

## Commentary

# Airspace Near Airport Runways: Private Property Rights Versus Rights of the Traveling Public

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### INTRODUCTION

As air travel steadily grows and airports nationwide seek to meet the increasing demands on their facilities through improvement and expansion projects, the issue of property rights to airspace near airport runways is becoming more significant. For decades, government and private landowners have made competing legal claims to such airspace. A recent state court decision brings this conflict to the forefront.

Contrary to longstanding federal property law and modern takings jurisprudence, last year the Nevada Supreme Court held that zoning regulations that restrict the height of new buildings near airport runways constitute a per se taking of airspace. (*See McCarran International Airport v. Sisolak*, 137 P.3d 1110 (Nev. 2006).) This case, and its larger implications, will be important to all airport owners, operators, and planners.

This commentary highlights the tension and the ongoing dispute between public and private interests over property rights to airspace near airport runways. First, it considers three questions that are fundamental to this inquiry: Who decides ownership of this

airspace? Who owns it? Who controls its use? Then it examines the applicability of recognized takings theories to alleged private airspace claims affected by regulations restricting building heights near airports.

Finally, it evaluates the differing approaches taken by courts in three recent takings cases involving airspace near airports—*Air Pegasus of D.C., Inc. v. United States*,<sup>1</sup> *Biddle v. BAA Indianapolis, LLC*,<sup>2</sup> and *McCarran International Airport v. Sisolak*.<sup>3</sup> Part IV concludes with a warning. Although the Nevada *Sisolak* case may be an aberration, the uncertainty it has produced should make any airport owner, operator, and planner wary.

### WHO DECIDES THE RULES, WHO OWNS, AND WHO CONTROLS THE AIRSPACE NEAR AIRPORT RUNWAYS?

#### Who Decides the Rules: The State or Federal Government?

Although state law ordinarily defines the property interests that qualify for constitutional protection,<sup>4</sup> this rule does not, and should not, apply to airspace near airport runways. The United States Supreme Court has long recognized that Congress has the

power to determine ownership of the nation's airspace without regard to applicable common law principles and to place any such airspace in the public domain when necessary to promote safe aviation.<sup>5</sup> While the Court cited no legal authority to support its recognition of this federal right other than statutory enactments by Congress itself, no other conclusion is tenable given the complex, extensive, and interdependent nature of the national air transportation system. Federal control over that system is absolute, as the Court has observed:

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.<sup>6</sup>

This centralization of control in the federal government ensures the availability of diverse, safe, and uninterrupted air transportation service, which is vital to the nation's security and economic well-being.

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1. 424 F.3d 1206 (Fed. Cir. 2005).

2. 860 N.E.2d 570 (Ind. 2007).

3. 137 P.3d 1110 (Nev. 2006).

4. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992).

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

6. *Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633-34

(1973) (quoting *Northwest Airlines, Inc. v. Minn.*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring)).

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Interference with the effective functioning of the national air transportation system would undoubtedly result if states have a separate ability to define property rights in airspace near airports. Consider the situation that might arise if a state recognized an expansive private property right extending to hundreds of feet of airspace in the immediate vicinity of airport runways. Airport owners and operators in that state would have to raise substantial sums, potentially billions of dollars, in order to ensure the safety of the public flying through this otherwise “private” airspace.<sup>7</sup> The general taxpayer would be on the hook if the government is required to pay property owners not to create a safety hazard or a nuisance, putting takings law on its head.

Airport owners and operators may attempt to cover these costs through revenue generated by greater landing fees, as the Nevada Supreme Court cavalierly suggested in *Sisolak*, but such alternatives may not be feasible for a variety of reasons. For example, low fare airlines may reduce or discontinue service to airports with unusually high landing fees because their customers may not willingly bear the increased expense. Airports may have to forego airspace acquisition and limit their existing and future services. Until the United States Supreme Court unequivocally declares that states have no power to define property rights in airspace near airports, airport owners, operators, and planners nationwide must prepare for the contingency that their own state courts might follow Nevada’s lead.<sup>8</sup>

#### Who Owns the Airspace?

Although private ownership of real property in common law included all airspace extending to the ends of the universe, that concept is not viable in a

modern world in which aviation serves as a cornerstone of commerce. The U.S. Supreme Court acknowledged this reality, and abrogated this “ancient” common law doctrine more than 60 years ago in *United States v. Causby*:

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.<sup>9</sup>

To avert such an interference with air commerce, the federal government has statutorily reserved to itself exclusive sovereignty over the nation’s airspace.<sup>10</sup>

In exercising this sovereignty, the federal government has conferred on every American citizen a “public right of transit through the navigable airspace.” (49 U.S.C. § 40103(a)(2)) “Navigable airspace,” as defined by federal law, is the “airspace above the minimum altitudes of flight prescribed by regulation,” including the “airspace needed to ensure safety in the takeoff and landing of aircraft.” (49 U.S.C. § 40102(a)(32)) Because Congress has placed the navigable airspace in the public domain, the public’s right to its use constitutes a servitude that is a preexisting limitation on title to all land, and the airspace above that land.<sup>11</sup> In other words, a landowner’s property rights include only the airspace below navigable limits.<sup>12</sup> Private property interests simply do not, as a general matter, exist in the navigable airspace of the United States.<sup>13</sup>

Congress has granted the Federal Aviation Administration sole authority

to regulate the use and scope of the navigable airspace in the public interest. (49 U.S.C. § 40103(b)(1)) When discharging this regulatory power, the FAA must act to maintain “safety as the highest priority in air commerce.” (49 U.S.C. § 40101(a)(1)) In pursuit of this goal, the FAA has declared that navigable airspace generally begins at an altitude of 500 feet above ground level in uncongested areas and at an altitude of 1,000 feet above the highest obstacle in congested areas. (14 C.F.R. § 91.119) By statutory and regulatory decree, however, navigable airspace includes airspace at lower altitudes when such airspace is necessary for the safe takeoff and landing of aircraft. (*See id.*, 49 U.S.C. § 40102(a)(32).) Federal law therefore defines navigable airspace as airspace that could begin at a very low altitude if doing so would advance the substantial federal interest in air safety.

By its assertion of sovereignty and guarantee of the public’s right of transit through the navigable airspace, federal law has necessarily preempted state recognition of private property rights in such airspace.<sup>14</sup> “[P]re-emption may be either express or implied, and is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.”<sup>15</sup>

Not only would the recognition of private property rights in any portion of the navigable airspace infringe upon the public’s right of flight, it would undermine the substantial federal interest in ensuring a safe and efficient national aviation system. Because the federally recognized public right to traverse federal navigable airspace must prevail over any state interest in defining property rights, the notion of private property rights in such airspace is untenable. With no private property interest in navigable airspace, a private

7. Airport owners and operators in Nevada now face this precise dilemma in the wake of *Sisolak*, an inverse condemnation action in which the state’s highest court disregarded the federal government’s authority to define airspace rights and held that an unqualified private property interest in airspace extends to 500 feet above ground level. *See Sisolak*, 137 P.3d at 1119–21.

8. The U.S. Supreme Court recently declined to consider this issue when it denied the petition for a writ of certiorari filed by McCarran International Airport and Clark County, Nevada, in *Sisolak*. *See McCarran Int’l Airport v. Sisolak*, 127 S.Ct. 1260 (Mem) (2007).

9. 328 U.S. at 260–61.

10. *See* 49 U.S.C. § 40103(a)(1) and historical notes. The federal government has asserted “complete and exclusive national sovereignty in the air space” overlying the United States since the passage of the Air Commerce Act of 1926, 44 Stat. 568, as amended by the Civil Aeronautics Act of 1938, 52 Stat. 973. *See Causby*, 328 U.S. at 260.

11. *See Griggs v. County of Allegheny*, 369 U.S. 84, 88 (1962); *see also Lucas*, 505 U.S. at 1030.

12. *See Claassen v. City & County of Denver*, 30 P.3d 710, 712–13 (Colo. App. 2000).

13. *Air Pegasus*, 424 F.3d at 121.9.

14. *Cf. Burbank*, 411 U.S. at 633 (finding preemption based on the

“pervasive nature of the scheme of federal regulation of aircraft noise”).

15. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).

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landowner near a runway should not be able to mount a successful takings claim because one of the predicates to the takings clause—private property—is missing.

#### Who Controls the Airspace?

A landowner has a right to make use of the airspace “superadjacent” to private property,<sup>16</sup> but that right is not absolute. Not only is superadjacent airspace subject to reasonable regulation through the government’s exercise of its police power,<sup>17</sup> the extent of its availability for use by a landowner is contingent upon its proximity to an airport runway. Until a landowner has a vested property interest in certain airspace, the nature and scope of the owner’s ability to use that airspace may change as airport needs evolve. Modifications to airport runways, for example, may increase or reduce the airspace available for private use depending on the location of impacted land.

When government limits the use of airspace to promote safety in the takeoff and landing of aircraft, two consequences follow: (1) The airspace above the land then becomes navigable airspace by definition, and (2) no private property interest can exist in such airspace.

The FAA has adopted a detailed regulatory scheme to ensure the safe use of the nation’s airspace in the public interest.<sup>18</sup> To promote safety in the takeoff and landing of aircraft, the FAA’s regulations require that the owner or developer of a project near an airport seek FAA determination as to whether the proposal will create an aviation hazard within the navigable airspace.<sup>19</sup> An object constitutes an obstruction to aviation if it exceeds certain height thresholds or penetrates imaginary surfaces determined by reference to an airport runway.<sup>20</sup> Airport authorities who receive federal airport

grants must, among other things, provide written assurance that they will clear airspace to protect against existing and future airport hazards, and will enact reasonable zoning laws (e.g., height restrictions) that only allow land uses near airports that are compatible with normal airport operations.<sup>21</sup> Through this process, local authorities facilitate the FAA’s fulfillment of its public mandate to ensure safe aviation.

Airport-related height limitations enacted by a local government pursuant to its police power are very similar to common building setbacks—both promote the public’s health, safety, and general welfare by establishing buffer zones between public easements and private structures to facilitate the safe operation of transportation vehicles. Like building setbacks, these regulations minimize the public’s risk of bodily harm and property damage by creating a safety buffer between flying aircraft and structures on the ground. Neither a building setback nor an airport zoning height regulation authorizes the public use of private property. Just as a building setback does not invite motor vehicles to drive across a home owner’s front yard, an airport zoning height regulation does not invite aircraft to traverse any airspace overlying private property.

The only difference between them, which has no legal significance, is that a building setback creates a “horizontal” safety buffer on the ground, while an airport zoning height regulation creates a “vertical” safety buffer in the sky. Because these two types of setbacks are functionally indistinguishable, the same constitutional standards must apply to both. Courts across the country have long recognized that government may require building setbacks through the noncompensable exercise of its police power to address public

safety and other concerns.<sup>22</sup> No legal basis exists for treating airport zoning height regulations any differently.

#### THE TAKINGS CLAUSE AND AIRSPACE NEAR AIRPORTS

When private property rights in airspace do exist, they enjoy protection from unreasonable and excessive government interference under the takings clauses of federal and state constitutions. Not only does the Supreme Court’s takings jurisprudence provide the rules that govern takings claims under federal law, it has long set the standard for state takings law. While state takings law can be more protective of property rights than federal law, most states simply adopt federal taking standards.

In *Lingle v. Chevron U.S.A. Inc.* (544 U.S. 528 (2005)), the Court summarized the four types of government actions that may result in takings liability. A landowner may only claim: (1) a regulatory taking based on a factual analysis that balances the purposes and economic impacts of the government’s regulatory action; (2) a total deprivation of economically viable use; (3) a physical taking based on a permanent physical occupation; or (4) a land use exaction. (*See id.* at 538.) If landowners near airports successfully establish the existence of private property rights in airspace near runways, it is important to see if any of these four takings theories support a claim for just compensation should either airport use or airport zoning regulations affect the private use of that airspace.

#### Regulatory Takings Jurisprudence

**I. The Penn Central Test.** The analytical approach promulgated in *Penn Central Transportation Co. v. City of New York* (438 U.S. 104 (1978)), governs the vast majority of cases in which airport zoning regulations are alleged to have caused a taking. *Penn Central* is particu-

16. See *Causby*, 328 U.S. at 265.

17. See *Penn Central*, 438 U.S. at 130–31.

18. See 14 C.F.R. pt. 77 (objects affecting navigable airspace).

19. See 14 C.F.R. §§ 77.1, 77.11; see also 49 U.S.C. § 44718(a) (adequate public notice of proposed construction is necessary to promote “safety in air commerce” and “the efficient use and preservation

of the navigable airspace and of airport traffic capacity at public-use airports”).

20. See 14 C.F.R. §§ 77.23, 77.25. The FAA retains discretion to determine that a structure would not pose a hazard to aviation, however, even if it exceeds specified height thresholds or penetrates applicable imaginary surfaces.

21. See 49 U.S.C. § 47107(a)(9) and (10); 14 C.F.R. § 77.3. The FAA has issued an advisory circular for airport-related zoning. See FAA, A Model Zoning Ordinance to Limit Height of Objects Around Airports, Advisory Circular 150/5190-4A (Dec. 14, 1987).

22. See, e.g., *Gorieb v. Fox*, 274 U.S. 603, 609 (1927); *Echevarrieta v. City of Rancho Palos Verdes*,

103 Cal.Rptr.2d 165, 171 (Cal.App. 2001); *Shriver v. City of Okoboji*, 567 N.W.2d 397, 404 (Iowa 1997); *Robinson v. City of Seattle*, 830 P.2d 318, 331–32 (Wash. 1992).

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larly helpful because the effect of the landmark preservation law at issue there is identical to the effect of airport zoning regulations—prohibiting the private use of airspace to prevent aviation hazards while permitting gainful use of the remainder of the parcel.

In *Penn Central*, the Court considered whether restrictions imposed by New York City's landmark preservation law on the use of airspace above the historic Grand Central Terminal constituted a taking. An application to construct an office tower in excess of 50 stories above the terminal building was denied, but the landmark preservation law did not impact any existing land use nor bar all future potential land uses. Similarly, airport zoning regulations typically limit the use private landowners can make of the airspace over their land in order to promote the public interest, while preserving their rights to continue existing or possibly different economically viable land uses.

*Penn Central* confirmed that airspace is not a separate segment of property for takings purposes. The "parcel as a whole," which includes its subsurface, surface, and superadjacent airspace, is the relevant property interest for analyzing whether a land use regulation has effected a taking. (*See id.* at 130–31.) Landowners cannot prove a taking merely by demonstrating the government regulation deprived them of the opportunity to exploit superadjacent airspace, as the *Penn Central* decision explains:

[T]he submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is simply untenable. Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights, but also in approving those prohibiting both the subjacent, and the lateral, development of particular parcels. (*See id.* at 130 (citations omitted).)

Land use regulations, like height restrictions near runways, traditionally "place limits on the property owner's right to make profitable use of some segments of his property" without causing a compensable event.<sup>23</sup> Regardless of whether a property right exists in airspace over private land, a compensable taking cannot occur as a matter of law when airport-related zoning regulations have allegedly interfered with only a portion of the private property rights (i.e., airspace), and have not deprived the landowner of all economically viable use of property (i.e., the land and the private airspace beneath the navigable airspace).

*Lingle* recently confirmed that *Penn Central* provides the sole test for determining whether a taking has occurred in "non-per se" cases. In doing so, *Lingle* reiterated that the takings analysis required by *Penn Central* balances various factors, including the regulation's economic impact on the landowner, the extent to which the regulation has interfered with the landowner's reasonable investment-backed expectations, and the character of the government action. (*See Lingle*, 544 U.S. at 538–39.)

*Penn Central* and *Lingle* evaluate land use regulations based on: (1) the magnitude of the landowner's regulatory burden—whether the regulation deprived the property of all viable economic use; (2) the character of the regulatory burden on property rights—whether the government has a valid reason for its regulatory action; and (3) the distribution of the regulatory burden among landowners—whether the government has "singled out" a landowner. (*See id.* at 538–39, 542–44.)

In the context of airport-related zoning, each of these considerations weighs heavily in the government's favor and against a finding of takings liability. Such regulations ordinarily allow at least some economically viable

use and value of the impacted property to remain, indisputably advance a substantial public safety purpose, and apply to all landowners within the jurisdiction of the local government, even though the height limitations imposed by them may vary by proximity to airport runways.

**II. The Lucas Test.** A claim that airport zoning regulations have resulted in the taking of airspace should not be subject to a *Penn Central* analysis when the challenged regulations are alleged to have permanently precluded all development or economic use of the property. The Court recently explained this rule in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency* (535 U.S. 302 (2002)), which it formulated more than a decade ago in *Lucas v. South Carolina Coastal Council* (505 U.S. 1003 (1992)):

[O]ur holding [in *Lucas*] was limited to "the extraordinary circumstance when no productive or economically beneficial use of land is permitted." The emphasis on the word "no" in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%. Anything less than a "complete elimination of value," or a "total loss," the Court acknowledged, would require the kind of analysis applied in *Penn Central*. (*Id.* at 330.)

Economically viable use exists, and no taking occurs, when at least some economic value remains following the government's regulatory action.<sup>24</sup> Liability arises under *Lucas* only in the "relatively narrow" category of "total regulatory takings" cases.<sup>25</sup>

After *Lucas*, the determinative question for takings purposes is whether airport zoning regulations have deprived all economically viable uses of the subject property as a whole.<sup>26</sup> The *Lucas* test only applies in the highly unusual case in

23. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497–98, 500 (1987).

24. See *Palazzolo v. R.I.*, 533 U.S. 606, 628–32 (2001).

25. *Lingle*, 544 U.S. at 538.

26. See *Tahoe-Sierra*, 535 U.S. at 326–327, 331–332.

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which regulatory restrictions on the use of airspace effectively bar any beneficial use of the underlying land. One most obvious example is where airport zoning regulations prohibit all development on land near the end of a runway in order to protect the public in the event of an airplane crash. Because a parcel is viewed in its entirety for takings purposes, anything short of such a total deprivation requires a *Penn Central* analysis.

#### Physical Takings Jurisprudence

**I. The *Causby* Test.** The mere passage of aircraft through airspace is insufficient to effect a taking. Rather, as the Court initially held in *United States v. Causby* and later reaffirmed in *Griggs v. County of Allegheny*, a taking results only when aircraft overflights are so low and so frequent that they have destroyed or at least substantially impaired an existing land use.<sup>27</sup> Such a taking is not of the airspace through which the aircraft fly, but of the vested property right in the existing land use on the ground. If both prongs of this *Causby* test are not satisfied, aircraft overflights do not amount to a taking.<sup>28</sup> Takings jurisprudence treats the use of airspace differently than the use of the land—the general rule is that, “unlike a government invasion of the surface land itself, an invasion of airspace above surface land does not per se constitute a taking.”<sup>29</sup>

Because the “airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment,” takings based on aircraft overflights are the rare exception rather than the rule.<sup>30</sup> The Court found a taking in *Causby* and *Griggs* only because the effects of low and frequent aircraft overflights destroyed the landowners' existing land uses (excessive noise destroyed the *Causby* landowners' existing commercial chicken business and the *Griggs* landowners' existing residential use).<sup>31</sup>

The Court later reiterated in *Penn Central* that the defining characteristic of the takings found in both cases was the substantial interference with existing land uses due to aircraft overflights.<sup>32</sup> In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court noted that aircraft flights through superadjacent airspace resulted in a taking in *Causby* only because their effects were so extreme that they essentially amounted to an invasion of the underlying land.<sup>33</sup> However, a mere diminution in property value caused by aircraft overflights is, by itself, insufficient to establish a taking under the *Causby* test.

It is noteworthy that between the decisions in *Causby* and *Griggs*, Congress broadened the definition of “navigable airspace” so that additional airspace was added to the public domain. The taking found in *Causby* was the result of frequent aircraft overflights below the navigable airspace, as then defined, that destroyed the existing use of the underlying land as a commercial chicken farm. All that *Griggs* held, by contrast, was that a taking may occur when aircraft substantially impair existing surface land uses as they fly through the navigable airspace during takeoff and landing.<sup>34</sup> *Causby* and *Griggs* should not be read as transforming public airspace into private property when the effects of aircraft overflights destroy or substantially impair existing uses of the surface below.

Despite having a place in the Court's takings jurisprudence for more than a half-century, the continued viability of the *Causby* test is presently uncertain. When the Court recently summarized the types of government actions that may result in takings liability in *Lingle*, it neither mentioned *Causby* nor *Griggs* nor acknowledged the existence of a special category of takings by aircraft overflights.<sup>35</sup> That significant omission suggests that a separate test to ascertain whether aircraft overflights have effected a taking may no longer exist. In the absence of a viable

*Causby* test, *Penn Central* governs alleged takings by aircraft overflights.

**II. The *Loretto* Test.** Even a cursory review of *Loretto v. Teleprompter Manhattan CATV Corp.* (458 U.S. 419, 102 S. Ct. 3164 (1982)), reveals that its theory of per se takings liability has no application to cases in which airport zoning regulations are alleged to have resulted in an airspace taking. In *Loretto*, a state statute expressly required a landlord to permit a cable television company to enter and install its cable facilities on the property. Acting pursuant to this statutory authority, the defendant cable television company physically attached plates, boxes, wires, bolts, and screws to the roof and exterior wall of the plaintiff landlord's building. Airport zoning regulations (e.g., height limitations), by contrast, merely control land use without authorizing or compelling the physical invasion or occupation of private property.

While observing that not every physical invasion results in a taking, *Loretto* determined that the invasion authorized by the government in that case was a permanent physical occupation that amounted to a per se taking. *Loretto* did not hold that all landlords could sue for a taking based on the mere passage of the law, regardless of whether a cable television company ever sought to install its facilities on their premises. Such a claim arose only when the permanent physical occupation occurred.

*Loretto* was a “very narrow” affirmation of “the traditional rule that a permanent physical occupation of property is a taking” because it deprives an owner of the fundamental right to exclude.<sup>36</sup> The prerequisite to per se takings liability under *Loretto* was a governmentally authorized permanent physical occupation of land, not police power restrictions on land use. Indeed, *Loretto* recognized a critical analytical “distinction between a permanent

27. See *Causby*, 328 U.S. at 266; *Griggs*, 369 U.S. at 87–90. In other words, the Court required a factual inquiry to ascertain whether the impact of aircraft overflights on the existing underlying land uses was significant enough to amount to a taking.

28. See *Causby*, 328 U.S. at 266.

29. See *City of Austin v. Travis County Landfill Co.*, 73 S.W.3d 234, 242 (Tex. 2002) (quoting *Brown v. U.S.*, 73 F.3d 1100, 1104 (Fed.Cir.1996)(italics supplied by court)).

30. See *Causby*, 328 U.S. at 266.

31. See *id.* at 259; *Griggs*, 369 U.S. at 87.

32. See *Penn Central*, 438 U.S. at 135.

33. 458 U.S. 419, 430–31 (1982).

34. See *Griggs*, 369 U.S. at 88 (“[f]ollowing the decision in the *Causby* Case, Congress redefined ‘navigable airspace’ to mean ‘airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter,

and shall include airspace needed to insure safety in take-off and landing of aircraft”).

35. See *Lingle*, 544 U.S. at 528, 536–40.

36. *Loretto*, 458 U.S. at 435 & n. 12, 439 n. 17, 441.

Three recent takings cases illustrate the tension between public safety concerns and claims to private property rights in the airspace through which the public flies.

physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property.<sup>37</sup> To be a *Loretto* per se physical invasion taking, a regulation must result in a “permanent physical occupation,” where the question of “whether a permanent physical occupation has occurred presents relatively few problems of proof [because] [t]he placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute.”<sup>38</sup> A height restriction near an airport runway is not an invasion or an occupation that results in a *Loretto* per se taking, but rather is a regulation of the use of property requiring the multifactor factual analysis outlined in *Penn Central*.

Not only has the Court reiterated the limited application of the per se takings doctrine during the 25 years since it decided *Loretto*,<sup>39</sup> it has recently warned lower courts not to expand the scope of per se takings liability indiscriminately.<sup>40</sup> In doing so, the Court emphasized that the doctrine applies only to government action that results in the permanent physical occupation of land, the permanent denial of all economically viable use of property, or an unconstitutional land use exaction.<sup>41</sup> Any lesser interference with private property rights is not appropriate for per se treatment.<sup>42</sup> *Penn Central* provides the “default rule” that applies in those lesser interference cases.<sup>43</sup>

*Loretto* should be largely irrelevant to takings claims based on airport-related zoning because that decision never contemplated that land use regulations enacted pursuant to the police power would result in a taking when they merely serve to preclude the use of airspace in a manner detrimental to the public’s health, safety, or general welfare. The extension of the type of

per se taking recognized in *Loretto* to circumstances of airport safety is inappropriate because the government cannot afford to regulate by purchase on matters of such public importance.<sup>44</sup> This fundamental principle has been the foundation of takings jurisprudence for nearly a century.<sup>45</sup> It therefore should not be surprising that the Supreme Court has never found a per se taking under *Loretto* where, as in the case of regulating airspace near airport runways, public safety was at issue.

**III. The Nollan/Dolan Tests.** Local governments commonly require that a landowner convey an avigation easement as a condition of development approval near an airport. Although the Court has never considered that specific type of easement, it did recognize in *Nollan v. California Coastal Commission* (483 U.S. 825, 107 S.Ct. 3141 (1987)), and *Dolan v. City of Tigard* (512 U.S. 374, 114 S.Ct. 2309 (1994)), that government may compel a landowner to convey an easement to the public as a condition of development approval when such a dedication would ameliorate problems that could be caused by the proposed project.

*Nollan* considers whether a nexus exists between the condition and the proposed land use; *Dolan* considers whether an exaction is roughly proportional to the projected impact of the proposed land use. Consistent with *Nollan* and *Dolan*, requiring a landowner to grant the public an avigation easement as a prerequisite to developing land near an airport generally could not be an unconstitutional exaction, because such a condition directly advances a legitimate state interest; the condition prevents the creation of a public nuisance in the form of a hazard to arriving and departing aircraft, and is a direct response to the aviation hazards posed by the proposed land use.

#### RECENT AIRPORT TAKINGS CASES

Within the past 25 years, lower appellate courts have been remarkably consistent in their approach to airspace-related takings claims. They have regularly rejected takings claims based on aircraft overflights that did not satisfy the *Causby* test and that did not involve the destruction or substantial impairment of existing land uses.<sup>46</sup> These courts also have rejected similar claims arising out of zoning laws that regulated land use near airports.<sup>47</sup>

Three recent takings cases illustrate the tension between public safety concerns and claims to private property rights in the airspace through which the public flies. Consistent with well-settled takings jurisprudence, the Federal Circuit in 2005 found no taking based on the inability to use navigable airspace in *Air Pegasus of D.C., Inc. v. United States* (424 F.3d at 1206), and the Indiana Supreme Court in 2007 determined that aircraft noise had not caused a taking in *Biddle v. BAA Indianapolis, LLC* (860 N.E.2d at 570). In stark contrast to the well-reasoned analyses of *Air Pegasus* and *Biddle*, and contrary to the overwhelming weight of modern national precedent, in 2006 the Nevada Supreme Court concluded that height limitations imposed by airport zoning regulations effected a *Loretto* per se taking in *McCarran International Airport v. Sisolak* (137 P.3d at 1110).

#### *Air Pegasus of D.C., Inc. v. United States*<sup>48</sup>

The pertinent issue addressed by the Federal Circuit in *Air Pegasus* was whether a heliport operator in Washington, D.C., had a cognizable property interest in the navigable airspace above the leased premises from which it conducted business. The operator did not fly helicopters, but rather provided a location from which helicopters could ar-

37. See *id.* at 430.

38. See *id.* at 437.

39. See Lingle, 544 U.S. at 538; F.C.C. v. Fla. Power Comm’n, 480 U.S. 245, 251 (1987).

40. See *Tahoe-Sierra*, 535 U.S. at 342.

41. See *id.* at 321-25 & n.18, 330, 337; Lingle, 544 U.S. at 538.

42. See *Tahoe-Sierra*, 535 U.S. at 322-23.

43. See *id.* at 332, 341-42; Lingle, 544 U.S. at 538.

44. See *Tahoe-Sierra*, 535 U.S. at 335.

45. See *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

46. See, e.g., *City of Austin v. Travis County Landfill Co.*, 73 S.W.3d 234 (Tex. 2002); *Thompson v. City & County of Denver*, 958 P.2d 525 (Colo. App. 1998); *Richmond, Fredericksburg &*

*Potomac R.R. Co. v. Metro. Wash. Airports Auth.*, 468 S.E.2d 90, 97 (Va. 1996); *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717 (Wyo. 1985).

47. See, e.g., *Harris v. City of Wichita*, 862 F.Supp. 287 (D.Kan. 1994), *aff’d*, 74 F.3d 1249 (10th Cir. 1996); *Patzau v. N.J. Dep’t of Transp.*, 638 A.2d 866 (N.J. Super. App.Div. 1994); *Fitzgarrald v. City of Iowa City*, 492 N.W.2d 659 (Iowa 1992); *Kimberlin v. City of Topeka*, 710 P.2d 682 (Kan. 1985);

*Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717 (Wyo. 1985). For older examples, see, e.g., *La Salle Nat’l Bank v. County of Cook*, 340 N.E.2d 79 (Ill.App. 1975); *Vill. of Willoughby Hills v. Corrigan*, 278 N.E.2d 658 (Ohio 1972); *Harrell’s Candy Kitchen, Inc. v. Sarasota-Manatee Airport Auth.*, 111 So.2d 439 (Fla. 1959).

48. 424 F.3d 1206 (Fed. Cir. 2005).

The question presented to the Indiana Supreme Court in *Biddle* was whether noise generated by aircraft flying over or near residential property resulted in a taking under the Fifth Amendment.

rive and depart; therefore, the business functioned much like an airport.

Following the events of September 11, 2001, the FAA used its emergency powers to shut down virtually all commercial air traffic throughout the United States. Although the FAA permitted most commercial aviation ports to resume flights within days, its rules for the Washington, D.C., area prohibited the heliport from ever reopening. Within a year, the heliport operator abandoned its lease and formally closed its 10-year-old business because of the resulting economic hardship. The operator claimed a taking based, among other things, on the denial of an asserted right of access to the navigable airspace from its heliport.

Even though the heliport operator previously enjoyed access to the navigable airspace, the Federal Circuit rejected this claim of a right of access based on the federal government's sovereignty over the nation's airspace. Citing the federal government's "long exercised dominant control over the navigable airspace in regulating the public right of transit," the court determined that "background principles of long-standing federal property law indicate that there is *no private property right in the navigable airspace of the United States*."<sup>49</sup> In the absence of such a property right, the heliport operator could have no takings claim as a matter of law.

*Biddle v. BAA Indianapolis, LLC*<sup>50</sup>

The question presented to the Indiana Supreme Court in *Biddle* was whether noise generated by aircraft flying over or near residential property resulted in a taking under the Fifth Amendment. The plaintiff landowners resided in a subdivision known as Hawthorne Ridge, which was less than three miles southwest of the Indianapolis International

Airport. Arriving and departing aircraft, including large passenger jets and cargo planes, flew over or near Hawthorne Ridge at altitudes ranging from 1,300 to 4,800 feet. The landowners alleged that noise from these flights disturbed the use and enjoyment of their property and thus effected a taking. They complained that the overflights had impaired their ability to sleep, talk, watch television, and host outdoor parties, and caused them to suffer as much as a 33 percent diminution in their property values. The trial court found that no taking occurred as a matter of law and entered summary judgment in favor of the defendant airport owner and operator.

Although the landowners claimed a taking solely by aircraft overflights, the Indiana Supreme Court undertook an analysis that combined the regulatory teachings of *Lingle* with a modified version of the *Causby* test. The court noted that *Lingle*'s modern regulatory takings approach provides an "adequate tool for evaluating takings claims generally," but explained that the *Causby* test as refined by more recent decisions of the Court of Federal Claims is "specially tailored to the task of identifying government takings based on aircraft noise."<sup>51</sup> The courts in such cases have recognized a presumption that aircraft overflights within the navigable airspace do not amount to a taking unless their impact on private property is "so severe as to amount to a practical destruction or a substantial impairment of it."<sup>52</sup> The *Biddle* court concluded that a *Lingle* analysis, coupled with this presumption, offers "a more precise standard for measuring the degree of harm, one that will result in more consistent decisions."<sup>53</sup>

Based on these principles, the court held that aircraft noise had not effected a taking as a matter of law. First, the aircraft overflights occurred at altitudes

several times higher than the downward reach of the navigable airspace. Second, noise produced by aircraft flying at altitudes ranging between 1,300 and 4,800 feet, while potentially considerable, did not amount to a practical destruction or substantial impairment of the subject properties. Third, the landowners still made many valuable uses of their properties despite the noise. On these grounds, the court affirmed the entry of summary judgment against the landowners in its entirety.

This outcome should not have surprised the landowners. Even though it did not employ a traditional *Causby* analysis, the court correctly did not find a taking merely because aircraft flew over private property. Rather, in accord with *Causby*, the court found no taking through a factual analysis that assessed the nature and extent of the effects (i.e., noise) of the aircraft overflights on the subject properties. Its conclusion is likewise consistent with the ad hoc factual inquiry required by *Penn Central* and *Lingle*.

*Biddle* suggests the tenuousness of *Causby* as a distinct test in the case of aircraft overflights. The Indiana Supreme Court would have been compelled to reach the same conclusion in *Biddle* whether it applied the traditional *Causby* test or *Lingle*'s clarification of the *Penn Central* test. By incorporating the *Causby* test within *Lingle*'s regulatory takings approach, the court is now moving toward a single test applicable to all non-per se cases—i.e., *Lingle*'s restatement of the familiar *Penn Central* multi-factor balancing analysis. The U.S. Supreme Court appears to have intended such a development when it omitted any discussion of *Causby* while summarizing in *Lingle* all the types of government actions that may result in takings liability.

49. See *id.* at 1218 (emphasis added).

50. 860 N.E.2d 570 (Ind. 2007).

51. See *id.* at 577, 579.

52. See *id.* at 579 (quoting Aaron v. U.S., 311 F.2d 798, 801 (Ct.Cl. 1963)).

53. See *id.* at 580.

The linchpin of the *Sisolak* holding was the court's assumption that Sisolak had a state-derived vested property interest in the airspace overlying his land up to 500 feet.

*McCarran International Airport v. Sisolak*<sup>54</sup>  
The central question considered by the Nevada Supreme Court in *Sisolak* was whether airport zoning regulations enacted by Clark County, Nevada, the owner and operator of McCarran International Airport, effected a per se taking of the airspace above private property located within the critical departure area of an airport approach zone. Sisolak owned three contiguous parcels that totaled 10 acres nearly a mile from the end of a runway at McCarran, the primary commercial airport serving southern Nevada and one of the nation's busiest airports. Sisolak claimed that the enactment of airport-related zoning regulations resulted in the per se taking of airspace privately owned by him. Sisolak acknowledged that these restrictions on land use were valid exercises of the police power that did not deprive him of all economically viable use of his property.<sup>55</sup> The trial court agreed with Sisolak and found a per se taking as a matter of law, resulting in a total just compensation award in excess of \$16 million.

Consistent with FAA regulations, the challenged regulations placed all property in the Las Vegas Valley within at least one of four imaginary surfaces or zones (runway approach, transition, horizontal, and conical), depending on its proximity to an airport runway. (See 14 C.F.R. § 77.25.) These surfaces did not constitute flight paths or otherwise determine the location of aircraft in the sky, but rather were merely height thresholds that established a safety buffer between aircraft flying overhead and objects on the ground.

Clark County generally authorized structures to exceed these thresholds if the FAA found that they would not create hazards to aviation. Although the regulations imposed the most burdensome height thresholds within the runway ap-

proach zone, and the least burdensome within the conical zone, they permitted construction anywhere to a height of at least 35 feet and even authorized variances for nonconforming future uses. Sisolak's property was located within the horizontal zone at the time he acquired it, but later came within the runway approach zone through a subsequent regulatory enactment.

Sisolak purchased the property solely for investment purposes. Prior to his purchase, Clark County had approved the construction of a go-kart facility on two of the parcels, which comprised one-half of the subject property. The owner at the time conveyed a perpetual avigation easement to Clark County in satisfaction of a condition of approval. This avigation easement granted the public a permanent right of flight at all altitudes over the encumbered portion of the property, subject only to its vested uses by the grantor and its successors in interest, but no structures were ever built under this development plan. Thereafter, while Sisolak possessed the property, Clark County approved a development plan that included a four-story, 600-room resort hotel-casino, with a building height of 66 feet.<sup>56</sup>

The FAA conducted an aeronautical study and found that, while it exceeded obstruction standards, this proposed development would not pose an aviation hazard at such a building height. The FAA never stated that a taller structure would pose such a hazard and Clark County never stated that it would reject a plan that proposed a taller structure. Clark County's approval ultimately lapsed, however, because the developer failed to commence construction within the required one-year period. The property remained undeveloped desert land, but indisputably had substantial economically viable use and value.

On these facts, the Nevada Supreme Court held that Clark County had ef-

fected a "Loretto-type per se regulatory taking" of all airspace more than 66 feet above ground level.<sup>57</sup> Although it purported to base its analysis on *Loretto*, the court actually formulated a two-prong test, never previously recognized by any appellate court, to find airspace takings liability. Under this novel approach, airport-related zoning regulations effect a *Loretto*-type per se regulatory taking if: (1) they authorize aircraft to physically invade airspace overlying private property at altitudes below 500 feet, and (2) sufficient evidence exists that aircraft have made such an invasion. The court determined that both of these prongs were satisfied in this case.

The linchpin of the *Sisolak* holding was the court's assumption that Sisolak had a state-derived vested property interest in the airspace overlying his land up to 500 feet.<sup>58</sup> Not only did the court purport to find this private property right in state statutes that were, in fact, silent on the issue, it misconstrued *Causby* and *Griggs* to find that such a right also existed under the federal regulatory definition of the navigable airspace. The court inexplicably overlooked that the airspace over Sisolak's property was part of the nation's navigable airspace as defined by federal law because it was necessary for the safe takeoff and landing of aircraft and thus was within the public domain and not subject to private ownership.<sup>59</sup> Despite the fact that the *Sisolak* court acknowledged the extraordinary protections that state constitutional law provides private property owners in Nevada, such reliance on state law is irrelevant in this case because that airspace was in the public domain and not available for private ownership.<sup>60</sup>

After having found a private property right in the airspace over Sisolak's property, the court then went on to hold that Clark County's airport zoning regulations

54. 137 P.2d 1110 (Nev. 2006).

55. Since 1955, Clark County had supplemented the traditional zoning laws governing the subject property through various airport zoning regulations. See *id.* at 1114. Long before the landowner acquired the subject property, the Nevada legislature declared aviation hazards a public nuisance and granted Clark County police powers to adopt reg-

ulations that preclude their creation and thereby advance the public's health, safety, and general welfare without effecting a taking. See NRS 497.040.

56. Clark County officials never denied a development application submitted while Sisolak possessed the property. See *id.* at 1116.

57. See *id.* at 1124-25, 1130.

58. See *id.* at 1119-21.

59. See 49 U.S.C. § 40102(a)(32).

60. See *Sisolak*, 137 P.2d at 1120-21. Also, without considering whether the necessary nexus even existed, the court simply concluded that the avigation easement granted no property rights to Clark County because its conveyance was an unconstitutional exaction under *Nollan*. In any event, contrary

to its plain language, the court further concluded that the easement merely precluded liability for noise.

The *Sisolak* decision took an approach that was diametrically opposite of the Nevada court's analysis in an airspace takings case decided less than two years earlier.

granted aircraft "permanent permission" to traverse Sisolak's airspace at altitudes below 500 feet.<sup>61</sup> By their plain terms, none of Clark County's regulations authorized, directed, or invited aircraft to invade the airspace over Sisolak's property or anywhere else. They were classic examples of how, since the *Euclid* decision 80 years earlier,<sup>62</sup> government exercises its police power to control land uses in the public interest without incurring any duty to compensate affected property owners.

The *Sisolak* court found that evidence existed of aircraft overflights of the subject property at altitudes below 500 feet.<sup>63</sup> Such evidence was limited to three documents that merely raised the possibility that an unknown number of aircraft may have occasionally flown over the subject property at unknown altitudes below 500 feet. While this evidence was certainly insufficient to establish a *Causby* taking, particularly given that no evidence existed that aircraft overflights destroyed or substantially impaired Sisolak's existing land uses (there were no such uses), the court decided that it was sufficient to meet *Loretto's* requirements. In response to the dissenters who appropriately argued that *Penn Central* governed Sisolak's claims, the Nevada Supreme Court concluded its liability analysis by holding that the takings clause of the state constitution, which was virtually identical to the federal constitution, compelled the same result.<sup>64</sup>

The *Sisolak* decision took an approach that was diametrically opposite of the Nevada court's analysis in an airspace takings case decided less than two years earlier. In *County of Clark v. Hsu*,<sup>65</sup> the Nevada court rejected the notion that *Loretto* governed cases in which the same airport zoning regulations allegedly

took airspace.<sup>66</sup> It concluded that the use of per se takings principles in such cases was "not in harmony with the laws of this state," and "embrace[d] the modern trend that airport height zoning ordinances, as a valid exercise of police power, are not the definitional equivalent of a per se physical taking."<sup>67</sup> The court determined that Penn Central's fact-based, multifactor balancing approach, rather than the per se principles applied by the trial court, provided the rules of law that governed the landowners' claims. In so holding, the court found, completely contrary to its later conclusion in *Sisolak*, that Clark County's airport zoning regulations did not authorize aircraft to use or occupy private property and that no taking had occurred.<sup>68</sup> Because the landowners in *Hsu* had not obtained a final decision from Clark County regarding the subject property's development potential (i.e., the landowners had not submitted, and Clark County had not rejected, a meaningful development plan and variance application), the court ordered a remand for the limited purpose of allowing them the opportunity to ripen their claims.<sup>69</sup>

There are several potential explanations for the conflicting decisions in *Hsu* and *Sisolak*. First, the justices of the Nevada Supreme Court are chosen for six-year terms by popular election. (See Nev. Const., art. 6, § 3.) As a result of an intervening election, the bench that decided *Sisolak* was substantially different than the one that decided *Hsu*. Second, because of the widespread public outcry that followed *Kelo v. City of New London* (545 U.S. 469 (2005)), the court may have viewed *Sisolak* with a pro-landowner philosophy. The court even observed in *Sisolak* that *Kelo* "emphasized that

a state may place stricter standards on its exercise of the takings power through its state constitution or state eminent domain statutes."<sup>70</sup> Third, the court may have fundamentally misunderstood applicable takings principles. This possibility appears the most remote because the court's own takings jurisprudence (e.g., the *Hsu* case) had long been consistent with lower appellate court and United States Supreme Court precedents. Regardless of the reason, however, takings law as applied in Nevada is now inconsistent and "out of step" with takings law as applied nationwide at the federal and state levels.

#### CONCLUSION

*Sisolak* exemplifies the concern expressed by Justice Harry Blackmun 25 years ago in his *Loretto* dissent. Justice Blackmun aptly observed at that time:

[H]istory teaches that takings claims are properly evaluated under a multifactor balancing test [i.e., *Penn Central*]. By directing that all "permanent physical occupations" automatically are compensable, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner," the Court does not further equity so much as it encourages litigants to manipulate their factual allegations to gain the benefit of its per se rule.<sup>71</sup>

If the Nevada Supreme Court was vulnerable in *Sisolak* to such a litigation strategy, even after it had earlier embraced a body of mainstream takings jurisprudence over many years, then other state appellate courts are similarly at risk. Airport owners, operators, and planners throughout the United States must prepare for this possibility, because any jurisdiction may be next.

61. See *id.* at 1125.

62. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

63. See *Sisolak*, 137 P.3d at 1124-25, 1130.

64. See *id.* at 1126-27, 1131, 1134. One of the dissenters observed that the majority's "broad statement" that the "eminent domain provision [of the Nevada Constitution] was intended to give landowners greater protection than that given under the Fifth Amendment of the United States Constitution . . . contradicts over a century of precedent." See *id.* at

1131; see also Nev. Const., art. 1, § 8(6).

65. 2004 WL 5046209 (Nev. Sept. 30, 2004), *cert. denied*, 544 U.S. 1056 (Mem) (2005). The court decided *Hsu* through an unpublished order of reversal and remand, which was not precedent under Nevada law, and denied Clark County's motion to publish without explanation. See Nev.Sup.Ct.R. 123.

66. For an extensive analysis of *Hsu*, see Jan G. Laitos, *Height Restrictions Near Airports: Physical*

*Takings, Regulatory Takings, or Police Power Exercises?* LAND USE LAW & ZONING DIGEST, Vol. 55, No. 9, at 3 (Sept. 2003).

67. See *Hsu*, 2004 WL 5046209, at \*13.

68. It is also noteworthy that the *Hsu* court found inapplicable the same three out-of-state cases, decided long before *Penn Central* ushered in the modern era of takings jurisprudence, which it later cited with approval in *Sisolak*. See *id.*, 2004 WL 5046209, at \*13 nn. 87 & 88 and accompanying text;

*Sisolak*, 137 P.3d at 1125-26 & n.72.

69. Not only did the earlier *Hsu* decision arrive at a result that was contrary to *Sisolak's* holding and reasoning, so too did the United States Court of Appeals for the Ninth Circuit recently state in *Vacation Village, Inc. v. Clark County, Nevada*, 2007 WL 2080288 (9th Cir. July 23, 2007), that: "We respectfully disagree with our colleagues on the Nevada Supreme Court [in the *Sisolak* case] concerning their interpreta-

tion of federal takings jurisprudence. No Fifth Amendment taking of the Landowners' property occurred under the standards set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)." See *Vacation Village*, 2007 WL 2080288, at \*9.

70. See *Sisolak*, 137 P.3d at 1126.

71. See *Loretto*, 458 U.S. at 451 (Blackmun, J., dissenting) (citations omitted).