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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

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.

2 Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).

3 See United States v. Causby, 328 U.S. 256 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922); United States v. Cress, 243 U.S. 316 (1917); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1872); *In re* Forsstrom, 44 Ariz. 472, 38 P.2d 878 (1934); Nalon v. Sioux City, 216 Iowa 1041, 250 N.W. 166 (1933); Kentucky State Park Comm'n v. Wilder, 260 Ky. 190, 84 S.W.2d 38 (1935); Friendship Cemetery v. Mayor and City Council of Baltimore, 200 Md. 430, 90 A.2d 695 (1952); Forster v. Scott, 136 N.Y. 577, 32 N.E. 976 (1893); City of Denton v. Hunt, 235 S.W.2d 212 (Tex. Civ. App. 1950); Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221, 225-31 (1931); Note, 16 U. DET. L.J. 46 (1952).

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 664, 668-69 (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).

4 See generally Harvey, *Landowners' Rights in the Air Age: The Airport Dilemma*, 56 MICH. L. REV. 1313 (1958).

5 52 Stat. 973, 980 (1938), 49 U.S.C. § 1304 (1958).

States v. Causby[6] 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]

6 328 U.S. 256 (1946).

7 *Id.* at 264.

8 72 Stat. 739, 49 U.S.C. § 1301(24) (1958).

9 For a discussion of whether the federal regulatory system has preempted the field regarding flights in the approach area, see Allegheny Airlines v. Village of Cedarhurst, 238 F.2d 812, 815 (2d Cir. 1956).

10 Large airplanes in operation today require a glide path in a ratio of fifty feet in ground length to each one-foot drop in altitude. See Harvey, *supra* note 4, at 1314.

11 See generally *A Conference on Control and Protection of Airport Approaches*, 24 J. AIR L. & COM. 169 (1957); Rhyne, *Airport Legislation and Court Decisions*, 14 J. AIR L. & COM. 289 (1947).

12 United States v. Causby, 328 U.S. 256, 261 (1946). The decision in this case upheld the claimant's right to damages from the United States for a taking of certain of his property located near an airport because of a substantial interference with his use and enjoyment of it by low flights of U.S. military planes when taking off from or landing at the airport.

13 84 F.2d 755 (9th Cir. 1936), *cert. denied*, 300 U.S. 654 (1937).

14 United States v. Causby, 328 U.S. 256, 261, 262, 264-67 (1946).

15 Principal case at 419, 168 A.2d at 127.

16 55 Wash. 2d 400, 348 P.2d 664 (1960).

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.[17] 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.[18] 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.[19]

Because most of the suits are based either on the nuisance[20] or on the trespass[21] 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,[22] because the marking of a street on a city map indicates nothing more than an intention to take property in the future.[23] 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.[24] In the airport situation it is quite obvious that a

17 *But see* United States v. 48.10 Acres of Land, 144 F. Supp. 258 (S.D.N.Y. 1956); and United States v. 4.43 Acres of Land, 137 F. Supp. 567, 569 (N.D. Tex. 1956).

18 Ackerman v. Port of Seattle, 55 Wash. 2d 400, 409-11, 348 P.2d 664, 671-72 (1960).

19 *Id.* at 410, 348 P.2d at 671.

20 See City of Newark v. Eastern Airlines, 159 F. Supp. 750 (D.N.J. 1958); Burnham v. Beverly Airways, Inc., 311 Mass. 628, 42 N.E.2d 575 (1942); Smith v. New England Aircraft Co., 270 Mass. 511, 170 N.E. 385 (1930).

21 See Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d 245 (1942). *But see* City of Phoenix v. Harlan, 75 Ariz. 290, 255 P.2d 609 (1953); Brooks v. Patterson, 159 Fla. 263, 31 So. 2d 472 (1947); Crew v. Gallagher, 358 Pa. 541, 58 A.2d 179 (1948).

22 Philadelphia Parkway Opening, 295 Pa. 538, 145 Atl. 600 (1929); Hoffer v. Reading Co., 287 Pa. 120, 134 Atl. 415 (1926); Herrington's Petition, 266 Pa. 88, 109 Atl. 791 (1920); Rowan v. Commonwealth, 261 Pa. 88, 104 Atl. 502 (1918); Bush v. McKeesport, 166 Pa. 57, 30 Atl. 1023 (1895); Whitaker v. Phoenixville Borough, 141 Pa. 327, 21 Atl. 604 (1891); Volkmar Street, 124 Pa. 320, 16 Atl. 867 (1889); Forbes Street, 70 Pa. 125 (1871).

23 See Philadelphia Parkway, 250 Pa. 257, 261, 95 Atl. 429 (1915).

24 Philadelphia Appeal, 364 Pa. 71, 70 A.2d 847 (1950); Philadelphia Parkway,

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.[25] If it does not and the planes are allowed to use the airport, there is clearly an acquiesence 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.[26] 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.

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supra note 23. See also Miller v. Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951), where the court refused to apply the general rule regarding street plans to the drawing of a plan for the construction of parks or playgrounds. It was held that an ordinance establishing such a plan without providing for compensation was unconstitutional.

25 Ackerman v. Port of Seattle, 55 Wash. 2d 400, 409, 348 P.2d 664, 671 (1960).

26 PA. STAT. ANN. tit. 2, § 1563 (Supp. 1960).