

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT  
IN AND FOR MARTIN COUNTY, FLORIDA

JOHN TELNACK, MARGUERITE TELNACK,  
SAMUEL ZWEBEN, LESLIE ZWEBEN,  
DAVID POWELL, JOYCE POWELL,  
KARL THOMAS, MICHELE THOMAS,  
KIMN CHARTIER

individually and on behalf of a  
class of all others similarly situated,

Plaintiffs,

vs.

MARTIN COUNTY, a political subdivision of the  
State of Florida,

Defendant.

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**ORDER ON PLAINTIFF'S RENEWED MOTION FOR CLASS  
CERTIFICATION**

**THIS CAUSE** came before the Court on December 1, 2 and 3, 2009 on Plaintiffs' Renewed Motion for Class Certification (the "Motion"). The Court having conducted a thorough analysis of the testimony and evidence presented at the evidentiary hearing on the Motion, having considered submitted argument of counsel and being duly advised in the premises finds and concludes as follows:

1. Plaintiffs initiated this action in June 2004 on behalf of themselves and a proposed class consisting of persons who own or lease residential real estate within the boundaries of three separate subclasses located near and around the Martin County Airport ("Witham Field"). Plaintiffs' at-issue complaint is the Fifth Amended Complaint (the "Complaint"). Plaintiffs, at this time, consist of nine individuals residing in five separate residences. The original named Plaintiffs were comprised of twenty-two individuals. Plaintiffs seek compensation from the Defendant, on behalf of themselves

and the purported class, for inverse condemnation under Florida's Constitution and the U.S. Constitution, due to inconvenience, noise, vibration and exhaust generated from jet aircraft operating out of Witham Field. The named Plaintiffs additionally have brought action individually against Martin County for trespass and nuisance claims. Plaintiffs' proposed subclasses consist of:

- A. **Subclass I:** approximately 100 homes "located approximately within the area defined by the Federal Aviation Administration 65 DNL Contour and/or clear zones/safety zones. *See* the Complaint ¶ 14(A);
- B. **Subclass II:** "homes located along the approach and departure runways beyond the Subclass I area and which are exposed to frequent jet noise generally falling within the Federal Aviation Administration-designated 60 DNL noise contour lines." *See* the Complaint ¶14(B); and
- C. **Subclass III:** homes "located within two miles of the ends of the runways, beyond the Subclass I and Subclass II areas." *See* the Complaint ¶ 14(C).

2. All named Plaintiffs reside within putative Subclasses I and II. Four out of the five homes associated with the named Plaintiffs are located within close proximity to one another; on S.E. St. Lucie Blvd. All the named Plaintiffs testified at the evidentiary hearing held on the Motion.

3. Plaintiffs Zweiben live within **Subclass II** on Willoughby Creek in a 1.5 million dollar home. The Zweibens purchased their Willoughby Creek home in 1999 for approximately \$750,000. The Witham Field noise has affected the Zweibens ability to: (a) entertain guests outdoors; (b) sleep; and (c) carry on telephone conversations. The

Zweibens agree that their home is certainly not similar to all the homes situated within Subclass II.

4. The Telnack Plaintiffs live within **Subclass II** in a 4835 square foot home with guest cottage, situated on approximately 300 feet of wide waterfront. The Telnacks purchased their home for approximately 1.1 million dollars. The Telnacks concede that the value of their property has substantially increased over the years and further, that their property is extremely unique when compared to other properties in Martin County. The Witham Field jet traffic has affected the Telnack's ability to: (a) entertain guests outdoors; (b) sleep; (c) invite guests to stay at their residence, during the season Thursday through Monday, due to the noise impact on their guests; (d) carry on conversations; and (e) keep black soot or specs off their white outdoor furniture and deck. Mr. Telnack took a very active role in creating the actual boundaries of the three Subclasses proposed in this case. The three putative Subclasses were configured as a result of Mr. Telnack's own observations and a compilation of information he gathered from others. The Subclass boundaries created by Mr. Telnack were not created based upon actual "sound" measurements.

5. The Powell Plaintiffs, like the Zweibens, live on Willoughby Creek in a beautiful home they had built in the late 1990's; this property is located within **Subclass II**. The Powell home was designed with outdoor living in mind. The Powells do not know how many other properties within Subclass II have the exceptional outdoor layout that their home has. Mr. Powell agrees that his property has increased in value since its construction. Mrs. Powell does not know whether the impact she and her husband have incurred due Witham Field jet activity is the same or similar when compared to all other

residents situated with putative Subclasses II. The Witham Field jet traffic has affected the Powells' ability to: (a) sleep; (b) entertain outdoors; (c) carry on telephone conversations with the windows open; and (d) keep "soot" off their patio, deck and boat. Mrs. Powell does not know if the Witham Field jet activity has affected all residential properties within Subclass II in the same way that her property has been affected.

6. Ms. Michelle Terry and Mr. Thomas reside in a lovely home in **Subclass II**. Ms. Terry and Mr. Thomas purchased the foregoing residence in 1997. The Witham Field jet activity has affected Ms. Terry's and Mr. Thomas' ability to: (a) sleep; (b) watch television; and (c) talk on the phone. Ms. Terry agreed that individuals are affected by noise in different ways. Mr. Thomas explained that he was involved in an "ad hoc" group with Mr. Powell, Mr. Telnack, Mr. Zweben and Ms. Pine to assist in formulating the Subclass group map attached to the Complaint. Per Mr. Thomas, the Subclass map attached to the Complaint, in the ad hoc group's judgment, set forth three classes wherein each class would generate similar losses of value due to the Witham Field jet impact. However, the ad hoc group did not take into consideration actual appraisals of properties within each subclass when formulating the Subclass map. Mr. Thomas admitted that it would be impossible to know the impact that Witham Field had/has on each home in each Subclass group.

7. Ms. Chartier is the only named Plaintiff who resides within **Subclass I**. Ms. Chartier admits to purchasing her home after the other named Plaintiffs claim that the Defendant "took" their property due to Witham Field jet activity. Ms. Chartier testified that she believes that the Witham Field impact on her property is "more severe than anyone else's due to her proximity" to Witham Field. Ms. Chartier also testified that her

“damages” are indeed different and distinct when compared to others residing within Subclass I. In fact, Ms. Chartier believes that her damages as a result of Witham Field jet activity are different than even her neighbors living down the street. Ms. Chartier is also currently contemplating selling her home to Martin County.

8. Regarding certification of a class, it is the named Plaintiffs who bears the burden of proof, and not simply supposition, to establish that the class should be certified. *Ernie Haire Ford, Inc. v. Gilley*, 903 So.2d 956 (Fla. 2nd DCA 2005). Class actions are the exception to the general rule that individuals will litigate their own claims. *Kia Motors America Corp. v. Butler*, 985 So.2d 1133 (Fla. 3d DCA 2008). Fla. R. Civ. P. 1.220(a) first requires that the proposed class must meet four prerequisites: numerosity; commonality; typicality; and adequacy. If the Court finds that each of above four prerequisites of Rule 1.220(a) is met, it must then determine whether the action at hand fits into one of three types of class actions permitted under Rule 1.220(b). The named Plaintiffs have elected to proceed under Rule 1.220(b)(3), which requires a finding that: (a) questions of law or fact common to the claim or defense of the representative party and the claim or defense of each member of the class “predominate” over any question of law or fact affecting only the individual members of the class; and (b) class representation is “superior” to other available methods for the fair and efficient adjudication of the controversy. It should be noted that the “predominance” requirement of Rule 1.220(b)(3) is more stringent than the “commonality” requirement of Rule 1.220(a). *City of Tampa v. Addison*, 979 So. 2d 246 (Fla. 2d DCA 2007) (quoting *Wyeth, Inc. v. Gottlieb*, 930 So.2d 635,639 (Fla. 3d 2006)).

9. Martin County concedes that the prerequisite of “numerosity” has been met by Plaintiffs. This Court finds that the “numerosity” prerequisite has been met.

10. Concerning the prerequisite of “commonality”, Plaintiffs argue that there are common questions regarding Martin County’s actions involving Witham Field and the effect that these actions have had on the putative class members’ properties. Martin County argues that each putative class member’s claim will depend on individual proof concerning the effect of jet overflights on each property and its owner. However, in Florida the threshold for the finding of the commonality prerequisite is not high. *Broin v. Phillip Morris Co.*, 641 So.2d 888, 890 (Fla. 3d DCA 1994). Such standard is “whether the representative members’ claims arise from the same course of conduct that gave rise to the other claims, and whether the claims are based on the same legal theory.” *Terry L. Braun, P.A. v. Campbell*, 827 So.2d 261, 267 (Fla. 5<sup>th</sup> DCA 2002). “The rule requires only that resolution of the common questions affect all or a substantial number of the class members.” *Broin* at 890 (*quoting Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 473 (5<sup>th</sup> Circ. 1986)). This Court finds that whether the expansion of Witham Field’s runways constituted/constitutes a de facto taking of an aviation easement under the Florida and U.S. Constitutions, is a “common question” arising from a single course of conduct that affects all putative class member and would be resolved under the same legal theory if raised via individual trials. In addition to the foregoing Florida cases, the case of *Johnson v. United States*, 208 F.R.D. 148 (W.D. Tex. 2001) also supports this Courts “commonality” finding. The common issue in the *Johnson* case was whether entry of contaminates constituted a taking, regardless of whether individual proof was needed on the source and degree of contamination. *Id.* In this action, the common issue

is whether the overflights constitute a taking; not the degree of interference of the use. However, the “degree of interference” issue does come into play within this Court’s predominance analysis set forth further along within this Court’s Order.

11. Concerning the prerequisite of “typicality”, the named Plaintiffs argue that their claims for inverse condemnation are typical of all other proposed class members because such other class members would present the same legal theories against Martin County, seek the same remedies for impact of jet aircraft on their properties and their claims would be based upon the same course of conduct by Martin County. The named Plaintiffs stated that their claims are not atypical of the putative class simply because they have larger or more valuable homes or that they are individually seeking relief for nuisance and trespass. Martin County, on the other hand, points out that all the named Plaintiffs do not have valid inverse condemnation causes of action against Martin County because their property values have increased since purchase. As such, Martin County argues, the named Plaintiffs claims are not typical of any other putative class member who has indeed experienced a decline in property value and thus, would be in a position to proceed against Martin County for inverse condemnation under the Florida Constitution. Furthermore, Martin County states that: (a) the named Plaintiffs reside within **Subclasses I and II (primarily II)** and most of the named Plaintiffs live within very close proximity of one another; (b) the named Plaintiffs did not present evidence at the hearing on the Motion that the putative class members actually suffered/suffer the same type/kind of impact from the jet activity associated with Witham Field as the named Plaintiffs; and (c) the vast differences in individual properties contained within the Subclasses make the named Plaintiffs’ claims atypical of proposed Subclasses. This

Court finds that because: (a) the named Plaintiffs do not reside within Subclass III; (b) the named Plaintiffs have not suffered a decrease in property values; and (c) there are indeed vast differences between the named Plaintiffs properties and the putative class members properties, as well as the alleged impact that Witham Field has on each of the properties, their claims are not typical of the proposed class members claims. *See Safeway Premium Fin. Co. v. Sosa*, 15 So.3d 8 (Fla. 3d DCA 2009). Therefore, the named Plaintiffs have failed to sustain their burden on this required prerequisite.

12. Concerning the prerequisite of “adequacy”, the named Plaintiffs espouse that they are adequate representatives for the purposed class as they share common interests with the class members. The majority of the named Plaintiffs testified that they will diligently prosecute this proposed class action, stating their active involvement in airport related issues over the years demonstrates their willingness and dedication to do so. Plaintiffs state that any delay in moving forward with attempting to certify a class in this litigation was not due to a lack of due diligence, but instead, was due to litigation regarding Martin County’s Motion for Determination of Avigation Easement Standards. The named Plaintiffs also claim that their individual trespass and nuisance claims should not prevent them from serving as class representatives because those claims will require similar presentation of proof to the inverse condemnation claims of the class. On the other hand, Martin County asserts that the named Plaintiffs have not demonstrated the ability and/or willingness to move the “class action” forward expeditiously inasmuch as it has taken them over five years to move, via an evidentiary, on the Motion. Furthermore, per Martin County, the named Plaintiffs have shown a far greater interest in reducing future operations at Witham Field versus obtaining monetary relief for alleged damages

sustained by the purported individual class members. Lastly, on the issue of “adequacy”, Martin County argues that Plaintiffs presented no evidence regarding their ability to finance this litigation as a class action, including the cost of retaining experts and the other associated costs of litigation. Rule 1.220(a)(4) requires that the proposed class representatives demonstrate that they and their counsel have both the ability and willingness to move the case forward expeditiously and with zeal. *See Browning v. Angelfish Swim Sch., Inc.*, 1 So.3d 355, 361 (Fla. 3d DCA 2009). The initial complaint in this case was filed in June 2004. The named Plaintiffs did not present required evidence at a class certification hearing until December 2009. Plaintiffs filed their initial Motion for Class Certification in March 2005 and scheduled a hearing for three days in October 2005; such hearing was canceled by Plaintiffs and not rescheduled for almost three years. Rule 1.220(d) requires a determination on whether a claim or defense is maintainable on behalf of a class “[a]s soon as practicable after service of any pleading alleging the existence of a class.” This Court finds that the named Plaintiffs did not move forward expeditiously, after the initial complaint was filed in 2004, on the specific issue of whether a class should be certified in this action. It is clear that the named Plaintiffs as individuals truly believed that their efforts over the years were better spent encouraging Martin County to implement policies to reduce future jet traffic at Witham Field versus, expeditiously moving forward with the required class certification hearing in this litigation. However, the foregoing efforts, no matter how good intentioned, did not assist or benefit the proposed class members in obtaining the damages they allegedly would be due as a result of a “taking” by Martin County. Furthermore, Judge Makemson’s ruling regarding the applicability of Florida law to the inverse condemnation claims is not a

reasonable basis for the significant delay in the named Plaintiffs' decision to move forward with the required class certification hearing. Certainly, Judge Makemson's ruling impacted all the "named" Plaintiffs ability to proceed with their inverse condemnation claims under Florida's Constitution. However, the fact that the named Plaintiffs were **personally impacted** by the foregoing ruling, should not in any way have impacted the Plaintiffs decision to expeditiously proceed forward, as class representatives, with the class certification hearing on behalf of the proposed class members, inasmuch as putative class members may have indeed had viable inverse condemnation claims under Florida's Constitution. Therefore, the named Plaintiffs have failed to sustain their burden of proof on this required prerequisite.

13. Despite the fact that this Court did not find that the named Plaintiffs met their required burden under Rule 1.220(a) to certify the proposed class, it will proceed to address Rule 1.220(b)(3). Under Rule 1.220(b)(3), the named Plaintiffs also have the burden of establishing that common issues "predominate" and the class is a "superior" method of adjudication. It is important to note that in every reported case wherein a court has specifically considered whether to certify a class for "takings" due to aircraft noise, the result has been a denial of class certification. The case of *Bieneman v. City of Chicago*, 864 F.2d 463 (7<sup>th</sup> Cir. 1988) provides one insight into why class certification generally is not an appropriate method for litigating airport "takings" cases. In *Bieneman*, the court explained why it affirmed the lower court's denial of a class certification by stating:

The magnitude of any effect on residential owners depends on topography, flight patterns, and many other variables; homeowners who want to sell to businesses (or are in areas zoned for business) may benefit from extra flights and so oppose homeowners differently

situated. No wonder courts routinely decline to certify classes in airport-noise cases.

Likewise, in the case of *City of San Jose v. Superior Court of Santa Clara County*, 12 Cal.3d 447 (Cal. 1974), the court pointed out the difference between a common fact that a particular type of aircraft operated overhead versus the vast array of individual factual presentations necessary to prove liability by a property owner by stating:

However, the present action for nuisance and inverse condemnation is predicated on facts peculiar to each prospective plaintiff. An approaching or departing aircraft may or may not give rise to actionable nuisance or inverse condemnation depending on a myriad of individualized evidentiary factors. While landing or departure may be a fact common to all, liability can be established only after extensive examination of the circumstances surrounding each party. Development, use, topography, zoning, physical condition, and relative location are among the many important criteria to be considered. No one factor, not even noise level, will be determinative as to all parcels.

The *City of San Jose* court disagreed that specific differences between individual property could be resolved by creating “subclasses” made up of similar property types, as each parcel is/was inherently unique. *Id.* Florida courts have agreed that individual parcels of real property are unique. *See Velickovich v. Ricci*, 391 So.2d 258 (Fla. 4<sup>th</sup> DCA 1980). *Mattoon v. City of Norman*, 633 P.2d 735 (Okla. 1981) is also instructive to the situation at hand. In such case, plaintiffs sought class certification due to alleged inverse condemnation of land by the city due to the city’s rezoning of property as a flood hazard district prohibiting most usages of the land. Analyzing predominance, the court noted that “predominance is a qualitative rather than quantitative matter because weight of issues may outweigh their number.” *Id.* Having determined that the central issue in the case was whether the ordinance resulted in such a substantial interference or impairment of the use and enjoyment of the affected land that it constituted a taking, the

court noted that to resolve this issue, it must determine how much the rights of each individual landowner was impaired and how extensive the interference of those rights was. *Id.* The *Mattoon* court noted that although the plaintiff argued that these were questions related to damages which could be resolved in individual hearings, these questions applied to both liability and damages and therefore, were impossible to separate and weigh to assess predominance of common issues over individual ones. *Id.* at 739-740. Plaintiffs espouse that the map attached as Exhibit A to the Complaint (the “Map”) reflects that property owners within a Subclass are exposed to similar noise levels. However, the Map is product of subjective, collaborative efforts expended by various named Plaintiffs and is not the product of a recognized, validated analysis. The Map’s foundation is based upon assumptions made by well-intentioned named Plaintiffs and hearsay statements gathered by them. However, despite such good intentions, this Court finds, as a matter of law, that due to the unscientific and speculative foundation of the Map, it is not in a position to certify the proposed Subclasses set forth within the Map. Furthermore, even if the proposed Subclasses were created via proper foundation, Subclass noise levels will not alone establish a “taking” for each property located within the Subclasses. Again, in order for a determination to be made that a “taking” has occurred by Martin County under the Florida and/or Constitutions, individualized, particularized inquiry (versus common or generalized) **must** be made concerning **each** property and the alleged impact that jet activity associated with Witham Field has on **each** property. The properties contained within the Subclasses proposed by the named Plaintiffs total thousands. Additionally, this Court finds that the named Plaintiffs reliance on the Martin County Property Appraiser’s decision to adjust taxable values of certain properties

situated around Witham Field is legally insufficient to establish that the value of all residential property situated with the Subclasses have been reduced due to jet operations at Witham Field. Along this line, it is important to point out that the Martin County Property Appraiser adjustments presented at the hearing on the Motion did not correspond with the proposed Subclasses Plaintiffs request that this Court certify. While this Court has found earlier within this Order that common questions among proposed class members exist, the need to determine the degree of impact in order to find whether there has been an actual "taking" under the Florida Constitution and/or the U.S. Constitution, will, without question predominate over the common issues.

14. Lastly, this Court will address the "superiority" factor required pursuant to Rule 1.220(b)(3). Plaintiffs argue that class action will be superior to the traditional method of individual litigation as individual plaintiffs will not be able to fund their own lawsuits. It was the named Plaintiffs burden to prove the foregoing at the hearing on the Motion. The named Plaintiffs did not present competent substantial evidence to allow this Court to properly consider this argument. Furthermore, inasmuch as applicable law regarding "takings" would require presentation of particularized evidence at trial concerning each of the hundreds if not thousands of properties contained within the Subclasses, the trial in this matter would take well in excess of the two weeks assessed by Plaintiffs' counsel within his post-hearing brief. This Court envisions, based upon the hearing on the Motion which itself took three **full** days to complete, that a class action jury trial concerning the alleged "takings" of hundreds if not thousands of properties contained within the proposed Subclasses would take months. The Circuit Civil Division in Martin County is currently presiding over thousands upon thousands of pending cases

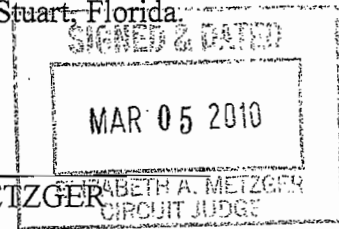
with extremely limited resources. As such, it is doubtful that such Division would be in a position to dedicate months to one trial in the foreseeable future. Certainly, individual cases necessitating less than two weeks of trial could be tried in Martin County's Circuit Civil Division much, much sooner. Therefore, this Court finds that class certification will not be a more efficient or superior method of adjudicating the takings alleged by the named Plaintiffs.

Based upon the foregoing findings and conclusions it is hereby ORDERED AND ADJUDGED as follows:

- A. Plaintiffs Renewed Motion for Class Certification is **DENIED** as the named Plaintiffs have not sustained their burden of proof to establish that the proposed class should be certified.

**DONE AND ORDERED** this 5<sup>th</sup> day of March, 2010 in Stuart, Florida.

ELIZABETH A. METZGER  
CIRCUIT JUDGE



Copies Furnished to:  
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