IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

CITY OF DANIA BEACH, a Florida municipal corporation,

Plaintiff,

Case No.: 93-18222 (05)

vs.

BROWARD COUNTY, FLORIDA, a political Subdivision of the State of Florida,

Defendant,
_____/

RESPONSE TO PLAINTIFF'S MOTION TO ENFORCE STIPULATED FINAL JUDGMENT AND CROSS-MOTION FOR RELIEF FROM STIPULATED FINAL JUDGMENT

Response to Motion to Enforce

The Defendant, BROWARD COUNTY, FLORIDA ("COUNTY"), by and through undersigned counsel, hereby responds to the Motion of Plaintiff, CITY OF DANIA BEACH ("CITY"), to enforce Stipulated Final Judgment and would state as follows:

1. By a Stipulated Final Judgment dated September 12, 1996, the Court adopted as part of its judgment the Interlocal Agreement entered into between the COUNTY and the CITY in October, 1995 as the judgment of the Court. The Interlocal Agreement is attached as Exhibit "A" to the Stipulated Final Judgment which itself is attached as Exhibit "A" to the CITY's Motion to Enforce.

2. The Interlocal Agreement and the Stipulated Final Judgment were entered into by the CITY and COUNTY to resolve litigation concerning implementation of the Fort Lauderdale-Hollywood International Airport ("Airport") Master Plan Update dated March, 1994. This

Master Plan Update provided for the widening of runway 9R/27L at the Airport to 150 feet and its lengthening to 9,000 feet.

3. The Interlocal Agreement recited agreement between the parties that the airport expansion was in the best interest of the residents of Broward County and addressed a number of issues, among them (1) airport expansion and runway restrictions, (2) noise mitigation, (3) annexation and de-annexation of certain properties in the airport vicinity, (4) platting, rezoning and other actions to provide for compatible land uses near the airport, (5) County purchase of infrastructure improvements from the CITY for consideration of $1,600,000.00, and (6) settlement of the outstanding litigation between the parties.

4. A primary focus of the Interlocal Agreement was to ameliorate, to the extent practicable, the noise impacts arising out of the operation of an international airport as, in this case, affected by the planned runway expansion.

5. The CITY in its Motion, has taken the position that the COUNTY's present plan for runway expansion, which is <u>not</u> the plan set forth in the 1994 Master Plan Update, is nearing the commencement of construction without the noise abatement restrictions set forth in paragraph 3B of the Interlocal Agreement having been implemented. It is the CITY's position that this is a violation of paragraph 3C of the Interlocal Agreement and that it is thereby entitled to the relief sought in the Motion.

6. The CITY is not entitled to the relief sought requested in its Motion for the following reasons:

a. Assuming the continued applicability of the Interlocal Agreement and the Stipulated Final Judgment, the CITY's request for relief is premature in that construction of the runway expansion has not commenced and is not imminent[1];

b. Assuming the continued applicability of the Interlocal Agreement and the Stipulated Final Judgment, the COUNTY is not in violation of paragraph 3B and C of the Interlocal Agreement; and

c. As set forth in the COUNTY's Cross-Motion for Relief from Final Stipulated Judgment, the assertions of which are adopted and incorporated herein, neither the Interlocal Agreement nor the Stipulated Final Judgment is any longer properly applicable to the COUNTY or the present runway expansion plans.

7. Particularly with respect to subparagraph 6b above, there has been no violation of paragraph 3B and C of the Interlocal Agreement and, even if construction had commenced, there would be no violation. Giving these provisions their broadest reading, they required a response from the FAA prior to commencement of construction of the expanded runway provided for in the March, 1994, Master Plan Update, that the noise abatement measures found in 3B were not objected to. In connection with the 1994 Master Plan Update, which provided for the expansion of the south runway to 9,000 feet in length, a Federal Aviation Regulations (FAR) Part 150 noise study was conducted and submitted to the FAA. This study not only included the measures set forth in paragraph 3B, but attached a version of the Interlocal Agreement which, with minor

[1] The CITY's representation in paragraph 4 of its Motion that runway construction is scheduled to begin in the third quarter of 2010 is not supported by Corrected Exhibit C to the Motion (as asserted by the CITY) which is a Declaration by the Airport Director dated April 9,2009, expressing his expectation at the time. Construction has not commenced and is, while in the early planning stages, not imminent.

variations, contained the measures found in paragraph 3B. (See Exhibit A attached hereto).[2] In its letter of December 12, 1995, to the Director of Aviation, the FAA specifically approved of many of the County's measures, including operational restrictions. (See Exhibit B attached hereto). As such, with respect to the planned expansion as set forth in the 1994 Master Plan Update, and as addressed by the Interlocal Agreement, this purported precondition to commencement of construction was addressed and substantially met.

8. As will be discussed in further detail in the COUNTY's Cross-Motion below, the plans for the expansion of the south runway at the Airport have changed significantly since the March, 1994, Master Plan Update and the entering into of the Interlocal Agreement and Stipulated Final Judgment. Among other things, it is now designed to be shorter (8,000 feet) and the existing cross runway (designated 13/31) will be eliminated. These newly updated plans change the noise contours surrounding the Airport. In the Preface to the 1994 FAR Part 150 Study, the potential for changes in the plans, and the resultant consequences, was specifically recognized as follows (see Exhibit C attached hereto): "As a final point, if future events or activities result in the need to revise the Airport noise exposure maps in this document, the associated noise compatibility program will also be revised, as appropriate." As a result, the Interlocal Agreement, including the provision at issue in the CITY's Motion, are no longer applicable.

9. Nonetheless, even assuming the continued applicability of the Interlocal Agreement in whole or in part, a reading of paragraphs 3 and 4 as a whole demonstrates that paragraph 3C comes into play only until a noise mitigation plan is adopted, funded and

[2] This first version of the noise abatement measures was rejected by the Dania Beach City Council. (See Exhibit A, p. 6-27). Subsequently, the Interlocal Agreement was approved and executed by the CITY with minor variations as to these noise abatement measures.

implemented. Once such a plan is funded and implemented there is no longer any need for the runway restrictions, which constitute noise abatement and not noise mitigation, to be implemented. Under the COUNTY's present plan, the noise mitigation measures will be funded and implementation, as contemplated by the Interlocal Agreement, would have occurred or will be occurring prior to and at the time of the opening of the expanded runway. As such, even if the Interlocal Agreement remained applicable to the present expansion plans (which it does not), should commencement of construction occur absent a Federated Aviation Administration ("FAA") "lack of objection" to the runway restrictions, no breach of the Agreement would have occurred.

10. It is also to be noted that the COUNTY's preferred alternative as provided to the FAA in the Environmental Impact Statement ("EIS") process included runway restrictions. The FAA, however, chose an alternative that was identical in all respects to the alternative submitted by the COUNTY except for the absence of such restrictions. Even so, the projected noise contours from each of these alternatives demonstrate, overall, less noise impact on Dania Beach than the 1997 noise contours map arising out of the approved 1994 Part 150 Study.

11. Notwithstanding the CITY's breaches of the Interlocal Agreement as set forth below in the COUNTY's Cross-Motion and notwithstanding the fact that such significant changes have occurred since the entry of the Stipulated Final Judgment so as to make compliance with all provisions of the Interlocal Agreement impossible (see Cross-Motion below), the COUNTY has nonetheless substantially complied with those portions of the Interlocal Agreement that it has the capability of complying with. This is shown by the following:

a. The noise abatement conditions found in paragraph 3B have been submitted to the FAA; and were submitted in the 1994 Part 150, for the proposed 9,000 ft runway

b. The COUNTY has submitted and continues to submit its noise mitigation plans to the CITY;

c. The COUNTY's plans are in compliance with FAA rules, regulations and grant requirements;

d. With respect to paragraph 3C, by the time the expanded south runway is operational, the COUNTY will have funded and implemented paragraph 4, the noise mitigation program, thus rendering paragraphs 3B and 3C superfluous and unnecessary; and

e. The COUNTY remains in compliance with paragraph 4C, especially the last paragraph of that provision

12. The granting of the CITY's Motion preventing commencement of construction in the absence of the implementation of the specific noise abatement procedures set forth in the Interlocal Agreement, which is a matter entirely within the control of the FAA, will violate public policy and would not be in the public interest. It has been determined by both the COUNTY and the FAA that expansion of the south runway is clearly in the public's interest. The CITY agreed that the proposed expansion is in the best interest of the residents of Broward County. While the expansion of any metropolitan airport raises issues and concerns of impact on surrounding neighborhoods, federal rules and regulations require mitigation of those impacts and provide funding for such purposes. The present project has undergone the necessary federal

environmental impact study and has been designed with such mitigation measures in mind and for eligibility of federal grant funds.

13. Given the many years of study, the extensive resources expended, the demonstrated need for additional capacity and the funding to be made available to the COUNTY by the federal government to meet these needs, there exist significant public interest and public policy reasons not to prevent the commencement of construction, when that time comes, due to a provision in the Interlocal Agreement that has no real meaning or relevance until such time as the runway expansion has been completed.

14. Based on the foregoing, and the assertions that follow in the COUNTY's Motion for Relief from Stipulated Final Judgment as adopted herein, the CITY's Motion should be denied.

Cross-Motion for Relief from Stipulated Final Judgment

15. This is a Cross-Motion for Relief from Stipulated Final Judgment pursuant to Rule 1.540(b)(5), Florida Rules of Civil Procedure. The basis for the Cross-Motion is that it is no longer equitable that the Stipulated Final Judgment have prospective application. There are several bases that require this finding.

A. The Interlocal Agreement[3], by its Terms, Does Not Apply to the Updated Planned Runway Expansion

16. By its terms, the Interlocal Agreement specifically addressed the March, 1994, Master Plan Update which proposed an expansion of 9R/27L to 9,000 feet. The "Whereas" clauses clearly referenced the Master Plan Update dated March, 1994 revising the previous

[3] Inasmuch as the Interlocal Agreement constitutes, for all intents and purposes, the Stipulated Final Judgment, all references to the Interlocal Agreement include, where applicable, the Stipulated Final Judgment and vice-versa.

Master Plans for the Airport in 1978 and 1987 which depicted the extension of the runway to 6,000 feet. Throughout the Interlocal Agreement the parties referenced "the Master Plan" and "the Runway Expansion."

17. A new Master Plan has been developed over the past fifteen (15) years and as of September 23, 2010, has been formally accepted by the FAA. There are significant changes in the new Master Plan including a shortening of the runway to 8,000 feet, a different design, the removal of the crossway runway identified as runway 13/31, as well as other differences. The proposed South Runway Expansion presents a diminished noise projection compared to the 1997 noise contours map. There is nothing in the Interlocal Agreement that indicates that it was intended to apply to any and all future proposed changes to the Airport no matter how different any such proposed changes may be.

18. Given the change in circumstances both with respect to the new plans for the runway extension as well as the passage of time, there are provisions in the Interlocal Agreement which logically no longer apply. For example, the noise abatement procedures set forth in paragraph 3B, discussed above, describe aircraft that do not go beyond the specifications of Stage III aircraft. Since 1995, Stage IV aircraft have been introduced and are not accounted for in the provisions of paragraph 3B. Stage IV aircraft are much quieter than the Stage III aircraft in use in 1995.

19. The inapplicability of various provisions of the Interlocal Agreement, caused by the passage of time, changes in technology or changes in the Master Plan, render the Interlocal Agreement inapplicable to the present nature of the project. Moreover, if any one provision of the Interlocal Agreement (such as paragraph 3B) is no longer valid or applicable, the non-

severability provision of paragraph 18 of the Interlocal Agreement renders the entire agreement not enforceable. And to the extent that the Interlocal Agreement is not enforceable, the Stipulated Final Judgment is, of necessity, also no longer enforceable.

B. Breaches of the Agreement by the CITY Excuse Further Performance by the County.

20. While the CITY is demanding that the COUNTY comply with a particular term of the Interlocal Agreement, the CITY has, in several respects, breached the Interlocal Agreement itself thus excusing further COUNTY performance. Among the actions of the CITY which constitute breaches are the following:

a. In paragraphs 1 and 2 of the Interlocal Agreement, as well as the "Whereas" clauses, the CITY agrees that the Airport expansion proposed in the Master Plan is in the best interest of the residents of Broward County and further agrees to cooperate with the COUNTY in the preparation and approval of, among other things, an Environmental Impact Statement ("EIS") based upon the Master Plan for the Airport. The CITY's participation in commenting on the EIS has been directly contrary to those commitments. It argues that the expansion plans are not in the best interest of the residents and it challenges virtually the entire EIS as being insufficient and not worthy of acceptance. While it could be argued that paragraphs 1 and 2 of the Interlocal Agreement obligate the CITY only with respect to "the Master Plan" as submitted in March, 1994, such an argument bolsters the COUNTY's argument, as set forth above, that the Interlocal Agreement no longer applies inasmuch as that Master Plan has been revised.

b. The CITY's court challenge to the FAA's Record of Decision ("ROD") seeks, in essence, a consideration, if not an actual decision, by the FAA to completely abandon

the expansion of a south runway (i.e., 9R/27L), in favor of the construction of an entirely new north runway parallel to the existing north runway. This is entirely inconsistent with not only the purpose but also the specific terms of the Interlocal Agreement.

c. The CITY has provided the COUNTY with a counter-proposal to the draft Noise Mitigation Plan previously submitted to the CITY. Pursuant to paragraph 4C of the Interlocal Agreement, "[a]ny counter-proposals made by CITY shall be based upon a consideration of the desires of the residents of the area and shall be consistent with then-current and applicable guidelines, including, at a minimum, federal regulations regarding grant eligibility and the expenditure of the aviation funds." A review of the CITY's counter-proposal clearly demonstrates that it is in violation of this requirement. While it is merely one aspect of the Interlocal Agreement, it goes to the very heart of the COUNTY's efforts with regard to expansion of the Airport and the development of an acceptable noise mitigation program. Here, too, the CITY has breached the Interlocal Agreement.

d. The CITY has breached the covenant of good faith and fair dealing implied in all contracts. It has done so through its continually obstructive actions notwithstanding the provisions in the Interlocal Agreement specifically providing for the CITY's cooperation with the COUNTY in moving the expansion project forward and obtaining a favorable EIS. Stated in another way, the CITY comes before the court with unclean hands.

21. Where, as here, there are breaches of dependent covenants, rescission of the Interlocal Agreement or discharge of the other party's (i.e., the COUNTY's) obligations are the proper remedies.

C. The Parties have Abandoned the Interlocal Agreement.

22. Both parties have abandoned the Interlocal Agreement because of the changes in the proposed expansion of runway 9R/27L. Despite the words of the parties, their conduct must be viewed as establishing abandonment. On the CITY's part that conduct is in the form of the breaches discussed above which are inconsistent with the position that the Interlocal Agreement is in effect in every respect (keeping in mind the non-severability clause discussed previously). From the COUNTY's standpoint abandonment is demonstrated by its change in plans and corresponding belief that all terms of the Interlocal Agreement are no longer operative notwithstanding the COUNTY's continuing efforts to develop a noise mitigation plan acceptable to the CITY – something that the COUNTY would be engaging in irrespective of a formal written agreement, as provided in the Record of Decision issued by the FAA.

D. The Agreement is No Longer Binding Due to the Doctrine of Frustration of Purpose.

23. The purpose for which the Agreement was originally created, i.e., to implement the 1994 Master Plan, no longer exists due to a change in circumstances. Moreover, assuming that the FAA's non-objection to the operational restrictions set forth in the 1994 Part 150 Study is not deemed a complete satisfaction of the requirements of paragraph 3D (which, as noted above, it certainly should be) the purpose for which paragraph 3C was created has been frustrated by the actions of the FAA in presenting a response to the proposed noise abatement measures for the 8,000 foot runway which neither objected to nor failed to object to said measures. And, while this is only one provision in the Interlocal Agreement which might otherwise be separated out, the non-severability clause must again be considered.

E. The Agreement is No Longer Binding Due to Impossibility of Performance.

24. Similar to but somewhat different from the doctrine of frustration of purpose, is the applicability here of the doctrine of impossibility of performance. Impossibility of performance is further implicated by the inability of both the CITY and the COUNTY to comply with all terms of the Interlocal Agreement in a manner consistent with presently existing FAA guidelines and requirements.

F. Enforcement of the Agreement, or at Least Preventing Commencement of Construction, Would Violate the Public Interest and Public Policy.

25. As noted in Paragraph 12 above expansion of the Airport in a timely manner is necessary in the public interest and for significant public policy reasons.

Conclusion

26. It is clear that circumstances have changed since 1995, and the COUNTY and the CITY have continued to engage in a process where both parties have had to adapt to those changed circumstances. For the reasons set forth above, those changed circumstances have rendered the Interlocal Agreement no longer applicable to all aspects of the project and, by its own terms, no longer operative. For these reasons, the COUNTY respectfully requests that this Court either 1) summarily provide it relief from the Stipulated Final Judgment and declare the Stipulated Final Judgment of no further force and effect, or 2) set the matter down for an evidentiary hearing and the submission of memoranda of law on the issues presented.

Respectfully submitted,

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