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Environment - Switzerland

Noise Nuisance Resulting from the Operation of a Major Airport

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Background

Noise Nuisance from Major Airports to be Judged by Expropriation Judge Compensating for and Evaluating Disadvantages from Flight Noise

Background

"[Remedies against Noise Nuisance](#)" reported on the situation regarding air traffic noise at Kloten airport, near Zurich, which resulted from a proposed new treaty between Switzerland and Germany. The treaty failed and instead Germany passed an administrative regulation. As from April 13 2008, Kloten airport - which is of vital importance to the Swiss economy - cannot be approached by flying over German territory between 9:00pm and 7:00am, or on weekends and official holidays. However, when the airport was built shortly after World War II, the runway system was designed in such a way that approaching aircrafts mainly fly in from the north over the least populated area, which lies partially within the German territory.

During restricted hours, the airport must now be approached from the south and the east, over densely populated terrain. It was never anticipated that these residential zones would one day be affected by significant noise from landing, low-flying aircraft. Today, thousands of real estate owners are complaining about excessive noise and seeking compensation for the environmental impact, which usually manifests itself in the form of a drop in the market value of the real estate (due to a decline in quality of living and thus an impact on the fair market value), as well as the costs of installing noise insulation (ie, special windows).

Hundreds of actions are thus pending, at first instance, against the operator of Kloten airport, which has been privatized since 2001. In order to manage these proceedings economically, the cases have been joined. Following the first leading decisions of the Swiss Supreme Court regarding claims for compensatory damages resulting from aircraft noise on the one hand and flyovers on the other, further Supreme Court decisions have been issued dealing with the relevant jurisdiction of the courts (civil judges in the case of nuisance protection claims; otherwise expropriation judges), and with the evaluation and the amount of compensatory damages for excessive aircraft noise.

Noise Nuisance from Major Airports to be Judged by Expropriation Judge

In Swiss Supreme Court Decision BGE 134 III 248 a real estate owner brought a claim before a civil judge requesting that aircraft flying into land at Kloten airport be banned from flying over his land at an altitude of less than 500 metres. The Supreme Court decided that such a demand, which is based on defensive rights pursuant to private law (Articles 679 and 684 of the Swiss Civil Code), is acceptable only if it concerns airfields that are not operated on a concession basis. In such cases the operator would have to secure such flyover rights with an easement.

In the case of major airports that are operated on a concession basis, such as Kloten and Cointrin, noise nuisance claims must be heard by an expropriation judge. This applies to both flyovers at a low altitude,⁽¹⁾ which are viewed as a direct intrusion into the real estate, and flyovers at a high altitude. The distinction is relevant as in the latter case, compensation will be awarded only if it can be shown that the noise has an unforeseeable,⁽²⁾ specific and grave impact on the affected real estate.

Compensating for and Evaluating Disadvantages from Flight Noise

Meanwhile, Swiss Supreme Court Decision BGE 134 II 46 dealt with the court's previous case law on both flight noise and assessment by expropriation judges, and confirmed the previous case law. In addition, this

is the first decision: (i) to approve a claim for compensation of a real estate owner for loss in value where the requirement of unforeseeability was satisfied (ie, the real estate was acquired or rebuilt before 1961); and (ii) actually to award compensation to such real estate owner. The following issues were relevant in this particular case, but also apply more generally:⁽³⁾

- Excessive noise nuisance has a negative impact on market value. This need not be demonstrated by actually selling the property.
- The damage suffered is considered to be grave if the ensuing costs reach a certain threshold percentage of the total value of the property (which can be the case if the property is devalued by 10%).
- The damage suffered is not counterbalanced to any extent by the fact that residential neighbourhoods around the airport benefit from better air transport connections.
- The estimation of the reduction in market value must be scheduled for a representative appointed date and must be the same for all claimants filing a claim for the same reason. Future increases or reductions in noise, or mere potential increases or reductions, are not taken into consideration.
- The econometric method, chosen by a panel of experts, was considered most appropriate⁽⁴⁾ to evaluate the reduction. This method involves a compositional procedure that focuses not on a particular property itself, but rather on those factors that influence price. It is based on an extensive collection of data by the Zürcher Kantonalbank (approximately 7,500 effective sales through private contract over the course of a decade). Each result identified in this way must be verified by an inspection.
- In particular, flight noise affecting the property during the daily routine (6:00am to 10:00pm and 9:00pm to 12:00pm), as well as at peak times (7:00am to 9:00pm), is assessed.

In this decision the real estate owner was awarded a reduced market value of 20% (rounded up). Since the operator of Kloten airport had already helped to pay for soundproof windows, the compensation was reduced by that amount.

For further information on this topic, please contact [Max Walter](mailto:Max.Walter@pestalozzilaw.com) or [Michael Lips](mailto:Michael.Lips@pestalozzilaw.com) at Pestalozzi Attorneys at Law by telephone (+41 44 217 91 11) or by fax (+41 44 217 92 17) or by email (max.walter@pestalozzilaw.com or michael.lips@pestalozzilaw.com).

Endnotes

(1) According to Swiss Supreme Court Decision BGE 122 II 349, 'low altitude' is defined as less than 108 metres above ground (see also BGE 134 II 49, where this factor is heightened to 125 metres above ground for wide-bodied aircraft). In the same decision the court also specified that due to the significantly steeper flight paths for departures, only landing approaches can be of expropriatory relevance.

(2) According to Swiss Supreme Court Decision BGE 121 II 317, the significant increase in air traffic is noticeable to everyone, so that all claimants who purchased their real estate after 1960 (except as a result of universal succession) miss out and fail to satisfy the requirement of unforeseeability (see also detailed confirmation in Swiss Supreme Court Decision BGE 124 II 49).

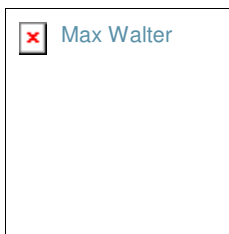
(3) Regarding individual case groups, attention should also be paid to the following decisions of the Swiss Supreme Court: BGE 134 II 145 and BGE 134 II 152 (mere acquisition of developed land, partly before 1961); BGE 134 II 160 (apartment building); BGE 134 II 164 (farmhouse); BGE 134 II 172 (party commercially used rental property); 134 II 176 (public building with apartments and kindergarten); BGE 134 II 182 (building lease realty).

(4) "The price discrepancies on the market are explained by specific characteristics of the commodities which provide the user or owner to a greater or lesser extent with pleasure and which therefore determine the willingness to pay."

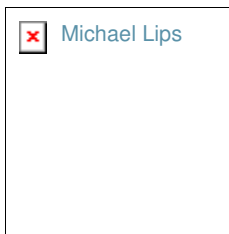
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