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No. 70220-3-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KEBEDE ADMASU, et al.,

Petitioners,

vs.

THE PORT OF SEATTLE,
a Washington municipal corporation,

Respondent.

PETITION FOR REVIEW

Darrell L. Cochran, WSBA No. 22851
Jason P. Amala, WSBA No. 37054
Kevin M. Hastings, WSBA No. 42316
Counsel for Petitioners

PFAU COCHRAN VERTETIS
AMALA, PLLC
911 Pacific Avenue, Suite 200
Tacoma, Washington 98402
(253) 777-0799

TABLE OF CONTENTS

I. IDENTITY OF PETITIONERS 1

II. THE DECISION OF THE COURT OF APPEALS 1

III. ISSUES PRESENTED FOR REVIEW 2

A. Should review be granted under RAP 13.4(b)(1) and (b)(2) because the Court of Appeals' decision in this case is in conflict with previous decisions of the Court of Appeals and this Court? 2

B. Should review be granted under RAP 13.4(b)(4) because this case presents an issue of substantial public interest that should be determined by the Supreme Court? 2

IV. STATEMENT OF THE CASE 2

A. The Third Runway's Impact On Nearby Communities 3

B. Procedural History 4

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 12

A. Review is warranted under RAP 13.4(b)(1) and (b)(2) because Division One's decision is in conflict with multiple decisions of the Court of Appeals and this Court 12

B. Review is warranted under RAP 13.4(b)(4) because this petition involves an issue of substantial public interest that should be determined by this court. 19

VI. CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Moeller v. Farmers Ins. Co. of Wash.,
173 Wn.2d 264, 267 P.3d 998 (2011) 16, 17, 18, 19

Sitton v. State Farm. Mut. Auto. Ins. Co.,
116 Wn. App. 245, 63 P.3d 198 (2003) 14, 15, 19

Smith v. Behr Process Corp.,
113 Wn. App. 306, 323, 54 P.3d 665 (2002) 13, 14, 15, 19

STATUTES

49 C.F.R. 47504 8

RULES

CR 23(b) 1, 12, 14, 16, 17, 18, 19, 20

OTHER AUTHORITIES

Newberg on Class Actions § 10:2 (4th ed. 2002) 19

I. IDENTITY OF PETITIONERS

Kebede Admasu, et al, ask this Court to accept review of the decision designated in Part II below.

II. THE DECISION OF THE COURT OF APPEALS

The Petitioners before this Court consist of hundreds of Washington citizens who began experiencing severe, constant disruptions to the enjoyment of their properties—including jet noise, vibrations, soot, and fumes due to increased overhead flights—immediately after Defendant Port of Seattle ("Port") began operations on its newly-constructed third runway ("Third Runway") at Seattle-Tacoma International Airport. Petitioners then filed a proposed class action lawsuit against the Port, alleging damages under an inverse condemnation cause of action and moving for certification under CR 23(b)(3). The trial court denied class certification, reasoning that inverse condemnation claims require an individualized showing of diminution in property value to establish both liability and damages and, thus, common issues of fact or law did not predominate over individual issues (the "predominance" criterion") and that a class action was not a superior method of adjudicating Petitioners' claims due to the existence of those individualized issues (the "superiority" criterion).

In an originally unpublished decision, Division One affirmed the trial court's denial of class certification, holding that Petitioners failed to satisfy CR 23(b)(3)'s predominance and superiority criteria. *Admasu v. Port of Seattle*, ___ Wn. App. ___, ___ P.3d ___, 2014 WL 7339741, at

*2-4 (Wash. Ct. App. Oct. 27, 2014). On December 18, 2014, Division One entered an order granting the Port's motion to publish its decision. Petitioners now request this court to review Division One's decision.

Division One held that Petitioners failed to meet the predominance criterion because (1) "[g]eneralized evidence of diminished value and generalized proof that the diminished value resulted from airport operations would not establish liability for inverse condemnation" and (2) the "Class Plaintiffs [sic] proposed methodology for demonstrating class-wide diminution in value [was] not sufficiently concrete" to establish that common issues predominated over individual issues. *Admasu*, 2014 WL 7339741, at *3. Division One also held that Petitioners failed to meet the superiority criterion because (1) of "the many individual inquiries that would be required to determine both liability and damages" and (2) "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." *Admasu*, 2014 WL 7339741, at *4.

III. ISSUES PRESENTED FOR REVIEW

A. Should review be granted under RAP 13.4(b)(1) and (b)(2) because the Court of Appeals' decision in this case is in conflict with previous decisions of the Court of Appeals and this Court?

B. Should review be granted under RAP 13.4(b)(4) because this case presents an issue of substantial public interest that should be determined by the Supreme Court?

IV. STATEMENT OF THE CASE

A. The Third Runway's Impact On Nearby Communities

In November 2008, the Port began operations on the Third Runway.[1] The Port built the Third Runway 1,750 feet west of the existing runways (i.e., 1/3 of a mile),[2] and the Third Runway is responsible for 33% of arriving air traffic (e.g., approximately 52,320 arrivals in 2010, or 143 planes per day).[3] The Third Runway changed flight patterns, including overflights from "propeller-driven aircraft that are required to turn on takeoff to avoid being overtaken by faster jet aircraft that are taking off behind them."[4]

Unsurprisingly, the Third Runway's operations immediately began impacting the surrounding neighborhoods to their detriment. The Port received hundreds of complaints (a 350% increase) immediately after the Third Runway opened.[5] And the complaints of property owners described the Third Runway's negative impacts in no uncertain terms. As stated by one property owner, "Before, when the planes were in a landing pattern a half-mile away, there was little noise."[6] Property owners were able to enjoy their backyards, carry on conversations without difficulty, watch television without issue, and use electronic devices without any signal interference.[7] After the Port began operations on the Third Runway, however, property owners in the vicinity became prisoners in their own

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[1] Clerks Papers (CP) at 3937.
[2] CP at 1502.
[3] CP at 1295; *see also* CP at 1523 (reflecting a total of 313,954 flights in 2010).
[4] CP at 1503.
[5] CP at 1051-1054, 1103 (noting an increase in complaints per month by a factor of 3.5)
[6] CP at 3588-3589.
[7] CP at 3445-3446; 3452-3453; 3470-3472; 3542; 3548; 3580-3581.

homes, unable to enjoy their outside property. Children no longer played outside, homeowners no longer went for walks or bike rides, and neighbors no longer held conversations outside.[8] As another property owner aptly summarized, "You never see anyone out and about."[9]

For some owners, not even remaining locked inside with all the windows and doors shut brought relief.[10] The Third Runway has brought aircraft directly overhead at low altitudes, and consequently, the noise was not only louder but significantly more intense.[11] The thrust of jet engines now shook houses, causing so much vibration that glassware rattled, light bulbs unscrewed, and nails backed out of sidewall.[12] The aircraft also disrupted electronic signals, interfered with cellular phone conversations, and disrupted satellite television transmissions.[13] Along with these issues, the aircraft using the Third Runway substantially increased the amount of dust and soot falling on homes and caused jet fuel odor.[14] Furthermore, imprisoning those affected by the Third Runway drastically changed the character of the neighborhoods, essentially causing blight.[15] With reduced property values, some property owners stopped maintaining their homes and tending to their yards.[16]

B. Procedural History

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[8]CP at 3470-3472; 3518-3519; 3542; 3573-3574; 3580-3581.
[9] CP at 3573-3574.
[10] CP at 3525; 3573-3574.
[11] CP at 3542; 3518-3519; 3548; 3588-3589.
[12] CP at 3580-3581; 3489-3490; 3593-3594.
[13] CP at 3445-3446; 3452-3453; 3470-3471; 3542; 3548; 3566; 3580-3581.
[14] CP at 3445-3446; 3452-3453; 3470-3471; 3548; 3580-3581; 3588-3589; 3593-3594.
[15] CP at 3489-3490; 3566-3567.
[16] CP at 3566-3567.

i. Petitioners Seek Class Certification

Seeking relief from the detrimental impacts of Third Runway operations on property owners within its vicinity, Petitioners filed a class action complaint.[17] Petitioners then moved for class certification.[18] The trial court entered an order denying class certification, but permitting Petitioners to file another class certification motion.[19] Petitioners filed a Second Amended Motion for Class Certification, which the trial court again denied.[20]

Petitioners' Second Amended Complaint was before the trial court when it considered Petitioners' Second Amended Motion for Class Certification. In their Second Amended Complaint, Petitioners alleged:

> By reason of the third runway's close proximity to the Plaintiffs' and Class Members' properties, the flight path of aircraft originating and arriving at Sea-Tac Airport is located in the vicinity of Plaintiffs' and Class Members' properties. The number of airplanes passing in the vicinity of Plaintiffs' and Class Members' properties has increased dramatically. Such airplanes, on take-off and landing, use the third runway at all hours of the day and night. The aircraft fly over private property in Sea-Tac Airport's vicinity at a low altitude. The increase in air traffic passing over the Plaintiffs' and Class Members' properties in close proximity to the properties has created heightened noise pollution, increased vibration, and increased toxic discharge and fumes, all of which have negative physical effects on Plaintiffs, Class Members, and other inhabitants of their homes.[21]

Based on this factual predicate, Petitioners' Second Amended Complaint

[17] CP at 165.
[18] CP at 37, 219.
[19] CP at 897-898
[20] CP at 1256, 2055.
[21] CP at 170.

presented a single cause of action—inverse condemnation—and specifically alleged:

> *As a direct and proximate result of the increased airport operations at Sea-Tac Airport, including the use of the third runway following its construction*, Defendant has substantially interfered with the practical use and enjoyment of Plaintiffs' and Class Members' properties. *By doing so, Defendant has caused a diminution in the fair market value of the Plaintiffs' and Class Members' properties* and has taken and/or damaged the Plaintiffs' and Class Members' properties without the payment of just compensation and without due process of law, contrary to the United States Constitution and the Washington State Constitution.[22]

In their Second Amended Motion for Class Certification, Petitioners proposed two separate classes, Class A and B.[23]

ii. Class definition

Petitioners defined Class A as (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.[24] Petitioners developed the criteria for Class A by cross-referencing the Port's 2009 INM noise contours, the Port's complaint data, and a social survey of 936 residents in the proposed class area.[25]

Petitioners' noise expert, Dr. Sanford Fidell, undertook an

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[22] CP at 173 (emphasis added).
[23] CP at 1258. Petitioners submitted visual representations of the two proposed classes plotted on a map. CP at 1005, 1007. Petitioners did not appeal from the trial court's denial of certification of Class B.
[24] CP at 1011, 1260.
[25] *Id.*

extensive social survey of 936 property owners to measure the actual community reaction to airport externalities approximately one year after the Port started using the third runway.[26] In Dr. Fidell's survey, 43% (402 of 936) of the respondents described themselves as highly annoyed by aircraft noise over the prior year.[27] In general, the results of Dr. Fidell's survey discovered that "the noise and vibration associated with aircraft operations on [the Third Runway] highly annoy, disturb the sleep, and interfere with the speech of substantial proportions of the residential population living north, south, and west of the airport."[28] Many survey respondents also reported that "[t]he soot and fumes associated with increased aircraft operations was also annoying."[29]

Most importantly, the survey's results revealed that 12.9% of the population in neighborhoods in the Third Runway's vicinity reported being "highly annoyed" at a Day-Night Average Sound Level (DNL)[30] of 51 decibels (dB), a substantially lower threshold than the 65 dB DNL predicted by the Federal Aviation Administration (FAA) and relied on by the Port.[31] These findings were important because federal regulations of airport noise impacts define "significant noise impacts" as occurring when more than 12.9% of the population in a given area is highly annoyed by

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[26] CP at 1086, 1096.
[27] CP at 1097.
[28] CP at 1086.
[29] *Id.*
[30] "DNL is . . . a cumulative measure of environmental noise exposure . . . embraced by the [Federal Aviation Administration]. CP at 1041.
[31] CP at 1044-1047, 1050-1051.

aircraft noise.[32] Thus, Dr. Fidell opined that the boundary of one class of property owners suffering "significant impacts" from the Third Runway's operations "included all property within the airport's [51 dB DNL] aircraft noise exposure contour as of 2009."[33]

Accordingly, Petitioners compared the findings of significant noise impacts with the Port's noise data and concluded that residents experiencing noise exposure of at least 51 dB DNL correlated to significant noise impacts as defined by the FAA.[34] Petitioners next examined the Port's 2009 actual DNL contours and plotted them on a map.[35] Thus, the western boundary of Class A is the edges of the 51 dB DNL contour as provided by the Port (i.e., where 12.9% or more of the local population are highly annoyed).[36]

Furthermore, Dr. Fidell analyzed the actual complaint data collected by the Port that reflects the change in complaints from property owners before and after the opening of the Third Runway.[37] The northern and southern boundaries of Class A reflected the spread of these intensifying complaints.[38] Not surprisingly, Class A contained an

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[32] CP at 1046-1047.
[33] CP at 1054.
[34] CP at 1260-1261.
[35] The Port of Seattle is required to collect the underlying noise data and to periodically update its noise contour maps in order to qualify for federal noise mitigation grant money. *See* 49 C.F.R. 47504 ("Noise compatibility programs"). The Port of Seattle is currently in the process of preparing its next Part 150 study update for the FAA. *See* Port of Seattle, Seattle-Tacoma International Airport Part 150 Study Update website, at www.airportsites.net/SEA-Part150.
[36] *See* CP at 1054.
[37] CP at 1051-1054, 1103-1107.
[38] *See* CP at 1009, 1011.

overwhelming majority of the property owners who contacted Petitioners' counsel regarding possible action against the Port.[39]

Moreover, because Petitioners' claims arose out of the use of the westernmost Third Runway, logic suggested that residents east of the airport do not share a common experience with west-side residents. Thus, the eastern boundary of Class A lay along the extended centerline of the second runway (16C, 34C) of Sea-Tac Airport.[40]

Finally, the Port asserted that avigation easements precluded relief for at least some of the property owners who fell within the contours of Class A, including Miriam Bearse and John McKinney. Because of the common factual and legal issues regarding the easements, Plaintiffs proposed to divide Class A into two subclasses: a subclass with easements and a subclass without easements.[41]

iii. Valuation Experts

In order to establish the diminution of property value suffered by the class members, Petitioners retained Dr. Ronald Throupe and Wayne Hunsperger, Member of the Appraisal Institute and Senior Residential Appraiser, as valuation experts.[42] According to Petitioners' valuation experts, Petitioners' proposed class "exhibit[ed] commonalities such that any economic impact on value from an environmental disamenity [could] be measured using commonly employed appraisal techniques."[43]

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[39] *See* CP at 1011, 1024-1029.
[40] CP at 1261.
[41] CP at 1262.
[42] CP at 1214-1218, CP at 1149-1155.
[43] CP at 1153.

Hunsperger proposed the usage of "[m]ultivariate statistics or regression modeling . . . to quantify the relationship between a dependent variable and one or more independent variables."[44] Hunsperger testified that this methodology would control for the impacts of the other two runways, as the impacts of the previous two runways "are inherent in the baseline [property] values because they've been there for a long time. That's already built in"[45]

Hunsperger also made clear that the methodology would ***not*** measure noise, overflight frequencies, or odors in the class area, but ***would*** measure the Third Runway's impact on properties within the class area as a diminution in property values reflected as dollar amounts.[46] Hunsperger reiterated that this methodology ***would*** demonstrate the Third Runway's impacts on affected properties, as the "impacts [were] the dependent variable that we're solving for in the equation."[47] Thus, "the logic of the model" would support causation of diminution of class property values by the Third Runway's operations, and quantification of the Third Runway's impacts could be further supplemented by social opinion surveys of affected areas, such as Dr. Fidell's study, and "paired sales analysis."[48]

Under the valuation experts' proposed methodology, individual property characteristics "such as quality, type, size, and age [would] not

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[44] *Id.*
[45] CP at 1907.
[46] CP at 1905.
[47] CP at 1903; *see also* CP at 1893 ("[W]e'll solve probably for a variable that has to do with noise-related impacts.").
[48] CP at 1895, 1903-1904.

change the substantial common elements among the individual properties in evaluating impacts of the effective negative externalities on them."[49] In any event, such individual characteristics would be accounted for as independent variables in the methodology and could be analyzed en masse, such as applying the county assessor's ratios to subareas.[50] Throupe and Hunsperger also testified that, once the methodology determined the aggregate diminution in value of class properties, the diminution could be apportioned to each individual property through usage of the assessor's ratio.[51]

iv. The trial court's denial of certification

In its order denying class certification, the trial court found that Petitioners met many of the requirements for class certification.[52] However, the trial court concluded that Petitioners failed to meet the "predominance" requirement of CR 23(b)(3), i.e., "that common legal and factual issues predominate over individual issues."[53] The trial court reasoned that, under Washington law, a plaintiff's showing of a "permanent, measurable diminution in market value" of a plaintiff's property 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."[54] It further reasoned, "[Petitioners] have presented no

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[49] CP at 1153.
[50] *Id.*; CP at 1861-1862, 1893.
[51] CP at 1861-1862, 1894-1895.
[52] CP 2062-2065.
[53] *Id.*
[54] CP at 2067 (citing *Martin v. Port of Seattle*, 64 Wn.2d 309, 318-20, 391 P.2d 540 (1964)).

methodology for proving a class-wide diminution of property values based on alleged increases in noise, vibrations or emissions attributable to the Third Runway."[55] The trial court concluded that, because the "pivotal issue of liability, including the related questions of causation and defenses to liability" required a number of property-specific determinations, individual issues predominated over common issues in the case.[56]

Finally, the trial court ruled that Petitioners failed to meet the "superiority" requirement of CR 23(b)(3), i.e., "that 'a class action is superior to other available methods for the fair and efficient adjudication of the controversy.'"[57] It reasoned, "Diminution in market value is so wedded to noise invasion that the former cannot be proved without again proving the latter."[58] Thus, it concluded, "The evidence necessary to establish liability to the class would have to be considered again in each property owner's damages case."[59]

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Review is warranted under RAP 13.4(b)(1) and (b)(2) because Division One's decision is in conflict with multiple decisions of the Court of Appeals and this Court.

RAP 13.4(b)(1) and (b)(2) provide that review will be accepted where the Court of Appeals' decision is in conflict with another decision of this Court or the Court of Appeals. Division One's holdings that Petitioners could not satisfy either CR 23(b)(3)'s "predominance" or its

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[55] CP at 2067.
[56] *Id.*
[57] CP at 2068.
[58] *Id.* (internal quotation marks omitted).
[59] *Id.*

"superiority" criteria for class certification due to the existence of individualized issues of liability and damages are in conflict with previous decisions of the Court of Appeals and this Court.

First, Division One's holding that Petitioners failed to meet CR 23(b)(3)'s predominance criterion due to the existence of individualized issues in this case is in stark conflict with Division Two's holding in *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 323, 54 P.3d 665 (2002). In *Behr*, the trial court certified a class action alleging that several Behr products, "intended for use on exterior wood surfaces, caused extensive mildew damage to class members' homes." *Behr*, 113 Wn. App. at 315. On appeal, Behr argued that the trial court incorrectly ruled that the plaintiffs met CR 23(b)(3)'s predominance requirement because "product liability cases involving 'multiple disparate incidents', rather than a single incident such as an airplane crash, 'defy common adjudication.'" *Id.* at 319 (quoting Behr's Br. at 77). But Division Two rejected Behr's argument, holding:

> 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." *Clark v. Bonded Adjustment Co.*, 204 F.R.D. 662, 666 (E.D. Wash. 2002) (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Fed. Practice & Procedure* § 1778 (2d ed. 1986)). That class members may eventually have to make an individual showing of damages does not preclude class certification. *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975); *Osborne* [*v. Subaru of Am., Inc.*, 198 Cal. App. 3d 646, 243 Cal.Rptr. 815, 821 (Cal. Ct. App. 1988)].

Id. at 323. Applying this standard, Division Two observed that "the putative class members' claims arose from a common nucleus of operative facts involving the formulation, manufacture, and sale of Behr's allegedly defective products." *Behr*, 113 Wn. App. at 323. Thus, Division Two concluded that the trial court properly determined that plaintiffs had met the predominance criterion and certified the class. *Id.*

Likewise, Division One's decision in this case is in conflict with its own decision in *Sitton v. State Farm. Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 63 P.3d 198 (2003). In *Sitton*, the trial court certified a class action alleging that State Farm used "medical utilization reviews" of claims submitted by insureds under their State Farm personal injury protection ("PIP') policies in bad faith for the sole purpose of denying or limiting payments of benefits to the insureds. *Sitton*, 116 Wn. App. at 248-49.

On review, State Farm argued that certification of the class was inappropriate because the plaintiffs could not meet CR 23(b)(3)'s predominance requirement. *Id.* at 254. Specifically, State Farm contended that "the claims of each class member will necessarily require litigation regarding the facts of each accident, the medical condition of each insured, the specific action taken by each review panel, individual causation, and individual damages." *Id.* Division One rejected State Farm's arguments, however, and applied the *Behr* "common nucleus of operative facts" predominance standard. *Id.* at 255-56. It held:

> Under State Farm's interpretation of the predominance requirement, no subsection (b)(3) class could be certified where the claim requires resolution of

> individual issues such as causation and harm. We reject this interpretation of the rule as inconsistent with the purpose of class actions and as failing to consider judicial economy. Here, the central allegation is that State Farm's utilization reviews are not for the purpose of determining whether medical treatment is covered, but are a means to wrongfully deny or limit benefits. A common nucleus of operative facts appears to exist on this issue, and that satisfies the predominance standard of CR 23(b)(3).

Id. at 256.

Like the plaintiffs in *Behr* and *Sitton*, Petitioners in this case asserted a "common nucleus of operative facts":

> As a direct and proximate result of the increased airport operations at Sea-Tac Airport, including the use of the third runway following its construction . . . Defendant has caused a diminution in the fair market value of the Plaintiffs' and Class Members' properties and has taken and/or damaged the Plaintiffs' and Class Members' properties without the payment of just compensation and without due process of law.

And the evidence in the record, including Dr. Sanford Fidell's social survey, demonstrated the existence of this common nucleus.[60] Accordingly, Petitioners made a sufficient showing to satisfy CR 23(b)(3)'s predominance requirement under *Behr* and *Sitton*.

Moreover, Division One's holding that Petitioners' proposed methodology for establishing the Port's liability and the class's damages by deriving an aggregate, class-wide measure of diminished value and allocating individual damages to each class member was insufficient to

[60] CP at 1086 (social survey respondents reported negative effects of airport operations after Third Runway operations began, including noise, vibrations, soot, and fumes); 1895, 1903-1904 (Petitioners' valuation model would demonstrate diminishment in value of Petitioners' properties attributable to Third Runway and would further quantify the Third Runway's effects through usage of social survey data).

meet the predominance criterion is in conflict with this Court's decision in *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 267 P.3d 998 (2011). In *Moeller*, the trial court certified a class alleging that Farmers failed, pursuant to its automobile insurance policies issued to Washington insureds, to tender payment for the diminished value of its insureds' postaccident, repaired automobiles. *Moeller*, 173 Wn.2d at 267, 259. As part of its certification, the trial court approved of the class's plan to use a "mathematical model" to determine "a figure for aggregate, class-wide damages." *Id.* at 280. Specifically, the class intended to use "a statistical methodology and data from car auction sales to prove that, on average, cars that are wrecked and repaired sell for lower prices than do cars that are unwrecked and therefore, as a statistical matter, diminished value exist[ed]." *Id.* at 293 (Alexander, J., dissenting). The class then planned to "categorize and quantify the alleged average decreases in value associated with types or amounts of damage, multiply each alleged average amount by the number of class members in each damage category, and then tally the numbers to provide a class-wide damages estimate." *Id.* Finally, the class intended to account for class members who had no viable damages claim by "lop[ping] . . . off a percentage" of the class-wide damages estimate. *Id.* at 294.

On review, Farmers contended that the trial court improperly certified the class under CR 23(b)(3) because it "did not first require Moeller to prove Farmers' liability as to every member of the class." *Id.* at 279. The dissenting opinion echoed these arguments, commenting that,

under the class's methodology, there was "no way to ensure that each car included in the model actually sustained diminished value." *Id.* at 294. The dissent also reasoned that the class's methodology "potentially allow[ed] damages to be awarded without competent proof of liability to every class member." *Id.* Instead, the dissent reasoned that "individualized proofs of the preaccident and postrepair values of each damaged car should be required to ascertain which of the thousands of class members actually suffered damage caused by Farmers' failure to tender a diminished value payment" and "Moeller should be required to prove how much damage each individual class member sustained." *Id.* at 293-94.

However, the majority decision of this Court rejected those arguments, acknowledging CR 23(b)(3)'s predominance requirement and approving the trial court's reasoning that the class's methodology supported certification, as Farmers retained the ability to "'present evidence of individual claims supporting defenses unique to each claim and defend against the nature and extent of damages, if any.'" *Id.* at 280 (quoting *Moeller* Clerk's Papers at 1581). Accordingly, the majority affirmed the trial court's class certification under CR 23(b)(3). *Id.* at 281.

Like the establishment of the class-wide diminished value of automobiles in *Moeller*, in this case Petitioners proposed establishing diminished property value on a class-wide basis using a mathematical model, thus demonstrating liability to the class, and then allocating individual damages based on that class-wide amount. Such a showing was

sufficient to establish a common issue of liability to the class under *Moeller*. Indeed, as the leading commentator has observed, "[I]t is not unusual, and probably more than likely in many types of cases, that aggregate evidence of the defendant's liability is more accurate and precise than would be so with individual proofs of loss." 3 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 10:2 (4th ed. 2002). Accordingly, Division One's assertion that such "generalized" evidence is insufficient to satisfy the predominance criterion is in conflict with *Moeller*, and this Court should accept review.

Second, Division One's holding in this case that Petitioners failed to satisfy CR 23(b)(3)'s superiority criterion is also in conflict with this Court's decision in *Moeller*. In *Moeller*, the majority opinion approved of the trial court's reasoning that "'a class action [was] a superior, although not perfect means, for policyholders to pursue any claims they may have for inherent diminished value against Farmers.'" *Id.* at 280 (quoting *Moeller* Clerk's Papers at 1581). Again, as discussed above, Petitioners in this case proposed a methodology for establishing class-wide diminution in property values and allocating individual damages that was highly similar to the policyholder class's methodology used to establish class-wide diminished value of automobiles and individual damages in *Moeller*. Accordingly, Division One's decision in this case is in conflict with this Court's decision in *Moeller* that such a class action framework presents a superior means of adjudicating diminished value claims and their inherent issues of liability and damages.

B. Review is warranted under RAP 13.4(b)(4) because this petition involves an issue of substantial public interest that should be determined by this court.

Finally, RAP 13.4(b)(4) provides that review will be accepted where the petition involves an issue of substantial public interest that should be determined by the Supreme Court. In general, Division One's decision impermissibly constricts the criteria for class action certification in this state, conflicting with well-established Washington law. Despite the holdings of the *Behr* and *Sitton* decisions that a "common nucleus of operative facts as to each class member's claim" is sufficient to meet CR 23(b)(3)'s predominance requirement, Division One's decision in this case essentially holds that establishing the defendant's liability to, causation, and damages for each and every class member is also necessary. Moreover, despite this Court's approval of aggregate proof of liability and damages in *Moeller*, Division One's decision in this case held that individualized proof is necessary for every class member. Under this logic, however, individual issues will almost always predominate over common issues in a proposed class action, as Division One's decision essentially requires individualized mini-trials to establish liability and damages for every class member. Simply put, Division One's decision impermissibly imposes an insuperable bar to class certification under CR 23(b)(3).

For the same reasons, even if the effects of Division One's decision were confined to the particular facts and legal issues surrounding inverse condemnation claims based on airport expansion, it is still of

substantial public interest. According to a 2009 Washington State Department of Transportation ("WSDOT") publication, 138 public use airports alone exist in this state. WSDOT specifically identified "[p]lanning for future airport capacity needs statewide" and "[b]uilding new airports where gaps exist in the system" as challenges facing this state's airport system within the next 25 years.[61] Give these indications of future airport expansion, both in terms of construction of new facilities and increased usage of existing ones, the public deserves clarification of whether it is required to meet nigh-impossible requirements in seeking to collectively safeguard its property rights in such cases.

VI. CONCLUSION

Accordingly, Petitioners respectfully request that the Court accept review of Division One's decision in this case and the issues presented in this petition.

RESPECTFULLY SUBMITTED this 20th day of January, 2015

PFAU COCHRAN VERTETIS AMALA, PLLC

By: 

Darrell L. Cochran, WSBA No. 22851
Jason P. Amala, WSBA No. 37054
Kevin M. Hastings, WSBA No. 42316

[61] Appendix at 20. In the interests of brevity, Petitioners have attached only the relevant excerpt from WSDOT's 238-page publication. The full publication may be accessed at: http://www.wsdot.wa.gov/NR/rdonlyres/A1A271D0-E9DF-4157-9DBC-A7853513FDD9/0/AirportGuide.pdf.

STATE OF WASHINGTON)
)ss
COUNTY OF KING)

Laura Neal, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on January 20th, 2015, I delivered via Email a true and correct copy of the above, directed to:

Tim J. Filer
Patrick J. Mullaney
Samuel T. Bull
Foster Pepper PLLC
1111 3rd Avenue, #3400
Seattle, WA 98101
Attorneys for: Port of Seattle

Traci M. Goodwin
Port of Seattle
2711 Alaskan Way
Seattle, WA 98111
Attorney for: Port of Seattle

DATED this 20th day of January, 2015.

Laura Neal
Legal Assistant to
Darrell L. Cochran

APPENDIX

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:

Verellen, ACJ

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.

Washington State Airport Guide

M 3049

Washington State Department of Transportation
Aviation Division

Appendix 018

Washington State Airport Guide

M 3049

September 2009

Washington State Department of Transportation
Aviation Division
PO Box 3367
Arlington, WA 98223

360-651-6300
1-800-552-0666 (inside WA only)
Fax 360-651-6319

www.wsdot.wa.gov/aviation

Foreword

Washington State Department of Transportation (WSDOT) Aviation is responsible for the development of the *Washington State Airport Guide*. The primary purpose of the guide is to promote the use of the state's aviation system by providing basic and user friendly information regarding airport facilities.

As pilot in command, you are responsible for the safety of your flight. WSDOT Aviation does not assume responsibility for incomplete or inaccurate information contained herein due to ever-changing airport conditions and service facilities.

For complete information regarding airport facilities, pilots should consult the current *FAA Airport Facility Directory* (AFD) and current navigation charts. In addition, it is recommended that pilots contact a Flight Service Station (FSS) to determine conditions at an unfamiliar airport.

Editor
This version of the
Washington State Airport Guide
was edited by WSDOT Aviation

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Message From WSDOT Aviation

On behalf of WSDOT Aviation, welcome to the Washington State airport system, one of the most geographically diverse systems in the nation. Our state boasts a variety of unique airports including mountain strips, seaplane bases, and a beach airport at Copalis.

Here are a few facts about Washington's airports:

We have 138 public use airports in our state classified as 16 commercial, 19 regional, 23 community, 33 local service, 38 rural essential, and 9 seaplane. The airports are operated by local jurisdictions such as cities, counties, ports, state, and private parties. Many airports are unstaffed and maintained by airport volunteers. Sixty-five of these airports are included in the federal system and are eligible for federal grants. The remaining airports are smaller and rely on exclusively state and local funding. 136 of these airports are featured in this guide.

Recently the state completed a Long-Term Air Transportation Study to update the aviation system plan and identify future challenges. What are the challenges facing the airport system in the next 25 years?

- Funding to maintain and improve the airport system.
- Protecting airports from incompatible land use.
- Preventing airport closures.
- Sustaining air service to small communities.
- Planning for future airport capacity needs statewide.
- Building new airports where gaps exist in the system.
- Educating the public on the value of air transportation.

While the state is responsible for planning the aviation system and providing financial assistance to airports, most challenges must be addressed locally by the airport owner. In order to preserve the airport system for future generations, aviators of all backgrounds must be engaged in the issues affecting their local airports.

The *Washington State Airport Guide* is a tool for you to explore our system of airports and understand first hand the value they bring to Washington State. Please share your experience with others and continue to highlight the importance of the state's aviation system.