satisfy: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of the representatives. In addition, as CR 23(b) is applied here, the plaintiff has to satisfy both predominance and superiority requirements.[9]

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[5] The proposed class action was to be divided into Class A and Class B. On appeal, the Class Plaintiffs challenge only the trial court's decision on Class A.

[6] Lacey Nursing Ctr., Inc. v. Dep't of Revenue, 128 Wn.2d 40, 47, 905 P.2d 338 (1995).

[7] Schnall v. AT&T Wireless Servs., Inc., 171 Wn.2d 260, 266, 259 P.3d 129 (2011).

[8] Lacey, 128 Wn.2d at 47. The trial court "must articulate on the record each of the CR 23 factors for its decision on the certification issue." Schwendeman v. USAA Cas. Ins. Co., 116 Wn. App. 9, 19, 65 P.3d 1 (2003).

[9] CR 23(b)(3). In making the predominance and superiority findings, the trial court should consider, among other things, "the interest of members of the class in individually controlling the prosecution or defense of separate actions," "the desirability or undesirability of concentrating the litigation of the claims in the particular forum,"

The trial court here found that the Class Plaintiffs failed to satisfy the predominance requirement "that the questions of law or fact common to the members of the class predominate over any questions affecting only the individual members."[10] The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[11] This "requirement is not a rigid test, but rather contemplates a review of many factors, the central question being whether 'adjudication of the common issues in the particular suit has important and desirable advantages of judicial economy compared to all other issues, or when viewed by themselves.'"[12] "[T]he relevant inquiry is whether the issue shared by the class members is the dominant, central, or overriding issue shared by the class."[13]

Here, the trial court found that individual issues would predominate over common issues "because the evidence required to establish liability is necessarily property-specific."[14] Under Washington law, the effects of airplane noise and related impacts do not constitute a taking of an individual's property unless the property

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and "the difficulties likely to be encountered in the management of a class action." CR 23(b)(3).

[10] CR 23(b)(3).

[11] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997).

[12] Sitton v. State Farm Mut. Auto. Ins. Co., 116 Wn. App. 245, 254, 63 P.3d 198 (2003) (quoting 1 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 4.25, at 4-86 (3d ed. 1992)).

[13] Miller v. Farmer Bros. Co., 115 Wn. App. 815, 825, 64 P.3d 49 (2003); see also Smith v. Behr Process Corp., 113 Wn. App. 306, 323, 54 P.3d 665 (2002) ("In deciding whether common issues predominate over individual ones, the court is engaged in a pragmatic inquiry into whether there is a common nucleus of operative facts to each class member's claim." (citation and internal quotation marks omitted)).

[14] Clerk's Papers at 2066.

owner can prove a measurable diminution in the property's market value.[15] Consequently, each affected property owner must establish that his or her property has suffered a diminution in value because of the government action in order to demonstrate liability. Moreover, a similar showing is required to establish the appropriate amount of damages. Therefore, although the Port's general actions may be common to all, liability can likely be established only after examination of the circumstances surrounding each of the affected properties.

The Class Plaintiffs contend that common issues nevertheless predominate because they can demonstrate a class-wide, aggregate diminution of property values resulting from airport operations on the third runway, which can then be apportioned to the individual properties. But the Class Plaintiffs' proposed approach for accomplishing this objective involved only abstract concepts that give little confidence that common issues would actually predominate over individual issues. The Class Plaintiffs' valuation experts, Dr. Wayne Hunsberger and Dr. Ronald Throupe, did not provide a concrete method for determining diminished value attributable to the third runway airport operations.[16] Instead, they primarily discussed general information describing a variety of accepted techniques for analyzing properties affected by

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[15] See Highline School Dist. No. 401, King County v. Port of Seattle, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976); Martin v. Port of Seattle, 64 Wn.2d 309, 318-20, 391 P.2d 540 (1964).

[16] The Class Plaintiffs also retained Dr. Sanford Fidell, a noise expert, who conducted a community noise impact study to measure community reaction to the airport. Dr. Fidell's work does not purport to determine property value diminution, and the valuation experts had not decided how Dr. Fidell's study would be incorporated into their own research.

disamenities such as airports.[17] Both experts clearly explain that they have not considered in any detail the particular techniques they will utilize, the manner or combination in which any technique will be utilized, the specific disamenities they intend to measure, or the information they will need to conduct their studies. Beyond the very general discussions of possible techniques and vague references to their ability to account for a vast multitude of likely impacts on property value apart from the third runway, the experts offer little assurance that the plaintiffs would be able to prove a useful *class-wide* diminution of property values based on specific airport operations attributable only to the third runway. For example, the experts provided only a superficial explanation of how they would account for airport operations attributable to the preexisting runways. Furthermore, the experts did not provide specific information about how they would establish causation between any property value diminution and the airport operations in general, and they did not explain how they would establish causation for particular conditions associated with airport operations.

Generalized evidence of diminished value and generalized proof that the diminished value resulted from airport operations would not establish liability for inverse condemnation. Instead, as the trial court determined, individual, property-specific information would be required. The Class Plaintiffs proposed methodology for demonstrating class-wide diminution in value is not sufficiently concrete to

[17] These techniques include basic descriptive statistics, multivariate statistics, paired sales analysis, case study analysis, and formal and informal survey research.

persuade us or the trial court that common issues would predominate over individual issues.[18] The trial court did not abuse its discretion in this regard.

The trial court here also found that the Class Plaintiffs failed to satisfy the superiority requirement, which requires "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[19] It is "a highly discretionary determination that involves consideration of all the pros and cons of a class action as opposed to individual lawsuits."[20] "[W]here individual claims of class members are small, a class action will usually be deemed superior to other forms of adjudication."[21] But "[i]f each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not 'superior.'"[22]

It was not unreasonable for the trial court to determine that many individual issues will be involved in determining both whether a taking of a specific property occurred and the measure of damages for individual property owners.[23] The trial court determined that certifying the claims as a class action would not promote the efficient resolution of the class members' claims given the many individual inquiries

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[18] "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." Wal-Mart Stores, Inc. v. Dukes, __ U.S. __, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011).

[19] CR 23(b)(3).

[20] Miller, 115 Wn. App. at 828.

[21] Id.

[22] Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1192 (9th Cir. 2001).

[23] "[M]any courts that find common predominance lacking, also hold that the prevalence of individual issues renders the case unmanageable for superiority purposes." WILLIAM RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:74 (5th ed. 2014).

that would be required to determine both liability and damages. This determination is supported by the record, especially because the valuation experts' imprecisely defined study required consideration of individualized information for purposes of reaching any conclusions regarding diminution in value or causation.[24] Moreover, the trial court's decision is supported by persuasive authority concluding that a class action often is not a superior method of litigating inverse condemnation cases involving aircraft noise.[25] The trial court did not abuse its discretion in determining that a class action where the plaintiffs would likely allocate individual damages based on a class-wide diminution in value is not superior to individual actions where the plaintiffs would prove property-specific diminution in value.[26]

Because the Class Plaintiffs failed to satisfy the predominance and superiority prerequisites required by CR 23(b), the trial court did not abuse its discretion in denying class certification.[27]

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[24] For example, Dr. Throupe indicated that they might utilize an appraisal method, and that "it could be hundreds. It could be thousands" of appraisals that would be conducted. Clerk's Papers at 1691.

[25] See, e.g., Bieneman v. City of Chicago, 864 F.2d 463, 465 (7th Cir. 1988); Ario v. Metro. Airports Comm'n., 367 N.W.2d 509, 515-16 (Minn. 1985); City of San Jose v. Superior Court, 12 Cal.3d 447, 525 P.2d 701, 710-11, 807-08 (1974); Alevizos v. Metro. Airports Comm., 298 Minn. 471, 216 N.W.2d 651, 668 (1974).

[26] Notably, there have been a number of inverse condemnation actions precipitated by the development and prior expansions of the Sea-Tac Airport, but none of these cases proceeded as class actions. See Highline School Dist., 87 Wn.2d 6; Anderson v. Port of Seattle, 66 Wn.2d 457, 403 P.2d 368 (1965); Martin, 64 Wn.2d 309; Cheskov v. Port of Seattle, 55 Wn.2d 416, 348 P.2d 673 (1960); Ackerman v. Port of Seattle, 55 Wn.2d 400, 348 P.2d 664 (1960), abrogated by Highline School Dist., 87 Wn.2d 6; Anderson v. Port of Seattle, 49 Wn.2d 528, 304 P.2d 705 (1956).

[27] We need not evaluate the trial court's finding that the class representatives were inadequate because a failure of proof on any one of the prerequisites is fatal to certification. See Garcia v. Johanns, 444 F.3d 625, 631 (D.C. Cir. 2006); Valley Drug Co. v. Geneva Pharm., Inc., 350 F.3d 1181, 1189 (11th Cir. 2003); Retired Chicago

Avigation Easement Plaintiffs

The Easement Plaintiffs contend that the trial court erred by granting summary judgment in favor of the Port on the claims brought by plaintiffs whose properties are burdened by an avigation easement. We disagree.

"Property is often analogized to a bundle of sticks representing the right to use, possess, exclude, alienate, etc."[28] Easements give holders "rights that were contained within the right of possession and carved out of it by the owner of the possessory estate: sticks taken out of the bundle."[29] As such, "[e]asements are property rights or interests that give their holder limited rights to use but not possess the owner's land."[30] To the owner of the burdened estate, easements "are subtractions from his full spectrum of rights, burdens on his title."[31] Generally, avigation easements permit the easement holder to engage in "unimpeded aircraft flights over the servient estate[s]."[32] Such easements deprive the landowners of their rights to the stated property interest.

Police Ass'n v. City of Chicago, 7 F.3d 584, 596 (7th Cir. 1993); Milonas v. Williams, 691 F.2d 931, 938 (10th Cir. 1982); see also Pickett v. Holland Am. Line-Westours, Inc., 145 Wn.2d 178, 188, 35 P.3d 351 (2001) (holding that because CR 23 is identical to its federal counterpart, FED. R. CIV. P. 23, federal cases interpreting the analogous federal provision are highly persuasive).

[28] Kiely v. Graves, 173 Wn.2d 926, 936, 271 P.3d 226 (2012).

[29] 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 2.1, at 80 (2d ed. 2004).

[30] State v. Newcomb, 160 Wn. App. 184, 191, 246 P.3d 1286 (2011); see City of Olympia v. Palzer, 107 Wn.2d 225, 229, 728 P.2d 135 (1986) ("'An easement is a right, distinct from ownership, to use in some way the land of another, without compensation.'" (quoting Kutschinski v. Thompson, 101 N.J.Eq. 649, 656, 138 A. 569 (1927)).

[31] 17 STOEBUCK & WEAVER, supra note 29, at 80.

[32] BLACK'S LAW DICTIONARY 622 (10th ed. 2014).

Both versions of the avigation easements burdening the properties in this case provide similar property interests for our purposes.[33] The landowners bargained away an easement authorizing "the use and passage of all types of aircraft" and agreed to be burdened by those conditions "which may be alleged to be incident to or to result from" those airport operations.[34] Upon that conveyance, the granted property interest can no longer be subject to a taking. The Port takes nothing from them by using the easement granted for airport operations.[35]

Notably, the Easement Plaintiffs do not argue on appeal that the Port exceeded the scope of the easement. Nor do they raise on appeal any of the

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[33] The Easement Plaintiffs each own land burdened by one of two versions of avigation easement, one issued prior to 1993 and one issued after 1993 when the legislature amended RCW 53.54.030. The pre-1993 easements provide, in relevant part, that the grantor conveys and warrants to the Port, appurtenant to and for the benefit of the airport and "any additions thereto," a permanent easement "for the free and unobstructed use and passage of all types of aircraft . . . through the airspace over or in the vicinity of [the grantor's real property], with such use and passage to be unlimited as to frequency, type of aircraft, and proximity." Clerk's Papers at 2196 (1989 easement). The easement expressly states that "noise, vibrations, fumes, deposits of dust or other particulate matter . . ., fear, interference with sleep and communication, and any and all other things which may be alleged to be incident to or to result from" airport operations "shall constitute permanent burdens" on the grantor's real property. Id. The grantor also waived "all damages and claims for damages caused or alleged to be caused by or incidental to" airport operations. Id. The scope of the post-1993 easements is substantially similar to the pre-1993 easements, except that the burden of noise associated conditions arising from airport operations is limited to a certain average yearly noise exposure. See Clerk's Papers at 2191 (1996 easement).

[34] Clerk's Papers at 2191, 2196.

[35] Accord Orion Corp. v. State, 109 Wn.2d 621, 641, 747 P.2d 1062 (1987) ("[A] property right must exist before it can be taken." (citation and internal quotation marks omitted)); Granite Beach Holdings, LLC v. State ex rel. Dep't of Nat. Res., 103 Wn. App. 186, 207, 11 P.3d 847 (2000) ("The appellants' inverse condemnation claim was properly dismissed because the property right the appellants claim was injured [to cross adjoining state lands] does not exist.").

contract formation defenses such as unconscionability, misrepresentation, and duress that might render the easements invalid.

Instead, the Easement Plaintiffs assert that the easements cannot frustrate their claims because, at the time that they granted the easements, they did not knowingly or voluntarily waive their federal and state constitutional rights to just compensation for the diminished value of their property or their right to a jury trial to determine just compensation.[36] The concerns they express, that they had no choice but to provide the easements because the noise was so stressful and that they did not know the easements prevented them from suing the Port for a taking, are encompassed within the contract defenses that they declined to raise on appeal. But they seek to elevate these issues to a constitutional dimension by their waiver argument.[37]

The Easement Plaintiffs cite no compelling authority applying constitutional waiver requirements to any analogous situation, where a property owner conveys property to a governmental entity. Their reliance on criminal cases and cases

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[36] See U.S. CONST. amend. V; WASH. CONST. art. I, § 16 (amend. 9). A landowner is entitled to have a jury determine the amount of compensation. Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 657, 935 P.2d 555 (1997) (quoting WASH. CONST. art. I, § 16 (amend. 9)); see also RCW 8.12.090. The Easement Plaintiffs attempt to disconnect the right to compensation and a jury determination into separate and distinct rights, but they are one and the same because the right to a jury determination stems from the right to compensation when a taking occurs. See WASH. CONST. art. I, § 16 (amend. 9) ("No private property shall be taken or damaged for public or private use without just compensation having been first made, . . . which compensation shall be ascertained by a jury, unless a jury be waived.").

[37] Of the 126 Easement Plaintiffs, 79 purchased their property subject to previously-recorded easements. Those plaintiffs cannot assert waiver arguments. See Wyatt v. United States, 271 F.3d 1090, 1096 (Fed. Cir. 2001) ("It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation.").

involving First Amendment or parental rights is unavailing. Moreover, the Easement Plaintiffs were engaged in commercial transactions when, in exchange for compensation, they conveyed the avigation easements to the Port. It goes almost without saying that, in order to waive a right, the right must exist.[38] Having clearly granted permission for the Port to conduct airport operations, there is no remaining claim for inverse condemnation based on that same activity. In other words, having conveyed part of the bundle of sticks to the Port, the property owners are necessarily and voluntarily precluded any claim for inverse condemnation based upon the Port's authorized use of those sticks.[39]

Accordingly, the trial court properly granted summary judgment in favor of the Port on those claims brought by the Easement Plaintiffs.

Noise Exposure Map Plaintiffs

The NEM Plaintiffs contend that the trial court erred by granting the motion for summary judgment on all of their claims. We agree.

Federal law, through the Aviation Safety Noise Abatement Act of 1979 (ASNAA), imposes a general limitation on recovery of damages caused by noise once a person has actual or constructive notice that noise exposure maps have been

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[38] See Bowman v. Webster, 44 Wn.2d 667, 669, 269 P.2d 960 (1954) ("The right, advantage, or benefit must exist at the time of the alleged waiver."); Tjart v. Smith Barney, Inc., 107 Wn. App. 885, 899, 28 P.3d 823 (2001) ("Washington courts recognize that a contracting party cannot waive a statutory right before the right exists."). "The doctrine of waiver ordinarily applies to all rights or privileges to which a person is legally entitled." Bowman, 44 Wn.2d at 669.

[39] To the extent that the Easement Plaintiffs argue that they did not knowingly and voluntarily waive their rights to *past* damages for takings that occurred prior to the time they granted the easements, the express language of the easement waiving all claims for damages caused by airport operations precludes such a claim. See Keyes v. Bollinger, 31 Wn. App. 286, 293, 640 P.2d 1077 (1982) ("[W]aiver may be established by proof of an express agreement.").

submitted to the Secretary of Transportation.[40] The NEM Plaintiffs do not dispute on appeal that 49 U.S.C. § 47506 precludes their recovery of damages due to noise. And the Port does not dispute that the ASNAA does not preclude the recovery of damages caused by conditions other than noise. Instead, the parties dispute whether the motion for summary judgment adequately addressed claims for damages caused by other conditions described in the complaint, namely increased vibrations, toxic discharge, and fumes.[41]

"It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment."[42] Further, "[a]llowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond."[43] Thus, "it is incumbent upon the moving party to determine what issues are susceptible to resolution by summary judgment, and to clearly state in its opening papers those issues upon which summary judgment is sought."[44] If the moving party fails to do so, it may either strike and refile its motion for summary judgment or raise the new issues

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[40] See 49 U.S.C. § 47506. Under the statute, damages for noise attributable to an airport are recoverable only if damages result from a significant change in the airport layout, the flight patterns, or the type or frequency of aircraft operations, or if there was an increase in nighttime operations.

[41] Among other things, the plaintiffs alleged that "[t]he increase in air traffic passing over the Plaintiffs' properties in close proximity to the properties has created heightened noise pollution, increased vibration, and increased toxic discharge and fumes." Clerk's Papers at 2076.

[42] White v. Kent Med. Ctr., Inc., PS, 61 Wn. App. 163, 168, 810 P.2d 4 (1991).

[43] Id.

[44] Id. at 169; see Davidson Serles & Assocs. v. City of Kirkland, 159 Wn. App. 616, 637-38, 246 P.3d 822 (2011).

in a new filing at a later date, but the moving party cannot prevail on the original motion based on issues not raised therein.[45]

Here, the Port's motion for summary judgment requested that the trial court dismiss all of the NEM Plaintiffs' claims. However, the motion discussed only ASNAA's federal preemption over claims for damage caused by noise conditions. The Port's motion did not address the plaintiffs' claims for damages caused by fumes or toxic discharge. In fact, the motion did not even make a passing mention of fumes or toxic discharge. And the plaintiffs' responsive memorandum discusses these conditions only to emphasize that those claims were not a subject of the present summary judgment motion. Contrary to the Port's assertions, a general request to dismiss all claims, standing alone, is inadequate to raise those claims and issues not discussed more fully within the motion for summary judgment.

Similarly, the Port argues that it adequately raised the issue whether ASNAA precludes the NEM Plaintiffs' claims for vibration damages by briefly stating that the "causes of action . . . each depend on [an] alleged increase in operations and the alleged 'heightened noise pollution' and vibrations (*i.e.*, low frequency noise) caused by those operations."[46] But this passing reference does not "clearly state" that this is an issue "upon which summary judgment is sought."[47] The Port's motion did not put the NEM Plaintiffs on notice that they needed to address whether the ASNAA applies

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[45] See White, 61 Wn. App. at 169.

[46] Clerk's Papers at 3849.

[47] White, 61 Wn. App. at 169.

to damages from vibrations,[48] and they had no opportunity to make an adequate response.

Accordingly, summary judgment on those claims for damages caused by increased vibrations, toxic discharge, and fumes was premature because they were not adequately raised in the Port's motion for summary judgment.

We affirm in part and reverse in part.[49] Specifically, we affirm the trial court's order denying class certification and its order granting summary judgment based on the avigation easements. We affirm the trial court's order granting summary judgment in favor of the Port on the NEM Plaintiffs' claims for damages caused by noise, but we reverse the order to the extent that it dismisses the NEM Plaintiffs' claims for damages caused by increased vibrations (whether or not related to low frequency noise), toxic discharge, and fumes.

WE CONCUR:

Cox, J.

Becker, J.

[48] We take no position here on the issue whether, or the extent to which, the ASNAA limits recovery of damages for vibrations attributable to the airport.

[49] We deny appellants' motion to strike portions of the amicus brief. "[A] motion to strike is typically not necessary to point out evidence and issues a litigant believes this court should not consider." Engstrom v. Goodman, 166 Wn. App. 905, 909 n.2, 271 P.3d 959 (2012). Rather, "the brief is the appropriate vehicle for pointing out allegedly extraneous materials—not a separate motion to strike." Id. To the extent the briefing discusses evidence outside the record, we have not considered it. RAP 9.12.

Appendix 2

HONORABLE BRUCE E. HELLER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

MIRIAM BEARSE, JOHN MCKINNEY and DARLENE MOORE, individually, and on behalf of a class of persons similarly situated, Plaintiffs, v. THE PORT OF SEATTLE, a Washington Municipal corporation, Defendant.	No. 09-2-22569-9 KNT ORDER DENYING PLAINTIFFS' AMENDED MOTION FOR CLASS CERTIFICATION

In this inverse condemnation action against the Port of Seattle, Plaintiffs have moved for class certification. Plaintiffs allege that they and thousands of other property owners in the proximity of the Sea-Tac Airport have suffered diminished property values resulting from increased airline flights utilizing the Port's Third Runway. The Court has reviewed extensive briefing from the parties and heard oral argument on January 21, 2011.

At oral argument, the Court expressed a number of concerns, including the ill-defined nature of the proposed class (all property owners "in the proximity" of Sea-Tac), the absence of expert testimony showing how plaintiffs would prove the impact of airplane noise on property values, and the absence of a trial plan. Plaintiffs acknowledged that they had not met their burden under CR 23. Based on this concession, the Court indicated that the present class certification motion would be denied. Plaintiffs requested the opportunity to file another

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amended motion for class certification once they have analyzed recently provided noise data that they say will enable them to propose subclasses based on varying degrees of noise impact. Plaintiffs also promised to provide the Court with a methodology for assessing the effect of noise pollution on property values.

The Port's position is that allowing plaintiffs to file yet another motion for class certification would be futile, even if plaintiff could cure the issues identified above. This futility argument is based on a number of defenses, the most important of which is that liability for inverse condemnation can only be established by proving a Third Runway related loss of property values to each individual in the class. If that is the case, then, according to the Port, plaintiffs can never meet the predominance or superiority requirements of CR 23(b)(3).

While it might appear more efficient for the Court to address the Port's defenses now, instead of waiting until another class certification motion is filed, the Court has concluded that this would be a mistake. It cannot engage in a serious examination of the requirements of CR 23 unless (1) plaintiffs have more precisely defined the proposed class and submitted a detailed trial plan for managing a case of this magnitude, and (2) the Port has provided its response.

Plaintiffs' motion for class certification is therefore **denied** without prejudice. If plaintiffs decide to file another class certification motion, it shall be filed within 60 days of the January 21, 2011 hearing date.

IT IS SO ORDERED.

ENTERED this 28th day of January, 2011.

BRUCE E. HELLER, JUDGE

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Appendix 3

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

MIRIAM BEARSE, JOHN MCKINNEY and DARLENE MOORE, individually, and on behalf of a class and subclasses of persons similarly situated,

Plaintiffs,

v.

THE PORT OF SEATTLE, a Washington municipal corporation,

Defendant.

The Honorable Bruce E. Heller

No. 09-2-22569-9 KNT

ORDER DENYING PLAINTIFFS' SECOND AMENDED MOTION FOR CLASS CERTIFICATION

THIS MATTER came before the Court on Plaintiffs' Second Amended Motion For Class Certification.

I. MATERIALS CONSIDERED

The Court has considered:

1. Court's Order Denying Plaintiffs' First Amended Motion For Class Certification dated January 28, 2011 (Docket #97);

2. Plaintiffs' Second Amended Certification Motion (Docket #146);

3. Declaration Of Darrell L. Cochran In Support Of Plaintiffs' Second Amended Certification Motion (Docket #141);

4. Declaration Of Sanford Fidell, Ph.D., In Support Of Class Certification (Docket #142);

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5. Declaration Of Wayne Hunsperger, MAI, SRA, In Support Of Class Certification (Docket #143);

6. Declaration Of Ronald Throupe, Ph.D., MRICS, In Support Of Class Certification (Docket #144);

7. Declaration Of Miriam Bearse In Support Of Plaintiffs' Motion For Class Certification (Docket #55);

8. Declaration Of John McKinney In Support Of Plaintiffs' Motion For Class Certification (Docket #54);

9. Declaration Of Darlene Moore In Support Of Plaintiffs' Motion For Class Certification (Docket #56);

10. The Port Of Seattle's Opposition To Plaintiffs' Second Amended Certification Motion (Docket #159);

11. Declaration Of Steven R. Alverson In Opposition To Plaintiffs' Second Amended Certification Motion (Docket #151);

12. Declaration Of James DeLisle, Ph.D., In Opposition To Plaintiffs' Second Amended Certification Motion (Docket #152);

13. Declaration Of Terry Grissom In Opposition To Plaintiffs' Second Amended Certification Motion (Docket #153);

14. Declaration Of Bates McKee, MAI, In Opposition To Plaintiffs' Second Amended Certification Motion (Docket #154);

15. Declaration Of Patrick Mullaney In Opposition To Plaintiffs' Second Amended Certification Motion (Docket #157);

16. Declaration Of John Schlosser In Opposition To Plaintiffs' Second Amended Certification Motion (Docket #155);

17. Declaration Of Mary L. Vigilante In Opposition To Plaintiffs' Second Amended Certification Motion (Docket #156);

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18. Defendant Port Of Seattle's Notice of Supplemental Authority (Docket #161);

19. Plaintiffs' Reply In Support Of Plaintiffs' Second Amended Certification Motion (Docket #166);

20. Declaration Of Darrell L. Cochran In Support Of Plaintiffs' Reply In Support Of Plaintiffs' Second Amended Certification Motion (Docket #163);

21. Declaration Of Loren A. Cochran In Support Of Plaintiffs' Reply In Support Of Plaintiffs' Second Amended Certification Motion (Docket #164);

22. Declaration Of Sanford Fidell, Ph.D., In Support Of Plaintiffs' Reply In Support Of Plaintiffs' Second Amended Certification Motion (Docket #165);

23. The Port Of Seattle's Supplemental Brief Re: Impact Of Individual Tort Claim Filings On Class Certification (Docket #167);

24. Declaration Of Patrick Mullaney In Support Of The Port Of Seattle's Supplemental Brief Re: Impact Of Individual Tort Claim Filings On Class Certification (Docket #168);

25. Plaintiffs' Response To Defendant Port Of Seattle's Supplemental Brief Re: Impact Of Individual Tort Claim Filings On Class Certification (Docket #171);

26. Declaration Of Darrell L. Cochran In Support Of Plaintiffs' Response to Defendant Port Of Seattle's Supplemental Brief Re: Impact Of Individual Tort Claim Filings On Class Certification (Docket #170);

27. The demonstrative exhibits used at the February 3, and February 6, 2012 hearings on the Second Amended Certification Motion; and

28. The pleadings and files on record in this case.

The Court conducted hearings and heard oral argument on February 3 and February 6, 2012. The parties thereafter submitted detailed proposed Orders and Findings of Fact and Conclusions of law.

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II. FACTS

Plaintiffs have brought this class action lawsuit for inverse condemnation under Washington law. They allege a permanent diminution in the value of residential real property owned as of November 20, 2008 caused by increased noise, vibration, and emissions from airport operations after the opening of the Third Runway at Seattle-Tacoma International Airport ("Sea-Tac"). They seek certification of the following proposed classes:

Class A:

> Class A would consist of (1) residential property owners (2) who as of November 20, 2008, have or had interests in real property (3) located within the areas north, west, and south of the third runway of Seattle-Tacoma International Airport as defined on the attached map.

Class B:

> Class B would consist of (1) residential property owners (2) who as of November 20, 2008, have or had interests in real property (3) located within the areas west-northwest of the third runway of Seattle-Tacoma International Airport as defined on the attached map.

The Avigation Easement Subclass:

> Plaintiffs propose to divide Class A into two subclasses: a subclass of owners with properties that are subject to avigation easements in favor or the Port and a subclass of owners of without such avigation easements.

Plaintiffs propose three class representatives for Class A: Miriam Bearse, Darlene Moore, and John McKinney. Their properties are all located in proposed Class A. Ms. Bearse and Mr. McKinney have avigation easements recorded against their respective properties, and they are proposed as representatives for the Avigation Easement Subclass. Ms. Bearse and Ms. Moore have each recently filed tort claims with the Port asserting a right to recover both property and personal injury damages allegedly caused by increased noise, vibrations, and emissions from airport operations since the Third Runway opened. Plaintiffs have not proposed a class representative who owns or owned property in proposed Class B.

The Court's January 2011 Order directed Plaintiffs to provide (1) "subclasses based on

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varying degrees of noise impact" (Order at 2:2); and (2) a methodology for assessing the impact of allegedly increased noise on property values (*id.* at 2:3-4).

Plaintiffs rely upon work by Dr. Sanford Fidell to establish the proposed class boundaries. Plaintiffs base the western boundary of Class A on Dr. Fidell's metric assessing annoyance called the "Community Tolerance Level" or "CTL." CTL is not a measurement of noise—*i.e.*, the amount of sound energy reaching a particular property.[1] Rather, it is a measure of annoyance caused by both "acoustic" and "non-acoustic" factors.[2] These non-acoustic factors include a fear of airplane crashes, distrust of government, and attitudes about the airport operator (the Port).[3] Dr. Fidell's CTL model has never been used before in a condemnation proceeding to demonstrate a government taking.[4]

Dr. Fidell did not determine whether the amount of aircraft noise actually increased in the Class Areas as a result of the Third Runway. At his deposition, Dr. Fidell testified:

> Q. Have you made any before and after the opening of the Third Runway comparison of noise levels at properties within the class areas, either Class Area A or Class Area B to determine if noise levels in those class areas has increased or decreased since the opening of the third runway.
>
> A. No.[5]

Plaintiffs' justification for Class B is a "significant change in complaint intensity."[6] No noise measurements were taken in Class B and none of the named Plaintiffs or the survey respondents live in or near Class B. Dr. Fidell did not apply his CTL model to Class B, and the "% Highly Annoyed" in Class B is below the level that Plaintiffs used to establish the western boundary of Class A.[7]

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[1] Fidell Dep. 90.
[2] Fidell Dep. 25, 76-77; Alverson Decl. ¶ 31.
[3] Fidell Dep. 90:18-20, 184:18-185:10.
[4] Fidell Dep. 25:10-16, 110:24-111:9, 225:12-25; Hunsperger Dep. 168:11-14.
[5] Fidell Dep. 277:22-278:3.
[6] Second Amended Certification Motion, p. 7.
[7] Fidell Dep. 63:10-64:9.

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The Port's airport noise expert, Mr. Steve Alverson, compared aircraft noise levels in the Class Areas before and after the opening of the Third Runway. Mr. Alverson concluded that the noise levels experienced at particular properties within the Class Areas vary dramatically depending on location and other factors. Mr. Alverson also concluded that the Third Runway's contribution to aircraft noise exposure at a particular property in the Class Areas varies from as much as 52% directly north of the Third Runway to as little as 1% for areas to the west in Class B.[8]

Plaintiffs two valuation experts, Mr. Hunsperger and Dr. Throupe, testified at their depositions that, as of the time they prepared their declarations in support of the Second Amended Certification Motion, they had not spoken with Dr. Fidell; they had not participated in defining the boundaries of the proposed Class Areas; they did not know whether noise or emissions had increased for any property in the Class Areas; they did not know if any property had experienced a diminution in value caused by the Third Runway; and they had not created the model to evaluate, on a class-wide basis, whether increased Third Runway-related aircraft noise affected property values.[9]

Plaintiffs' valuation experts plan to test for the generalized effect of the Third Runway by examining property values before and after it opened. As Mr. Hunsperger explained in his Declaration (Paragraph 15), "an aggregate loss can be determined for each class area, or if necessary, aggregate loss can be determined for certain subgroups of properties within each class area, and the loss allocated to each property individually." Rather than determine damages at individual properties, Plaintiffs' valuation experts propose having class members equitably allocate the aggregate class-wide diminution that they intend to calculate, perhaps through some sort of group participation.[10]

[8] Alverson Decl. ¶ 15 & Ex. 3.
[9] Throupe Dep. 27:13-15, 18:4-10, 199:23-24, 200:14-22; Hunsperger Dep. 39:5-15, 43:7-17, 166:8-9.
[10] Throupe Dep. 180:17-181:15 ("[W]e'll actually have the class participate in how it should be done.").

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Plaintiff's valuation experts relied on several studies relating to property values near airports. The *Meta-Analysis of Airport Noise and Hedonic Property Values* study by Jon P. Nelson, attached as Exhibit B to the Declaration of Dr. Throupe, examined noise as a "percent decrease in given property value due to a one dB increase in noise exposure on the DNL scale."[11] The study entitled *The Effect of Airport Noise on Housing Values: A Summary Report* by Booz-Allen & Hamilton, Inc., which is attached as Exhibit B to the Declaration of Wayne Hunsperger, also quantified noise exposure.[12] None of the studies relied upon by Plaintiffs' valuation experts used Dr. Fidell's CTL index or an analysis of noise complaints to assess the effect of airport noise on property values. Neither Mr. Hunsperger nor Dr. Throupe has ever conducted a property appraisal where "annoyance" was used as a property attribute.[13]

Bates McKee, an appraiser hired by the Port, determined that approximately 4,635 properties in proposed Class A, including the Bearse and McKinney properties, are subject to avigation easements, recorded on the title, obtained prior to the alleged taking. In general, these are the parcels nearest to Sea-Tac Airport in areas that formerly or currently experience aircraft noise levels of 65 dB DNL or greater. Each easement allows unrestricted overflight for Sea-Tac Airport, as long as threshold noise limits are not exceeded.

Mr. McKee also determined that about 6,950 properties in Class A located within the Airport's 1991 or 1998 65 dB DNL noise contour were sold at least once after July 1993. The Port published FAR Part 150 noise exposure maps, and federal statutes and regulations limit the recovery of damages attributable to airport noise for these properties, unless there was an increase in the DNL above the level shown on the NEM of 1.5 dB or greater.[14]

Since November 14, 2011, more than 340 persons have filed separate, individual administrative tort claim forms with the Port asserting claims for property damage and personal

[11] Throupe Decl., Ex. 2, p. 7 (emphasis added).
[12] Hunsperger Decl., Ex. 2, p. 8.
[13] Throupe Dep. 201:17-21; Hunsperger Dep. 167:25-168:2.
[14] McKee Decl. ¶ 47; 14 C.F.R. 150.21(2)(f)(1).

injuries related to noise, vibrations, and emissions from operations on the Third Runway. As indicated above, the class action lawsuit is limited to property damage claims.

III. ANALYSIS

A. Elements Of Inverse Condemnation.

An inverse condemnation plaintiff bears the burden of proving (1) a taking or damaging (2) of private property (3) for use (4) without just compensation being paid (5) by a government entity that has not instituted formal proceedings. *Phillips v. King County*, 136 Wn.2d 946, 957, 968 P.2d 871 (1998). The government activity must cause the alleged damage to the property. *Gaines v. Pierce County*, 66 Wn. App. 715, 726, 834 P.2d 631 (1992), *rev. denied*, 120 Wn.2d 1021 (1993) (causal relationship must exist before liability for inverse condemnation can attach because "governmental conduct that is not a cause of damage to plaintiff cannot constitute a 'taking' for purposes of inverse condemnation"). Inverse condemnation claims must be based on permanent injury to the property. *N. Pac. Ry. Co. v. Sunnyside Valley Irrig. Dist.*, 85 Wn.2d 920, 924, 540 P.2d 1387 (1975).

B. Consideration of CR 23's Requirements

CR 23(a) requires plaintiffs to satisfy four preliminary requirements: (1) numerosity and impracticability of joinder; (2) questions of law or fact common to the class; (3) typicality of claims or defenses; and (4) adequacy of representation. Because they seek certification of a damages class, plaintiffs "must further satisfy the tougher standard of CR 23(b)(3) and prove that common legal and factual issues *predominate* over individual issues and that a class action is an otherwise superior form of adjudication." *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 269, 259 P.3d 129(2011)(emphasis in original).

Before granting class certification, the court must engage in a rigorous analysis to ensure that all requirements of CR 23 have been met. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011); *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 18-19, 65 P.3d 1 (2003). In doing the analysis, a court "may certainly look past the pleadings" to understand the claims,

defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues. *Id.* at 93-94. The court must consider the evidence in the record, including expert testimony, to decide whether the case meets the requirements of CR 23. *Schwendeman*, 116 Wn. App. at 21 n.34; *Oda v. State*, 111 Wn. App. 79, 94, *rev.denied*, 147 Wn.2d 1018 (2002).

1. Numerosity – CR 23(a)(1)

CR 23(a)(1) requires that the Court find the "class is so numerous that joinder of all members is impracticable." This numerosity requirement is met if joinder would be extremely difficult or inconvenient. *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 821, 64 P.3d 49 (2003). Although there is no fixed numerosity requirement, courts have recognized a rebuttable presumption that joinder is impracticable if the class contains at least 40 members. *Id.* The trial court should also consider the size of the class in conjunction with other factors, including judicial economy, geographic dispersement of the class members, the size of individual claims, the financial resources of the class members, and the ability of claimants to file individual suits. *Id.* at 821-22.

More than 330 individuals have already filed tort claim forms with the Port regarding the Third Runway. Most of these claims are by current or former property owners from within the proposed class boundaries. Further, as acknowledged by the Port during oral argument, thousands of property owners live within the proposed class boundaries. Based on these numbers, the Court concludes that plaintiffs satisfy the requirements of CR 23(a)(1).

2. Commonality – CR 23(a)(2)

CR 23(a)(2) requires that the Court find "there are questions of law or fact common to the class." This "commonality" requirement is met if "... the defendant was engaged in a 'common course of conduct' in relation to all potential class members ..." *King v. Riveland*, 125 Wn.2d 500, 519, 886 P.2d 160 (1994). The Court finds that the commonality requirement is met because the claims of all proposed class members arise from the Port's operation of the Third

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Runway. The proposed class member claim inverse condemnation as a result of increased noise from the Third Runway. *Arlo v. Metro Airports Comm'n*, 367 N.W.2d 509 (Minn. 1985)(questions of law and fact common to the class existed in airport inverse condemnation case).

The Port argues that because neither Dr. Fidell's CTL analysis nor his study of telephone complaints establishes the existence of the increased noise, plaintiffs cannot establish that they have suffered "the same injury." *Dukes*, 131 S. Ct. at 2551. While this argument impacts the Court's analysis under CR 23(b)(2), the merits of Dr. Fidell's methodology do not affect the commonality requirement. Regardless of whether the proposed class members could ultimately establish injury from increased noise generated by the Third Runway, their claims all arise from a common set of circumstances, i.e., the effects of the Third Runway on their property values.

3. Typicality – CR 23(a)(3)

CR 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." This "typicality" requirement is met if the claims of the representative plaintiffs "... arise[] from the same event or practice or course of conduct that gives rise to the claims of other class members, and if [their] claims are based on the same legal theory." *Smith*, 113 Wn. App. at 320. As with the commonality requirement, "[w]here the same unlawful conduct is alleged to have affected both the named plaintiffs and the class members, varying fact patterns in the individual claims will not defeat the typicality requirement." *Id.*

The proposed class representatives' claims are based on damages from the same course of conduct, the Port's operation of the Third Runway, allegedly affecting all other proposed class members. However, Ms. Bearse and Ms. Moore are not typical of the absent class members they seek to represent because they are both among the group of people who have filed tort claims with the Port seeking to recover damages *in addition to* permanent diminution in value to their real property. Plaintiffs' proposed Classes exclude this remedy on behalf of the absent members

of the putative class. John McKinney, who has not filed a tort claim, meets the typicality requirement for Class A.

None of the named plaintiffs' claims are typical of the claims of members of proposed Class B because they do not reside in or are members of Class B. *Dukes*, 131 S. Ct. at 2550 (representative must be member of the class). Class B should not be certified because it has no representative. *Betts v. Reliable Collection Agency, Ltd.*, 659 F.2d 1000, 1005 (9th Cir. 1981) ("[A] fundamental requirement in the establishment of a subclass is that the representative plaintiff must be a member of the class she wishes to represent.").

4. Adequacy – CR 23(a)(4)

Proposed class representative must adequately represent and protect the interests of other members of the class. CR 23(a)(4). No class can be certified where the interests of the class representative are antagonistic to those of the unnamed class members. *DeFunis v. Odegaard*, 84 Wn.2d 617, 622, 529 P.2d 438 (1974). A class representative will be deemed to be in conflict with absent members of a putative class if he or she opts not to pursue certain claims or remedies, because foregoing those claims will preclude absent class members from later pursuing them. *See* 5 *Newberg on Class Actions* § 17:12 (4th ed. 2002 & 2010 Supp.)

Under Washington law, a person is entitled to only a single lawsuit to assert all claims arising out of or related to a claimed injury. *Landry v. Luscher*, 95 Wn. App. 779, 785-86, 976 P.2d 1274, *rev. denied*, 139 Wn.2d 1006 (1999) (plaintiff limited to one lawsuit for property and personal injury from one incident). This rule applies both in the individual context and in class actions. *Knuth v. Beneficial Wash., Inc.*, 107 Wn. App. 727, 731, 31 P.3d 694 (2001) (res judicata bars second class action based on claims that could have been brought in first class action).

Plaintiffs' conflict arises from the fact that they have chosen to limit their case to claims for permanent damage to the value of real property and have foregone other theories under which they could arguably recover other types of damages. As plaintiffs' counsel acknowledged

during oral argument, they decided to forego personal injury claims to enhance their chances of obtaining class certification. Yet plaintiffs' counsel has recently filed more than 330 individual claims with the Port (including claims on behalf of Ms. Bearse and Ms. Moore) alleging personal injury claims as well as damage to their properties.

Plaintiffs' decision to engage in "claim splitting" by foregoing personal injury claims in the class action lawsuit creates a conflict with absent class members and makes Plaintiffs inadequate class representatives. *Sanchez v. Wal Mart Stores, Inc.*, 2009 WL 1514435, at *3 (E.D. Cal. 2009)(decision by class representative to limit claims to economic damages and not to pursue personal injuries created a conflict of interest); (*Fosmire v. Progressive Max Ins. Co.*, --- F.R.D. ----, 2011 WL 4801915 *8 (W.D. Wash. 2011) (failure to pursue stigma damages to maximize ability to obtain class certification created conflict of interest).

The Court concludes that Plaintiffs are not adequate class representatives as required by CR 23(a)(4).

C. Inverse Condemnation Claims Present Predominantly Individual Issues And A Class Action Is Not A Superior Mechanism For Resolving Those Claims.

Because plaintiffs are seeking certification of a damages class under CR 23(b)(3), they must also prove that common legal and factual issues predominate over individual issues and that a class action is a superior form of adjudication. *Schnall*, 171 Wn.2d at 169. This case does not satisfy either of these requirements of CR 23(b)(3).

1. Individual Issues Predominate Over Common Issues.

To establish "predominance," plaintiffs must prove that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." CR 23(b)(3). "The predominance requirement is more exacting and stringent than the commonality requirement" found in CR 23(a). *Schwendeman*, 116 Wn. App. at 20.

Individual issues predominate here because the evidence required to establish liability is necessarily property-specific. Under Washington law, no taking of property occurs through the

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effects of airplane noise and related impacts unless there is proof of a measurable diminution in the market value of the plaintiff's property. *Martin v. Port of Seattle*, 64 Wn.2d 309, 318-20, 391 P.2d 540 (1964). The litmus test for determining if an interference becomes a "taking" is whether the plaintiff can prove a permanent, measurable diminution in market value. *Id.* Thus, diminution in value is not simply the measure of damages in an inverse condemnation case – it is an element for establishing whether a taking has occurred at all.

Plaintiffs have 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. As previously described, plaintiffs have defined Class A and B based on annoyance rather than noise. Individual appraisals will likely be indispensable to determining the amount of diminution experienced by each property in the proposed Class Areas. Class treatment is not appropriate under such circumstances where the pivotal issue of liability, including the related questions of causation and defenses to liability, must be decided on a case-by-case basis for each class member. *City of San Jose*, 525 P.2d at 710-12; *Ario v. Metro. Airports Comm'n*, 367 N.W.2d 509, 515 (Minn. 1985). Proof 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 at a particular property all raise individualized issues that predominate over common issues in this case.

Additional property-specific evidence is required because two of the named plaintiffs' properties and many others in the proposed classes have express avigation easements. Further, federal law requires property-specific proof about properties that were purchased after the Port published one or more FAA-approved NEMs. The evidence needed to determine whether an avigation easement and/or NEM applies and whether a particular property owner can satisfy these additional proof requirements must be examined on a case-by-case basis. For example, plaintiffs Bearse and McKinney must each demonstrate that the aircraft noise reaching their

properties exceeds the specific levels specified in their respective avigation easements and (for Ms. Bearse) the level disclosed on the applicable NEM. These property- and claimant-specific obligations are exactly the kinds of individualized determinations that "predominate" over common issues and preclude class certification under CR 23(b)(3).

2. A Class Action Is Not A Superior Method Of Resolving Inverse Condemnation Claims.

CR 23(b)(3) also requires plaintiffs to show that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." CR 23(b)(3). "If each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not 'superior.'" *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1192 (9th Cir. 2001). This is true of inverse condemnation cases relating to airport operations. *City of San Jose*, 525 P.2d at 710-11.

Certifying plaintiffs' inverse condemnation claims as a class action would not promote the efficient resolution of these claims. As previously indicated, liability and damages are inextricably intertwined under Washington inverse condemnation law. *Martin*, 64 Wn.2d at 318-20. Courts have consistently held in inverse condemnation cases involving aircraft noise that a class action is not a superior method of litigating these claims because of the inherent overlap between liability and damages. "Diminution in market value is so wedded to noise invasion that the former cannot be proved without again proving the latter." *Ario*, 367 N.W.2d at 515. The evidence necessary to establish liability to the class would have to be considered again in each property owner's damages case. *Id.* at 515-16. Judge Zilly recognized these same issues when he denied class certification in *Favro v. Port of Seattle*, No. C92-1634Z (W.D. Wash., June 23, 1993), a case involving a much smaller, closely grouped set of properties.

IV. CONCLUSION AND ORDER

Plaintiffs have not met the class certification prerequisites of CR 23(a), and have failed to establish the predominance of common class-wide issues and the superiority of the class action

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as a mechanism for resolving the alleged inverse condemnation claims as required by CR 23(b). After more than two years of litigation and three motions for class certification, plaintiffs have had a full and fair opportunity to present their arguments in support of class certification.. The Court concludes that plaintiffs' inverse condemnation claims are unsuitable for resolution in a class action.

Accordingly, IT IS HEREBY ORDERED THAT plaintiffs' Second Amended Certification Motion is DENIED.

IT IS FURTHER ORDERED THAT this case will go forward solely with regard to the claims of the named Plaintiffs.

IT IS FURTHER ORDERED THAT the parties shall meet and confer and provide the Court with a proposed revised case schedule. The case schedule shall be provided to the Court not later than 30 days from the date of this Order.

DATED this 9th day of April, 2012.

/s/

Judge Bruce E. Heller

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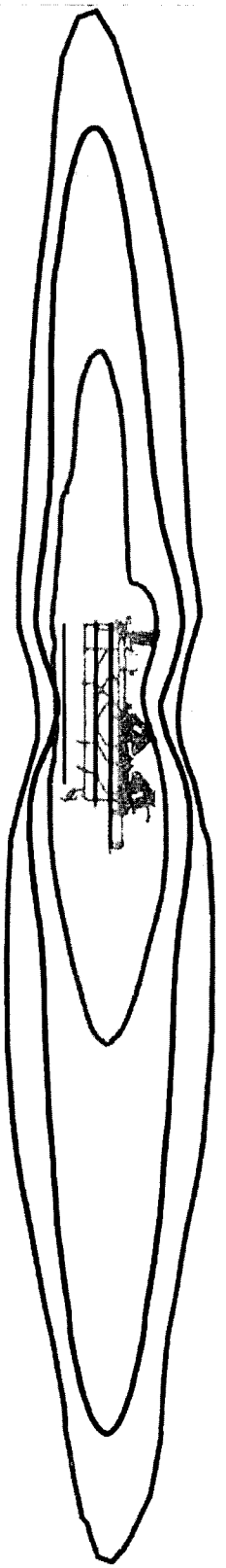
Appendix 4

Decreasing Noise Over Time

Seattle-Tacoma International Airport & Vicinity



65 DNL Contour

2010 65 DNL (ESA)

1998 65 DNL (POS)
Publ. 12/15/01, 2002 Part 150

1991 DNL (POS)
Publ. 07/25/93, 1994 Part 150

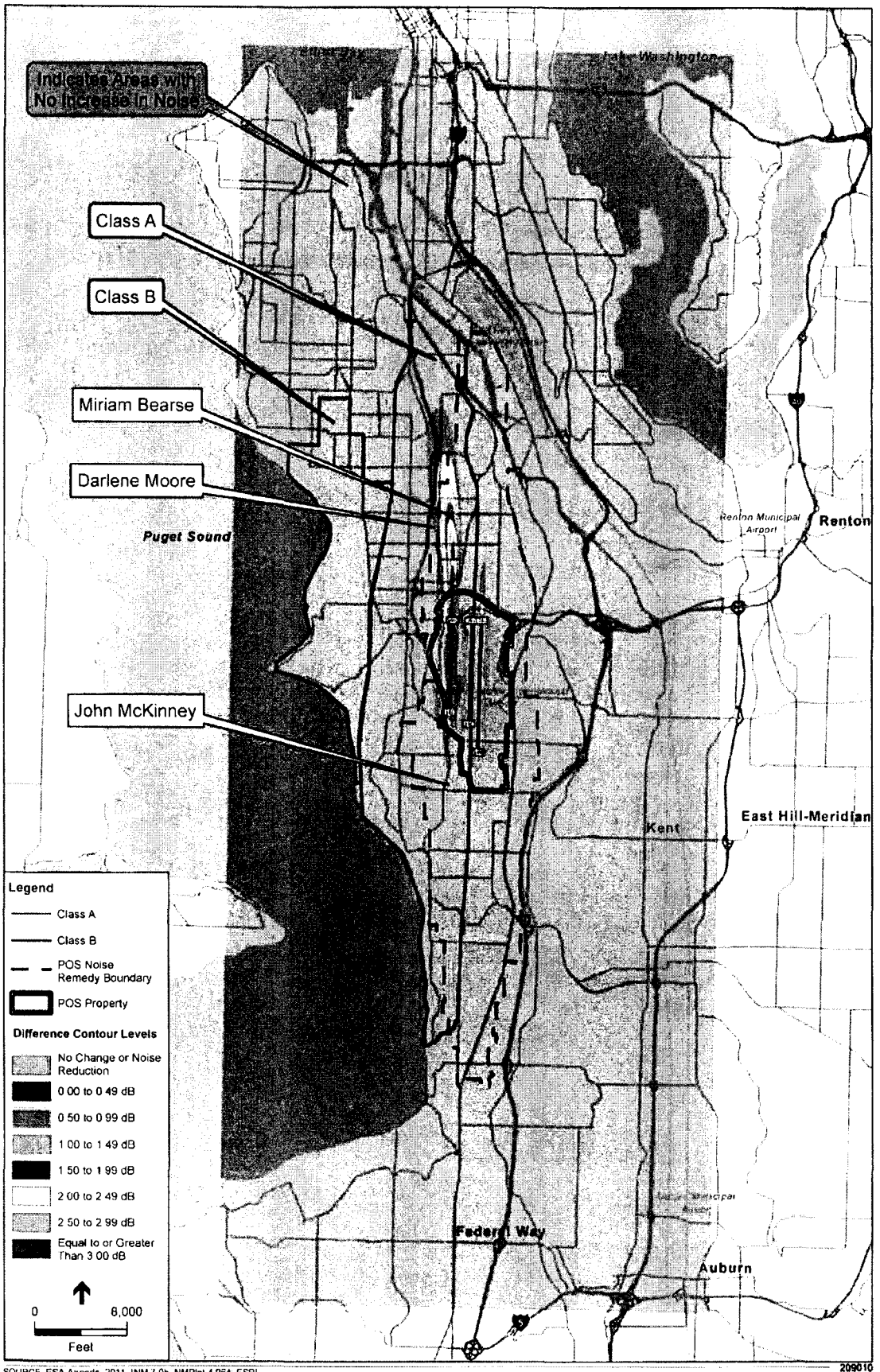
Parcels

Parcel

Map by Schlosser Geographic Systems, Inc. (SGSI) | NoiseAreas_20101210.wor

Exhibit 5

Appendix 5



SOURCE: ESA Airports, 2011, INM 7 0b, NMPlot 4 954, ESRI

209010

Exhibit 2
2010 Actual versus 2007-2008 Actual Difference Contours

OFFICE RECEPTIONIST, CLERK

To: Adrian Urquhart Winder
Subject: RE: Admasu v. The Port of Seattle (Court of Appeals No. 70220-3-I) - Respondent's Answer to Petition for Review

Received 2-19-15

From: Adrian Urquhart Winder [mailto:WindA@foster.com]
Sent: Thursday, February 19, 2015 2:40 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Tim J. Filer; Patrick Mullaney; Traci Goodwin (Goodwin.T@portseattle.org); 'darrell@pcvalaw.com'; 'kevin@pcvalaw.com'; 'jason@pcvalaw.com'; 'mike@pcvalaw.com'; 'will@dixon-law.com'
Subject: Admasu v. The Port of Seattle (Court of Appeals No. 70220-3-I) - Respondent's Answer to Petition for Review

Dear Clerk of the Court:

Please find attached for filing with the Court the following document: Respondent The Port of Seattle's **Answer to Petition for Review**

- **Case:** Kebede Admasu, et al v. The Port of Seattle, Court of Appeals Case No. 70220-3-I
- **Court:** Supreme Court of the State of Washington
- **Counsel for Respondent:** Tim J. Filer, (206) 447-2904, WSBA No. 16285, filet@foster.com; Patrick J. Mullaney, (206) 447-2815, WSBA No. 21982, mullp@foster.com; Adrian Urquhart Winder, (206) 447-8972, WSBA No. 38071, winda@foster.com

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Thank you,
Adrian

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