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for

Grounded??
The Future of Airport Height Restrictions
Original Presentation
Friday, March 12, 2004

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Peter J. Kirsch, Esq., is a partner in the Denver law firm of Kaplan Kirsch & Rockwell LLP. His practice emphasizes environmental and land use law and public sector negotiations. He received his B.A. with highest honors from Oberlin College and his law degree from the University of Chicago. Mr. Kirsch represents primarily local governments and special interest groups in negotiations and litigation concerning large infrastructure projects. He has authored numerous articles and spoken at dozens of professional conferences on topics related to airport development, land use planning, growth management, environmental law, and the negotiation of intergovernmental agreements.

Mr. Kirsch has frequently been involved in matters that are subject to intense public and political debate, including cases such as the collection of water in the Platte River in Nebraska and Wyoming, the purchase of parkland in southern California, the restoration of the Kennebec River in Maine, and the adoption of growth management legislation in Colorado. He has represented dozens of airports and local governments throughout the country on land use compatibility and development matters. He is a past chair of the Transportation Section of the International Municipal Lawyers Association and presently is on the Board of Trustees of Colorado Conservation Voters and Oberlin College.

Allan L. Hale, Esq., is founder and partner in the Denver, Colorado, law firm of Hale Hackstaff Friesen, LLP, where he practices in real estate and complex commercial litigation. In particular, Mr. Hale concentrates on representing owners facing urban renewal and regulatory takings issues. He also works in the areas of public utility, public policy, and regulatory law. He has been involved in recent legislative efforts to reform Colorado’s condemnation laws.

Mr. Hale is a graduate of Harvard University (B.A. 1979). After college, he worked for U.S. Senator Gary Hart (Democrat, Colorado) for three years. He graduated from the University of Denver College of Law (J.D. 1985), where he was Editor-in-Chief of the Denver University Law Review. After law school, Mr. Hale practiced law with the Denver law firm of Davis, Graham & Stubbs, where he became a partner in 1991. In 1993, Mr. Hale formed his own firm, which is the predecessor to Hale Hackstaff Friesen, LLP. He is a member of the Denver and Colorado Bar Associations and the Colorado Trial Lawyers Association. In 1996, the Denver Bar Association gave him the Richard M. Davis Award which recognized him as an outstanding young lawyer in Denver. He has taught at the National Institute for Trial Advocacy since 1993. He is a frequent lecturer on eminent domain issues.

Jan G. Laitos is the John A. Carver, Jr. Professor of Law and Director of the Natural Resources and Environmental Law Program at the University of Denver College of Law. He is a Reporter for the Land Use Law & Zoning Digest, published monthly by the
American Planning Association, and also a Regional Board Member of The Rocky Mountain Land Use Institute. He has served as a commissioner (and Vice Chair) on the Colorado Water Quality Control Commission from 1985-1992. He is a trustee of the Rocky Mountain Mineral Law Foundation. He received his B.A. from Yale, his J.D. from the University of Colorado Law School, and his S.J.D. from the University of Wisconsin Law School. In 1996, he was selected by the University of Denver for the University’s Distinguished Teaching Award.

Prior to joining the faculty at the Denver Law School, he was the law clerk to the Chief Justice of the Colorado Supreme Court and an attorney in the Office of Legal Counsel at the U.S. Department of Justice in Washington, D.C. He is the author of several articles on natural resources and environmental law and many on the Takings Clause and Retroactivity. He is also the author of six books: Hornbook on Natural Resources Law (West Publishing, 2002); Regulation of Toxic Substances and Hazardous Wastes (Foundation Press, 2000); Law of Property Rights Protection: Limitations on Governmental Powers (Aspen Law and Business, 1999), and annual updates; Energy and Natural Resources Law (West Publishing, 1992); Cases and Materials on Natural Resources Law (West Publishing, 1985); and A Legal Economic History of Air Pollution Controls (Carrollton Press, 1980). The West Publishing Company will be publishing the second edition of his casebook on Natural Resources Law in 2004, and the Foundation Press will publish The Law of CERCLA and RCRA in 2005. He is a contributing author to a book published by Duke University Press in 2002 entitled The Moral Austerity of Environmental Decisionmaking.

Kirk B. Lenhard, Esq., was born in Hampton, Virginia, May 7, 1950; was admitted to the Nevada and U.S. District Court, District of Nevada bar, 1975; to the U. S. Supreme Court, 1980; and to the U. S. Court of Appeals, Ninth Circuit, 1981. His education includes University of Northern Colorado (B.A., 1972) and University of Tulsa (J.D., 1974), Phi Alpha Delta. He is a member of the State Bar of Nevada, Fellow of the American College of Trial lawyers, American Bar Association, National and American Trial Lawyers Association, and the Federal Bar Association. Mr. Lenhard is the author of Chapter 7 (Service of Process), Nevada Civil Practice Manual (1988 and 1992 ed.). His practice areas are litigation and bankruptcy.
Session Summary

Airports can be enormously important economic engines for entire metropolitan areas; however, they also present unique land use problems for airport proprietors, local governments and private landowners. Not only does airport activity necessarily produce unwanted noise, but successful airports generally induce considerable nearby industrial and commercial development which may or may not be seen as desirable by an airport’s neighbors. Protecting the safe operations of arriving and departing aircraft also requires large areas of compatible land uses – and height restrictions for the safety both of the aircraft and persons on the ground.

This session will address the legal and policy issues associated with the need to protect areas outside an airport from encroaching into the airspace needed for landing and departing aircraft. Commonly appearing as local height ordinances or state laws that incorporate the federal Part 77 height standards, these height limits raise complex land use law and constitutional questions.

The panel will use a pending Nevada Supreme Court case, Clark County v. Hsu, as a case study to examine the legal and policy questions that arise when an airport proprietor needs to limit the height of development on off-airport land. Panelists will discuss whether height limitations constitute physical takings, regulatory takings or are permissible exercises of local government police powers. The panel will also discuss the applicability of these same principles to aircraft overflights and federal regulation of navigable airspace. (Should the Hsu case be decided before the Conference, the panelists will also discuss the significance of the ruling.)
A Model Zoning Ordinance to Limit Height of Objects Around Airports

Advisory Circular
Subject: A MODEL ZONING ORDINANCE TO LIMIT HEIGHT OF OBJECTS AROUND AIRPORTS

Date: 12/14/87
Initiated by: AAS-100
AC No: 150/5190-4A
Change:

1. PURPOSE.

a. This advisory circular provides a model zoning ordinance to be used as a guide to control the height of objects around airports.

b. This advisory circular has been editorially updated for reprint/stock purposes only. There were no changes made to the content of the advisory circular except to update the format and renumber the document to AC 150/5190-4A.


3. FOCUS.

a. Aviation safety requires a minimum clear space (or buffer) between operating aircraft and other objects. When these other objects are structures (such as buildings), the buffer may be achieved by limiting aircraft operations, by limiting the location and height of these objects, or, by a combination of these factors. This advisory circular concerns itself with developing zoning ordinances to control the height of objects, based on the obstruction surfaces described in Subpart C of Federal Aviation Regulations (FAR) Part 77, Objects Affecting Navigable Airspace, current edition. It should be recognized, however, that not all obstructions (objects whose height exceeds an obstruction surface) are a hazard to air navigation.

b. The Federal Aviation Administration (FAA) conducts aeronautical studies on obstructions which examine their effect on such factors as: aircraft operational capabilities; electronic and procedural requirements; and, airport hazard standards. If an aeronautical study shows that an obstruction, when evaluated against these factors, has no substantial adverse effect upon the safe and efficient use of navigable airspace, then the obstruction is considered not to be a hazard to air navigation. Advisory Circular 150/5300-4, Utility Airports--Air Access to National Transportation, current edition, presents additional discussion on hazards to air navigation.

c. Airport zoning ordinances developed for height limitations do not in themselves ensure compatible land use surrounding the airport. Land use zoning, incorporating height limiting criteria, is an appropriate means for achieving this objective. Advisory Circular 150/5050-6, Airport-Land Use Compatibility Planning, current edition, presents generalized guidance for compatible land use planning in the vicinity of airports.
d. Any height limitations imposed by a zoning ordinance must be "reasonable," meaning that the height limitations prescribed should not be so low at any point as to constitute a taking of property without compensations under local law. Therefore, the zoning ordinance should not purport to impose height limitations in any area so close to the ground that the application of criteria prescribed would result in unreasonable or unduly restrictive height limitations. This is provided for by provision 12, Excepted Height Limitations, of Section IV, Airport Zone Height Limitations, in the Model Zoning Ordinance.

e. The decision as to the excepted height limits should be made on the basis of local conditions and circumstances, including the uses being made of property in the vicinity of the airport. In making such a decision, the political subdivision should use the same procedures generally recognized as desirable in preparing comprehensive zoning ordinances, including necessary coordination with recognized state, regional, and local planning offices, where applicable.

f. Areas in the various zones where the height limitation is below the excepted height limit prescribed in the ordinance should be acquired to ensure the required protection. In the approach area, the minimum acquisition begins at the end of the primary surface defined in FAR Part 77, Section 77.25, and extends outward with the width of the approach surface defined in that section, to a point where the approach surface slope reaches a height of 50 feet above the ground elevation of the runway or terrain, whichever distance is the shorter. If easements are acquired, they should include the right of passage over the property by aircraft as well as the right to prevent creation of future obstructions.

g. Drafters of airport zoning ordinances should consult with Federal Aviation Administration (FAA) Airports personnel in regional or district offices when developing airport zoning regulations.

h. The standards contained in FAR Part 77, Subpart C, make it possible to determine, for any location on or adjacent to an airport, the height at which any structure or object of natural growth would constitute an obstruction. Section 77.13 of FAR Part 77, Subpart C sets forth the requirements for filing notice of proposed construction or alteration.

i. If the object exceeds a height or surface defined in Subpart C of FAR Part 77, it would be an obstruction and would be the subject of an aeronautical study by the FAA to determine its effect on navigable airspace. If the object is concluded to have a substantial adverse effect upon the safe and efficient utilization of such airspace, it would be determined to be a hazard to air navigation. The FAA cannot prevent its erection without local assistance. The enactment of this proposed model zoning ordinance will permit the local authorities to control the erection of hazards to air navigation and thus protect the community's investment in the airport.
8. **GENERAL INSTRUCTIONS FOR USING THE MODEL ZONING ORDINANCE.**

a. The model zoning ordinance may be used as a guide for developing airport zoning ordinances to limit the height of objects that may interfere with the operation of a civil airport or heliport. The blank spaces should be filled in with appropriate data as noted.

b. It is not necessary that all material set forth in the model ordinance be used for all airport zoning ordinances. For example, if the airport to be zoned is a utility airport with no precision or nonprecision instrument runways existing or planned, those definitions and paragraphs referring to precision or nonprecision instrument runways or larger than utility runways may be omitted, (see appendix 2). However, if the airport changes to a larger than utility airport or receives instrument approach procedures, the ordinance should be amended to provide for the changes.

c. Section III should only include the airport zones applicable to the airport being zoned. An approach zone is applied to each end of each runway based upon the type of approach available or planned for that runway end. The most precise type of approach, existing or planned, for either end of the runway determines the primary surface width. Heliports do not have horizontal or conical zones. Other zones to accommodate the areas covered in FAR Par 77.23(a)(2) and (3) may be added.

d. Examples of several airport-type ordinances are included in the appendices for guidance.

LEONARD E. MUDD
Director, Office of Airport Standards
APPENDIX 1. MODEL ZONING ORDINANCE TO LIMIT HEIGHT
OF OBJECTS AROUND AN AIRPORT 1/

AN ORDINANCE REGULATING AND RESTRICTING THE HEIGHT OF STRUCTURES AND
OBJECTS OF NATURAL GROWTH, AND OTHERWISE REGULATING THE USE OF PROPERTY,
IN THE VICINITY OF THE ______ 2/ BY CREATING THE APPROPRIATE ZONES AND
ESTABLISHING THE BOUNDARIES THEREOF; PROVIDING FOR CHANGES IN THE
RESTRICTIONS AND BOUNDARIES OF SUCH ZONES; DEFINING CERTAIN TERMS USED
HEREIN; REFERRING TO THE ______ 2/ ZONING MAP WHICH IS INCORPORATED IN
AND MADE A PART OF THIS ORDINANCE; PROVIDING FOR ENFORCEMENT; ESTABLISHING
A BOARD OF ADJUSTMENT; AND IMPOSING PENALTIES. 1/.

This Ordinance is adopted pursuant to the authority conferred by ______ 3/.
It is hereby found that an obstruction has the potential for endangering
the lives and property of users of ______ 2/; and property or occupants of
land in its vicinity; that an obstruction may affect existing and future
instrument approach minimums of ______ 2/; and that an obstruction may reduce
the size of areas available for the landing, takeoff, and maneuvering of
aircraft, thus tending to destroy or impair the utility of ______ 2/ and the
public investment therein. Accordingly, it is declared:

(1) that the creation or establishment of an obstruction has the potential
of being a public nuisance and may injure the region served by ______ 2/;

(2) that it is necessary in the interest of the public health, public
safety, and general welfare ______ 4/ that the creation or
establishment of obstructions that are a hazard to air navigation
be prevented; and

(3) that the prevention of these obstructions should be accomplished, to
the extent legally possible, by the exercise of the police power
without compensation.

1/ This title should be written to meet the usages and legal requirements
of your state, and the political subdivision.

2/ Insert the name of the airport being zoned by the Ordinance.

3/ This citation should be made to conform to the usual method of citing
your state laws.

4/ If other terms are commonly used by the courts of your state in defining
the limits of police power, such as "convenience" or "prosperity," they
should be added here.
8. HEIGHT - For the purpose of determining the height limits in all zones set forth in this Ordinance and shown on the zoning map, the datum shall be mean sea level elevation unless otherwise specified.

9. HELIPORT PRIMARY SURFACE - The area of the primary surface coincides in size and shape with the designated takeoff and landing area of a heliport. This surface is a horizontal plane at the elevation of the established heliport elevation.

10. HORIZONTAL SURFACE - A horizontal plane 150 feet above the established airport elevation, the perimeter of which in plan coincides with the perimeter of the horizontal zone.

11. LARGER THAN UTILITY RUNWAY - A runway that is constructed for and intended to be used by propeller driven aircraft of greater than 12,500 pounds maximum gross weight and jet powered aircraft.

12. NONCONFORMING USE - Any pre-existing structure, object of natural growth, or use of land which is inconsistent with the provisions of this Ordinance or an amendment thereto.

13. NONPRECISION INSTRUMENT RUNWAY - A runway having an existing instrument approach procedure utilizing air navigation facilities with only horizontal guidance, or area type navigation equipment, for which a straight-in nonprecision instrument approach procedure has been approved or planned.

14. OBSTRUCTION - Any structure, growth, or other object, including a mobile object, which exceeds a limiting height set forth in Section IV of this Ordinance.

15. PERSON - An individual, firm, partnership, corporation, company, association, joint stock association, or governmental entity; includes a trustee, a receiver, an assignee, or a similar representative of any of them.

16. PRECISION INSTRUMENT RUNWAY - A runway having an existing instrument approach procedure utilizing an Instrument Landing System (ILS) or a Precision Approach Radar (PAR). It also means a runway for which a precision approach system is planned and is so indicated on an approved airport layout plan or any other planning document.

17. PRIMARY SURFACE - A surface longitudinally centered on a runway. When the runway has a specially prepared hard surface, the primary surface extends 200 feet beyond each end of that runway; for military runways or when the runway has no specially prepared hard surface, or planned hard surface, the primary surface ends at each end of that runway. The width of the primary surface is set forth in Section III of this Ordinance. The elevation of any point on the primary surface
2. Utility Runway Nonprecision Instrument Approach Zone - The inner edge of this approach zone coincides with the width of the primary surface and is 500 feet wide. The approach zone expands outward uniformly to a width of 2,000 feet at a horizontal distance 5,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

3. Runway Larger Than Utility Visual Approach Zone - The inner edge of this approach zone coincides with the width of the primary surface and is ________ 7/ feet wide. The approach zone expands outward uniformly to a width of 1,500 feet at a horizontal distance of 5,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

4. Runway Larger Than Utility With A Visibility Minimum Greater Than 3/4 Mile Nonprecision Instrument Approach Zone - The inner edge of this approach zone coincides with the width of the primary surface and is ________ 7/ feet wide. The approach zone expands outward uniformly to a width of 3,500 feet at a horizontal distance of 10,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

5. Runway Larger Than Utility With A Visibility Minimum As Low As 3/4 Mile Nonprecision Instrument Approach Zone - The inner edge of this approach zone coincides with the width of the primary surface and is 1,000 feet wide. The approach zone expands outward uniformly to a width of 4,000 feet at a horizontal distance of 10,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

6. Precision Instrument Runway Approach Zone - The inner edge of this approach zone coincides with the width of the primary surface and is 1,000 feet wide. The approach zone expands outward uniformly to a width of 16,000 feet at a horizontal distance of 50,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

7. Heliport Approach Zone - The inner edge of this approach zone coincides with the width of the primary surface and is ________ 8/ feet wide. The approach zone expands outward uniformly to a width of 500 feet at a horizontal distance of 4,000 feet from the primary surface.

8. Transitional Zones - The transitional zones are the areas beneath the transitional surfaces.

8/ The size of the heliport primary surface must be based on present and future heliport operations.
5. **Runway Larger Than Utility With A Visibility Minimum As Low As 3/4 Mile**
   Nonprecision Instrument Approach Zone - Slopes thirty-four (34) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 10,000 feet along the extended runway centerline.

6. **Precision Instrument Runway Approach Zone** - Slopes fifty (50) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 10,000 feet along the extended runway centerline; thence slopes upward forty (40) feet horizontally for each foot vertically to an additional horizontal distance of 40,000 feet along the extended runway centerline.

7. **Heliport Approach Zone** - Slopes eight (8) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a distance of 4,000 feet along the heliport approach zone centerline.

8. **Transitional Zones** - Slope seven (7) feet outward for each foot upward beginning at the sides of and at the same elevation as the primary surface and the approach surface, and extending to a height of 150 feet above the airport elevation which is ___ feet above mean sea level. In addition to the foregoing, there are established height limits sloping seven (7) feet outward for each foot upward beginning at the sides of and at the same elevation as the approach surface, and extending to where they intersect the conical surface. Where the precision instrument runway approach zone projects beyond the conical zone, there are established height limits sloping seven (7) feet outward for each foot upward beginning at the sides of and at the same elevation as the approach surface, and extending a horizontal distance of 5,000 feet measured at 90 degree angles to the extended runway centerline.

9. **Heliport Transitional Zones** - Slope two (2) feet outward for each foot upward beginning at the sides of and at the same elevation as the primary surface and the heliport approach zones and extending a distance of 250 feet measured horizontally from and at 90 degree angles to the primary surface centerline and heliport approach zones centerline.

10. **Horizontal Zone** - Established at 150 feet above the airport elevation or at a height of ___ feet above mean sea level.

11. **Conical Zone** - Slopes twenty (20) feet outward for each foot upward beginning at the periphery of the horizontal zone and at 150 feet above the airport elevation and extending to a height of 350 feet above the airport elevation.
SECTION VII: PERMITS

1. Future Uses - Except as specifically provided in a, b, and c hereunder, no material change shall be made in the use of land, no structure shall be erected or otherwise established, and no tree shall be planted in any zone hereby created unless a permit therefor shall have been applied for and granted. Each application for a permit shall indicate the purpose for which the permit is desired, with sufficient particularity to permit it to be determined whether the resulting use, structure, or tree would conform to the regulations herein prescribed. If such determination is in the affirmative, the permit shall be granted. No permit for a use inconsistent with the provisions of this Ordinance shall be granted unless a variance has been approved in accordance with Section VII, 4.

a. In the area lying within the limits of the horizontal zone and conical zone, no permit shall be required for any tree or structure less than seventy-five feet of vertical height above the ground, except when, because of terrain, land contour, or topographic features, such tree or structure would extend above the height limits prescribed for such zones.

b. In areas lying within the limits of the approach zones, but at a horizontal distance of not less than 4,200 feet from each end of the runway, no permit shall be required for any tree or structure less than seventy-five feet of vertical height above the ground, except when such tree or structure would extend above the height limit prescribed for such approach zones.

c. In the areas lying within the limits of the transition zones beyond the perimeter of the horizontal zone, no permit shall be required for any tree or structure less than seventy-five feet of vertical height above the ground, except when such tree or structure, because of terrain, land contour, or topographic features, would extend above the height limit prescribed for such transition zones.

Nothing contained in any of the foregoing exceptions shall be construed as permitting or intending to permit any construction, or alteration of any structure, or growth of any tree in excess of any of the height limits established by this Ordinance except as set forth in Section IV, 12.

2. Existing Uses - No permit shall be granted that would allow the establishment or creation of an obstruction or permit a nonconforming use, structure, or tree to become a greater hazard to air navigation than it was on the effective date of this Ordinance or any amendments thereto or than it is when the application for a permit is made. Except as indicated, all applications for such a permit shall be granted.
SECTION VIII: ENFORCEMENT

It shall be the duty of the ___ 15/ to administer and enforce the regulations prescribed herein. Applications for permits and variances shall be made to the ___ 15/ upon a form published for that purpose. Applications required by this Ordinance to be submitted to the ___ 15/ shall be promptly considered and granted or denied. Application for action by the Board of Adjustment shall be forthwith transmitted by the ___ 15/.

SECTION IX: BOARD OF ADJUSTMENT

1. There is hereby created a Board of Adjustment to have and exercise the following powers: (1) to hear and decide appeals from any order, requirement, decision, or determination made by the ___ 15/ in the enforcement of this Ordinance; (2) to hear and decide special exceptions to the terms of this Ordinance upon which such Board of Adjustment under such regulations may be required to pass; and (3) to hear and decide specific variances.

2. The Board of Adjustment shall consist of ___ members appointed by the ___ 12/ and each shall serve for a term of ___ years until a successor is duly appointed and qualified. Of the members first appointed, one shall be appointed for a term of ___ year, ___ for a term of ___ years, and ___ for a term of ___ years. Members shall be removable by the appointing authority for cause, upon written charges, after a public hearing.

3. The Board of Adjustment shall adopt rules for its governance and in harmony with the provisions of this Ordinance. Meetings of the Board of Adjustment shall be held at the call of the Chairperson and at such other times as the Board of Adjustment may determine. The Chairperson or, in the absence of the Chairperson, the Acting Chairperson may administer oaths and compel the attendance of witnesses. All hearings of the Board of Adjustment shall be public. The Board of Adjustment shall keep minutes of its proceedings showing the vote of each member upon each question; or if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall immediately be filed in the office of ___ 15/ and on due cause shown.

4. The Board of Adjustment shall make written findings of facts and conclusions of law giving the facts upon which it acted and its legal conclusions from such facts in reversing, affirming, or modifying any order, requirement, decision, or determination which comes before it under the provisions of this Ordinance.

15/ Insert here the title of the appropriate official, such as Director, Department of Public Works, etc.
SECTION XII: PENALTIES

Each violation of this Ordinance or of any regulation, order, or ruling promulgated hereunder shall constitute a misdemeanor and shall be punishable by a fine of not more than ___ dollars or imprisonment for not more than ___ days or both; and each day a violation continues to exist shall constitute a separate offense.

SECTION XIII: CONFLICTING REGULATIONS

Where there exists a conflict between any of the regulations or limitations prescribed in this Ordinance and any other regulations applicable to the same area, whether the conflict be with respect to the height of structures or trees, and the use of land, or any other matter, the more stringent limitation or requirement shall govern and prevail.

SECTION XIV: SEVERABILITY

If any of the provisions of this Ordinance or the application thereof to any person or circumstances are held invalid, such invalidity shall not affect other provisions or applications of the Ordinance which can be given effect without the invalid provision or application, and to this end, the provisions of this Ordinance are declared to be severable.

SECTION XV: EFFECTIVE DATE

WHEREAS, the immediate operation of the provisions of this Ordinance is necessary for the preservation of the public health, public safety, and general welfare, an EMERGENCY is hereby declared to exist, and this Ordinance shall be in full force and effect from and after its passage by the ___ and publication and posting as required by law.
Adopted by the ___ this ____ day of __________, 19____.
Airport Issues

• Cross-Jurisdictional Matters
  – Intergovernmental Agreements
  – “Overlay Zones”
  – Zoning Ordinances

• Inverse Condemnation and Regulatory Takings

• Noise - Is It Compensable?
Cross-Jurisdictional Issues

Example: Gunnison
Intergovernmental Agreement

City Council vs. Board of County Commissioners
Overlay Zones

- Airport Development Zone
- Limited Development Zone
- Approach Zone
- Flight Pattern Zone
Zoning Ordinance

Height Restrictions for Property
Surrounding Airport
MODEL ORDINANCE
ORDINANCE NO. ___
ZONING ORDINANCE TO LIMIT HEIGHT OF OBJECTS AROUND
GUNNISON COUNTY AIRPORT

AN ORDINANCE REGULATING AND RESTRICTING THE HEIGHT OF STRUCTURES AND
OBJECTS OF NATURAL GROWTH, AND OTHERWISE REGULATING THE USE OF PROPERTY, IN
THE VICINITY OF THE GUNNISON COUNTY AIRPORT BY CREATING THE APPROPRIATE ZONES
AND ESTABLISHING THE BOUNDARIES THEREOF; PROVIDING FOR CHANGES IN THE
RESTRICTIONS AND BOUNDARIES OF SUCH ZONES; DEFINING CERTAIN TERMS USED HEREIN;
REFERRING TO THE GUNNISON COUNTY AIRPORT ZONING MAP WHICH IS INCORPORATED IN
AND MADE A PART OF THIS ORDINANCE; PROVIDING FOR ENFORCEMENT; REPEALING ALL
ORDINANCES IN CONFLICT HEREWITH; AND IMPOSING PENALTIES.

This Ordinance is adopted pursuant to the authority conferred by XX of Colorado Statutes. It is hereby found that an
obstruction has the potential for endangering the lives and property of users of the Gunnison County Airport, and
property or occupants of land in its vicinity; that an obstruction may affect existing and future instrument approach
minimums of Gunnison County Airport; and that an obstruction may reduce the size of areas available for the
landing, takeoff, and maneuvering of aircraft, thus tending to destroy or impair the utility of Gunnison County
Airport and the public investment therein. Accordingly, it is declared:

1. that the creation or establishment of an obstruction has the potential of being a public nuisance and may
   injure the region served by Gunnison County Airport;

2. that it is necessary in the interest of the public health, public safety, and general welfare that the creation or
   establishment of obstructions that are a hazard to air navigation be prevented; and,

GUNNISON COUNTY AIRPORT MODEL HEIGHT ZONING ORDINANCE CITY OF GUNNISON
3. that the prevention of these obstructions should be accomplished, to the extent legally possible, by the exercise of the police power without compensation. It is further declared that the prevention of the creation or establishment of hazards to air navigation, the elimination, navigation, or marking and lighting of obstructions are public purposes.

IT IS HEREBY ORDAINED BY THE CITY OF GUNNISON, COLORADO, AS FOLLOWS:

SECTION I: SHORT TITLE

This ordinance shall be known and may be cited as the Gunnison County Airport Height Zoning Ordinance.

SECTION II: DEFINITIONS

As used in this Ordinance, unless the context otherwise requires:

1. AIRPORT - Gunnison County Airport.

2. AIRPORT ELEVATION - 7,674 feet above mean sea level as shown on the Airport Layout Plan.

3. APPROACH SURFACE - A surface longitudinally centered on the extended runway centerline, extending outward and upward from the end of the primary surface and at the same slope as the approach zone height limitation slope set forth in Section IV of this ordinance. In plan the perimeter of the approach surface coincides with the perimeter of the approach zone.

4. APPROACH, TRANSITIONAL, HORIZONTAL, AND CONICAL ZONES - These zones are set forth in Section III of this Ordinance.
5. **BOARD OF ADJUSTMENT** — The City of Gunnison existing Zoning Board of Adjustment shall act as the Airport Zoning Board of Adjustment.

6. **CONICAL SURFACE** - A surface extending outward and upward from the periphery of the horizontal surface at a slope of 20 to 1 for a horizontal distance of 4,000 feet.

7. **HAZARD TO AIR NAVIGATION** - An obstruction determined to have a substantial adverse effect on the safe and efficient utilization of the navigable airspace.

8. **HEIGHT** - For the purpose of determining the height limits in all zones set forth in this Ordinance and shown on the zoning map, the datum shall be mean sea level elevation unless otherwise specified.

9. **HORIZONTAL SURFACE** - A horizontal plane 150 feet above the established airport elevation, the perimeter of which in plan coincides with the perimeter of the horizontal zones.

10. **AIRPORT ZONING BOARD** — The existing Planning Commission of the City of Gunnison shall act as the Airport Zoning Board.

11. **LARGER THAN UTILITY RUNWAY** - A runway that is constructed for and intended to be used by propeller driven aircraft of greater than 12,500 pounds maximum gross weight and jet powered aircraft.

12. **NONCONFORMING USE** - Any pre-existing structure, object of natural growth which is inconsistent with the provisions of this Ordinance or an amendment thereto.

13. **NONPRECISION INSTRUMENT RUNWAY** - A runway having an instrument approach procedure utilizing air navigation facilities with only horizontal guidance, or area type navigation equipment, for which a straight-in nonprecision instrument approach procedure has been approved or planned.

**GUNNISON COUNTY AIRPORT MODEL HEIGHT ZONING ORDINANCE/CITY OF GUNNISON**
Inverse Condemnation or Regulatory Taking?

- *Animas Valley Sand and Gravel, Inc. V. Board of County Comm’rs*, 38 P.3d 59 (Colo. 2001).
Lucas

“The United States Supreme Court has established two per se tests under which a regulation can effect a taking absent a physical encroachment onto the land. First, a regulation constitutes a per se taking when it ‘does not substantially advance legitimate state interests.’ Second, a per se taking occurs when a regulation ‘denies an owner economically viable use of his land.’ *Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992).*”

*Impacts of Regulatory Takings Law on Local Governments, Karen A. Aviles, Esq., Assistant City Attorney, Denver, Colorado.*
“Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation’s economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action....

Thus, *Palazzolo* endorses a two-tiered inquiry in a regulatory inverse condemnation claim. First, a court must determine whether a per se taking has occurred. Second, if a landowner is unable to prove a per se compensable takings claim (because the regulation has a legitimate purpose and her land has not been rendered economically idle), the landowner still may be able to prove a taking has occurred under a fact-specific inquiry.”
“The Palazzolo Court did not address what level of interference by a regulation would constitute a taking. The Colorado Supreme Court in Animas Valley Sand and Gravel, Inc. v. Board of County Comm’rs, 38 P.3d 59, 66 (Colo. 2001) holds that the level of interference must be very high and the property must only retain a value that is slightly greater than de minimis. The fact specific inquiry is to provide a safety valve to protect the landowner in the truly unusual case where the diminished economic value of the property in connection with other factors means the property effectively has been taken from its owner.”

Impacts of Regulatory Takings Law on Local Governments, Karen A. Aviles, Esq., Assistant City Attorney, Denver, Colorado.
Another interesting aspect of regulatory takings jurisprudence that impacts decisions at the local level - what is the property to be examined to determine if a taking has occurred - was settled by the Supreme Court in Palazzolo and in Colorado by Animas Valley. The Colorado Supreme Court held that a court must look at the entire contiguous parcel of land owned, not merely the portion most drastically affected by the regulation. The property as a whole, the whole “bundle” of property rights, must be examined. To evaluate the effect of the regulation on only one segment of the parcel would mean that virtually any land use regulation would effect a taking if the landowner redefined the relevant parcel small enough. Animas Valley, 38 P.3d at 69. (Examine entire 46 acres on two parcels to determine if plan prohibiting sand and gravel mining on 37 of 46 acres constituted a taking). Accord, Pennsylvania Coal (impact on mineral estate only not a taking); Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470 (1987); Penn Central, 438 U.S. at 130 (loss of right to develop air space over Grand Central Station not a taking); Andrus v. Allard, 444 U.S. 51 (1979).”

Aircraft Noise

IS IT COMPENSABLE?
Taking v. Damaging

- Physical invasion
- Substantial deprivation of use and enjoyment
- Legal interference
- Value of property taken plus damage to remainder

- No physical invasion
- Activities on abutting land
- Substantial damage (annoyance or inconvenience not enough)
- Compensation for unique or special injuries
Nuisance?

- Substantial interference with use and enjoyment of land
- Local ordinances
Federal Law

- General rule:
  - Aircraft must fly below 500’ above ground level (AGL) for there to be a “taking”
  - Navigable airspace = public domain
  - Two prong test:
    - Physical invasion
    - Substantial interference with use and enjoyment (low and frequent)
Exceptions

• Glide Paths
  – *Griggs v. Allegheny County*

• Flights above 500’
  – *Branning v. United States*
  – *Argent v. United States*
Colorado Law

• No physical invasion = No “taking”
• Frequent and low flights 500’ AGL
• Substantial, direct, and immediate interference with owner’s enjoyment
• Taking
Compensation - Taking

- Estimate value of property actually taken
- Owner shall receive full and actual value of property actually taken
- C.R.S. § 38-1-114
- Fair market value of property taken - highest and best use
- Compensation for damage or benefit to remainder
Compensation - Damaging

• Compensation for “damaging”
  – Owner must show special / unique damages not common to the general public
  – Depreciation in value is insufficient
  – Annoyance and inconvenience do not rise to level of compensable damages
  – Non-physical intrusions may be trespass
Relocation and Re-establishment

• Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601, et seq. (the “URA”)

Relocation and Re-establishment Expenses

- In Addition to Payment of Just Compensation
- Federal or Federally Assisted Projects
- Relocation Costs = Modifications to Personal Property
- Reestablishment Costs = Modifications to Replacement Real Property
- Reestablishment is Capped at $10,000
C.R.S. § 24-56-103(1)

“Whenver a program or project to be undertaken by a displacing agency will result in the displacement of any person, the displacing agency shall provide for the payment of:

• Actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;
• Actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the displacing agency;
• Actual reasonable expenses in searching for a replacement business or farm; and
• Actual reasonable expenses necessary to reestablish a displaced farm, nonprofit organization, or small business at its new site in accordance with criteria to be established by the department of transportation, but no more than ten thousand dollars.”
TRANSITION ZONES AND HEIGHT RESTRICTIONS NEAR AIRPORTS:  POLICE POWER REGULATIONS OR PER SE TAKINGS?

Jan G. Laitos
John A. Carver Jr., Professor of Law
University of Denver College of Law

[Note: The arguments outlined here are those that a property owner might make who is subject to a government’s airport transition zone or height restrictions near a runway. These arguments have been taken in large part from the briefs filed by the attorney for the property owner in the case of County of Clark v. Hsu (Nevada Supreme Court case no. 38853, argued 2003). This attorney, Michael M. Berger, of Berger & Norton in Los Angeles, California, has also written about the case in the Land Use Law & Zoning Digest. The arguments of the property owner summarized here are taken both from Michael Berger’s briefs, and from his commentary about the case which appeared in the November 2003 Digest. Prof. Laitos’ comments about Michael Berger’s arguments appear in brackets.]

When property owners adjacent to, or near, an airport runway finds themselves subject to government restrictions on the use of the airspace above the property, one legal question that arises is whether such restrictions are constitutional. The owners may wish to build upwards, into the airspace, in order to maximize the potential economic value of their property. The government, by contrast, may wish to limit such vertical use of the private property, because tall buildings might pose a hazard to airplanes which might need to use that airspace for maneuvering room.

The Takings Clause of the United States Constitution is triggered where the private property owner’s legitimate desire to build upwards into airspace above the land confronts the government’s equally legitimate desire to restrict such building for airplane safety reasons. How should courts resolve this conflict of competing interests?
I. How to Characterize the Reason for the Restriction is Critical

Government typically wants the label of “height restriction” to be employed when referring to transition zones (for airplane takeoffs and landings) and all other limits on airspace near airport runways. This is because height restrictions are generally not constitutional takings of property. Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

However, property owners subject to such restrictions argue that such laws are not zoning restrictions on building heights intended to serve the public interest. Rather, the property owner wants the court to look behind the label and see that the PURPOSE of the restriction is to authorize physical entry and use of the airspace, since the restriction typically allows the pilot of any commercial aircraft to trespass at low altitude into privately owned airspace next to its airport. In other words, the reason behind the restriction in the first place is to allow aircraft the temporary use of airspace above privately owned property. Aircraft might need to use that airspace at unpredictable times, and therefore the government prevents building into the now restricted airspace.

If one characterizes these airport laws as laws involving government action intended to permit actual public entry onto, and use of, private property, then the Penn Central case is not applicable. In Penn Central, there is no physical invasion by members of the public. With a restriction on airspace above private property near an airport, the government anticipates physical invasion by aircraft using the airport.

[However, the fact is that these laws are height restrictions – their effect is to prevent property owners from building upwards into airspace. As such, the laws are identical to the law at issue in the Penn Central case, which prevented the property owner from building upwards into airspace. JGL ]
II. If the Government is Taking Airspace, That is a Physical Taking

The United States Supreme Court has explained that physical takings and regulatory takings are two entirely different kinds of takings. Tahoe-Sierra Preservation Council v. Tahoe Reg. Planning Agency, 535 U.S. 302 (2002). A physical taking is when property is taken from private property owners for public use by offering that property for others to use. A transition zone or height restriction ordinance near a runway is intended to provide maneuvering room for commercial airplanes flying into, or out of, a public airport. As such, these laws are examples of physical takings, not regulatory takings.

Supreme Court jurisprudence suggests that when the government permits strangers to trespass onto, or through, private property at will, that is a physical taking. The important fact is that the government, by its law, is enabling private parties to go upon someone else’s private property. It is irrelevant that the government agency itself is not physically intruding upon the private property. It is the enablement – that the underlying owners did not invite and were powerless to prevent – that renders the government liable for a physical taking. Kaiser-Aetna v. United States, 444 U.S. 164 (1979); Loretto v. Teleprompter-Manhattan CATV Co., 458 U.S. 419 (1982); Nollan v. California Coastal Comm., 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).

As the Court of Appeals for the Federal Circuit summarized the law: “As a general proposition, if the Government for purposes of public use physically occupies, either by its own agents or by third parties, privately owned land over the owner’s objections, liability is a foregone conclusion.” Hendler v. United States, 952 F. 2d 1364, 1374 (Fed. Cir. 1991).

[In the Court’s physical takings cases, the law in question was not put in place in order to protect the safety of the public. In Kaiser-Aetna, Loretto, Nollan, and Dolan, the law later found to be a taking was a naked attempt by the government to extract property from private owners simply to save the government money – the law was not designed to prevent a disaster like an airplane colliding into a building. Moreover, the property in question in these cases was not being restricted, which is the case with a height restriction; the
property was opened up to the public for physical invasion by others. JGL

III. When the Government’s Interest is Financial Gain, There May be a Takings Presumption

The United States Supreme Court has warned that, when the government interest is financial (e.g., obtaining airspace needed to support its airport operations), its actions must be viewed with suspicion. United States Trust Co. v. New Jersey, 431 U.S. 1, 26 (1977); United States v. Good Real Property, 510 U.S. 43, 55-56 (1993). One could argue that a transition zone or a height restriction near an airport is simply an attempt to force selected neighbors to subsidize the airport by forcing them to donate maneuvering space for aircraft.

[Supreme Court takings cases do not focus on whether financial gain is a motive behind the law being challenged as a taking. The United States Trust, Good Real Property, and Winstar cases are not takings cases. JGL]

IV. Case Law Suggests that Landowners Near Airport Runways Subject to Height Restrictions Have Valid Takings Claims

There are as many as ten cases which have found airport-related height restrictions to be takings. See, e.g., Indiana Toll Road Comm. v. Jankovich, 193 N.E. 2d 237 (Ind. 1963); Aeronautics Comm. v. State, 440 N.E. 2d 700 (Ind. App. 1982); Sneed v. County of Riverside, 218 Cal. App. 205 (Call. App. 1963). These cases tend to conclude that height restrictions near airports are physical takings, not regulatory takings, because they authorize physical invasions into a restricted zone.

[Virtually every case which has found that height restrictions near airports are takings has been decided 20 to 40 years ago. Conversely, virtually every modern case addressing this topic tends to hold that such restrictions on airspace are not takings. JGL]
TRANSITION ZONES AND HEIGHT RESTRICTIONS NEAR AIRPORTS: POLICE POWER REGULATIONS OR PER SE TAKINGS?

Jan G. Laitos
John A. Carver Jr., Professor of Law
University of Denver College of Law
County of Clark v. Hsu

- Nevada Supreme Court Case #38853
- Argued 2003
- Michael M. Berger, Berger & North, represented property owner subject to airport transition zone height restrictions
Are such restrictions constitutional?

- Property owners want to build upwards to maximize potential economic value of the property
- Government wants to limit vertical use of the property to reduce hazard to airplanes
Takings Clause – US Constitution

• Triggered where the private property owner’s legitimate desire to build upwards into airspace above the land confronts the government’s equally legitimate desire to restrict such building for airplane safety reasons.

• How should courts resolve this conflict of competing interests?
How to Characterize the Reason for the Restriction is Critical


- However, property owners subject to such restrictions argue that such laws are not zoning restrictions on building heights intended to serve the public interest.
How to Characterize the Reason for the Restriction is Critical

- Is the real PURPOSE of the restriction to authorize physical entry and use of the airspace, since the restriction typically allows the pilot of any commercial aircraft to trespass at low altitude into privately owned airspace next to its airport?

- In other words, is the reason behind the restriction in the first place to allow aircraft the temporary use of airspace above privately owned property?
How to Characterize the Reason for the Restriction is Critical

• If these laws are intended to permit actual public entry onto, and use of, private property, then the Penn Central case is not applicable.

• In Penn Central, there is no physical invasion by members of the public. With a restriction on airspace above private property near an airport, the government anticipates physical invasion by aircraft using the airport.
How to Characterize the Reason for the Restriction is Critical

• However, the fact is that these laws are height restrictions – their effect is to prevent property owners from building upwards into airspace. As such, the laws are identical to the law at issue in the Penn Central case, which prevented the property owner from building upwards into airspace.
If the Government is Taking Airspace, That is a Physical Taking


• A physical taking is when property is taken from private property owners for public use by offering that property for others to use.
If the Government is Taking Airspace, That is a Physical Taking

- A transition zone or height restriction ordinance near a runway is intended to provide maneuvering room for commercial airplanes flying into, or out of, a public airport. As such, these laws are examples of physical takings, not regulatory takings.
If the Government is Taking Airspace, That is a Physical Taking

- Supreme Court jurisprudence: when the government permits strangers to trespass onto, or through, private property at will, that is a physical taking.
- The government, by its law, is ENABLING private parties to go upon someone else’s private property.
If the Government is Taking Airspace, That is a Physical Taking

- Irrelevant that the government agency itself is not physically intruding upon the private property. It is the enablement – the underlying owners did not invite and were powerless to prevent – that renders the government liable for a physical taking.

If the Government is Taking Airspace, That is a Physical Taking

• The Court of Appeals for the Federal Circuit summarized the law: “As a general proposition, if the Government for purposes of public use physically occupies, either by its own agents or by third parties, privately owned land over the owner’s objections, liability is a foregone conclusion.” Hendler v. United States, 952 F. 2d 1364, 1374 (Fed. Cir. 1991).
If the Government is Taking Airspace, That is NOT a Physical Taking

• In the Court’s physical takings cases, the law in question was not put in place in order to protect the safety of the public. In Kaiser-Aetna, Loretto, Nollan, and Dolan, the law later found to be a taking was a naked attempt by the government to extract property from private owners simply to save the government money – the law was not designed to prevent a disaster like an airplane colliding into a building.
If the Government is Taking Airspace, That is NOT a Physical Taking

• Moreover, the property in question in these cases was not being restricted, which is the case with a height restriction; the property was opened up to the public for physical invasion by others.
When the Government’s Interest is Financial Gain, There May be a Takings Presumption

• The United States Supreme Court has warned that, when the government interest is financial (e.g., obtaining airspace needed to support its airport operations), its actions must be viewed with suspicion. United States Trust Co. v. New Jersey, 431 U.S. 1, 26 (1977); United States v. Good Real Property, 510 U.S. 43, 55-56 (1993).
When the Government’s Interest is Financial Gain, There May be a Takings Presumption

• One could argue that a transition zone or a height restriction near an airport is simply an attempt to force selected neighbors to subsidize the airport by forcing them to donate maneuvering space for aircraft.
When the Government’s Interest is Financial Gain, There is NOT NECESSARILY a Takings Presumption

- Supreme Court takings cases do not focus on whether financial gain is a motive behind the law being challenged as a taking. The United States Trust, Good Real Property, and Winstar cases are not takings cases.
Case Law Suggests that Landowners Near Airport Runways Subject to Height Restrictions Have Valid Takings Claims

- Ten cases which have found airport-related height restrictions to be takings.
Case Law Suggests that Landowners Near Airport Runways Subject to Height Restrictions Have Valid Takings Claims

• These cases tend to conclude that height restrictions near airports are physical takings, not regulatory takings, because they authorize physical invasions into a restricted zone.
Case Law Suggests that Landowners Near Airport Runways Subject to Height Restrictions Have NO Valid Takings Claims

- Virtually every case which has found that height restrictions near airports are takings has been decided 20 to 40 years ago. Conversely, virtually every modern case addressing this topic tends to hold that such restrictions on airspace are not takings.
POLICE POWER
REGULATIONS OR PER
SE TAKINGS?

Jan G. Laitos
The Legal Problem

Whether government has the right to regulate land use in the vicinity of a government-owned airport in order to promote the public’s health, safety, and general welfare without incurring the obligation to compensate private landowners under the takings clauses of the federal and state constitutions for any resulting adverse economic effects?

The Nevada Supreme Court is now considering this question in County of Clark v. Tien Fu Hsu, et al., Case No. 38853. Clark County, Nevada (the “County”) was found liable as a matter of law for the per se physical taking of airspace over real property, owned by Tien Fu Hsu and others (the “Hsu Landowners”) near McCarran International Airport (“McCarran”), based on its enactment of airport zoning regulations that serve to prevent the creation of aviation hazards. The County has appealed from the $22,107.674 final judgment entered in favor of the Hsu Landowners on November 26, 2001 following a jury trial on the issue of just compensation. The parties argued this matter before the Nevada Supreme Court on June 25, 2003 and no decision has yet been issued.

The Hsu litigation presents an excellent case study of the planning issues which local governments must consider when they seek to regulate land uses, pursuant to their police power, for the purpose of safeguarding the public from aviation hazards.

McCarran’s History

In 1941, McCarran commenced operations in Las Vegas, Nevada as a small desert air field known as Alamo Field.

The County purchased Alamo Field on December 19, 1948 and renamed it McCarran Field, which eventually became McCarran International Airport.

Substantial development over the years has urbanized the area around McCarran, which is currently one of the busiest airports in the United States. The world famous Las Vegas Strip is in McCarran’s immediate vicinity.

The County’s Airport Zoning Regulations

More than a half-century ago, the Nevada Legislature statutorily declared that aviation hazards are a public nuisance and conferred police power authority on local governments, including the County, to adopt airport zoning regulations that precluded their creation without compensation.1

1 See N.R.S. 497.030 and 497.040.
Since 1955, the County has adopted airport zoning regulations pursuant to this police power authority for the purpose of promoting development in which airport, residential, and commercial uses are all compatible. These regulations are no different than traditional zoning laws which regulate land use in the public interest. As a result, the approach that courts, like the Nevada Supreme Court, take to resolve airspace takings claims can have far-reaching implications for land use planners nationwide.

The County’s airport zoning regulations, among other things, regulate the height of buildings and other structures to prevent the creation of aviation hazards near McCarran and other airports, including the federally owned Nellis Air Force Base. These height regulations are analogous to a setback in the sky.

The government’s authority to regulate land use in the public interest is well-recognized. The United States Supreme Court observed long ago:

Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple, but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise.²

The Challenged Ordinances

The Hsu Landowners premised their takings claim on the County’s adoption of airport zoning regulations in February 1981 (Ordinance 728) and August 1990 (Ordinance 1221). These regulations are comparable to regulations adopted by government in other contexts for the purpose of promoting the public’s health, safety, and general welfare.

Ordinances 728 and 1221 placed all property in the County within at least one of four imaginary surfaces or zones (runway approach, transition, horizontal, and conical) depending on its proximity to the end of an airport runway.

Ordinances 728 and 1221 imposed the most burdensome height regulations on land within the runway approach zone and the least burdensome height regulations on land within the conical zone, but guaranteed all landowners a building height of at least 35 feet and established a variance procedure by which they could seek approval for a nonconforming future use. A landowner must obtain a determination by the Federal Aviation Administration that a proposed land use would not pose a hazard to aviation as a prerequisite to the issuance of a variance.

By their plain terms, Ordinances 728 and 1221 did not authorize aircraft to fly anywhere, did not instruct pilots where to fly, and did not cause the physical invasion of any airspace.

Aircraft would follow the same flight patterns regardless of whether the County had adopted these regulations because they proceed exclusively at the direction of federal authorities:

Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal command. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.3

The Three Recognized Categories Of Takings

The United States Supreme Court recognizes three categories of takings: (1) a per se taking by permanent physical occupation of property; (2) a per se taking by a regulation that deprives the property of all economically viable use; and (3) a non-per se taking found after a factual analysis that balances the purposes and economic impacts of the government’s regulatory action.4 The first category is characterized by the placement of a fixed structure on private land by either the government or a private party acting with the government's authorization.5 The second category is characterized by government regulation rendering private property economically useless.6 The third category is characterized by an “ad hoc, factual” inquiry which balances a variety of factors, including the character of the government action, the regulation’s economic impact on the landowner, and the extent to which the regulation has

5 See Loretto, 458 U.S. at 419.
6 See Lucas, 505 U.S. at 1003.
interfered with the landowner’s reasonable investment-backed expectations, in order to ascertain whether a taking has occurred. The overwhelming majority of modern takings cases should be and are resolved under the third category.

The United States Supreme Court has long held that the imposition of height regulations on private property does not result in a compensable taking.

It is a very rare case where per se principles apply, and courts traditionally have treated airspace differently than land. As a general rule, “unlike a government invasion of the surface land itself, an invasion of airspace above surface land does not per se constitute a taking.”

**An Airspace Takings Case Study: County of Clark v. Hsu**

The *Hsu* case provides a classic example of what can happen when a court finds, without undertaking a proper analysis, that the mere passage of an ordinance has resulted in a taking.

In 1992, the Hsu Landowners acquired, either in whole or in part, the seven contiguous parcels totaling approximately 37.23 acres along Tropicana Avenue in Las Vegas, Nevada that comprise the subject property.

Since before its acquisition by them, the subject property has been situated across the street from McCarran and northwest of a major runway that has been used by jet aircraft from as early as the 1960s and commercial aircraft even longer.

Based on its location, the subject property is situated within the “transition zone” according to the County’s airport zoning regulations.

When the Hsu Landowners acquired the subject property, trailer court and lounge businesses were being operated there. They continued these land uses and also began a billboard business there after obtaining a necessary variance from the County’s airport zoning regulations. Ordinances 728 and 1221 did not impair these existing land uses in any way and allowed many other economically viable uses of the subject property.

The Hsu Landowners never intended, planned, or applied to develop the subject property for any other uses. The extent to which they could develop the subject property therefore remains unknown.

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8 *See id.* at 107, 124, 130-38; *Welch v. Swasey*, 214 U.S. 91, 107 (1909).
The Hsu Landowners even conceded that the County's enactment of Ordinances 728 and 1221 constituted valid exercises of the police power and did not deprive them of all economically viable use of their property, but nevertheless contended that the height regulations imposed by these ordinances effected a “per se” taking of airspace over their land. The trial court agreed with the Hsu Landowners as a matter of law.

It is noteworthy that the theory of liability advocated by the Hsu Landowners, which combined principles relating to aircraft overflights, physical invasions, and land use regulations, has never been recognized by any appellate court. In short, modern courts have not adjudicated the type of takings claim asserted by the Hsu Landowners under a per se approach.

Contrary to prevailing law, the trial court assumed that the Hsu Landowners had a constitutionally protected property interest in all airspace overlying their land when none existed, overlooked that their claim was not ripe for adjudication because they had not exhausted their administrative remedies by first submitting a development plan for the County's approval, and found without any evidence having been presented that aircraft “go through the airspace” and that it “is necessary and used by the airport.”

The trial court's assumption that landowners enjoy an unlimited property right to the airspace overlying their land is expressly contradicted by well-settled United States Supreme Court precedent, which states:

It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe — Cujus est solum ejus est usque ad coelum. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.10

The trial court’s holding was also contrary to the longstanding rule that governs takings by aircraft overflights:

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.11

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11 Id. at 266.
The Hsu Landowners presented no evidence of low and frequent aircraft overflights or of any impact on their existing land uses.

The Hsu Landowners are now asking the Nevada Supreme Court to adopt a new per se takings theory even though the United States Supreme Court has recently cautioned against the expansion of the per se takings doctrine:

Land-use regulations are ubiquitous and most of them impact property values in some tangential way — often in completely unanticipated ways. Treating them all as per se takings would transform government regulations into a luxury few governments could afford.\(^\text{12}\)

To prevent widespread takings liability from crippling the government’s capacity to function, the United States Supreme Court now instructs that per se takings can occur only in the extraordinary case in which there has been a permanent physical occupation or a permanent regulatory denial of all economically viable use of property.\(^\text{13}\) Neither has occurred in this case.

A non-per se, factual analysis therefore provides the appropriate method for determining whether there has been a taking under these circumstances.\(^\text{14}\) The balancing of factors required by this approach makes clear that the Hsu Landowners have sustained no taking of a property interest.

**Conclusion**

Regardless of their specific facts, cases like *Hsu* threaten the land use planning efforts of all governments. Despite its best efforts to plan for McCarran’s anticipated growth through the adoption of appropriate airport zoning regulations, the County has been held liable for a multimillion dollar judgment based on a novel per se takings theory. Such a holding, if affirmed, would establish a precedent that undermines the government’s authority to regulate effectively in the public interest through the police power. Government simply cannot afford that kind of liability in order to fulfill its vast obligations to its citizens.

\(^\text{12}\) *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 122 S.Ct. 1465, 1479 (2002); *see also* *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)(“[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law”).

\(^\text{13}\) *See Tahoe-Sierra*, 122 S.Ct. at 1478-80 & n.18, 1483, 1487.

BILL NO. 6-20-90-2

SUMMARY - An Ordinance to amend Chapter 29.50 to enlarge the area included within the regulations governing airport airspace zoning and height restrictions and to adopt new airport airspace zoning maps for McCarran International Airport, North Las Vegas Airport, Overton Airport and Jean Airport.

ORDINANCE NO. 1221
(of Clark County, Nevada)

AN ORDINANCE TO AMEND TITLE 29, CHAPTER 29.50, PUBLIC USE AIRPORT HEIGHT ZONING RESTRICTIONS BY ADOPTING SPECIFIC AIRSPACE ZONING MAPS FOR MCCARRAN INTERNATIONAL, NORTH LAS VEGAS, OVERTON AND THE JEAN AIRPORTS, TO PROVIDE THAT NOTICE MUST BE GIVEN TO THE FAA PRIOR TO CONSTRUCTION WITHIN THE PROVIDED HEIGHT STANDARDS, TO MODIFY THE LANGUAGE PROVIDING FOR VARIANCE PROCEDURES AND PROVIDING FOR OTHER MATTERS PROPERLY RELATING THERETO.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CLARK, STATE OF NEVADA, DOES HEREBY ORDAIN AS FOLLOWS:

29.50.010 Definitions. As used in this chapter, unless the context otherwise requires or the definition is inconsistent with a definition by the Federal Aviation Administration:

(1) "Public use airport" means any of the following airports in Clark County, Nevada: McCarran International Airport, Overton Airport, Searchlight Airport, Jean Airport, No. Las Vegas Airport, Boulder City Airport, Echo Bay Airport, Henderson Sky Harbor Airport, Three Corners Airport, Hidden Hills Airport.

(2) "Airport elevations" mean the highest point of an airport's usable landing area measured in feet above mean sea level.

(3) "Approach surface" means a surface longitudinally centered on the extended runway centerline, extending outward and
upward from the end of the primary surface and at the same slope as approach zone height limitation slope set forth in Section 29.50.030. In plan, the perimeter of the approach surface coincides with the perimeter of the approach zone.

(4) "Approach, transitional, horizontal, and conical zones" are as set forth in Section 29.50.020.

(5) "Conical Surface" means a surface extending outward and upward from the periphery of the horizontal surface at a slope of 20:1 for a horizontal distance of four thousand feet.

[(6)] (3) "Hazard to air navigation" means an obstruction determined to have a substantial adverse effect on the safe and efficient utilization of navigable airspace.

[(7)] (4) "Height." For the purpose of determining the height limits in all zones set forth in this chapter and/or shown on an airspace zoning map, the datum shall be mean sea level elevation unless otherwise specified.

[(8)] (4) "Horizontal surface" means a horizontal plane one hundred fifty feet above the established airport elevation, the perimeter of which in plan coincides with the perimeter of the horizontal zone.

(9) "Larger than utility runway" means a runway that is constructed for and intended to be used by propeller driven aircraft of greater than twelve thousand five hundred pounds maximum gross weight and jet power aircraft.

[(10)] (5) "Nonconforming use" means any pre-existing structure or use of land which is inconsistent with the provisions of this chapter or an amendment thereto.

[(11) "Nonprecision instrument runway" means a runway having an existing instrument approach procedure utilizing air navigation facilities with only horizontal guidance, or area type navigation equipment, for which a straight-in nonprecision instrument approach procedure has been approved or planned.]
"Obstruction" means any structure, growth, or other object, including a mobile object, which exceeds a limiting height set forth in Section 29.50.030.

"Person" means an individual, firm, partnership, corporation, company, association, joint stock association, or governmental entity; includes a trustee, a receiver, an assignee, or a similar representative of any of them.

"Precision instrument runway" means a runway having an existing instrument approach procedure utilizing an instrument landing system (ILS) or a precision approach radar (PAR). It also means a runway for which a precision approach system is planned and is so indicated on the Official Airport Airspace Zoning Maps.

"Primary surface" means a surface longitudinally centered on a runway. When the runway has a specially prepared hard surface, the primary surface extends 200 feet beyond each end of that runway, when the runway has no specially prepared hard surface or planned hard surface, the primary surface ends at each end of that runway. The width of the primary surface varies with the type of runway and its approach and is set forth in Section 29.50.020. The elevation of any point on the primary surface is the same as the elevation of the nearest point on the runway centerline.

"Runway" means a defined area on an airport prepared for landing and takeoff of aircraft along its length.

"Runway Protection Zone" (formerly "Runway Clear Zone") means a trapezoidal area at ground level, for the purpose of protecting the safety of approaches and keeping the area clear of the congregation of people.

"Structure" means an object, including a mobile object, constructed or installed by man, including but without limitation, buildings, towers, cranes, smokestacks, earth
formation, signs and overhead transmission lines.

(19) "Transitional surfaces" mean surfaces which extend outward at ninety degree angles to the runway centerline, and the runway centerline extended at a slope of seven feet horizontally for each foot vertically from the sides of the primary and approach surfaces to where they intersect the horizontal and conical surfaces. Transitional surfaces for those portions of the precision approach surfaces, which project through and beyond the limits of the conical surface, extend a distance of five thousand feet measured horizontally from the edge of the approach surface and at ninety degree angles to the extended runway centerline.

(20) "Tree" means any object of natural growth.

(21) "Utility runway" means a runway that is constructed for and intended to be used by propeller driven aircraft of twelve thousand five hundred pounds maximum gross weight and less.

(22) "Visual runway" means a runway intended solely for the operation of aircraft using visual approach procedures. (Ord. 728 § 3 (part), 1981)]

29.50.020 Airport zones. In order to carry out the provisions of this chapter, there are created and established certain zones which include all of the airspace above the height of thirty-five feet above the surface of the land, lying beneath the approach surfaces, transitional surfaces, horizontal surfaces, and conical surfaces, as they apply to the portions of any public use airport lying within the jurisdiction of Clark County, Nevada. Such zones for [McCarran International Airport] each public use airport are shown on the [McCarran International] Official Airport Airspace Zoning Map [consisting of three sheets, prepared by the Clark County Airport Engineering Department dated September 10, 1979.] for each public use airport as adopted by specific map as put forth in §29.50.050. [a copy of which is
on file at the county clerk's office and which is hereby incorporated by reference and made a part hereof.] An area located in more than one of the [following] airport zones is considered to be only in the zone with the more restrictive height limitations.

[(A) Runway Approach Zones.

(1) McCarran International Airport

(a) Utility Runway Visual Approach Zone

Runways 19R, 01L. The inner edge of this approach zone coincides with the width of the primary surface and is two hundred fifty feet wide. The approach zone expands outward uniformly to a width of one thousand two hundred fifty feet at a horizontal distance of five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(b) Runway Larger than Utility Visual Approach Zones - Runways 01L, 07L, 07R. The inner edge of this approach zone coincides with the width of the primary surface and is one thousand feet wide. The approach zone expands outward uniformly to a width of one thousand five hundred feet at a horizontal distance of five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(c) Precision Instrument Runway Approach Zones

Runways 19L, 25R, 25L. The inner edge of this approach zone coincides with the width of the primary surface and is one thousand feet wide. The approach zone expands outward uniformly to a width of sixteen thousand feet at a horizontal distance of fifty thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(2) All Other Public Use Airports

(a) Utility Runway Visual Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface two hundred fifty feet wide. The approach zone expands outward uniformly to a width of one thousand two hundred
fifty feet at a horizontal distance of five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(b) Utility Runway Nonprecision Instrument Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is five hundred feet wide. The approach zone expands outward uniformly to a width of two thousand feet at a horizontal distance five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(c) Runway Larger than Utility Visual Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is five hundred feet wide. The approach zone expands outward uniformly to a width of one thousand five hundred feet at a horizontal distance of five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(d) Runway Larger than Utility with a Visibility minimum Greater than Three-fourths Mile Nonprecision Instrument approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is five hundred feet wide. The approach zone expands outward uniformly to a width of three thousand five hundred feet at a horizontal distance of ten thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(e) Runway Larger than Utility with a Visibility Minimum as Low as Three-fourths Mile Nonprecision Instrument Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is one thousand feet wide. The approach zone expands outward uniformly to a width of four thousand feet at a horizontal distance of ten thousand feet from the primary surface. Its centerline is the continuation of the
centerline of the runway.

(f) Precision Instrument Runway Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is one thousand feet wide. The approach zone expands outward uniformly to a width of sixteen thousand feet at a horizontal distance of fifty thousand feet from the primary surface. It centerline is the continuation of the centerline of the runway.

(B) Transition Zones. Transition zones are established adjacent to each runway and approach zone and are the areas beneath the transitional surfaces. Transition zones extend outward from the primary surface and shall slope upward and outward one foot vertically for each seven feet horizontally to the point where they intersect the surface of the horizontal zone. Transition zones are also established adjacent to approach zones for the entire length of the approach zones. Such transition zones flare symmetrically with either side of the runway approach zones from the base of such zones, and slope upward and outward at the rate of one foot vertically for each seven feet horizontally to the points where they intersect the surface of the horizontal and conical zones. Transition zones are also established adjacent to a precision instrument approach zone where it projects through and beyond the limits of the conical zone, extending a distance of five thousand feet measured horizontally from the edge of the instrument approach zone at right angles to the runway centerline.

(C) Horizontal Zone. The horizontal zone is the area beneath the horizontal surface and is established by swinging arcs of five thousand feet radii for all runways designated utility or visual and ten thousand feet radii for all others from the center of each end of the primary surface of each runway and connecting the adjacent arcs by drawing lines tangent to those arcs.
The horizontal surface is located at a height of one hundred fifty feet above the established airport elevation. The horizontal zone does not include the approach zones or transition zones.

(D) Conical Zone. The conical zone lies beneath the conical surface established as the area commencing at the periphery of the horizontal zone and extending upward one foot in height for every twenty feet of horizontal distance outward therefore for a distance of four thousand feet to a height of three hundred and fifty (350) feet above the airport elevation. The conical zone does not include the instrument approach zones or transition zones. (Ord. 728 & 3 (part), 1980)

29.50.030 Airport zone height limitations. (A) Except as otherwise provided in this chapter, no structure shall be erected, altered, or maintained in any airport zone [created by this chapter to a height] that would violate the height limitations depicted in the maps adopted herewith [in excess of the applicable height limit established in this chapter for such zones]. However, nothing in this chapter shall be construed as prohibiting the construction or maintenance of any structure to a height up to thirty-five feet above the surface of the land in any zone created by this chapter. [Further, no Building or structure shall be erected within the zones unless the Federal Aviation Administration (FAA) of the United States of America and the director of aviation of the county shall have determined that the building or structure is so situated or marked that it would not be a hazard] Any building or structure constructed within the zones shall be situated or marked as approved by the Federal Aviation Administration and the Clark County Department of Aviation so that it does not constitute a hazard as defined in Section 29.50.010(3). All construction within
the various height zones shall be subject to the property owner's signing an avigation easement. [Such applicable height limitations are established for each of the zones in question as follows:

(A) Runway Approach Zones.

   (1) McCarran International Airport.

      (a) Utility Runway Visual Approach Zone - Runways 19R,01L. Slopes twenty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

      (b) Runway Larger than Utility Visual Approach Zones - Runways 01R, 07L, 07R. Slopes twenty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

      (c) Precision Instrument Runway Approach Zones Runway 19L, 25R, 25L. Slopes fifty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of ten thousand feet along the extended runway centerline; thence slopes upward forty feet horizontally for each foot vertically to an additional horizontal distance of forty thousand feet along the extended runway centerline.

(2) All Other Public Use Airports.

   (a) Utility Runway Visual Approach Zone. Slopes twenty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

   (b) Utility Runway Nonprecision Instrument approach Zone. Slopes twenty feet outward for each foot upward
beginning at the end of and at the same elevation as the primary
surface and extending to a horizontal distance of five thousand
feet along the extended runway centerline.

(c) Runway Larger than Utility Visual Approach
Zone. Slopes twenty feet outward for each foot upward beginning
at the end of and at the same elevation as the primary surface
and extending to a horizontal distance of five thousand feet
along the extended runway centerline.

(d) Runway Larger than Utility with a visibility
Minimum Greater than Three-fourths Mile Nonprecision Instrument
Approach Zone. Slopes thirty-four feet outward for each foot
upward beginning at the end of and at the same elevation as the
primary surface and extending to a horizontal distance of ten
thousand feet along the extended runway centerline.

(e) Runway Larger than Utility with a Visibility
Minimum As Low as Three-fourths Mile Nonprecision Instrument
Approach Zone. Slopes thirty-four feet outward for each foot
upward beginning at the end of and at the same elevation as the
primary surface and extending to a horizontal distance of ten
thousand feet along the extended runway centerline.

(f) Precision Instrument Runway Approach Zone.
Slopes fifty feet outward for each foot upward beginning at the
end of and at the same elevation as the primary surface and
extending to a horizontal distance of ten thousand feet along the
extended runway centerline; thence slopes upward forty feet hori-
zontally for each foot vertically to an additional horizontal
distance of forth thousand feet along the extended runway
centerline.

(B) Transition Zones. Slopes one foot vertically for
each seven feet horizontally beginning at the sides of and at the
same elevation as the primary surface and approach surface, and
extending to a height of one hundred fifty feet above the airport
elevation. In addition to the foregoing, there are established height limits of one foot vertically for each seven feet horizontally beginning at the sides of and the same elevation as all approach zone surfaces for the entire length of all approach zone surfaces and extending upward and outward to the points where they intersect the horizontal and conical surfaces. Where the precision instrument runway approach zone projects beyond the conical zone surface, a height limit of one foot for each seven feet of horizontal distance shall be maintained beginning at the sides of and the same elevation as the approach surface, and extending a horizontal distance of five thousand feet measured at ninety degree angles to the extended runway centerline.

(C) Horizontal Zone. One hundred fifty feet above the established airport elevation.

(D) Conical Zone. One foot vertical height for each twenty feet of horizontal distance beginning at the periphery of the horizontal zone and extending a horizontal distance of four thousand feet to a height of three hundred fifty feet above the airport elevation. (Ord. 728 § 3 (part), 1980)

29.50.040 Notices of Construction or Alteration.

(A) Any person proposing construction or alteration in the environs of any public use airport or airport operated by the United States Armed Services shall notify the Chief, Air Traffic Division, FAA Regional Office having jurisdiction over the area within which the construction or alteration will be located not less than thirty days before the commencement of the construction or alteration if such construction or alteration exceeds any of the following height standards:

(1) Two hundred (200) feet above the ground level at its site.

(2) The plane of an imaginary surface extending outward and upward at a slope of 100 to 1 for a horizontal distance of
20,000 feet from the nearest point of the nearest runway of any airport subject to the provisions of this chapter.

(3) For highways, railroads and other traverse ways for mobile objects; if construction or alteration is of greater height than the standards set forth in subparagraphs (1) or (2) hereinbefore after their height has been adjusted upward for the appropriate traverse way as follows:

(a) For interstate highways: 17 feet
(b) For any other public roadways: 15 feet
(c) For any private road: 10 feet or the height of the highest mobile object that would normally traverse the road, whichever is greater.
(d) For any railroad: 23 feet
(e) For a waterway or any other unspecifed traverse way: the height of the highest mobile object that would normally use the traverse way.

(4) When requested by the FAA, any construction or alteration that would be in an instrument approach area and available information indicates the height might exceed any FAA obstruction standard.

Any notice required by this section shall be on FAA Form 7460-1, available from the regional offices of the Federal Aviation Administration.

(B) Construction or Alteration not requiring notice.

Notice to the FAA is not required for construction or alteration of any of the following:

(1) Any object that would be shielded by existing structures of a permanent and substantial character or by natural terrain or topographical features of equal or greater height, and would be located in the congested area of a city, town, or settlement where it
is evident beyond all reasonable doubt that the structure so shielded will not adversely affect safety in air navigation.

(2) Any antenna structure of 20 feet or less in height except one that would increase the height of another antenna structure.

(3) Any air navigation facility, airport visual approach or landing aid, aircraft arresting device, or meteorological device, of a type approved by the Administrator, or an appropriate military service on military airports, the location and height of which is fixed by its functional purpose.

(4) Any construction or alteration for which notice is required by any other FAA regulation.

29.50.050 Official Airport Airspace Zoning Maps. The following official airport airspace zoning maps for specific public use airports lying within the jurisdiction of Clark County, Nevada, as adopted by ordinance of the Board of Clark County Commissioners, are on file at the office of the County Clerk and hereby incorporated by reference and made a part hereof:

(A) The McCarran International Airport Official Airspace Zoning Map, consisting of five (5) sheets, prepared by the Clark County Airport Engineering Department dated July 18, 1990 and adopted by Ordinance Number 1221.

(B) The North Las Vegas Air Terminal Official Airspace Zoning Map, consisting of one (1) sheet, prepared by the Clark County Airport Engineering Department dated July 18, 1990 and adopted by Ordinance Number 1221.

(C) The Overton Airport Official Airspace Zoning Map.
consisting of one (1) sheet, prepared by the Clark
County Airport Engineering Department dated July 18, 1990
and adopted by Ordinance Number 2221.

(D) The Jean Airport Official Airspace Zoning Map
consisting of one (1) sheet, prepared by the Clark
County Airport Engineering Department dated July 18, 1990
and adopted by Ordinance Number 2221.

29.50.060 Use restrictions. Notwithstanding any other
provisions of this chapter, no use may be made of land or water
within any zone established by this chapter in such a manner as
to create electrical interference with navigation signals or
radio communication between the airport and aircraft, make it
difficult for pilots to distinguish between airport lights and
others, result in glare in the eyes of pilots using the airport,
impair visibility in the vicinity of the airport, create bird
strike hazards, or otherwise in any way endanger or interfere
with the landing, takeoff, or maneuvering of aircraft intending
to use the airport. (Ord. 728 & 3 (part), 1980)

29.50.070 Nonconforming uses. (A) Regulations Not
Retroactive. The regulations prescribed by this chapter shall
not be construed to require the removal, lowering, or other
change or alteration of any structure not conforming to the regu-
lations as of the effective date of this chapter, or otherwise
interfere with the continuance of a nonconforming use. Nothing
contained in this chapter shall require any change in the
construction, alteration, or intended use of any structure, the
construction or alteration of which was begun prior to the effec-
tive date of this chapter, and is diligently prosecuted.

(B) Marking and Lighting. Notwithstanding the preceding
provisions of this section, the owner of any existing
nonconforming structure may be required to install, operate, and
maintain thereon such markers and lights as may be deemed neces-

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sary by the director of aviation to indicate to the operators of aircraft in the vicinity of the airport the presence of such airport obstruction. (Ord. 728 & 3 (part), 1980)

29.50.080 Variances. (A) Future Uses. Any person desiring to erect or increase the height of any structure, or to permit the growth of any tree, or otherwise use his property in a manner which would constitute a violation of these regulations, may apply to the county planning commission for a variance from these regulations. Such variances may be allowed where a literal application or enforcement of these regulations would result in practical difficulty or unnecessary hardship, and the relief granted would not be contrary to the public interest, but would do substantial justice and be in accordance with the spirit of these regulations [and of Chapter 29.66]. Any such variance allowed may be subject to any reasonable conditions that the county planning commission or board of county commissioners may deem necessary to effectuate the purposes of [Chapter 29.66,] Title 29 including, but not limited to, the condition to require the owner of the structure or tree in question to install, operate, and maintain, at the owner's expense, such markings and lights as may be necessary. If deemed proper by the board of county commissioners, this condition may be modified to require the owner to permit the county, at its own expense, to install, operate, and maintain the necessary markings and lights.

Variances pursuant to this chapter shall be considered under the procedures put forth under Section 29.66 of this title with the exception that the applicant shall notify the FAA Regional Office of the application prior to the time of submission of the variance application and that the Planning Commissions' action concerning the variance application shall be considered advisory only, with all variances being referred to the Board of County Commissioners for final disposition.

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(B) Existing Uses. No permit shall be granted that would allow the establishment or creation of an obstruction or permit a nonconforming use, structure, or tree to become a greater hazard to air navigation than it was on the effective date of this chapter or any amendments thereto, or than it is when application for a permit is made.

(C) Nonconforming Uses Abandoned or Destroyed. Whenever a nonconforming structure, as set forth in the provisions of Chapter 29.45, has been abandoned or more than fifty percent torn down, physically deteriorated, or decayed, no permit shall be granted that would allow such structure to exceed the applicable height limit or otherwise deviate from the zoning regulations.

SECTION 2. If any section of this ordinance or portion thereof is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such holding shall not invalidate the remaining parts of this ordinance.

SECTION 3. All ordinances, parts of ordinances, chapters, sections, subsections, clauses, phrases or sentences contained in the Clark County Code in conflict herewith are hereby repealed.

SECTION 4. This ordinance shall take effect and be in force from and after its passage and the publication thereof by title only, together with the names of the County Commissioners voting for or against its passage, in a newspaper published in and having a general circulation in Clark County, Nevada, at least once a week for a period of two (2) weeks.

PROPOSED on the 20th day of June, 1990.


PASSED on the 18th day of July, 1990.

VOTE:

AYES: Jay Bingham
Paul J. Christensen
Manuel J. Cortez

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Thalia M. Dondero
Karen Hayes

NAYS: None
ABSTAINING: None
ABSENT: William V. Pearson
        Bruce L. Woodbury

BOARD OF COUNTY COMMISSIONERS
CLARK COUNTY, NEVADA

By [Signature]
Chairman

ATTEST:

LORETTA BOWMAN, County Clerk

This ordinance shall be in force and effect from and after the ___st day of ___August______, 1990.
DEPARTMENT SEVEN  
LAS VEGAS, NEVADA 89155  

DECISION

The parties filed three Motions for Summary Judgment. The Plaintiff, Clark County ["Plaintiff" or "County"] filed two motions seeking summary judgment and the Defendants, [collectively the "Landowners"] filed a motion which sought summary judgment as to liability only. The Court heard oral argument as to all three motions beginning on January 12, 2001 and concluding on January 19, 2001. The Court now
renders this written decision.

Positions of the Parties

Defendants

The Defendants instituted this counterclaim for inverse condemnation of the airspace over their property after the County condemned a portion of the subject property for the widening of Tropicana Avenue. In their Motion for Summary Judgment and in their oppositions to the County's two Motion for Summary Judgment, Defendants contend that their air space was taken without compensation for use by the airport. The County issued Ordinances 728 and 1221 which restricted the height of buildings over the Defendants property. Additionally, and most critically, however, Defendants allege that their property has been included in a "transition zone", which allows the invasion of their air space renders this taking of the property, a "per se" taking. It is a per se taking because the government took the airspace for its own use. The undisputed testimony of the Airport personnel is that the reason for the height limitations on this property is due to the property's inclusion in a transition zone. The transition zones are zones that are needed by the airport to safely operate and which can be used by airplanes when other methods of approach and departure are blocked or unusable for whatever reason. While the airport personnel cannot say how often this space is invaded, they are clear that the space is necessary and that it is used. Defendants do not
challenge the necessity nor the public use of their air space; however, Defendants
maintain that this use results in a "taking" under the U.S. and Nevada Constitutions.
As such, Defendants are entitled to just compensation for their property.

Defendants deny that this is a regulatory taking in that a regulatory taking
involves only restrictions upon the use of one's property but does not allow for
physical occupation of that property by another. Once a physical use is permitted, the
law regarding regulatory takings is inapplicable. Since planes are allowed into the
transition zones, the airspace has been invaded and the taking is per se and not
regulatory.

Plaintiff

The Plaintiff has five reasons why it believe that summary judgment should be
granted in its favor and why summary judgment should be denied to the Defendants.
It should be noted at the start that two of the reasons had previously been ruled on
and that the County had not timely requested reconsideration. As such, the rulings
made in 1997 are the law of the case and are not to be revisited. These five reasons
are as follows:

1. The Landowners have no standing to pursue their claim because they
acquired the subject properties after the Ordinances were enacted. The County
argues that the vesting in a taking occurs when the condemning agency takes
952 P.2d 1390; (1998). The Court ruled that just compensation should be paid to the
person who owns the property at the time of the taking. Since the Landowners did not
own the property at the time of the ordinance, there is no taking.

2. Landowners do not have any right to the airspace. The County cites NRS § 493.050 and says that ownership is subject to the right of flight. The County insists that this statute means that there is no right to airspace above the actual height of the building as it is being used.

3. The ordinances are constitutional on their face. Even though the Landowners do not claim any unconstitutionality, for the Landowners to win, the Court must find that the ordinances themselves amount to a taking. The Court must determine if the property has lost all economic use and whether the land use does not represent a legitimate state interest. Basically, the County argues that this is a regulatory taking case and that the test of Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) is what the Court should employ. Here the use is legitimate as the use by the airport does constitute a public purpose. The Legislature wanted to use police power as much as possible so as to not pay compensation. The ordinances were a response to that desire. The Landowners' property is still viable. The Landowners want to skip to the fact that its current use is not its highest and best use but that is not the test. The land has economic viability and therefore no taking has occurred. Moreover, there is no interference with a reasonable investment relationship on this property. The County advises that despite the usual need for factual inquiries in a regulatory takings case, that in a situation such as this one, where the issues are clear, the Ninth Circuit recently held that this issue may be resolved as a matter of law on a Motion for Summary Judgment. Buckles v. King 191
F.3d 1127, 1138-1143 (9th Cir. 1999). Therefore, this Court should grant summary judgment in favor of the County.

4. The claims are not ripe as the Landowners have not been denied the right to build. Since the Landowners have not applied for a variance, they cannot raise any claims. Additionally, the Landowners cannot remove the airspace from their “bundle of rights”. Since they continue to use the property, there is no loss.

5. The properties in question were purchased in the mid 1980’s. The property was zoned T-C which had a 35 foot height limit. Today, the property is still zoned T-C with a 35 foot height limit. There was no taking. There was no application for any permit. Claimants had no existing rights to use the airspace above 100 feet.

Landowners’ Response

Landowners argue that Argier is inapposite because this is not the case of different parties seeking the same condemnation award. Rather, the issue is whether the taking is compensable. In this case, these invisible grids and planes are so intangible that even the County does not know when the air space is being used or when it started. Standing and ripeness are not issues in this case. In any event most of the parcels were owned by related entities. Landowners point out that every jurisdiction except one has held that these airport taking cases are compensable and are per se takings, not regulatory ones. Plaintiff may condemn the airspace; however, it must pay for it. The Landowners also remind the Court that it has already ruled that the date of purchase is not relevant under federal law as the U.S. Supreme
Court has allowed subsequent purchasers to bring takings claims. Loretto v.
Teleprompter Manhattan CATV Corp., 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct.
3164 (1982); Nollan v. California Coastal Commission, 483 U.S. 825; 107 S. Ct. 3141;
97 L. Ed. 2d 677 (1987). As to the issue of a "variance", it is inapplicable because
this is not a regulatory taking so there is no necessity for "finality". Additionally, this
Court has already ruled that to make application would be futile especially in light of
the fact that the prior owner did make application and was rejected for a 240 foot
structure. Additionally, the former Airport Director, Robert Broadbent testified that
he would have personally blocked any request for a variance for this property. The
County fails to mention that no properties in the Transition Zone have been granted a
variance.

The Legislature in NRS § 479.270 has expressly stated that payments be made
for the taking of air rights. It is clear that the law acknowledges both the possession of
air rights and the compensability thereof.

The Landowners emphasis that they do not argue that the Ordinances are
unconstitutional on their face. Landowners do not argue that the easement is
unwarranted or that the taking of the easement is not for public use. Landowners
merely seek compensation for the avigation easement which the County is using for
its airport operations. There is not a regulatory taking here, there is a physical
invasion of the airspace. Not only can the Landowners not build but airplanes are
allowed to go into the space. Physical invasion of space is a per se taking and not a
regulatory one.
Landowners also note that the Courts have always held that air rights are a separate stick in the bundle of rights. These rights can be adjudicated separately. The U.S. Supreme Court has addressed air rights multiple times. United States v. Causby, 328 U.S. 256 (1946) made clear that air space above 500 feet is the public domain and there is no taking but the Court has also made it clear in Griggs v. Allegheny County, 369 U.S. 84 (1962), that Congress could not take portions under 500 feet of airspace without just compensation.

As to the final argument that there is no taking because the use of the property is still T-C, Landowners point out that if one takes a portion of land, it does not matter if the buildings are still there. Whenever anything is taken, the zoning is not relevant except as to determining the best use of the property in ascertaining damages.

Analysis

The Court has viewed these Motions for Summary Judgment as oppositions to each other. It is clear to the Court that in order to conduct this trial, the issues for the jury must be clearly placed before them. It is also clear that the method of conducting the trial is dependent on whether this is a per se taking or a regulatory taking. Each type of taking has its own rules and procedures. The Motions for Summary Judgment show that each side believes that there is no question of material fact in determining that they should win based on their view of the case. As the County has pointed out, the Ninth Circuit in Buckles v. King, supra, has stated that the Court can decide the issue of whether there has been a taking on a Motion for
Summary Judgment. The Court agrees that it is up to the court to determine whether this is a regulatory taking or per se taking. There is no doubt that the taking cannot be both and therefore, this Court must decide which type of taking has occurred.

As mentioned earlier, certain rulings such as the irrelevancy of the ownership of the property at the time of the enactment of the ordinance and of the futility of making application for variances on this property were previously decided and are the law of the case. However, the Court will briefly address the Argiers issue. In Argiers, the condemning authority sought to relieve itself of the duty to pay just compensation because the landowner had sold his property to the county prior to trial on the issue of just compensation. The Nevada Supreme Court defined the issue as follows: "The only issue this court must decide is whether the Argiers' conveyance of their land to Clark County extinguished their right to just compensation." The Nevada Supreme Court held that such a right is not extinguished. In holding that the original landowner held the right, the Court basically held as follows: (1) just compensation is always due when one appropriates property through condemnation; and (2) that between claimants to the same property, the person owning the rights at the time of the taking is entitle to the payment absent actually giving or selling the right to receive the compensation.

It appears to this court, that in Argiers, our Supreme Court was setting priorities as between claimants. The references to United States v. Dow, 357 U.S. 17, 2 L. Ed. 2d 1109, 78 S. Ct. 1039 (1958) and to Brooks Investment Co. v. City of Bloomington, 305 Minn. 305, 232 N.W.2d 911 (Minn. 1975), both refer to priorities between claimants. Argier is about the priorities between claimants and not a rule that prevents a condemning agency from paying compensation because there may be
other or earlier claimants. Additionally, NRS § 37.115, protects condemning agencies from multiple claimants by bifurcating the procedure and allowing the agency to obtain its judgment of condemnation and then holding a separate proceeding amongst any claimants regarding the allocation of that compensation. To read *Argier* as the County argues confirms that a condemner need not pay just compensation if there might be disputes as to whom the award should go. It is inconceivable to this court that the Nevada Supreme Court, with its strong belief in due process and with its knowledge of takings law, would hold that a condemner can take property but never have to pay just compensation as long as the original owner was unaware of his rights.

The County argues that Landowners have no air rights above the current use because of NRS § 493.050. NRS § 493.050 states that the flying of aircraft is lawful unless the flight is below the current use of the property. The fact that a flight is lawful is not particularly useful in the context of an inverse condemnation action where the Landowners allege use of the airspace. This statute applies to property not subject to any governmental ordinance. The statute is also about the legality of flight and is meant to forestall trespass actions. The County’s argument that there are no air rights are belied both by NRS § 479.270 and by the court’s holding in *Penn Central*. The Legislature would not need to allow for the condemnation of air rights if none existed. Neither avigation easements nor § 497.270 would be necessary if there were no air rights. This statute anticipates that air space may need to be condemned. This Court understands that legislative bodies, the Legislature, the County Commission, and the Airport Board, desire to avoid the payment of just compensation to the extent possible by using zoning to achieve the use of the properties. However, NRS § 497.030 is the law. The operative words in this statute are “to the extent legally possible”. It is for the courts to determine whether it is legally possible not to
pay just compensation.

*Penn Central* is based on the land owners desire to build a 55 story office building above the historic Penn Central Station. The New York authorities denied the right to build as part of its Landmarks Preservation Laws. The issue itself was whether the air rights could be limited. This presupposes that air rights exist. The Supreme Court decided that air rights could be regulated in certain instances but it did not decide that no rights existed. Therefore, the argument that the Landowners cannot recover because they have no air rights above that which currently covers the existing use is without merit.

The crux of the argument in this case is whether there is a regulatory or per se taking. The County has ably stated the tests to be used in a regulatory taking in *Penn State* and in *Kelly*. In those cases, the courts found that where a public purpose exists and where the land retains an economic value, then the police power of zoning can be used to avoid the payment of just compensation. In fact, when the police power is properly used, it results in no taking at all. The Landowners do not disagree with the County's view of what the test would be if this were a regulatory taking. But the Landowners argue that use of the air space calls for a different analysis. The analysis is one found in many takings cases including amongst others, *Causby* and *Griggs*, *supra*. In *Penn Central*, the Court did not overrule *Causby* or *Griggs*. Also, *Nollan* and *Loretto* were both decided after *Penn Central*. In essence, despite *Penn Central*, there are a number of factors which remove certain types of regulations from the *Penn Central* analysis.
In its opinion in Penn Central, the Court discusses the types of takings. The final "taking" is as follows:

"Finally, government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute "takeings." United States v. Causby, 328 U.S. 256 (1946), is illustrative. In holding that direct overflights above the claimant's land, that destroyed the present use of the land as a chicken farm, constituted a "taking," Causby emphasized that Government had not "merely destroyed property [but was] using a part of it for the flight of its planes." Id., at 262-263, n.7. See also Griggs v. Allegheny County, 369 U.S. 84 (1962) (overflights held a taking); Portsmouth Co. v. United States, 260 U.S. 327 (1922) (United States military installations' repeated firing of guns over claimant's land is a taking); United States v. Cress, 243 U.S. 316 (1917) (repeated floodings of land caused by water project is a taking); but see YMCA v. United States, 395 U.S. 85 (1969) (damage caused to building when federal officers who were seeking to protect building were attacked by rioters held not a taking). See generally Michelman, supra, at 1226-1229; Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964)."

Id. at p. 128.

The Supreme Court has repeatedly held that cases involving intrusions onto the land or airspace of others are different from other regulatory cases. In Nollan, supra, the Court points to the fact that not only is the landowner limited in his use of the property, but that the landowner is required to allow access onto his land for the benefit of the public and then holds that just compensation is required. The Court held that an essential right of ownership was the right to exclude others from the property.

In Loretto, the small metal boxes and cable wires/ waves constitute enough of an invasion to property to fall into the Causby type takings and require compensation.

Courts have repeatedly held that the government cannot use its legitimate police power to force a Landowner to allow others onto his property without the
payment of just compensation. The Plaintiff has not disputed that the Landowners' property is not being used in its transition zone nor has the Plaintiff argued that there is no entry upon the property. The Plaintiff has many legal theories in opposition to the Defendant Landowners' Motion for Summary Judgment, but no factual ones. The Plaintiff has not disputed that aircraft do go through the airspace above the Landowners properties and that the airspace is necessary and used by the airport. In its Motion for Summary Judgment, the Plaintiff argues that it is entitled to regulate the Defendants' land because it is for the public good. In essence the Plaintiff alleges that the Landowners not only are barred from using the airspace themselves but that the Plaintiff has allowed the airport to make use of the airspace. There is no evidence that the Plaintiff has presented that would dispute that the Landowners' property is used by the airport for the public good nor that would prevent the court from entering summary judgment in favor of the Defendants as to liability. Accordingly, this Court must find that the governmental action in this case denies the Landowners the right to use the air rights and it denies the right to exclusive possession of the air rights and it allows the airport to use the air rights of the Defendants. This results in a "per se" taking that requires just compensation.

CONCLUSION

The Takings Clause of the Fifth Amendment provides: "Nor shall private property be taken for public use, without just compensation." The aim of the Clause is to prevent the 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."


The use of the Defendant's property is indeed for the benefit of the public. Pursuant to the United States and Nevada Constitutions, the Defendants need not bear the burden themselves. The Defendants' Motion for Summary Judgment as to liability is granted. The Plaintiff's two Motions for Summary Judgment are denied. Trial is set to commence on February 26, 2001 at 1:30 p.m. This court finds that the issue of liability and damages as to this condemnation case are inextricably intertwined. Therefore, this case is not appropriate for NRCP 54(b) certification.

IT IS SO ORDERED.

DATED this 26th day of January, 2001.

MARK GIBBONS,
District Judge
Proof of Service

I, Jason Cook, hereby certify that on 1/26/01 copies of the foregoing Decisions re Motions for Summary Judgment were placed in the attorney boxes or mailed to the following attorneys:

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Law Clerk, Dept VII
[Bracketed] material is that portion being deleted
Underlined material is that portion being added

BILL NO. 6-20-90-2

SUMMARY - An Ordinance to amend Chapter 29.50 to enlarge the area included within the regulations governing airport airspace zoning and height restrictions and to adopt new airport airspace zoning maps for McCarran International Airport, North Las Vegas Airport, Overton Airport and Jean Airport.

ORDINANCE NO. 1221
(of Clark County, Nevada)

AN ORDINANCE TO AMEND TITLE 29, CHAPTER 29.50, PUBLIC USE AIRPORT HEIGHT ZONING RESTRICTIONS BY ADOPTING SPECIFIC AIRSPACE ZONING MAPS FOR MCCARRAN INTERNATIONAL, NORTH LAS VEGAS, OVERTON AND THE JEAN AIRPORTS, TO PROVIDE THAT NOTICE MUST BE GIVEN TO THE FAA PRIOR TO CONSTRUCTION WITHIN THE PROVIDED HEIGHT STANDARDS, TO MODIFY THE LANGUAGE PROVIDING FOR VARIANCE PROCEDURES AND PROVIDING FOR OTHER MATTERS PROPERLY RELATING THERETO.

STATE OF NEVADA, DOES HEREBY ORDAIN AS FOLLOWS:

29.50.010 Definitions. As used in this chapter, unless the context otherwise requires or the definition is inconsistent with a definition by the Federal Aviation Administration:

(1) "Public use airport" means any of the following airports in Clark County, Nevada: McCarran International Airport, Overton Airport, Searchlight Airport, Jean Airport, No. Las Vegas Airport, Boulder City Airport, Echo Bay Airport, Henderson Sky Harbor Airport, Three Corners Airport, Hidden Hills Airport.

(2) "Airport elevations" mean the highest point of an airport's usable landing area measured in feet above mean sea level.

(3) "Approach surface" means a surface longitudinally centered on the extended runway centerline, extending outward and
MEGABUCKS
payment of just compensation. The Plaintiff has not disputed that the Landowners' property is not being used in its transition zone nor has the Plaintiff argued that there is no entry upon the property. The Plaintiff has many legal theories in opposition to the Defendant Landowners' Motion for Summary Judgment, but no factual ones. The Plaintiff has not disputed that aircraft do go through the airspace above the Landowners properties and that the airspace is necessary and used by the airport. In its Motion for Summary Judgment, the Plaintiff argues that it is entitled to regulate the Defendants' land because it is for the public good. In essence the Plaintiff alleges that the Landowners not only are barred from using the airspace themselves but that the Plaintiff has allowed the airport to make use of the airspace. There is no evidence that the Plaintiff has presented that would dispute that the Landowners' property is used by the airport for the public good nor that would prevent the court from entering summary judgment in favor of the Defendants as to liability. Accordingly, this Court must find that the governmental action in this case denies the Landowners the right to use the air rights and it denies the right to exclusive possession of the air rights and it allows the airport to use the air rights of the Defendants. This results in a "per se" taking that requires just compensation.

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IT IS ANCIENT DOCTRINE THAT A COMMON LAW OWNERSHIP OF THE LAND EXTENDED TO THE PERIPHERY OF THE UNIVERSE? CUJUS EST SOLUM EJUS EST USQUE AD COELUM. BUT THAT DOCTRINE HAS NO PLACE IN THE MODERN WORLD. THE AIR IS A PUBLIC HIGHWAY, AS CONGRESS HAS DECLARED. WERE THAT NOT TRUE, EVERY TRANS-CONTINENTAL FLIGHT WOULD SUBJECT THE OPERATOR TO COUNTLESS TRESPASS SUITS. COMMON SENSE REVOLTS AT THE IDEA.

United States v. Causby, 328 U.S. 256, 260-61 (1946)
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.

United States v. Causby, 328 U.S. 256, 266 (1946)
Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as per se takings would transform government regulations into a luxury few governments could afford.