September 11, 2017

Steve Edmiston
[redacted]
Des Moines, WA 98198
Email: [redacted]
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SENT BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Mr. David Soike
Interim CEO
Port of Seattle
2711 Alaskan Way
Seattle Washington 98121

Mr. David Soumi
Acting Northwest Mountain Deputy Regional Administrator
Federal Aviation Administration
Northwest Mountain Region
1601 Lind Avenue Southwest
Renton, WA 98057

Re: **Cease and Desist Flights Over Des Moines Neighborhood; Public Records Request**

Dear Mr. Soike and Mr. Soumi:

I am writing to demand that the Port of Seattle ("POS") and Federal Aviation Administration ("FAA") cease and desist the new and increased air traffic over my home in Des Moines.

As a resident of Des Moines, in the over 100-year-old historic Woodmont neighborhood that is south and west of SeaTac Airport (the "Airport"), I am writing to confirm and to inform you that no avigation easement has been granted in the airspace over my property located at [redacted], Des Moines, Washington, 98198 (the "Property"). Further, should the Port of Seattle, which operates the Airport, its tenant airlines, and FAA claim that a prescriptive easement has been attained, I maintain and serve notice that the current use of airspace is not permitted and reserve all related rights and remedies.

As repeatedly stated by Port and FAA representatives at public meetings this year, there has been exponential growth in the number of flights over the neighborhood cities south of the Airport (a number cited by the POS is 260 additional flights over my home

every day). According to the Port of Seattle website, the Airport serviced 381,408 total aircraft operations in 2015, a 12 percent increase over the prior year's activity. Notably, since 2003, the number of commercial flight operations has doubled to nearly 400,000.

Your representatives have also stated that further exponential growth is expected (see, e.g., the POS Century Agenda published this past Spring). Notably, to accommodate this unprecedented volume, many of the flights landing over Des Moines now align near, or over, the shoreline of the City, the Redondo piers, the Marina, and other recreational, historical, and sensitive areas, in an apparent attempt to increase capacity at the Airport through the use of new technology-procedures and full-time use of the 3rd Runway. This new pattern of flights over Des Moines previously not impacted by airport operations in this manner has increased in the past months. Even worse, the new and increased operations are now occurring extensively as night-time operations. I am writing this letter to both affirm my rights as a homeowner in Des Moines and serve notice upon the FAA and the Port of Seattle that promoting and permitting these new flight patterns, and increases in such flights, is in violation of my property rights. For clarity, both my spouse and I have recently and personally observed jet aircraft in landing patterns directly above our home in the past few months.

We are now experiencing not only noise but vibrations, fumes, deposits of dust or other particulate matter, fear, and interference with sleep, interference with communication, and interference with our ability to use and enjoy the exterior locations property for recreation. This has never occurred before during our ownership, which dates back in this neighborhood to 1988.

So that we can avoid argument over what is "new" in relation to the overflight issues I address in this letter, I respectfully hereby make a public records request:

> **All documents, including communications, relating to procedures that have been adopted for takeoffs and landing operations conducted south of Seatac airport beginning on or after February 14, 2012, to date. For the purpose of this request, "procedures" shall carry the same meaning that is used in Section 213(e) of the FAA Modernization and Reform Act of 2012, 49 U.S.C. 40101 (as amended 2017). In addition, I request all documents, including communications, relating to any decision made on or after February 14, 2012, to grant a categorical exclusion with respect to any procedures relating to takeoff and landing operations conducted south of Seatac airport. "Decision" shall have the same meaning as set forth in the statute cited above.**

By Definition, No Avigation Easement Has Been Granted Over Significant Portions of Des Moines

An avigation easement is defined as "an easement permitting unimpeded aircraft flights over the servient estate." Black's Law Dictionary (10th ed. 2014). More specifically, though, the FAA's own regulations are clear regarding avigation easements:

> Avigation easements are typically acquired for airspace requirements as indicated on the airport layout plan, including the approach area and approach protection zone layout. This layout depicts the imaginary surfaces for the airport … the existing and ultimate approaches, height and slope protection, a plan and profile for approach protection zones and approach areas, and location and elevation of obstructions to air navigation as identified by the imaginary surfaces. Airport imaginary surfaces are established with relation to the airport and to each runway. The size of each such imaginary surface is based on the category of each runway according to the type of approach available or planned for that runway.

FAA Advisory Circular 150/5100-17 (2005). Generally, an avigation easement permits the easement holder to engage in aircraft flights over the servient estate. *Admasu v. Port of Seattle,* 185 Wn.App. 23, 36, 340 P.3d 873 (2014) (summary judgment dismissing claims from plaintiff homeowners *that had granted avigation easements to Port of Seattle in exchange for a mitigation package*).

It is important to note that by executing avigation easement acquisitions as part of the POS noise remedy program, the POS has conceded in court (and conceded in the easements agreements themselves that the property rights at issue included "the use and passage of all types of aircraft") that the property rights at issue exist and have value and could therefore provide consideration for the easements and waivers acquired by the POS. *Id; see also Orion Corp. v. State*, 109 Wash.2d 621, 641, 747 P.2d 1062 (1987) ("[A] property right must exist before it can be taken." (citation and internal quotation marks omitted)). As stated in *Admasu*, the property rights acquired defined the type of permanent "burdens" to the property from overflights to include "noise, vibrations, fumes, deposits of dust or other particulate matter ..., fear, interference with sleep and communication, and any and all other things which may be alleged to be incident to or to result from" airport operations. *Id*. fn. 33.

It is true that the Aviation Safety Noise Abatement Act of 1979 (ASNAA), 49 U.S. Code § 47506, imposes a general limitation on recovery of damages caused by noise if a person has certain actual or constructive notice of the Airport noise exposure maps when they acquire the home. However, the problems with the Airport's current unauthorized expansion is underscored when considering the exceptions to this statute. Critically, a homeowner may still recover damages if the person shows that:

> (1) after acquiring the [homeowner's] interest, there was a significant:
>
> (A) change in the type or frequency of aircraft operations at the airport;
> (B) change in the airport layout;
> (C) change in flight patterns; or

(D) increase in nighttime operations; and

(2) the damages resulted from the change or increase.

49 U.S. Code § 47506. Remarkably, *all of these exceptions apply* to the facts in the present case. Note this statute does not limit non-noise damages in any way. Thus, even if noise damage was not compensable, (as the Port conceded in the *Admasu* case), the ASNAA does not preclude the recovery of damages caused by conditions other than noise, such as fumes or toxic discharge. In the *Admasu* case, the Port's summary judgment for claims from increased vibrations, toxic discharge, and fumes was *reversed* to the extent that the claims involved damages caused by increased vibrations (whether or not related to low frequency noise), toxic discharge, and fumes.

It is also important to note that my Woodmont Country Club neighborhood is an over 102-year-old historical area, originally created in 1915 as a seasonal retreat and recreational community and accessed by the Mosquito Fleet. The Club possesses private community facilities including a large beach plaza and sport court. The WCC charter is "to promote friendly relations and develop open air sports... and aquatic exercises among its members." The Woodmont Dock was the historical location of one of the Prohibition era's most significant events, the arrest of Roy Olmstead on Thanksgiving Day, 1925. The community prides itself in its ability to carry on celebrations and traditions in the beautiful outdoor Pacific Northwest. I believe the WCC's ability to enjoy its traditions – particularly outdoors – has been significantly impaired by the new and increased aviation operations. I am therefore copying this letter to the WCC Board of Directors.

My concern in this arena arises from my belief that the POS and FAA will, in response to this letter, assert that the complaints herein have been the subject of prior authorizations, including the most recent NEPA Part 150 studies. However, I am unaware that the FAA or POS as part of such prior study and action has ever engaged the WCC for the purpose of providing notice and opportunity with respect to the new flight related patterns and frequency. As I'm sure you now aware, the recent Federal Court of Appeals decision *City of Phoenix v. Huerta and Federal Aviation Administration*, No. 15–1158 (D.C. Cir., August 29, 2017), addressed this very issue, and makes clear that the FAA is to provide notice and opportunity for input to historical neighborhoods and that such notice must not be "parked" in a single location (i.e., a city official), but must be given to "local citizens and community leaders" so that they are aware of proposed new routes and procedures. The failure to do so in City of Phoenix was deemed arbitrary and capricious under three different federal statutes.

If you contend the WCC or any residents in this historic neighborhood, including myself, were provided notice of new routes, new procedures, and new flight frequencies, I respectfully hereby make a public records request:

Please identify and provide all communications of any type supporting your contention that WCC or any residents in the WCC historic neighborhood,

including myself, were provided notice and an opportunity to provide input in relation to new routes, new procedures, and new flight frequencies.

To date, I have neither granted the POS an avigation easement over my Property, nor have I ever received any related compensation or consideration. If it is the POS's intent to seek an avigation easement from me, note that property owners who grant avigation easements generally receive compensation in return. Not surprisingly, cases that involve a taking of property and/or airspace, under the Fifth Amendment of the U.S. Constitution, typically require payment of just compensation in what would amount to an inverse condemnation, resulting from an airport's interference with the use and enjoyment of the property.

No Prescriptive Easement Can be Claimed Over Significant Portions of Des Moines

With the potential exception for homeowners that have granted easements and provided waivers to the POS, the increase in air traffic volume and flight frequency above Des Moines also undercuts any claimed prescriptive easement over the neighborhood. Black's Law Dictionary defines a prescriptive easement as one "created from an open, adverse, and continuous use over a statutory period." Under Washington law, "[p]roof of such prescriptive right necessarily includes a showing of uninterrupted hostile use for 10 years which has been open and notorious." *Petersen v. Port of Seattle*, 94 Wn.2d 479, 485 (1980) (holding that the Port's use was non-hostile and, even had the trial court found a prescriptive easement, it was not for the type and number of aircraft later used and therefore didn't reduce the damages suffered).

Similarly, there has not been an uninterrupted hostile use of the airspace over my home and in our Woodmont neighborhood. And even if the Port of Seattle was to claim a prescriptive easement over these Des Moines properties, the current volume and frequency of disturbances, which has materially increased in the past several months—certainly within a 10-year period and certainly new at night-time—is beyond the scope of any purported easement by prescription. "In ascertaining whether a particular use is permissible under a prescriptive easement the court should compare that use with the uses leading to the prescriptive easement in regard to: (a) their physical character, (b) their purpose, and (c) the relative burden caused by them upon the servient tenement." *Lee v. Lozier,* 88 Wn.App. 176, 187–88 (1997). Enhanced airport activity following acquisition of an adverse right or a judgment for a damaging, which activity *causes further damage,* would, of course, be compensable. *Petersen* at 483 (emphasis added). The physical character of the planes and the substantially greater burden inflicted on Des Moines homeowners with the recent west-shifted flight patterns would render any previously claimed prescriptive easement moot and make the current use impermissible and compensable.

Notice is Hereby Given to the Port of Seattle of its Violation of the Airspace over the Property

The Port of Seattle is well-aware of individuals' property rights and where they come into conflict with the operation of the Airport—particularly as it relates to homeowners' claims of takings, trespass, or nuisance resulting from the attendant noise, vibrations, fumes, dust, fuel, and similar emissions.

As mentioned above, I demand that the Port of Seattle cease and desist the increased air traffic over my home and my Des Moines – and particularly, Woodmont – neighborhood. In the interim, I will consider any and all measures available to protect my interests in the Property, in light of the Airport's impermissible use of the airspace at current levels of activity. No avigation easement exists over the Property, and I reserve my rights to all damages, including health issues, loss of sleep, loss of enjoyment, and reduced market value.

On Injuries to the Citizens of Des Moines

Courts are accepting the realities of the actual harms inflicted upon airport neighbors. Illustrative is *Brenner v. New Richmond Regional Airport*, 816 NW2d 291 (2012). In *Brenner*, the Court considered and dissected long-standing US Supreme Court precedent (*US v. Causby*), and recognized that "flights over private land are not a taking, *unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.*" *Brennan*, citing *Causby,* at 266, 66 S.Ct. 1062 (emphasis added). Further, the Court rejected a strict "cap" on altitude:

> … overflights that invade the person's superadjacent block of airspace, even takeoffs and landings, may constitute a taking for which compensation is required…The standard for a taking in an airplane overflight case is whether the overflights have been low enough — that is, invasions of a person's block of superadjacent airspace — and frequent enough to have a direct and immediate effect on the use and enjoyment of the person's property. If this standard can be satisfied, the government has "taken" an easement without paying compensation for it.

Id. The *Brennan* Court directly assessed the dispute over the height of a homeowner's superadjacent space, and bypassed an absolute height cap in favor of the actual reality of damage. The Court even noted:

> One commentator has suggested that tying takings to the minimum safe altitude of flight — known as the "fixed height" theory — "misread[s] the Supreme Court's analysis." Colin Cahoon, Comment, *Low Altitude Airspace: A Property Rights No-Man's Land,* 56 J. Air L. & Com. 157, 171 (1990). The Cahoon article, which lays out six separate theories of airspace ownership, asserts that the Supreme Court rejected the "fixed height" theory by its reasoning in such cases as *Griggs*. *Id.* at 179-81. "If the `fixed height' theory were to be followed to its logical conclusion, no taking could have occurred, since the planes flying over Mr. Griggs' house were within navigable airspace." *Id.* at 180.

Id. The Brennan Court's final conclusions are strikingly applicable and even poignant.

> The creation and expansion of airports is usually deemed a public good. But that good frequently comes at a significant cost to neighboring landowners. This cost cannot be ignored.
>
> One of the principal purposes of the Takings Clause is `to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' *Dolan v. City of Tigard,* 512 U.S. 374, 384, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994) (quoting *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)).
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> * * *
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> We conclude that a taking occurs in airplane overflight cases when government action results in aircraft flying over a landowner's property low enough and with sufficient frequency to have a direct and immediate effect on the use and enjoyment of the property.

Id.

Courts in non-aviation environmental harm cases are similarly showing increased flexibility in assessing how plaintiffs might proceed to trial and prove damages. It is true that a plaintiff must establish a harm or imminent harm. However, this can be shown by alleging the disputed activity "impairs his or her economic interests or aesthetic and environmental well-being." *Wash. Envt'l Council v. Bellon*, 732 F.3d 1131, 1140 (9th Cir. 2013). Regardless of the choice of legal theories asserted, the falling home prices and harm to both the aesthetic and environmental well-being is a truth that is self-evident.

Courts are also becoming reticent to rely upon legalistic, procedural rules (e.g., standing) to deprive citizens of such interests where the realities of the harms no longer are fairly remedied by archaic statutes.

> As the Ninth Circuit recently explained, federal courts lack jurisdiction to hear a case when the harm at issue is "not only widely shared, but is also of an abstract and indefinite nature — for example, harm to the common concern for obedience to the law." *Novak v. United States,* 795 F.3d 1012, 1018 (9th Cir. 2015) (quoting *Fed Elec. Comm'n v. Akins,* 524 U.S. 11, 23 (1998)). Standing alone, "the fact that a harm is widely shared does not necessarily render it a generalized grievance." *Jewel,* 673 F.3d at 909; *see also Massachusetts v. EPA,* 549 U.S. 497, 517 (2007) ("[I]t does not matter how many persons have been injured by the challenged action" so long as "the party bringing suit shows that the action injures him in a concrete and personal way." (quotation marks omitted and alterations normalized)); *Akins,* 524 U.S. at 24 ("[A]n injury .... widely shared ... does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an `injury in

> fact.'"); *Covington v. Jefferson Cnty.,* 358 F.3d 626, 651 (9th Cir. 2004) (Gould, J., concurring) ("[T]he most recent Supreme Court precedent appears to have rejected the notion that injury to all is injury to none for standing purposes."); *Pye v. United States,* 269 F.3d 459, 469 (4th Cir. 2001) ("So long as the plaintiff ... has a concrete and particularized injury, it does not matter that legions of other persons have the same injury."). Indeed, even if "the experience at the root of [the] complaint was shared by virtually every American," the inquiry remains whether that shared experience caused an injury that is concrete and particular *to the plaintiff*. *Jewel,* 673 F.3d at 910. Applying the correct formulation of the generalized grievance rule, plaintiffs' alleged injuries — harm to their personal, economic and aesthetic interests — are concrete and particularized, not abstract or indefinite.

Juliana v. U.S., No. 6:15-cv-01517-TC. (USDC OR 2016).

It is true that the Port and FAA have for the most part successfully fended off aviation harm cases brought by SeaTac Airport neighbor cities and citizens. It is my conclusion that many of these cases were, at least in part, ill-conceived and overly broad. My assessment is that a more narrowly drawn, thoughtful claim will find a great chance of success in the Western District of Washington and 9th Circuit Court of Appeals, particularly after the amendment to the FAA's authorizing statute, and the decision in *City of Phoenix*, both expressly referenced above. My sense is that there is substantial litigation risk to the POS in particular. My hope is that we can find a solution to address the concerns in this letter. In the meantime, and to avoid misunderstanding, my expectation is that you will comply with my cease and desist demand until such resolution can be achieved. I look forward to hearing from you soon.

Very truly yours,

STEVE EDMISTON