Case No. 93671-4
(Court of Appeals Case No. 73504-7-I)

SUPREME COURT
OF THE STATE OF WASHINGTON

EVERETT HANGAR, LLC, a Washington limited liability company,
Respondent,

v.

KILO 6 OWNERS ASSOCIATION, a Washington nonprofit corporation; KILO SIX, LLC, a Washington limited liability company; HISTORIC HANGARS, LLC, a Washington limited liability company; HISTORIC FLIGHT FOUNDATION, a Washington nonprofit corporation; and JOHN SESSIONS, an individual
Petitioners.

REPLY TO ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Everett Hangar's request for review of the jet blast issue should be denied because Everett Hangar has not met, or even purported to meet, the criteria for discretionary review.

Everett Hangar has tried to add a jet blast zone to the Easement to prevent the Historic Flight Foundation from using the Lot 11 ramp for museum activities. No jet blast zone language is in the Easement. No evidence at trial remotely suggested the parties intended to include a jet blast zone in the Easement. And adding a jet blast zone to the Easement would be wholly inconsistent with the other CC&Rs, the Leases, and the permitted uses of the properties.

Nevertheless, the trial court improperly added a jet blast zone to the Easement, and enjoined the Foundation from placing any object or person on the Lot 11 ramp at any time. This was a matter of legal interpretation of the Easement, not dependent on any factual findings, and reviewable *de novo* on appeal.

The Court of Appeals unanimously reversed the trial court's legal interpretation of the Easement as a matter of law by ruling the Easement does not include a jet blast zone. This interpretation is supported by the Easement's language, other CC&Rs, the size of Lot 11, the permitted and historical uses of Lot 11, the impact a jet blast zone would have on the

uses of Lot 11, the ground leases, the regulatory scheme governing aircraft movement, and the parties' past practices.

By interpreting the Easement as it did, the Court of Appeals corrected the trial court's clear legal error. Review of this issue should be denied.

II. ARGUMENT

A. Everett Hangar Does Not Meet, or Even Try to Meet, the Criteria to Grant Review.

It is not clear that Everett Hangar wants the Court to review the jet blast issue in the first place. Everett Hangar asks the Court to review this issue if "the Court were to review this case." Answer to Pet. for Review at 3. In making its contingent request, Everett Hangar makes no effort to explain why the Court should grant review of Everett Hangar's issue under any of the considerations listed in RAP 13.4(b). The Court should decline to grant review of Everett Hangar's issue for this reason alone.

B. The Easement's Language Does Not Include a Jet Blast Zone.

The Court of Appeals recognized that legal interpretation of any express easement begins with the obvious: its language. Here, the Easement's language does not include a jet blast zone. The Easement states:

> **12.7 Ingress and Egress Easement for Aircraft.** Each Owner shall have an ingress and egress easement over and

> across such portions of the airplane ramps located on any Lot as is reasonably necessary to move aircraft to or from any Building and the adjacent properties on which taxiways, runways, and airport facilities are located.

CP 463. The Easement authorizes the parties to move aircraft across "portions" of one another's ramps as is reasonably necessary. It makes no mention of a jet blast zone or moving aircraft under power, as opposed to movement by other appropriate means.

C. Adding a Jet Blast Zone to the Easement Is Inconsistent with Lot 11's Size and the Documents Governing Lot 11's Use.

Construing the Easement to grant Everett Hangar the right to a jet blast zone is inconsistent with the size of Lot 11 and the expressly authorized uses of Lot 11. The CC&Rs and Lot 11 lease give the Foundation the right to use its whole property, including its ramp. Ex. 11 at Ex. C §§ 1, 2 (intended uses and use restrictions under the CC&Rs); Ex. 5 §§ 1.01-.02 (lessee of Lot 11 may use the entire leased premises). And those documents provide that Paine Field is leasing Lot 11 to be used for, among other things, "a historic aircraft hangar and museum, public education, and event venue." Ex. 5 (the Lot 11 ground lease) § 1.02(a). Everett Hangar's ground lease also explicitly recognizes that Lot 11—Everett Hangar's neighboring lot—is intended to be used as a historic flight museum. Ex. 6 Recitals ¶ C (reciting same intended uses for Lot 11 as

those in the Lot 11 ground lease). These are precisely the purposes for which Lot 11 has been used since it was created.

The Foundation could not use its ramp if a jet blast zone were added now to the Easement. Everett Hangar's Learjet 60 creates jet blast up to 240 feet behind the aircraft, and Everett Hangar's Gulfstream IV creates jet blast up to 200 feet behind the aircraft. CP 464. Both jet blast zones are larger than Lot 11, which is only 188 feet wide. Ex. 11 (the CC&Rs) at Ex. D at 2. Thus, if the Easement were to include a right to a jet blast zone, as Everett Hangar contends, then the Foundation would have to keep its entire ramp vacant at all times so that Everett Hangar could move its private jets under power at a moment's notice. This would deny the Foundation the use of its entire ramp for expressly permitted activities.

Construed in this way, as Everett Hangar suggests, the Easement would swallow all other uses of the Lot 11 ramp. As the Court of Appeals noted, this interpretation would impermissibly grant a preference for Everett Hangar's operations over the Foundation's operations. Nothing in the language of the CC&Rs or the Leases supports such a preference. The Court of Appeals therefore correctly concluded that the CC&Rs do not include a right to a jet blast zone in addition to the Easement.

D. Everett Hangar Can Continue to Move Its Private Jets Under Power.

The Court of Appeals interpretation of the Easement is consistent with the existing legal framework for managing jet blast at airports and does not inhibit Everett Hangar's operation of its aircraft. Everett Hangar has always routinely and safely moved its private jets under power, including across Lot 11, and can continue to do so.

Under the Snohomish County Code and federal regulations, the responsibility for safely moving an aircraft under power—and managing any resulting jet blast—lies with the *pilot*, not other occupants of the ramp. Snohomish County Code § 15.08.322 (no aircraft shall be operated in a manner such that jet blast might harm people or property); 14 C.F.R. §§ 91.3 and 91.13 (pilot is responsible for operation of the aircraft, and cannot operate it carelessly or recklessly in a manner that would endanger people or property). Consequently, it is the responsibility of Everett Hangar's pilots to ensure its private jets are operated in a safe manner. It is not the Foundation's responsibility to keep its entire ramp clear at all times in case Everett Hangar wants to use it instead of using Everett Hangar's own exit on its own ramp.

This regulatory allocation of responsibility has worked successfully. In six years prior to litigation, Everett Hangar never missed

a flight because of Foundation activities. RP 305, 406-07. Everett Hangar also uses its ramp infrequently: it averages fewer than 1.4 departures per week, requiring approximately 45 minutes of ramp time for departures per week. Exs. 216-231; *see also* CP 458. Everett Hangar has operated safely each time it has departed, and one-third of its departures have been made *under power* while crossing Lot 11. RP 305. The Court of Appeals decision does not alter Everett Hangar's existing right to move under power across Lot 11, and the Foundation has never had any objection to Everett Hangar doing so safely—as it has always done. The Court of Appeals decision simply reverses the trial court's dramatic expansion of the Easement beyond its historical uses, and beyond what the Easement's language permits, to require the Foundation to keep its entire ramp clear and unused at all times.

The Court of Appeals decision also preserves Everett Hangar's right to tow its planes to the taxiway if necessary to account for surrounding activities. Everett Hangar tows its planes from its hangar to its ramp each time it flies, and routinely tows its planes to the taxiway whenever it is preparing both private jets for departure at the same time. RP 156, 1206-1210. These practices can continue, and Everett Hangar can safely move its aircraft across Lot 11 to the taxiway (and beyond) without producing jet

blast when beneficial to do so. *Id.*; RP 375-76 (describing that Everett Hangar could have a plane towed farther than Kilo 7 if necessary).

E. Interpretation of the Easement Is a Question of Law, Not Dependent Upon Any Finding of Fact.

Everett Hangar argues that the Court of Appeals owed deference to the trial court's factual findings concerning the Easement. Answer 16-18. Everett Hangar is wrong. The legal interpretation of the Easement is not dependent upon any finding of fact.

The trial court explicitly undertook a legal analysis of the Easement, interpreting its "unambiguous" language "in a manner that reflects its plain meaning." CP 470-71 ¶¶ 2-3. The trial court made *no* factual findings—labeled either as findings of fact or conclusions of law—with respect to the *parties' intent* in drafting the Easement. *See* CP 452-484. In the absence of factual findings regarding the parties' intent, an appellate court reviews a trial court's legal conclusions interpreting a legal instrument *de novo*. *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979).

Everett Hangar claims the trial court made relevant factual findings, and cites Conclusion of Law ¶ 6 and Findings of Fact ¶¶ 39, 50, and 64. *See* Answer 17-18. But those conclusions merely recite the trial court's views about uses of the Easement without any reference to the parties' intent. CP 463, 466, 470, 472. Indeed, Everett Hangar offered no testimony

regarding the parties' intent. Instead, Everett Hangar offered expert testimony supporting Everett Hangar's preferred legal interpretation of the Easement. *Id.* The trial court agreed with Everett Hangar's legal interpretation, but a unanimous Court of Appeals—properly engaging in *de novo* review—did not.

Veach is instructive. There the parties disputed whether a quitclaim deed conveyed either an easement or fee simple title for a railroad right-of-way. 92 Wn.2d at 571. The trial court concluded, without referencing the parties' intent, that the deed conveyed fee simple title. *Id.* at 573. The Court of Appeals deferred to the trial court and affirmed, but the Supreme Court reversed. *Id.* at 576. The Supreme Court, noting that no party to the deed testified about intent, distinguished between a factual finding of the parties' intent and a legal conclusion as to the effect of a deed. *Id.* at 573. The Supreme Court then engaged in its own analysis and construed the deed as conveying an easement. *Id.* at 574. The Court of Appeals applied the same principle here in interpreting the language of the Easement as a matter of law. There is no basis to review that interpretation.

III. CONCLUSION

When construing the Easement together with other governing documents, the Court of Appeals properly and unanimously reversed the trial court. It owed no deference to the trial court's legal conclusions. The

trial court made no findings of fact relating to the parties' intent. No testimony regarding intent was offered at trial. The Court of Appeals therefore applied the correct standard of review, and its legal interpretation of the Easement is supported by the Easement's language and the evidence in the record, including other provisions of the CC&Rs, the size of Lot 11, the permitted and historical uses of Lot 11, the impact a jet blast zone would have on the uses of Lot 11, the ground leases, the regulatory scheme governing aircraft movement, and the parties' past practices.

The Court should decline review of the Easement and jet blast zone.

RESPECTFULLY SUBMITTED this 14th day of November, 2016.

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By _____
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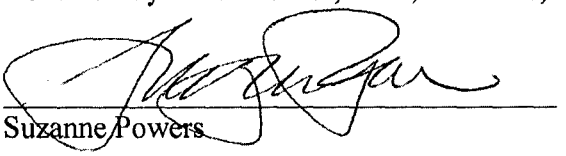
Kilo 6 Owners Association, Kilo Six, LLC, Historic Hangars, LLC, Historic Flight Foundation, and John Sessions

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused a copy of this document to be served via email and U.S. Mail to the last known address of all counsel of record.

I certify under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

DATED this 14th day of November, 2016, at Seattle, Washington.



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