Constitutional Law-Eminent Domain-Master Flight Plan as a Taking of Land Under Approach Area to Municipal Airport

Ralph L. Wright S. Ed

University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Air and Space Law Commons, Constitutional Law Commons, Fourteenth Amendment Commons, Land Use Law Commons, and the Transportation Law Commons

Recommended Citation

Available at: https://repository.law.umich.edu/mlr/vol60/iss1/6

This Recent Important Decisions is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
Constitutional Law — Eminent Domain — Master Flight Plan as a Taking of Land Under Approach Area to Municipal Airport—Plaintiff owned land adjacent to the Greater Pittsburgh Airport which lay under an approach area for one of the runways. Allegheny County, in compliance with rules and regulations of the Civil Aeronautics Authority, drafted a "Master Plan," approved by the CAA, which showed the approach area over part of plaintiff’s property. Plaintiff sued to recover damages from the county, owner and operator of the airport, alleging an appropriation of his land because of the substantial interference with its use and enjoyment caused by flights at low altitudes above his land during landings and take-offs. Upon an award of damages by the viewers, the county objected, claiming there had been no taking; but the lower
court dismissed the county's exceptions. On appeal from the order of dismissal, held, reversed, two justices dissenting. Neither the ownership and operation of the airport nor the adoption of the “Master Plan” constituted a taking by the county of an easement of avigation over plaintiff's property for which compensation must be made.1 Griggs v. Allegheny County, 402 Pa. 411, 168 A.2d 123 (1961).

The fifth amendment of the United States Constitution provides that "private property" shall not "be taken for public use without just compensation." The Supreme Court has held that the fourteenth amendment makes this restriction applicable to state governments.2 From the words of the amendment it is clear that there must be a "taking" before a landowner is entitled to compensation. The general rule is that there need not be an actual physical taking, but that a restriction, diminution, or interruption of the rights of ownership lessening the value of land, and conferring property rights upon the public for public use constitutes a "taking."3

The eminent domain provision of the Constitution has increasing significance in the air age.4 The Air Commerce Act of 1926, as amended by the Civil Aeronautics Act of 1938, declares, "There . . . exist[s] in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable airspace of the United States."5 "Navigable airspace" is defined as the airspace above the prescribed minimum altitudes of flight. Under this definition, the Supreme Court in United

---

1 There is either an alternative holding or strong dictum declaring that no evidence was offered to show that such action deprived the plaintiff of the use and enjoyment of his property, substantially or otherwise. Principal case at 418, 168 A.2d at 126-27.


When governmental action actually destroys property rights, it may constitute a regulation—an exercise of the police power, for which compensation is not required. See Pennsylvania Coal Co. v. Mahon, supra; Ackerman v. Port of Seattle, 55 Wash. 2d 400, 403-07, 348 P.2d 688, 691 (1960). For articles discussing the distinction between regulation and taking, see Abels, Price Control in War and Emergency, 90 U. Pa. L. Rev. 675 (1942); Cochran, Governmental Seizure of a Business To Prevent Strike-Caused Work Stoppages—Regulation or Taking? 19 Geo. Wash. L. Rev. 184 (1950); Kauper, Wanted: A New Definition of the Rate Base, 37 Mich. L. Rev. 1209 (1939).


States v. Causby\(^8\) held that the navigable airspace which Congress placed in the public domain did not include the glide path for take-offs and landings.\(^7\) In 1958, however, Congress amended the statute\(^8\) and included in “navigable airspace” the airspace needed to insure safety in take-offs and landings.\(^9\) The court in the principal case, without discussing the effect of the 1958 statute on the Causby holding, follows categorically the proposition formulated in that case. The Causby decision places the airports and airlines in a difficult position since a long glide path is necessary for the operation of large planes.\(^10\) The rights of landowners adjacent to airfields must continually be balanced against the airlines’ rights of free access to the airways.\(^11\) In the balancing process there is no place for the ancient common law doctrine of usque ad coelum, and in Causby the court clearly said that it did not apply to modern air transportation.\(^12\) The Court in Causby instead adopted the rule formulated in Hinman v. Pacific Air Transport\(^13\) that the landowner owns only the airspace he actually occupies, and can object only to such use of the airspace above the surface as does actual damage.\(^14\) In the principal case the court suggests obiter that because the flights substantially deprived the plaintiff of the beneficial use and enjoyment of his property,\(^15\) perhaps the airlines would be liable for a taking if they had been clothed with the power of eminent domain. In Causby the United States both owned and operated the aircraft which caused the deprivation of the owner’s use and enjoyment of the neighboring property, although the opinion does not indicate who actually maintained and operated the airport. Thus the issue in the principal case reduced itself to whether ownership of the airport and formulation of a “Master Plan” alone is sufficient governmental action to constitute a taking of property which must be compensated under the fourteenth amendment.

The Supreme Court of Washington in Ackerman v. Port of Seattle\(^16\)
decided that the Port was liable in damages for a taking which resulted from low flights into the airport in accordance with federally-prescribed regulations and orders. This seems to be the only case in which relief was granted on the grounds of constitutional taking where the defendant participated in no actual flights. In *Ackerman*, the Port itself did not fly any planes, and apparently used no “Master Plan,” yet was held liable for its failure to provide adequate facilities, necessitating the frequent low flights over the plaintiff’s lands. The court observed that an adequate approach-way is as necessary a part of an airport as is the ground on which the airstrip itself is constructed, and must be provided so that private airspace of adjacent landowners will not be invaded by airplanes using the airport. The Port had the power to acquire an approach-way by condemnation, but failed to exercise that power, with the result that plaintiff’s private airspace was used as an approach area without just compensation having been paid to him. The use of land for the maintainence of other property devoted to a public purpose is a taking for a public use.

Because most of the suits are based either on the nuisance or on the trespass doctrine, there is little authority for the view that property is “taken” by low flying planes in the approach area. However, the Pennsylvania cases dealing with the filing of a plat as constituting a taking could have led, by way of analogy, to a finding that use of the “Master Plan” resulted in a taking. The rule as developed in those cases is that the mere plotting of a street upon a city plan, without anything more, does not constitute a taking authorizing compensation to the abutting owners, because the marking of a street on a city map indicates nothing more than an intention to take property in the future. But an exception to the rule has developed: if the city does some unequivocal act evidencing its intention to open the street followed by actual work done on it, the right to compensation will accrue even if the council fails or neglects to pass an opening ordinance. In the airport situation it is quite obvious that a

19 Id. at 410, 348 P.2d at 671.
22 Philadelphia Parkway Opening, 295 Pa. 538, 145 Atl. 600 (1929); Hoffer v. Reading Co., 287 Pa. 120, 134 Atl. 415 (1925); Herrington’s Petition, 266 Pa. 88, 109 Atl. 791 (1920); Rowan v. Commonwealth, 261 Pa. 88, 104 Atl. 562 (1918); Bush v. McKeesport, 168 Pa. 87, 30 Atl. 1023 (1886); Whitaker v. Phoenixville Borough, 141 Pa. 527, 21 Atl. 604 (1891); Volkmar Street, 124 Pa. 320, 16 Atl. 867 (1889); Forbes Street, 70 Pa. 125 (1871).
glide-path is necessary for take-offs and landings and that the purpose for which the airport was constructed cannot be effectuated without such a path. The condemnation of land and the construction of the airport is the beginning of the project necessary for flights. It is an unequivocal indication of the intention of the political subdivision to open an operational unit which requires an approach area. As the court said in Ackerman, the subdivision which is granted the power to condemn should condemn enough private property for the total functional operation of the airport. If it does not and the planes are allowed to use the airport, there is clearly an acquiescence by the subdivision in the take-offs and landings; this constitutes a taking the same as would condemnation, and the subdivision should be liable for any interference with the beneficial use of the property.

It would appear that the reasoning of the Ackerman case is to be preferred, especially in view of the fact that the Pennsylvania Airport Zoning Act confers upon political subdivisions the power to condemn property interests for air avigation easements to provide approach protection for aircraft. While this statute is not couched in the words of an affirmative command to a city or county to condemn all property in the landing area, it is indicative of a legislative desire that political subdivisions use their authority to condemn property where it is needed for the proper operation of an airport.

Ralph L. Wright, S.Ed.

---