

By Carol Ward

The News On Noise

Recent Lawsuits Show Airports Can Effectively Defend Themselves Against Noise-Related Claims

Noise complaints are a constant concern for small airports, but two recent court decisions bode well for airports' potential vulnerability in noise-related lawsuits. They also underscore the need for airports to mount aggressive defenses against noise-related claims, attorneys say.

In March, a Martin County, Fla., court rejected the request of five homeowners to certify a class action of several thousand homeowners seeking damages for diminution of property values attributable to jet noise at **Martin County (MCZ)**. And in Chesapeake, Va., a jury rejected a claim by a couple seeking financial compensation, even though a judge ruled that the noise had decreased the value of their home.

Although the two cases are unique and may have little bearing on other potential claims around the country, in both cases the airports involved were proactive in defending themselves against financial claims

"In the Martin County case, one of the things the plaintiffs kept saying in court was, 'We can't believe how hard the county is fighting this, we can't believe how aggressive they are,'" says Peter Kirsch, a partner with the Denver, Colo.-



Reno-Tahoe International's position between two mountain ranges means planes are forced into a north-south takeoff and landing pattern. Noise complaints are minimal now, but expected increases in traffic could prompt community concern.

Photograph by Richard Stokes

based law firm **Kaplan Kirsch & Rockwell LLP**, which assisted in the defense. "Our response to the court was, 'Of course we're fighting it.' We were facing potentially tens if not hundreds of millions of dollars in exposure, so we had

to fight very hard."

That effort was in relation to a potential class-action suit which, if it had been allowed, could have included claims of 5,000 or more plaintiffs, Kirsch says.

The Chesapeake Airport Authority case involved far fewer potential plaintiffs but the principle was the same, says Patrick O'Donnell, an attorney with the Norfolk, Va.-based firm **Kaufman & Canoles**, which defended the authority.

"In our case, there are 14 separate lawsuits from the property owners in the same neighborhood alleging essentially the same theory of damage," he says. O'Donnell says the property owners in the initial case never made a formal settlement demand or offer, and concedes



LEFT: Peter Kirsch, a partner with the law firm Kaplan Kirsch & Rockwell LLP, advises airports to aggressively fight any noise-related lawsuit to eliminate the prospect of "me-too" claims.

RIGHT: Patrick O'Donnell, an attorney with the firm of Kaufman & Canoles, successfully defended the Chesapeake Airport Authority in a recent noise-related lawsuit but says there are 13 other plaintiffs waiting in the wings.

that "settlement may make sense in some cases." But he adds that "airports and municipalities must be mindful of the precedent settlements may set."

The Details

The Chesapeake Airport Authority case was complicated by the fact that the judge in the case determined that the plaintiff's property was damaged, and the property owners were entitled to a jury trial to assess the amount of damage. The property in question was sold in 2006 for 114% more than it was purchased for five

years earlier, but the plaintiffs claimed the price would have been higher but for increased aircraft overflights and noise at **Chesapeake Regional** (CPK), a general aviation airport. According to O'Donnell, the airport presented evidence that the property appreciated at or above the rate of appreciation for similar properties unaffected by noise.

"The airport vigorously defended the case because it felt strongly that the plaintiffs' evidence of loss of value was very speculative and not supported by market data," he says. "The jury seemed to agree."

The MCZ case would have been

groundbreaking had the judge agreed to certify a class action. According to Kirsch, there are no reported instances where a class-action lawsuit has been successful against an airport based on noise. He admits that in the Martin County case, the plaintiffs may decide to move forward individually but the process would likely to be costly to the homeowners and, in any case, the airport's exposure is substantially less.

In arguing against class action, Kirsch says the defense focused on individual impact.

"What we showed in this case is the amount of damage is unique to individual homes," he says.

In addition, Kirsch says the defense invested heavily in expert witnesses to attack the plaintiffs' arguments about property values near the airport, and exploited a "knowledge gap" to use federal law to exclude key pieces of plaintiffs' evidence concerning past noise levels. They also spent significant time educating the court on noise-related issues, which Kirsch says "paid off in the court's greater understanding of why simple assertions of impacts do not rise to the level of creating liability."

Claims On The Rise?

Despite airport wins in those two cases, Kirsch warns that noise-related claims could be on the rise in the near-term future. At issue are property values. In some states, plaintiffs must prove that their property value declined in order to mount a case. That was difficult in the past, but may be less so now.

In some states, including Florida, a homeowner can't claim financial damage to his property because of noise unless he can show that there has been an actual reduction in property value, Kirsch says. In the past two years, property values have been declining nationwide, opening up the possibility of more noise-related claims.

"The threshold question that plaintiffs have to demonstrate – that their property value has gone down – suddenly is no longer impossible," says Kirsch. "The plaintiffs still have to show that the decrease was caused by airport noise, but it means there is much more incentive for plaintiffs to file."

But David Taber, an attorney with Costa Mesa, Calif.-based **Chevalier, Allen & Lichman LLP**, says the economic recession has also caused traffic at most

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airports to decline significantly, reducing the likelihood of noise-related lawsuits. Taber notes, however, that current airport development could spur more claims.

He says that because of the economic stimulus, airports have been receiving federal funds to extend runways, build terminals and pay for other expansions.

"With those airports, you might have an argument saying you're going to increase the capacity of this airport, which is going to cause an increase in noise levels," he says.

Prevention

Nearly all airports have noise-mitigation efforts under way, which can be as basic as taking community complaints and relaying them to offending pilots or airlines, or as elaborate as buying up land and houses surrounding the airport. Taber says that in the current economy, it might behoove airports to focus on the latter.

"Airport operators, if they have the cash, might be able to use the economic downturn to buy up some of the land around the airport and use it as a buffer between it and the surrounding community," Taber says. "Prevention is

always the best policy, but you have to have some money to be able to prevent it."

Reno-Tahoe International (RNO) has undertaken myriad prevention measures, including property acquisition, in the past. Its latest effort is the installation of a \$2M, federally funded airport noise and operations monitoring system that uses 14 noise monitors to track the level of noise produced by aircraft flying overhead.


Krys Bart, president and CEO of the Reno-Tahoe Airport Authority, says RNO has experienced a downturn in traffic in recent years, and the current noise level is a new baseline. The monitoring system "gives us an opportunity to take a proactive step" in responding to community complaints, and also providing factual data to either support or counter noise claims.

"It helps us alleviate incorrect perceptions," she says, while also allowing the airport to be forthcoming, proactive and transparent about noise.

That could become more important as the airport expands. Bart says she envisions increased traffic, including international cargo flights that would operate primarily at night. Those developments are likely to cause some concern among residents near the airport,

Krys Bart, president and CEO of the Reno-Tahoe Airport Authority, says the airport's new noise-monitoring system will enable it to proactively address noise complaints and maintain a transparent record of noise-related infringements.



and the monitoring system will help collect factual data, with which RNO can then respond to the community. The monitoring system, and the related community interaction, could ultimately help RNO ward off noise-related lawsuits, Bart says. The main focus, though, is customer service and transparency, balancing the need to expand airport operations with the impact of those actions on the community. 

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