



District Court, Larimer County, Colorado Larimer County Justice Center 201 La Porte Avenue, Suite 100 Fort Collins, Colorado 80521-2761 (970) 498-6100	<p style="color: red;"> EFILED Document CO Larimer County District Court 8th JD Filing Date: Nov 5 2008 4:11PM MST Filing ID: 22344372 Reviewed by: COURT Colebank </p> <p> <small>FILED BY COMPTON COURT</small> <small>LARIMER COUNTY, COLO.</small> </p> <p style="text-align: center;"> NOV 05 2008  </p> <p style="text-align: center;"> <small>SHERLYN K. SAMPSON</small> </p> <p style="text-align: center;"> ↑ COURT USE ONLY ↑ </p>
<p> JOHN C. PERNICKA, CENTURY HELICOPTERS, INC., JOHN D. CLEAVER, RAYMOND MIDDLETON, GFC INVESTMENTS, WALTER J. FRICK TRUST, and CD FASTENERS, INC., </p> <p>Plaintiff,</p> <p>v.</p> <p> COMMUNITY AIRPARK ASSOCIATION, INC., and AIRPARK VILLAGE, LLC, </p> <p>Defendant.</p>	<p> Case No.: 06 CV 958 Courtroom: 4A </p>
FINDINGS OF FACT, ANALYSIS AND ORDERS GRANTING DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT	

On March 5, 2008, this Court entered an Order (the "Original Order") denying a summary judgment motion by Airpark Village, LLC ("AVL"). On June 4, 2008, AVL filed a renewed motion for summary judgment, to which the appropriate parties filed responses, and AVL replied. On October 16, 2008, the Court asked for additional briefing on certain issues, which the parties also provided.

This court has considered such documents, including their exhibits, and has considered the legal and factual arguments set forth in them.

ISSUE:

The Original Order denied AVL's motion for summary judgment because the doctrine of easement by estoppel is recognized in Colorado. There are factual controversies on the material

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issue of whether the documents and course of dealing among the parties when the commercial subdivision was established and operated for many years with a functioning airport support the existence of an easement by estoppel which would allow Plaintiffs to use the currently-existing runway and taxiways.

The Original Order recognized the possibility that the FAA or another regulatory body might prevent the use of the land for takeoffs and landings, even if an easement by estoppel were established, and that the airport runway/taxiways easements would fail for frustration of their purposes if such prohibition exists.

The primary arguments put forward in the renewed motion are that (1) use of the runway and taxiways for takeoffs and landings requires notice to the FAA, which Plaintiffs have not given, and (2) there is no possibility of Plaintiffs' using the runways for takeoffs and landings, because the City of Fort Collins has determined that such activity, even if initially viable as a grandfathered nonconforming use, has in fact been abandoned by Plaintiffs and such decision was not appealed.

FACTUAL MATTERS:

The land lay outside the boundaries of the City of Fort Collins for many years.

Community Airpark Association, Inc., ("CAA") a Defendant in this case, operated a small commercial airport on the land for several years, but abandoned it as of October 31, 2006. In connection with that action, CAA gave formal, written notice of abandonment to the FAA.

Plaintiffs state that they have continued to use the runway and taxiways for occasional takeoffs and landings. They have not filed any notice of such activities with the FAA.

In 2005 and 2006, proceedings were held to annex the land to the City of Fort Collins, as the Airpark Village Annexation, and the City Council rezoned the land from Industrial District to Employment District. See Lloyd Goff Affidavit, Exhibit 9 to the motion. The Employment District allows a number of uses, not including an airport, and prohibits uses not explicitly allowed. See Zoning Ordinance dated April 4, 2006, Exhibit 4 to motion, and Section 4.27 C of the land use code, exhibit 6 to the motion. Plaintiffs did not file any administrative or judicial proceeding to appeal or contest the annexation or rezoning.

In 2008, Peter Barnes, the Zoning Administrator, made the factual determination of abandonment of airport uses that is described in more detail below.

ISSUE:

The issue is whether events and circumstances subsequent to the October 31, 2006, closing of the small commercial terminated, as a matter of law, any easement rights held by Plaintiffs to use the runway/taxiways.

ANALYSIS:

FAA Approval:

The Court sought additional briefing from counsel on the issue of whether FAA approval is required for the occasional takeoffs and landings described by Plaintiffs. The materials initially submitted to the Court showed that notice to the FAA is clearly required if such activities constitute the operation of an "airport"; the Court's concern was whether such activities, if found not to constitute the operation of an airport, lie outside the scope of FAA regulation (because they are so minimal or for some other reason.)

The materials provided by counsel show that notice to the FAA is required before takeoffs and landings can be undertaken.

Upon receiving notice of the proposed activities, the FAA will make a determination under certain aeronautical criteria and either register no objection to the activity, approve it subject to certain conditions, or find it objectionable. 14 C.F.R. 157.7.

Section 157.1 states that the notice/determination provisions of section 157 apply to all persons who wish to activate a civil airport. Section 157.2 defines an “airport” to include any “other landing or takeoff area.” Such definition encompasses not just classic airports, heliports and the like, but the runway and taxiways involved here. None of the exceptions to the notice requirement listed in 14 C.F.R. 157.1 apply to the circumstances here. Subsection 157.1(c) provides for intermittent use of a site, but limits the period of intermittent use to less than one year. Plaintiffs have not stated their intent to comply with such a one year restriction, and indeed their activities have gone on for longer than a year and would not be limited in duration under an easement by estoppel. The Subsection (c) exception therefore does not apply.

Section 157.3 requires that the notice/determination procedure be followed by anyone who intends to “activate an airport” or to “activate any runway or other aircraft landing or takeoff area of an airport.” Because the airport previously operated on the site has been closed, with due notice to the FAA, Plaintiffs are required to comply with the activation procedure. The Court respectfully disagrees with Defendants’ counsel’s contention that the airport was never closed, even though a notice of closing in the appropriate form was sent to the FAA and acknowledged by it. The FAA’s position is consistent with this interpretation; see the November 27, 2007 Affidavit by Craig Sparks of the FAA, stating, “Airports[such as the one previously operated by CAA] not appearing in the FAA database are considered closed by the FAA.” The only reasonable interpretation of Section 157 is that takeoffs and landings after October 31,

2006, constitute a new activation of the runway and taxiways. A huge loophole would exist if the law were interpreted to mean that airports that had been officially closed could be revived without notice to the FAA; both logically and for basic safety reasons the FAA must be informed of renewed activities at a site that has previously been removed from its purview.

The Court concludes that FAA regulations do apply to Plaintiffs' takeoffs and landings and notes that Plaintiffs admittedly have not followed the required procedures for activation of the runway and taxiways.

Defendants' counsel contend that the FAA acts under 14 C.F.R. 157 merely in an advisory capacity. However, counsel also acknowledges that the FAA can impose civil penalties, such as a fine, on persons who do not provide notice when it is required.

The lack of FAA oversight, and even the possibility of civil penalties being imposed on Plaintiffs for their takeoffs and landings, arguably do not constitute a "flat" prohibition that would require termination of an implied easement under the frustration of purpose doctrine. However, willful failure to comply with a relevant governmental regulation, particularly one whose purpose is to protect the public, is at the very least a circumstance that the City of Fort Collins Zoning Administrator could consider in evaluating whether Plaintiffs continue to hold, or have abandoned, the right to pursue nonconforming activities.

**Annexation, Rezoning and Abandonment of Grandfathered Use Determination by
City of Fort Collins:**

It is axiomatic that municipalities may impose zoning regulations that contradict or negate landowners' rights under express or implied private agreements.

The City's annexation of the airport land and its rezoning to prohibit airport use made no exception for continuing airport activities except as a nonconforming, grandfathered use. Plaintiffs appeared at public meetings to contest the annexation and zoning proposals but did not file any action for administrative review, nor did they file any judicial proceeding to overturn the annexation or rezoning. Presumably they relied on a grandfathered right to continue takeoffs and landings on the runway/taxiways, as a nonconforming use.

The Court asked for additional materials on the issue of whether the determination of abandonment by Peter Barnes, the City's Zoning Administrator, was made with due process and is binding upon Plaintiffs. The Court has reviewed such additional materials, as well as those in the original motion documents, and is satisfied that the determination made by Mr. Barnes is within the scope of his apparent authority as Zoning Administrator; Plaintiffs were given sufficient notice and opportunity to seek reconsideration of his factual determination; and Mr. Barnes' confirmation of his decision after receiving correspondence from Plaintiffs' counsel was unambiguous. The Court concludes that Plaintiffs' right to seek review under C.R.C.P. 106(a)(4) within 30 days, was triggered in April, 2008.

As to Mr. Barnes' apparent authority, the Court notes that counsel for both sides presented their arguments and factual statements to him, in apparent recognition of his authority to render a binding determination on behalf of the City and without any stated challenge to that authority. The process with Mr. Barnes began in February, 2008. In March, 2008, and again in his April, 2008 letter Mr. Barnes refers to consultations with Paul Eckman of the City Attorney's office, which is another indication that he was acting with recognized authority.

The process was informal. No hearing or other formal proceeding occurred. However, neither counsel referred the Court to any requirement for a formal proceeding under the Land Use Code or otherwise. Most importantly, counsel for Plaintiffs was given notice and in fact participated in the process, most notably by his March 7, 2008 letter, and the City responded by allowing an opportunity for further factual presentation or argument.

The Court considered Plaintiffs' counsels' contention that Mr. Barnes' finding has not been properly registered in the City's official Record of Interpretations, under Section 1.4.3 of the Land Use Code. The finding of fact does not appear to be an interpretation of the type for which such registration is mandated, under that section. Even if it were, the question would be whether registration constitutes a mandatory, or merely administrative, requirement.

Mr. Barnes' determination of abandonment, set forth in his April, 2008 letter, is unambiguous. It is not conditional, nor does it contemplate any further action by Mr. Barnes or any other individual or department within the City. It was immediately made known to Plaintiffs' counsel. It was therefore final no later than the April 8, 2008 date of its receipt by such counsel.

After following any administrative appeal procedures authorized by the Land Use Code or City Ordinances, in order to satisfy the exhaustion of administrative remedies doctrine, Plaintiffs could have pursued judicial proceedings under C.R.C.P. 106(a)(4) to set aside arbitrary or unauthorized actions. No administrative or judicial appeal was filed, and the time for doing so has passed.

CONCLUSIONS AND ORDER:

Plaintiffs' current uses of the runway and taxiways are not authorized by the FAA.

Such uses are prohibited by the City of Fort Collins Zoning Ordinance. The only possibility for their being allowed was pursuant to the grandfather clause for nonconforming uses; Mr. Barnes' unappealed, now final determination of abandonment of the nonconforming use constitutes a prohibition that overrides any easement right to use the runway/taxiways.

Because of the prohibition, any easement for the use of the runway and taxiways has terminated, under the frustration of purpose doctrine.

The motion, and the relief sought therein are therefore granted.

The Court enters partial summary judgment in AVL's favor and against the Plaintiffs on Plaintiffs' First, Sixth, Seventh, and Eighth claims for relief set forth in the Complaint, as follows:

1. AVL's First Claim for Relief is for Declaratory Judgment against Plaintiffs and Counterdefendants, pursuant to C.R.C.P. 57(a) and C.R.S. 13-51-105, declaring the rights, status, and other legal relations between AVL and the Plaintiffs and Counterdefendants. Any easement by estoppel that may have come into existence is declared abandoned and terminated, under the frustration of purposes doctrine.
 - i. AVL's Second Claim for Relief is for quiet title to the real property clouded by Plaintiffs' lis pendens, legally described as:
 - ii. Tract A, Fort Collins Community Airpark Subdivision, According to the plat recorded April 3, 1967 at Book 9, Page 132, Reception No. 931089.6, and
 - iii. Tract D, Second Replat of the Fort Collins Industrial Park, According to the plat recorded November 28, 1975, at Book 1674, Page 989, Reception No. 135398.

CERTIFICATE OF MAILING

This is to certify that on the 5th day of November, 2008, a true and correct copy of the above and foregoing Order was delivered to the attorney of record and parties appearing *pro se* in the following manner:

For counsel in Fort Collins who have agreed to such procedure, by placing said copy in the attorney pick up files located in the Larimer County Justice Center, 201 LaPorte Avenue, Suite 100, Fort Collins, Colorado.

For all other counsel and/or parties appearing *pro se* by efilng said copy through Courtlink.

A handwritten signature in cursive script, appearing to read "L. A. Brandes", written over a horizontal line.

cc:

D. Dean, Esq.
R. Brandes, Esq.
D. Konkel, Esq.
M. Schlueter, Esq.
J. Fonfara, Esq.
D. Alexander, Esq.