

**Lee County Board of County Commissioners
Agenda Item Summary**

Blue Sheet No. 20050261

1. REQUESTED MOTION:

ACTION REQUESTED: Request Board direction regarding the Partial Final Judgment in Bennett v. Lee County Case No. 01-2712CA, declaring Section 34-1006(b)(2) and (b)(3) of the Land Development Code invalid.

WHY ACTION IS NECESSARY: Board must decide course of action for Lee County. *JK*

WHAT ACTION ACCOMPLISHES: Preserves right of appeal. *JK*

2. DEPARTMENTAL CATEGORY:
COMMISSION DISTRICT # *A12A*

3. MEETING DATE: *03-15-2005*

4. AGENDA:
 CONSENT
 ADMINISTRATIVE
 APPEALS
 PUBLIC
 WALK ON
 TIME REQUIRED:

5. REQUIREMENT/PURPOSE:
(Specify)
 STATUTE
 ORDINANCE
 ADMIN. CODE
 OTHER

6. REQUESTOR OF INFORMATION:
A. COMMISSIONER
B. DEPARTMENT County Attorney
C. DIVISION Litigation
BY: John J. Renner
Chief Assistant County Attorney

7. BACKGROUND: Richard Bennett, Tr. owns approximately 2.453 acres of undeveloped land adjacent to the Southwest International Airport. The majority of the land was within Noise Zone 3 that prohibits residential use. Bennett challenged the boundaries of Noise Zone 3 asserting that Section 34-1006 regulated based upon a 65 DNL noise contour and the Zone 3 boundaries to the south and east of the airport were not reasonably related to that noise contour. A trial was held before Judge Seals. Judge Seals ruled that there was an internal inconsistency between Sections 34-1006 (b)(2) and 34-1006 (b)(3). Additionally, the court found that there was no reasonable relationship between the boundaries of Noise Zone 3 and the 65 DNL noise contour. Accordingly, the court invalidated Sections 34-1006 (b)(2) and 34-1006 (b)(3).

The airport noise and planning consultants for the Port Authority have concluded the most recent Part 150 Noise Study. This is part of the requirement in the Lee Plan that the noise zones around the airport be reviewed and revised every five years. Revisions to the Land Development Code noise zones are to be proposed.

The County Attorney's Office recommends the filing of a notice of appeal to preserve its right to appeal the court's decision, pending the amendment of the Land Development Code to include airport noise regulations based on the most recent Part 150 study.

8. MANAGEMENT RECOMMENDATIONS:

9. RECOMMENDED APPROVAL:

A Department Director	B Purchasing or Contracts	C Human Resources	D Other	E County Attorney	F Budget Services				G County Manager
					OA	OM	RISK	GC	
N/A	N/A	N/A	N/A						<i>JK</i>

10. COMMISSION ACTION:

APPROVED
 DENIED
 DEFERRED
 OTHER

ATTY. GENERAL'S OFFICE
2/24/05

RECEIVED BY
COUNTY ADMIN: *JK*
2-24-05
10:55
COUNTY ADMIN
FORWARDED TO: *JK*
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**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA** **CIVIL ACTION**

RICHARD K. BENNETT, TRUSTEE,

Plaintiff,

v.

CASE NO.: 01-2712-CA-JHS

**LEE COUNTY and LEE COUNTY
PORT AUTHORITY,**

Defendants.

2005 FEB 16 PM 3:40
FILED BY
LEE CO. ATTORNEY

AMENDED FINAL PARTIAL JUDGMENT AS TO COUNT I

This cause coming before the Court for non-jury trial on Count I of Plaintiff's Complaint, the Court having taken testimony, received evidence, and heard argument of counsel; the Court makes the following findings of fact and law:

FINDINGS OF FACT

1. This case was tried before the Court on April 27 and April 28, 2004. The essence of Plaintiff's Count I is that Defendants, Lee County and Lee County Port Authority have by ordinance illegally placed approximately 2,453 acres of Plaintiff's ownership in a noise zone which prohibits residential use. Plaintiff's contended that the noise zone, Zone 3, is fatally defective in that it is arbitrary and irrational and a facial violation of due process of law. Plaintiff asserts that there is no rational or legitimate reason to prohibit residential use in areas otherwise suited for such use, and which were in an area of land designated as a noise contour of less than 65 DNL. The text of Lee County ordinance 34-1006(b)(2)a prohibits residential use in land "generally located between the 65 DNL and the limits of Zone 4 (the airport boundary) as determined in the adopted Part 150 Southwest Florida International cumulative noise maps." However, the accompanying legal

description of Zone 3 in § 34-1006(b)(2)b of the County's ordinance describes an area well-
outside (lower than) the Part 150-65 DNL contours. Thus, Plaintiff contends, the text of the
ordinance and the described coverage of Zone 3 are in irreconcilable conflict.

2. Defendants argued that the ordinance language, "generally between" 65 DNL and
Zone 4, was broad enough to allow for a legal description following section and half section lines,
even though thousands of acres were thus encompassed which were in lower noise contours.
Defendants further argued that such zoning is a proper exercise of the police power and served a
rational purpose, in that future homeowners in the Zone 3 area might complain about jet noise,
unless new residential use were prohibited in areas as low 55 DNL. No local jurisdiction in the
country was cited, by either party, that prohibited residential use in noise areas lower than 60 DNL.
No federal or state agency has a regulation or guideline more restrictive for residential use than 65
DNL. As to complaints, no specific dates, times, or nature of any complaints from residents who
experienced jet noise of less than 65 DNL, were offered.

3. It was apparent from the testimony and exhibits offered by both parties that along the
north and west of RSW, the County's 65 DNL contour line and the noise Zone 3 boundary were
relatively close. However the 65 DNL contours and the Zone 3 lines were not in any reasonable
conformance with one another to the south and east of the airport. Indeed, some portions of the Zone
3 line are over two miles from the projected 65 DNL contour line. This discrepancy and as
reasonably inferred from the Zone 3 maps, is in part due to using section lines as boundaries. Use
of section and subsection lines may be appropriate under some circumstances but not when the intent
is to write easier legal descriptions more than to reasonably regulate land use.

4. The trial testimony was that restricting residential use in areas of 55 DNL and higher

had been noted as a “goal” by the U.S. Environmental Protection Agency. However, there is no health or safety requirement or guideline that would prohibit residential use in between 55 - 65 DNL. The standard of 55 DNL is more akin the noise background in an urban residential area. The fact remains, however, that Lee County’s ordinance and Comprehensive Plan have adopted 65 DNL as the threshold contour for prohibiting new residential use; not 55 or 60 DNL.

5. After review of the testimony and evidence, the Court finds that the reach of airport Noise Zone 3, Ordinance 34-1006(b)(2)b, is too broad to be fairly debatable. The evidence demonstrated to the Court that Lee County preferred to use the mechanism of its noise zone ordinance to limit development therein to commercial and industrial uses, contrary to the County’s Comprehensive Plan, instead of permitting individual property owners to freely use and develop their lands subject only to normal and proper police power regulations. The noise zone boundaries in Zones 2 and 3 do not reasonably balance the rights of owners of undeveloped land with those of the end users of developed land in the airport vicinity.

6. The driving public purpose behind this over-broad noise zone is to reduce or eliminate complaints from future residential property owners. No health or safety goal has been proved. Lee County has not availed itself of other means of achieving this goal such as aviation easements, “notice to purchaser” requirements, or sound insulation regulations. Instead, the County engulfed thousands of acres in a residence-forbidden zone; thereby accomplishing its desire by potentially depriving the affected landowners of the beneficial use of their property. In sum, the County pushed too far with trying to protect all end users from their potentially imprudent choice of buying a home which is too close to the airport to suit their particular sensibilities.

FINDINGS OF LAW

1. The portion of Lee County's ordinance which nullifies its validity is § 34-1006(b)(2)b, the "legally defined" area. That sub paragraph describes approximately 13,000 acres, roughly 8,000 acres of which is outside and lower than the noise contour upon which the zone is "based." Zone 2, § 34-1006(b)(3)b, suffers from the same infirmity. Both legal descriptions contradict the text of the noise zone ordinance. Since one part of the ordinance specifically defines its purpose and expressly ties itself to the noise contours adopted by the County "based upon" the Part 150 Study "noise maps," and another part describes just the opposite, i.e. land not in the designated noise contour, the ordinance becomes irrational, quite arbitrary, and unrelated to any legitimate goal of promoting the citizenry's health, safety, welfare, or morals. The zoning line does not have to strictly trace the 65 DNL contour line, but there should be some reasonable conformity to it.

2. Plaintiff has proven beyond a "fair debate," that the noise Zone 3 it attacks bears no relationship to the community; health, safety, welfare, or morals. The owner will not be required to sacrifice his rights absent a substantial need for restrictions in the interest of public health, morals, safety, or welfare.

3. The stated legislative purpose for § 34-1006 is to set "standards" for land use and noise compatibility requirements." That is a valid police power goal. There is, in this matter, however no rational or logical connection between the expansive "squaring off" by the Airport's consultant and the health, safety, welfare, or morals of the citizens of Lee County. A wish to avoid complaining phone calls is insufficient justification to strip all residential use from 13,000 acres. When there is no such relationship between the zoning and the general welfare, the zoning will be

held constitutionally invalid. There is no “fairly debatable” argument to sustain § 34-1006.

WHEREFORE, the Court finds in favor of the Plaintiff, Richard K. Bennett as Trustee, against Defendants, Lee County and Lee County Port Authority and enters a declaratory judgment as follows:

a. Lee County ordinance § 34-1006(b)(2)b and (b)(3)b are facially unconstitutional in that they are an irrational and arbitrary deprivation of Plaintiff’s property interest, and unrelated to any legitimate state interest.

b. Both cited ordinances violate rights of Plaintiff guaranteed by Florida’s Constitution, viz; the right to protect property, Article I, Section 2 and the right to due process of law, Article I, Section 9.

c. The Court, therefore, strikes sections (b)(2)b and (b)(3)b of Ordinance 34-1006.

d. It is further Ordered that each party shall bear its own attorneys fees; but that Defendants are liable to Plaintiff for all reasonable costs incurred in preparing and prosecuting this action. The Court reserves jurisdiction to determine the amount of those costs upon motion of Plaintiff, as well as to determine the remaining count in Plaintiff’s Complaint.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida this 15th day of February, 2005.

S / JAMES H. SEALS

James H. Seals, Circuit Judge

Copies furnished to:

John J. Renner, Esquire
S. W. Moore, Esquire
William A. Keyes, Jr., Esquire