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Allocation of Property Interests in Air Space

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ALLOCATION OF PROPERTY INTERESTS IN AIR SPACE

Air transportation, an industry most vital to our nation, cannot tolerate the hazard of surface structures interfering with flight space. Surface owners, however, have substantial property interests in the airspace above their land. In a sense, then, the problem of constructing adequate airways is analogous to the task of building safe and efficient highways. The purpose of this note is to sketch the conflict between public and private interests in airspace and to analyze the federal and state response to the problem.

INTERESTS INVOLVED IN AIRSPACE AND THE FEDERAL RESPONSE

Significant congressional action regarding use of airspace dates from the Civil Aeronautics Act of 1938,[1] which declared all "navigable airspace" to be subject to the right of free transit by the public.[2] Navigable airspace was defined as the airspace above the "minimum altitudes of flight" established by the Civil Aeronautics Authority.[3] It was not clear whether Congress intended by this declaration to set aside, without compensation, such navigable airspace to be thereafter in the public domain, or merely intended to declare a policy whereby taking by eminent domain, with compensation, could occur in the future.

The first case involving use of airspace to reach the United States Supreme Court, *United States v. Causby*,[4] articulated only the character of a surface owner's interest in the airspace above his land. The Court skirted the question of the meaning of navigable airspace, carefully noting that the particular flights involved — landings and take-offs — were not within navigable airspace.[5] The surface owner's interest, said the Court, extended to at least as much of the space above the ground as he could use or occupy in connection with the land.[6] But more important, the surface owner's interest included that airspace necessary to enjoy the beneficial use of the ground, even though such airspace was not physically occupied. The Court noted that the flights of Government aircraft were so low and frequent as to constitute a direct interference with the enjoyment of the land and thus were "as much an appropriation of the use of the land as a more conventional entry upon it."[7] Causby was thus entitled to compensation.

Apparently in response to *Causby*, Congress amended the definition of navigable airspace in the Federal Aviation Act of 1958[8] to include such air-

1. Ch. 601, §§1-1110, 52 Stat. 973.
2. *Id.* §3 (now Federal Aviation Act of 1958, 49 U.S.C. §1304 (1964)).
3. *Id.* §1 (24) (now Federal Aviation Act of 1958, 49 U.S.C. §1301 (1964)).
4. 328 U.S. 256 (1946).
5. *Id.* at 263.
6. *Id.* at 264.
7. *Id.* at 264, 266. *Causby* is a progenitor of the so-called "inverse condemnation" cases. "Inverse condemnation" is "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." City of Jacksonville v. Schumann, 167 So. 2d 95, 98 (1st D.C.A. Fla. 1964).
8. 49 U.S.C. §§1301-1542 (1964).

space as is necessary to insure safety in take-off and landing of aircraft.[9] But the precise meaning of navigable airspace remained unclear until *Griggs v. County of Allegheny*.[10] In that case, the annoying flights were again take-offs and landings over the plaintiff's land, but the flights were definitely within navigable airspace since they were within the "minimum safe altitudes."[11] The Supreme Court nevertheless held that the surface owner was entitled to reasonable compensation for the air easement thus appropriated.[12] Apparently then, in light of *Causby* and *Griggs*, the congressional declaration of navigable airspace[13] must mean only that where public and private interests conflict, the public interest must prevail, but just compensation must be given for the private interests that are appropriated to public use.

Articulation of the various rights to airspace is, of course, only a necessary preliminary step to the broader problem of reconciling these conflicting interests. Unfortunately, the steps toward reconciliation taken by Congress have, in effect, amounted to nonaction. The Federal Aviation Agency (FAA), the body responsible for effectuation of congressional policy on airspace use,[14] has promulgated various standards to insure a safe, efficient flow of air commerce. Part 77 of the *Federal Aviation Regulations — Objects Affecting Navigable Airspace*[15] — applies to surface structures that rise more than 200 feet above the ground, regardless of whether they extend into navigable airspace.[16]

Any such structure may come under FAA scrutiny and may be found to be a hazard to air navigation.[17] But the remedies available to the FAA to cope with these hazards are seriously inadequate.[18] First, the FAA may appeal

9. *Id.* §1301 (24) (1964).

10. 369 U.S. 84 (1962).

11. *Id.* at 86. The Court said that a plane flying over plaintiff's house could come within 11.36 feet of his chimney and still be in the navigable airspace. *Id.* at 86, 87. FAA prescriptions of the "minimum safe altitudes of flight" may be found in FAA Regs., 14 C.F.R. §91.79 (1967). The Court acknowledged further that navigable airspace was in the "public domain" on the basis of the congressional declaration of policy in the Federal Aviation Act of 1958, 49 U.S.C. §1304 (1964).

12. The Court rejected the argument that flights in navigable airspace could not be the basis for a taking of private property. This argument was presented in Brief for the Port of Seattle as Amicus Curiae at 9, 10, 11, Griggs v. County of Allegheny, 369 U.S. 84 (1964).

13. 49 U.S.C. §1304 (1964).

14. Federal Aviation Act of 1958, 49 U.S.C. §§1341-55 (1964).

15. FAA Regs., 14 C.F.R. §§77.01-.75 (1967).

16. FAA Regs., 14 C.F.R. §77.11 (1967).

17. The procedure followed by the FAA in such circumstances is set out in the FAA Regs., 14 C.F.R. §§77.13 (a), .31-.39, .41 (1967).

18. Referring to the Federal Aviation Act of 1958, establishing the FAA, the Administrator of FAA points out: "That Act does not contain a basis for the mandatory marking and lighting of structures to warn pilots of aircraft of those structures. Neither does it contain specific authorization for regulations which would limit the heights of structures. To date, *no judicial decision has been issued on the extent to which ground structures may constitute an unlawful interference with the public right of freedom of transit through the navigable airspace recognized by Section 104 of the Act.* Until authoritative guidance is received on that point or express legislative authority is conferred, the Agency measures in the field of ground hazards to air navigation will be limited to the areas presently

to the landowner's sense of sportsmanship to modify the structure to meet FAA standards.[19] Should the landowner fail to respond, the FAA may then change aircraft routes and raise the minimum take-off and approach angles.[20] Of course, this is no solution at all in an era when most major airports must use every square yard of available space in an attempt to handle normal traffic with a minimum of safety and efficiency. Third, in the case of federal airports, surrounding property and air easements may be purchased.[21] This is certainly a viable solution, but presently it solves only the problem for military airbases. With regard to civilian airports, the FAA must rely upon the ability of each state to resolve the problems of airspace. The FAA may encourage states either to prohibit hazards by zoning or to purchase air easements.[22] Unfortunately, neither method is a practical remedy for local authorities to handle.

State Regulation of Surface Hazards: The Inadequacy of Zoning

Many states rely on zoning ordinances to prevent surface hazards surrounding airports. Some have enacted legislation that authorizes political subdivisions to zone against airport hazards.[23] Use of zoning restrictions by local authorities is apparently sanctioned not only by part 77 of the *Federal Aviation Regulations*, but also by language in the Federal Aid to Airport Act, which suggests zoning where "appropriate."[24]

Such zoning, however, has been attacked by the affected property owners as unconstitutional "taking" without compensation, in violation of fourteenth amendment due process. Local governmental units counter that it is simply "regulation" in the public interest.[25] The United States Supreme Court has enunciated two tests to distinguish a valid regulation from a taking for which compensation must be given. One test was articulated by the first Mr. Justice Harlan in *Mugler v. Kansas*.[26] In that case, a brewery owner asserted that statutes prohibiting the manufacture of liquor in the state destroyed the value of his property and therefore could not validly be enforced without

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covered in Part 77." FAA Administrator N.E. Halsby, *Introduction* to pt. 77 FAA Regs., 30 Fed. Reg. 1839 (1965) (emphasis added).

19. *See* Roosevelt Field v. Town of North Hempstead, 88 F. Supp. 177, 182 (E.D.N.Y. 1950), citing letter from CAA (Civil Aeronautics Authority), which was the predecessor of the FAA and handled the case.

20. Federal Aviation Act of 1958, 49 U.S.C. §1348 (1964).

21. *Id.* §§1344(c), 1349 (1964).

22. The FAA's power to control federal aid to airports, Federal Aid to Airports Act, 49 U.S.C. §1110 (1964), is a strong inducement to enforce compliance with FAA decisions.

23. E.g., Ala. Code tit. 4, §§63-67 (1965); Cal. Gov't Code §§440485.00-.14 (Deering 1954); Fla. Stat. §§333.01-.14 (1965); Ind. Ann. Stat. §14-422 (1964). *See also* 2 E. Yokley, Zoning Law and Practice §207 (3d ed. 1953) containing a model airport zoning statute.

24. 49 U.S.C. §1110(4) (1964).

25. In other zoning situations, not involving airports, height restrictions have been sustained when reasonably related to public health, safety, and welfare. *E.g.*, Welch v. Swasey, 214 U.S. 91 (1909). *See also* the cases reviewed in *Validity of Building Height Restrictions*, 8 A.L.R.2d 963 (1949).

26. 123 U.S. 623 (1887).

compensation to him. Speaking for the majority, Mr. Justice Harlan disagreed. The claimant had merely sustained a limitation upon certain uses of his property, which were injurious to public welfare.[27] A "taking" had not occurred since there was no appropriation to public *use*.

The "taking-regulation" dichotomy appears to be the test used by the majority of cases dealing with airport zoning.[28] The result is that most state decisions have, on due process grounds, totally invalidated height zoning restrictions intended to prevent the erection of structures near an airport. *Rice v. City of Newark*[29] and *Yara Engineering Corp. v. City of Newark*,[30] for example, held that a state statute, empowering political subdivisions to zone, did not authorize airport zoning unless it was specifically set out in the statute. In *Yara*, the New Jersey Supreme Court elaborated by saying:[31]

> The City may not under the guise of an ordinance acquire rights in private property which it may only acquire by purchase or by the exercise of its power of eminent domain.

More recently, the Supreme Court of Idaho in *Roark v. City of Caldwell*[32] invalidated an ordinance that not only prohibited the use of plaintiff's land bordering on the city airport for any but agricultural purposes, but also prohibited the erection of structures of varying heights.

The application of Mr. Justice Harlan's test to airport zoning cases is also apparent in *Sneed v. County of Riverside*.[33] In that decision a county zoning ordinance restricting the height of structures on land surrounding an airport in California was declared unconstitutional as a "taking" without compensation. The court reasoned:[34]

> [T]here is a distinction between the commonly accepted and traditional height restriction zoning regulation of buildings and zoning of airport approaches in that the latter contemplates actual use of the airspace zoned, by aircraft, whereas in the building cases there is no invasion or trespass to the area above the restricted zone.

A second test of the constitutional validity of zoning regulations, employed by a minority of states to uphold airport zoning statutes, was formu-

27. Mr. Justice Harlan's approach was further explained by Mr. Justice Brandeis: "The property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it. The State merely prevents the owner from making a use which interferes with paramount rights of the public." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting).

28. Justice Harlan's distinction between "regulation" and "taking" seems especially useful in height zoning cases for two reasons. First, the private loss is occasioned by the Government acting in a proprietary capacity. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 39 (1964). Second, the air easement created by governmental regulation is necessarily an addition to the assets of the air industry, a public enterprise.

29. 132 N.J.L. 387, 40 A.2d 561 (Sup. Ct. 1945).

30. 132 N.J.L. 370, 40 A.2d 559 (Sup. Ct. 1945).

31. *Id.* at 373, 40 A.2d at 561.

32. 87 Idaho 557, 394 P.2d 641 (1964).

33. 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963).

34. *Id.* at 209, 32 Cal. Rptr. at 320.

lated by Mr. Justice Holmes.[35] Holmes felt there was a continuum of interaction between private property interests and public needs; zoning regulations would thus be judged by the degree of impact they had on the owner's use of his property.[36]

The Florida Supreme Court's decision in *Harrell's Candy Kitchen v. Sarasota-Manatee Airport Authority*[37] is one of the leading cases applying Holmes's approach to airport zoning.[38] In that case, vertical zoning ordinances were imposed pursuant to a state statute[39] on property adjacent to a local airfield. On the defendant's land, buildings were not to exceed 27.64 feet. The defendant, however, planned a building that was to be 41 feet high, due primarily to an ornamental roof. The court ruled that the zoning regulation was constitutional for the owner had not been deprived of the beneficial use of land to such an extent that the constitutional prohibition against the taking of property without compensation had been violated. A building without the ornamental roof was said to be just as suitable for the desired purpose as was the proposed structure.

The minority position may be reconciled with the majority result, however. For although zoning ordinances were upheld under a general attack, the minority courts were not entirely convinced that zoning was the proper remedy for all possible airport hazards. The inference can readily be drawn that, in other cases, substantial harm to a property owner may transform a zoning regulation into an unconstitutional taking. Thus, even under the favorable minority view, airport zoning — which seeks to avoid the burden of paying substantial compensation to surface owners — would fail where it is needed most. It would therefore seem that airport zoning is not a feasible method to insure safe unobstructed airspace.

Acquisition of Air Easements: the Federal Example

Since zoning is an inadequate solution, states must formulate standards for the acquisition and purchase of public air easements. The federal government's practice regarding military airbases may then become an important and persuasive example to guide the states.[40] Specifically, the federal example is helpful to indicate the kinds of easements that may be acquired, the problem of determining when a taking occurs, the method of computing compensation, and the persons who have standing to sue for compensation.

35. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

36. *Id.* at 415-16.

37. 111 So. 2d 439 (Fla. 1959).

38. *See also* Baggett v. City of Montgomery, 276 Ala. 166, 170, 160 So. 2d 6, 9 (1963); Waring v. Peterson, 137 So. 2d 268, 272 (2d D.C.A. Fla. 1962).

39. Fla. Stat. §333.03 (1965).

40. The federal government is authorized to condemn and purchase easements. 40 U.S.C. §258(a) (1964). Courts have granted recovery to the injured landowner when the Government fails to purchase the easement. *E.g.*, United States v. Brondum, 272 F.2d 642 (5th Cir. 1959); Avery v. United States, 330 F.2d 640 (Ct. Cl. 1964); Aaron v. United States, 311 F.2d 798 (Ct. Cl. 1963); Klein v. United States, 152 Ct. Cl. 221 (1961); Highland Park v. United States, 161 F. Supp. 597 (Ct. Cl. 1958).

Two types of air easements may be acquired: "clearance" easements and "avigation" easements. The purchaser of a clearance easement takes a perpetual right to clear a determined portion of airspace of natural growth or structures and to prohibit future obstructions.[41] An avigation easement gives the taker the same rights to unobstructed airspace, but compensates the landowner, in addition to compensation for the airspace itself, for proximity damages — damages that result from noise and danger incident to low level flight over the property.

Pinpointing the precise time that taking occurs is crucial in inverse condemnation cases, for that moment marks the starting point for the statute of limitations. The leading case in this area, involving a suit for compensation for land flooded by a federal reservoir, is *United States v. Dickinson*.[42] In that decision, the federal statute of limitations was six years.[43] Suit was brought more than six years after the water had begun to rise onto the land, but less than six years after it had reached its final level. In allowing the suit, the Supreme Court reasoned it was not unreasonable for the owner to delay bringing suit until the final consequences of the flooding were manifest; for a premature suit might result in a denial of ultimate damages due to res judicata.[44] The statute of limitations would thus run from the date when the highest level was reached.

The *Dickinson* reasoning was applied to the taking of flight easements in *Aaron v. United States*.[45] The plaintiff's land had been subjected to several overflights per day in 1952 and early 1953. By late 1953 the flights had increased to ten or twelve a day. Citing *Dickinson*, the United States Supreme Court held that the statute of limitations began to run in August 1953, because that was the date of the first serious impairmant of the owner's use of the land.[46]

General guidelines for computing just compensation for the taking of an air easement were set forth in *United States v. Causby*:[47]

> It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. Market value fairly determined is the normal measure of the recovery. And that value may reflect the use to which the land could readily be converted, as well as the existing use.

Where less than the total use of the land is destroyed, the difference between the market value before and after the taking is the general measure of re-

41. United States v. Brondum, 272 F.2d 642 (5th Cir. 1959).

42. 331 U.S. 745 (1947).

43. 28 U.S.C. §2041 (1964), *as amended*, (Supp. II, 1966).

44. Res judicata is not really a threat to the landowner, however. Even though the Government purchases one air easement an increase in the number of flights over the land, Davis v. United States, 295 F.2d 931 (Ct. Cl. 1961), or the use of a new type of aircraft, Avery v. United States, 330 F.2d 640 (Ct. Cl. 1964), may give rise to a second taking.

45. 311 F.2d 798 (Ct. Cl. 1963).

46. *Id.* at 800, 801.

47. 328 U.S. 256, 261 (1946).

covery.[48] In *Highland Park v. United States*,[49] the plaintiff purchased tracts of land abutting a military airfield for 35,000 dollars, with the intention of subdividing them for residential use. After several homes were constructed and sold, the Air Force began using the airfield for flights of heavy jet bombers. The Court found that the jet flights over the plaintiff's property constituted a taking and that the property was reduced in value to 20,600 dollars. The market value of the developed portion of the tract was established by expert appraisal, and the value of the undeveloped portion was determined by allowing the owner a profit of fifty per cent of the purchase price on the undeveloped portion of the tract; thus, the total value at the time of taking was appraised at 85,270 dollars. From that figure was subtracted the residual value of the land, leaving the amount of compensation to be 64,570 dollars.[50]

Only the owner whose property is subjected to direct overflights has standing to sue for inverse condemnation of an avigation easement. The owner of adjacent property is denied recovery because there has been no trespass resulting in a taking.[51] Denial of recovery for a taking simply on the basis of property lines seems conceptually inconsistent with the reason for granting recovery at all. Recovery in the avigation easement cases has been based on substantial interference with property on the ground. Surely noise, vibration, and possible danger caused by low flights interferes with adjacent property to the same degree that it interferes with property directly in the line of flight.

Conclusion

There are three possible takers of the airspace: airlines, airport authorities, and the FAA. The airlines should be quickly disregarded as a taking agency, however, for they are not the exclusive beneficiaries of the taking. Further, they do not have the power of eminent domain necessary to acquire the essential property interest. Courts thus usually hold the airport authorities to be the taking agency.[52] The reasoning appears to be that the airport authority is the body most responsible for planning, since the authority

48. United States v. Welsh, 217 U.S. 333 (1910). Although *Welsh* does not deal with *air* easements, it is the leading case on the general measure of recovery.

49. 161 F. Supp. 597 (Ct. Cl. 1958).

50. *Id.* at 601. Another method was used in Rice v. City of Newark, 132 N.J.L. 387, 40 A.2d 561 (Sup. Ct. 1945), where valuation was based on tax assessment.

51. Batten v. United States, 306 F.2d 580 (10th Cir. 1962). *See* Freeman v. United States, 167 F. Supp. 541 (W.D. Okla. 1958) (flights alongside the plaintiff's land). In Pope v. United States, 173 F. Supp. 36 (N.D. Tex. 1959), the complaint was based on operation of an engine test cell by the Air Force. The court found no taking because the test cell did not encroach on the plaintiff's land. Nuclear detonations by the Atomic Energy Commission at a site removed from plaintiff's property was held not a taking in Bartholomae Corp. v. United States, 253 F.2d 716 (9th Cir. 1957). *See also* Highland Park, Inc. v. United States, 161 F. Supp. 597 (Ct. Cl. 1958); Herring v. United States, 162 F. Supp. 769 (Ct. Cl. 1958); Matson v. United States, 171 F. Supp. 283 (Ct. Cl. 1958).

52. Griggs v. County Allegheny, 369 U.S. 84 (1962).

makes the initial decisions to build the airport and to select the site. Most major airports, however, are operated by political subdivisions of the states and often lack funds sufficient to acquire the necessary extensive interests in property surrounding the airports.

It is therefore submitted that it is more reasonable for the federal government, through the FAA, to be the one to compensate the surface owner when flights in navigable airspace result in a taking. The federal government is authorized by the Constitution to insure the free flow of interstate commerce in both navigable waters and navigable airspace.[53]

> The declaration of what constitutes navigable airspace is an exercise of the same source of power, the interstate commerce clause, as that under which Congress has long declared in many acts what constitutes navigable and nonnavigable waters. The public right of flight in the navigable airspace owes its source to the same constitutional bases which, under decisions of the Supreme Court, has given rise to a public easement of navigation in the navigable waters of the United States, regardless of the ownership of the adjacent or subjacent soil.

When private property interests are taken to make waters navigable, the Government has been held liable.[54] Why should it be liable for a taking in navigable waters and not in navigable airspace?

Congress has recognized that local authorities might have difficulty shouldering the financial burden of taking easements and thus, in the Federal Aid to Airports Act,[55] has provided funds for the acquisition of easements and other necessary interests in airspace. This program, if augmented with sufficient funds, may prove to be an adequate solution. However, the present extensive involvement of the federal government in fostering air commerce through the FAA, in addition to its traditional preeminence in the area of interstate commerce, argues for direct federal procedures to acquire the necessary property interests.

Perhaps the most desirable solution would be for the FAA to be empowered to prevent erection of any hazard extending into navigable airspace and to regulate development of the surface in such a way that it does not impede safe air navigation. An adjunct of such federal regulation would be federal responsibility for compensable losses sustained because of the regulation.

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53. HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, ACT TO ENCOURAGE AND REGULATE THE USE OF AIRCRAFT IN COMMERCE AND FOR OTHER PURPOSES, H. R. Rep. No. 572, 69th Cong., 1st Sess. 5818 (1926).

54. United States v. Cress, 243 U.S. 316 (1917).

55. 49 U.S.C. §1110 (1964).