

May 9, 2025, “Plaintiff’s Motion For Partial Summary Judgment” filed May 9, 2025, and “Defendant’s Motion For Partial Judgment On The Pleadings And Dismissal Of Plaintiffs’ Inverse Condemnation Damaging Claim” filed May 9, 2025.² The motions are fully briefed and further argument would not materially assist the court. Thus, the motions are ripe for review.

BACKGROUND

Plaintiffs are more than 400 individual home/property owners who live in the Rock Creek Ranch community of Superior, Colorado. Rock Creek Ranch (“Rock Creek”) is located near the Rocky Mountain Metropolitan Airport (the “Airport”). Defendant, The Board of County Commissioners for Jefferson County, as successor in interest to the Jefferson County Airport Authority, owns and operates the Airport.

In the early 1990s when development of Rock Creek began, Defendant received twenty-nine avigation easements to allow for flight through the airspace of what would be become the Rock Creek development. The avigation easements were the subject of another recent lawsuit in Boulder. At issue in that case was whether some or all of the avigation easements had terminated due to certain conditions set

² In addition to these motions which involved substantive issues concerning the viability of Plaintiffs’ claims, the parties have filed cross-motions concerning the availability of attorney fees in the event Plaintiffs prevail on their claims for inverse condemnation. The issue of attorney fees will be addressed in a separate order.

forth in the easements. Following a bench trial, the court found that nine of the twenty-nine easements had terminated. The trial court's decision was affirmed by a division of the court of appeals.

This lawsuit represents round two in the dispute over use of the airspace over Plaintiffs' properties. Plaintiffs are the property owners located in the areas cover by the nine easements that have terminated. Plaintiffs brought this case alleging several claims for inverse condemnation.³ The thrust of Plaintiffs' complaint is that Defendant's continued use of the airspace over their property without an avigation easement results in a constitutional taking of their property. Plaintiffs seek partial summary judgment on their "takings" claim, arguing that Defendant's continued use of the terminated easement rights amounts to a taking as a matter of law.

Defendant denies that airport activities, i.e. aircraft from the Airport flying through the airspace above Plaintiffs' properties, amount to a constitutional taking of Plaintiffs' properties such that Defendant would have to compensate Plaintiffs. Defendant's argue, among things, there can be no taking because the Federal Aviation Administration ("FAA"), not Defendant, controls and directs the flight levels for aircraft

³ This case is actually two cases (23CV31075 and 24CV30251) that have been consolidated.

using the Airport. In furtherance of that defense, Defendant move for a ruling under C.R.C.P. 56(h) that Plaintiffs' ownership of their airspace as defined by Colo. Rev. Stat. § 41-1-107 is subject to aircraft flying as authorized by the FAA regardless of the level of that flight over Plaintiffs' properties.

Defendant's move for judgment on the pleadings under C.R.C.P. 12(c) as to Plaintiffs' "damaging" claim. Defendant contends that plaintiffs cannot establish that they have suffered the requisite "unique" damages necessary to maintain a damaging claim. Plaintiffs disagree and contend that they have adequately pled such a claim.

ANALYSIS

1. Legal Standard

A. C.R.C.P. 56(c) and 56(h)

The purpose of summary judgment under C.R.C.P. 56(c) is "to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with a trial when, as a matter of law, based on undisputed facts, one party could not prevail." *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). "Summary judgment is appropriate when the pleadings and supporting documents clearly demonstrate that no issues of material fact exist" *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 819 (Colo. 2004). "A

material fact is one that will affect the outcome of the case.” *Western Innovations, Inc. v. Sonitrol, Corp.*, 187 P.3d 1155, 1158 (Colo. Ct. App. 2008). “[A] genuine issue of material fact cannot be raised simply by allegations of pleadings or argument of counsel.” *Brown v. Teitelbaum*, 830 P.2d 1081, 1084 (Colo. Ct. App. 1991). “In addition to concerning a material fact, the issue in dispute must be ‘genuine.’ To avoid summary judgment, the evidence presented in opposition to such a motion must therefore be sufficient to demonstrate that a reasonable jury could return a verdict for the non-moving party.” *Andersen v. Lindenbaum*, 160 P.3d 237, 239 (Colo. 2007).

“The moving party bears the initial responsibility of informing the court of the basis for the motion and identifying those portions of the record and of the affidavits, if any, which he or she believes demonstrate the absence of a genuine issue of material fact.” *Quist v. Specialties Supply Co., Inc.*, 12 P.3d 863, 868 (Colo. Ct. App. 2000). “[O]nce this initial burden of production is met, the burden shifts to the opposing party to demonstrate that there exists a triable issue of fact.” *City of Aurora v. ACJ Partnership*, 209 P.3d 1076, 1082 (Colo. 2009). “The nonmoving party is entitled to the benefit of all favorable inferences that may be drawn from the undisputed facts, and all doubts as to the

existence of a triable issue of fact must be resolved against the moving party.” *Martini v. Smith*, 42 P.3d 629, 632 (Colo. 2002).

Summary judgment has been described as a “drastic remedy” to be granted only “when it is clear that the applicable legal standards have been met.” *People ex rel. Reign v. Meagher*, 465 P.3d 554, 559 (Colo. 2020).

C.R.C.P. 56(h) allows a party “[a]t any time after the last required pleading, with or without supporting affidavits . . . to move for determination of a question of law. If there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question.” The purpose of a Rule 56(h) motion is to “allow the court to address issues of law which are *not* dispositive of a claim,” i.e., allow the court to address issues of law which do not warrant summary judgment.” *Bd. Of Cnty Comm’rs v. United States*, 891 P.2d 952, 963 .14 (Colo. 1995). The summary judgment standard of review applies to C.R.C.P. 56(h) matters. *Stapleton v. Pub. Emp. Ret. Ass’n*, 412 P.3d 572, 576 (Colo. Ct. App. 2013).

B. C.R.C.P. 12(c)

“In considering a motion for judgment on the pleadings, a court must construe the allegations in the pleadings strictly against the moving party, must consider the allegations of the opposing party’s pleadings as

true, and should not grant the motion unless the pleadings themselves show that the matter can be determined on the pleadings.” *Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C.*, 287 P.3d 842, 847 (Colo. 2012). “Judgment on the pleadings is appropriate when a case’s material facts are not in dispute, and judgment on the merits can be achieved by focusing on the content of the pleadings and any facts of which the court will take judicial notice.” *Sterenbuch v. Goss*, 266 P.3d 428, 432 (Colo. App. 2011).

The standard for a motion for judgment on the pleadings under C.R.C.P. 12(c) is “consistent with that employed in resolving a motion to dismiss for failure to state a claim....” *Bedard v. Martinez*, 100 P.3d 584, 588 (Colo. Ct. App. 2004). “To survive a Rule 12(c) motion, a complaint’s factual allegations must allege plausible grounds to support a viable claim for relief.” *Spectrum Retirement Communities, LLC v. Continental Cas. Co.*, 2025 COA 57 at ¶ 14.

2. Defendant’s Motion on the “Right of Flight”

Under Colorado law, “The ownership of space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, *subject to the right of flight of aircraft.*” Colo. Rev. Stat. § 41-1-107 (emphasis supplied). Defendant seek a determination of law that “subject to the right of flight” language in section 41-1-107 “includes

aircraft flying at an altitude and course required by the FAA pursuant to federal law, including the airspace needed during the takeoff and landing of aircraft.” (Def.’s Mot. at 9.) Plaintiffs argue that Colorado law already defines the “right of flight” and its means “navigable airspace” as defined by federal law, which for an area like Rock Creek is 1,000 feet above the ground. What constitutes the right of flight is important in this case because much of what Plaintiffs complain about are overhead flights below 1,000 feet, especially flights involving flight schools which use the Airport runway for touch-and-go landings in a pattern set by the FAA at an altitude of 800 feet.

Colorado courts that have addressed inverse condemnation cases involving aircraft have applied the same analysis to determine whether overhead flights constitute a taking of property. *See Thompson v. City & Cnty. Of Denver*, 958 P.2d 525, 527-28 (Colo. Ct. App. 1998); *Claassen v. City & Cnty. of Denver*, 30 P.3d 710 (Colo. Ct. App. 2000). In doing so, the courts recognize that:

A landowner’s property interest in the land extends to the airspace directly over the property to the extent that the airspace can be used to benefit the underlying land. However, since Congress has placed *navigable airspace* in the public domain . . . the surface owner’s property interest in airspace above the land is generally limited to that airspace which is below navigable limits.

Thompson, 958 P.2d at 527 (citing *United States v. Causby*, 328 U.S. 256

(1946)) (emphasis supplied).

To determine what is “navigable airspace,” and thus whether a landowner has a property interest that may be taken by government action, Colorado courts look to federal law. Congress defines navigable airspace as “airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft.” 49 U.S.C. § 40102(32). The FAA, in turn, in its regulations defines the “minimum safe altitudes” as “except when necessary for takeoff and landing,” an altitude of “1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.”⁴ 14 C.F.R. § 91.119.

Using the limits set in 14 CFR § 91.119, the court of appeals has found, “there is generally a right of free passage for aircraft at heights greater than 500 feet above ground level (AGL) in uncongested areas, and landowners cannot ordinarily recover for an alleged taking of an aviation easement for overflights in this portion of airspace.” *Id.* In other words, Colorado courts define the airspace limits for purposes of analyzing a taking as those defined in 14 CFR § 91.119.⁵ *Id.*; *Claassen*,

⁴ For areas that are not “congested areas” the minimum altitude is 500 feet. *Id.* There is no serious dispute in this case that the Rock Creek area is a congested area.

⁵ The 500/1,000 foot minimum safe altitude in 14 CFR § 91.119 has existed for well over sixty years although its placement in the Code of Federal Regulations has changed over time.

30 P.3d at 712-13. In a congested area that means 1,000 feet, so aircraft flying above that level would not give rise to a taking of an avigation easement, but aircraft flying below that level may give rise to a takings claim if all of the other elements of the claim are met.

Defendant argues that *Thompson and Claassen* do not represent the final say of what the “right of flight” means under Colorado law. Defendant asserts that the right of flight goes beyond the 500/1,000 feet minimum safe altitude to include *any* airspace which an aircraft passes so long as it is approved by the FAA and directed by air traffic controls at the Airport. Consequently, under Defendant’s interpretation of the right of flight, Plaintiffs could not pursue a takings claim based on aircraft flying overt their properties at an altitude or course authorized by the FAA.

I am not persuaded by Defendant’s argument. Defendant’s argument finds no support in the Colorado case law that has considered how to define airspace for purposes of a takings. Contrary to Defendant’s assertion that *Thompson and Classen* “strongly suggest that all flight operations in compliance with FAA regulations would be operating under the right of flight recognized by Section 41-1-107,” that is not what they suggest. The cases are clear in their analysis that navigable airspace is as set forth in 14 CFR § 91.119. Taken to an

extreme, Defendant's argument would preclude Plaintiffs from asserting a takings claim if the FAA authorized a flight level just 50 feet about Plaintiffs' properties. Such a position has long been rejected by the courts, including the United States Supreme Court. *See, e.g., U.S. v. Causby*, 328 U.S. 256, 263-64 (1946); *Griggs v. Allegheny County, Pa.*, 369 U.S. 84, 88-89 (1962); *McCarren Int'l Airport v. Sisolak*, 137 P.3d 1110, 1119 (Nev. 2006) ("The United States Supreme Court emphasized, in *Griggs v. Allegheny County*, that although airplanes may fly below 500 feet when necessary for takeoff and landing, this right does not divest the property owner of his protected property right to his usable airspace. Rather, a landowner may still make a claim for compensation for the government's use of that airspace."); *Ackerman v. Port of Seattle*, 348 P.2d 664, 671 (Wash. 1960) ("The government simply cannot arbitrarily declare that all of the airspace over a person's land is public domain and then, cavalierly, claim absolute immunity against property owners' claims for any and all possible damages.").

Defendant is also unable to cite any case law from other jurisdictions that adopt its interpretation that any airspace in which an aircraft operates by FAA approval is exempt from a takings claim. As indicated by Plaintiffs' opposition, there is an unbroken line of federal and state cases from *Causby* in 1946 through at least *Sisolak* in 2006

that define navigable airspace as the 500/1,000 feet minimum safe altitude. I see no reason to diverge from what is now 80 years of case law defining property rights in airspace based on Defendant's novel argument.

Lastly, Defendant's reliance on other FAA regulations such as 14 CFR §§ 91.123 and 91.129(i), does not change my conclusion. While it is true that those regulations requires pilots to obtain and follow air traffic control clearances, they say nothing about navigable airspace or what constitutes a minimum safe altitude. So while these are undoubtedly important safety regulations, they do not alter the analysis for determining whether flights over Plaintiffs' properties amount to the taking of an avigation easement.

In sum, the right of flight under Colorado law is defined for purposes of this case the minimum safe altitude of 1,000 feet in a congested area as set forth in 14 CFR § 91.119. Flights above that altitude will not give rise to a takings claim. Flights below that altitude (regardless of whether for takeoff or landing or some other purpose) may be considered for purposes of determining whether Plaintiffs have established the taking of avigation easement. To the extent Defendant's motion seeks the court to apply another standard when evaluating Plaintiffs' takings claim, the motion is denied.

3. *Plaintiff's Motion for Partial Summary Judgment*

Plaintiffs argue that they are entitled to summary judgment on their “takings” claim because Defendant’s continued use of the airspace previously covered by the terminated aviation easements constitutes a taking as a matter of law. Defendant contends that factual disputes exists that preclude summary judgment. I agree with Defendant.

To prevail on their inverse condemnation claim for a taking, Plaintiffs must establish “(1) that there has been a taking . . . of a property interest; (2) for a public purpose without just compensation; (3) by a governmental or public entity that has the power of eminent domain but which has refused to exercise it.” *Thompson*, 958 P.2d at 527 (*citing Jorgenson v. City of Aurora*, 767 P.2d 756 (Colo. Ct. App. 1988)).

In the context of airplane flights over congested areas, “only frequent and low flights by aircrafts, directly over private land, below [1,000] feet AGL, that cause substantial, direct and immediate interference with the property owner’s enjoyment and use of the land, are takings.” *Id.* at 528.

Plaintiffs’ summary judgment argument is that because Defendant previously had easements to use Plaintiffs’ airspace and now they don’t, the continued use of the airspace is a taking as a matter of law. Plaintiffs’ argument proves too much. The assumption underlying

Plaintiffs' argument is that Defendant was required to obtain the easements because otherwise there would be a taking. But that does not necessarily follow. Certainly one inference that could be drawn from Defendant obtaining the easements is its belief that Airport operations over Plaintiffs' properties is a taking. However, that is not the only permissible inference. Another reasonable inference is that Defendant obtained the easements not because it was required to but because it was a way to avoid any uncertainty and future litigation (such as the current litigation) over whether there has been a taking. It is not for me to resolve these competing inferences on summary judgment.⁶

I acknowledge that whether there has been a taking is a question of law, see, e.g., *City of Colo. Springs v. Andersen Mahon Enters., LLP*, 260 P.3d 29, 32 (Colo. Ct. App. 2010), but embedded in that legal determination are factual questions. In this case, the factual disputes that need to be resolved include the frequency and flight level of aircraft over each of Plaintiffs' properties, as well as the impact those flights had on the use and enjoyment of Plaintiffs' properties. While Plaintiffs may ultimately be able to establish those facts in their favor at trial, they have not done so on the current summary judgment record. Therefore,

⁶ I find the cases relied on by Plaintiffs such as *Hayden v. Broker Defendants of Cnty. Comm'rs of Jefferson*, 580 P.2d 830 (Colo. Ct. App. 1978) and other federal cases distinguishable insofar as they involved the physical occupation of land.

Plaintiffs are not entitled to summary judgment and their motion is denied.

4. Defendant's Motion for Partial Judgment on the Pleadings

In addition to a “takings” claim, the Colorado constitution recognizes a “damaging” claim. See Colo. Const., art. II, § 15 (“private property shall not be taken or damaged for public or private use, without just compensation”). A damaging claim differs from a takings claim in that a damaging claim exists “to grant relief to property owners who have been substantially damaged by the creation of public improvements abutting their lands, but whose land has not been physically taken by the government.” *Thompson*, 958 P.2d at 528 (citing *City of Northglenn v. Grynberg*, 846 P.2d 175 (Colo. 1993)).

To succeed on a damaging claim the property owner must show “a unique or special injury that is different in kind from, or not common to, the general public.” *Id.* “The damage must be different in nature from, and not merely greater in degree than, that suffered by the general public.” *Id.*

“Annoyance and inconvenience do not rise to the level of compensable damages.” *Id.* Nor does the depreciation in value of the property. *Claassen*, 30 P.3d at 714. Also, “the greater amounts of noise and pollution suffered by a landowner adjacent to a public highway are

not different in kind from the effects suffered by the public in general.”
Id. (citing *Lakewood v. DeRoos*, 631 P.2d 1140 (Colo. Ct. App. 1981)).

Defendant argues that even when taking the well-pled allegations in Plaintiffs’ complaints as true, they have failed to satisfy the requirement to plead the unique or special injuries that will support a damaging claim. I agree.

To begin, I need not accept as true either conclusory allegations or legal conclusions. *Woodall v. Godfrey*, 533 P.3d 249, 255-56 (Colo. Ct. App. 2024) (noting “we are not required to accept as true legal conclusions that are couched as factual allegations . . . or ‘bare, conclusory assertions’ that are unsupported by factual allegations”). Accordingly, Plaintiffs’ allegations that activities from the Airport have damaged Plaintiffs “by affecting rights and interests that are not shared with the public generally, and that are different in kind, not just degree from those suffered by other members of the public,” (Am. Compl. ¶ 128), and “unreasonably interfere with [Plaintiffs] use of their [p]roperties in so substantial of a way to deprive the [Plaintiffs] of the practical enjoyment of their [p]roperties,” (*id.* at ¶ 129), are conclusory allegations that standing alone cannot support a damaging claim. Plaintiffs must allege facts that would make the conclusory allegations plausible.

The facts Plaintiffs allege fail to plausibly show how they have suffered “a unique or special injury that is different in kind from, or not common to, the general public.” *Thompson*, 958 P.2d at 528. Plaintiffs allege that they have been damaged by the increased noise and vibration levels, increased exposure to lead contaminants from aircraft engine emissions, and that the effect of these interferences with the use and enjoyment with their properties has reduced the market value for the properties. However, even if true, these injuries are not unique or special or different in kind from or common to the general public. Rather, these are precisely the type of injuries that the court of appeals in *Thompson* and *Claassen* held do not support a damaging claim. At best, the injuries Plaintiffs complain of are greater in degree than what the general public in the vicinity of the Airport may suffer, but nonetheless they are injuries common to the general public. That remains true whether the alleged injuries are considered separately or collectively.

Plaintiffs’ efforts to distinguish this case from *Thompson* and *Claassen* are unavailing. At times Plaintiffs conflate their damaging claim with their takings claim. But regardless of whether the overflight of aircraft allows Plaintiffs a takings claim, it does not change the fact that Colorado law requires Plaintiffs to show a unique injury from the general public — something that is not required in a takings claim.

While Plaintiffs cite to case law from other jurisdictions to show that courts have found that just compensation is still owed so long as substantial interference with the use and enjoyment of property is established,” (Pls. Respondent. at 11), those cases are inconsistent with Colorado law to the extent that they do not require unique or special injury.⁷

Further, the fact that *Thompson* and *Claassen* involved overflights from commercial aircraft at DIA while the activities at the Airport involve lower-level flights, including flight school operations, does not make this case distinguishable. The question is not whether the conduct at issue here is different or more intrusive but rather whether the injury suffered from the conduct is one that is unique from that suffered by the general public.

Finally, I find unpersuasive Plaintiffs’ argument that either the fact the Defendant had prior aviation easements or that certain aviation easements still exist somehow show that Plaintiffs have suffered an injury unique from the general public. The issue of easements — existing or not — does not bear on whether the injury suffered by Plaintiffs is unique. If anything, the fact that the majority of the

⁷ The theme of Plaintiffs’ position is that so long as there is a “substantial” impact from overflights on the use and enjoyment of property, that type of injury is necessarily different from any injury to the general public. If that were true, however, *Thompson* and *Claassen* would have been decided differently.

avigation easements still exist supports Defendant's position as those property owners still suffer from the same noise, vibration and pollution issues as Plaintiffs, albeit at perhaps a lesser degree than Plaintiffs. In any event, the fact that Defendant previously obtained easements does not establish a special or unique damage suffered by Plaintiffs relative to the general public. Therefore, Plaintiffs cannot maintain their damaging claim and Defendant is entitled to judgment as a matter of law.

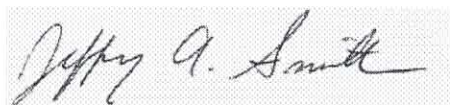
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Based on the foregoing, it is, therefore, ORDERED:

1. Plaintiffs' motion for partial summary judgment is denied.
2. Defendant's motion for a determination of a question of law is answered as set forth above.
3. Defendant's motion for partial judgment on the pleadings is granted. Plaintiffs' "damaging" claim is dismissed with prejudice.

Dated this 24th day of March, 2026.

BY THE COURT:



Jeffrey A. Smith
District Court Judge