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Airspace—Aircraft Noise—Inverse Condemnation Absent Overflight: Ferguson v. City of Keene, 238 A.2d 1 (N.H. 1968)

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RECENT NATURAL RESOURCES CASE
Airspace—Aircraft Noise—Inverse Condemnation Absent Overflight*

The right to quiet enjoyment of one's property is a principle deeply rooted in Anglo American Law.[1] At common law, ownership of the land was said to extend to the periphery of the universe—*"Cujus est solum ejus est usque ad coelum."*[2] But, as the Supreme Court in the often cited case of *United States v. Causby*[3] declared, that doctrine has no place in the modern world. With the advent of widespread air travel, to recognize that the individual has unending rights to the airspace above his property would be a breach of common sense. However, for many who live below[4] or near[5] the flight-paths of modern aircraft, enjoyment of their property has been severely limited by the volume of noise emitted by such aircraft.[6]

Inverse condemnation is the popular term used to describe a cause of action against a governmental defendant to recover the value of property which has been taken by the governmental agency when in fact no formal exercise of eminent domain has been attempted by that agency.[7] The action is based on the constitutional prohibition

* Ferguson v. City of Keene, 238 A.2d 1 (N.H. 1968).

1. W. Prosser, Torts § 90 (1964); Restatement of Torts § 822 (1939).

2. United States v. Causby, 328 U.S. 256, 260-61 (1946), *citing,* 1 Coke, Institutes ch.1, § 1 (4a) (19th ed. 1832); 2 Blackstone, Commentaries 18 (Lewis ed. 1896).

3. 328 U.S. 256 (1946).

4. *See e.g.,* Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946).

5. Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962); Martin v. Port of Seattle, 64 Wash.2d 309, 391 P.2d 540 (1964), *cert. denied,* 379 U.S. 989 (1965).

6. For extensive discussion of the problems created by aircraft noise, *see generally* Hill, *Liability for Aircraft Noise—The Aftermath of Causby and Griggs,* 19 U. Miami L. Rev. 1 (1964); Spater, *Noise and the Law,* 63 Mich. L. Rev. 1373 (1965); Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect,* 71 Dick. L. Rev. 207 (1967); Tondel, *Noise Litigation at Public Airports,* 32 J. Air L. & Com. 387 (1966); Note, *Jet Noises in Airport Areas: A National Solution Required,* 51 Minn. L. Rev. 1087 (1967).

7. Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962); Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964), *cert. denied,* 379 U.S. 989 (1965).

against the "taking" of property without compensation.[8] "[T]he flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it."[9] The Court in *Causby* reasoned that the intrusion was so immediate and direct that it subtracted from the owner's full enjoyment of the proprty and limited his exploitation of it and was thus a "taking" in the constitutional sense. The courts are generally in agreement that in the presence of overflight, excessive noise can indeed be a nuisance giving rise to an easement which may be such an interference with the enjoyment of one's property as to constitute a "taking."[10]

In *Ferguson v. City of Keene*[11] an action was brought for injury to plaintiff's property caused by noise and vibration from the operation of defendant city's airport which adjoined plaintiff's residence. Plaintiff had purchased the property, including her residence, which was situated near the north-south runway of the airport. Several years later the defendant city took a portion of plaintiff's land in order to lengthen the runway, so that its southerly end reached within a few hundred feet of plaintiff's house. The problem of noise was created by the use of a warm up apron located opposite the plaintiff's residence. Plaintiff contended that during the years 1963 and 1964 the noise and vibration level was such as to break windows, interrupt sleep, and disrupt conversation thus making life in the home "unbearable."[12] The plaintiff argued that this use of the airport facilities constituted a taking and appropriation of her property for which the defendant refused compensation, thus giving rise to an action for "inverse condemnation." Defendant maintained, however, that no taking of property could be alleged since the flight path of the aircraft did not cross the property and that damage

8. U.S. Const. amend. V; *see* Annot., 77 A.L.R.2d. 1355 (1961); United States v. Causby, 328 U.S. 256 (1946). In Griggs v. Allegheny County, 369 U.S. 84 (1962), the doctrine of inverse condemnation was extended to apply to an easement taken by Allegheny County, Pennsylvania which operated a municipal airport. The question of the identity of the party to be held liable for a taking was not posed in *Causby* because the aircraft and airport were government owned and controlled by a government operated control tower. Although the Federal Government may assist in the financing and planning of the air facility, it is the municipality which determines its location and runway-layout and owns and operates it. Thus it is the operator's obligation to acquire any property interests necessary to the operation of the business. *See* Hill, *Liability for Aircraft Noise—The Aftermath of Causby and Griggs,* 19 U. Miami L. Rev. 1 (1964).

9. United States v. Causby, 328 U.S. 256, 264 (1946).

10. *E.g.*, United States v. Causby, 328 U.S. 256 (1946); Griggs v. Allegheny County, 369 U.S. 84 (1962); City of Jacksonville v. Schumann, 199 So. 2d 727 (Fla. App. 1st, 1967), *cert. denied,* 204 So.2d 327 (Fla. 1967), *cert. denied,* 390 U.S. 981 (1968).

11. 238 A.2d 1 (N.H. 1968).

12. *Id.* at 2.

alone without an actual taking requires no compensation. On overruling of the city's demurrer to writ, the defendant city took exception which was reserved and transferred by the superior court. The New Hampshire Supreme Court *held,* Exception overruled and remanded: Plaintiff failed to state a cause of action in inverse condemnation for want of any claim of overflight.[13]

The court in *Ferguson,* while recognizing the existence of a cause of action in inverse condemnation, nonetheless stated that it could be employed only in the presence of direct overflight:

> A genuine distinction may reasonably be thought to exist between the nature of the injury suffered by the owner whose land is subjected to direct overflight, and that suffered by his neighbor whose land is not beneath the flight path. Only the former has lost the use of the airspace above his land, and he is subjected to risks of physical damage and injury not shared by the latter.[14]

The majority in *Ferguson,* citing *United States v. Causby*[15] and *Griggs v. Allegheny*,[16] point out that the United States Supreme Court has not gone beyond the point of allowing recovery in inverse condemnation for damages occasioned by direct flights of aircraft over a claimant's property. Some writers have argued that while the question remains open whether claimants adjacent to airports but not directly beneath aircraft flightpaths should be compensated, the logic of *Causby* and its idea of fairness would seem to require compensation absent direct overflight.[17]

13. The court did hold, however, that a cause of action in nuisance was sufficiently alleged.

14. 238 A.2d 1, 3 (N.H. 1968).

15. 328 U.S. 256 (1946). In *Causby,* low flights over a chicken farm by army and navy planes destroyed the farm's usefulness by frightening the chickens, making them fly into walls, thus causing their death. The noise frightened the owners and disturbed their sleep. The Supreme Court held that the flights constituted a "taking" for which the government must pay compensation.

16. 369 U.S. 84 (1962). In Griggs, noise and vibration forced the Plaintiff and his family to move from their home. The Supreme Court held that the county had taken an air easement over the plaintiff's property for which it must pay compensation as required by the fourteenth amendment to the Constitution. *Griggs* answered a question left unanswered by *Causby,* that is, the identity of the party to be held liable for a taking. The problem did not arise in *Causby* because the aircraft and airport were government owned and controlled by a government-operated control tower. In *Griggs* the airport was civilly owned and operated by Allegheny County, although its location, runway length and direction etc. were subject to approval by the C.A.A. The Court concluded that it was the promoter, owner and lessor of the airport who took the air easement in the constitutional sense and who should pay the compensation. *See* Hill, *Liability for Aircraft Noise—The Aftermath of Causby and Griggs,* 19 U. Miami L. Rev. 1 (1964).

17. Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law,* 1962 Supreme Court Review 63.

In *Batten v. United States*,[18] the Tenth Circuit Court of Appeals refused to extend the doctrine of inverse condemnation to a situation not involving overflight. In *Batten*, jet airplane noise from a nearby military base caused windows and dishes to rattle and smoke to blow into homes, which disrupted normal activities and interfered with the use and enjoyment of the property. The court held that such interference was not a taking for which the government must pay compensation in the absence of aircraft flights over the property. "Sound waves, shock waves, and smoke pervade property neighboring that on which they have their source but the disturbance caused thereby is only a neighborhood inconvenience unless they are intentionally directed to some particular property. . . ."[19]

The majority opinion in *Batten* was accompanied by a strong dissent written by Chief Judge Murrah.[20] He argued that a constitutional taking does not necessarily depend on whether the government physically invaded the property damaged, and that the economic interest is no different from that "taken" in *Causby* and *Griggs*. "[T]he Government may surely accomplish by indirect interference the equivalent of an outright physical invasion."[21] The majority asserts that there was nothing more than an interference with the use and enjoyment of the property which does not constitute a "taking." As pointed out by the dissent the question arises as to what point the interference is raised to the dignity of a "taking." Is it when the windows rattle, or when they actually fall out; when the noise makes conversation difficult, or when it stifles it entirely? When does the taking actually occur?

United States v. Certain Parcels of Land in Kent County, Michigan[22] involved the issue of inverse condemnation in an action brought by the United States against the Board of Education of the City of Grand Rapids and certain land owners. In connection with a highway construction project the plaintiff condemned a portion of land owned by the defendant School Board. The defendant alleged

18. 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

19. *Id.* at 585. One writer has criticized the holding in the *Batten* as being unsound: "It cannot be dismissed as a case involving only consequential damage, as the trial court found a diminution in value of from $4,700 to $8,000—from 40.8 per cent to 55.3 per cent—in the ten homes involved." Hill, *Liability for Aircraft Noise—The Aftermath of Causby and Griggs*, 19 U. Miami L. Rev. 1, 29 (1964). Several federal district courts have also held repeated flights nearby but not directly overhead must be endured as mere consequential damages, which may not be compensable. *See, e.g.*, Moore v. United States, 185 F. Supp. 399 (N.D. Tex. 1960); Freeman v. United States, 167 F. Supp. 541 (W.D. Okl. 1958).

20. 306 F.2d 580, 585 (10th. 1962).

21. *Id.* at 586.

22. United States v. Certain Parcels of Land in Kent County, Michigan, 252 F. Supp. 319 (W.D. Mich. 1966).

that the plaintiff did not set forth the full extent of the properties and interests taken, and that the noise, vibration, dirt and filth coming from the highways were so severe and intense as to render the school property ineffective and useless for the purpose of educating students. The plaintiff, like the defendants in the "airplane cases," argued that, if such damages do in fact exist, they are only consequential and therefore uncompensable. The court, in denying summary judgment for the plaintiff, reasoned that interference, if it is such as to destroy the use of the property, can be compensable taking.[23] "Rather than blindly follow the rule . . . that no such damages are compensable, the courts have, in each instance, looked to the evidence to see the extent of the interference and have announced that if it is so great as to constitute a wholly unreasonable and substantially destructive interference with the property involved, a taking will be found."[24]

Several state courts have chosen not to follow the holding in *Batten* that damages will not be allowed absent overflight.[25] *Thornburg v. Port of Portland*[26] presented facts similar to those in *Ferguson*.[27] Here aircraft flights passed both near and directly over the plaintiff's property, however, it was contended by the plaintiff that the flights passing overhead did not contribute the most offensive noise. Thus the court was faced with the issue of whether noise caused by aircraft flying adjacent to private property can constitute a taking in the constitutional sense. Concerning this distincton the court in *Thornburg* said:

> It is sterile formality to say that the government takes an easement in private property when it repeatedly sends aircraft directly over the land at altitudes so low as to render the land unusable by its owner, but does not take an easement when it sends aircraft a few feet to the right or left of the perpendicular boundaries (thereby rendering the same land equally unusable). The line on the ground which marks the landowner's right to deflect surface invaders has no particular relevance when the invasion is a noise nuisance.[28]

While holding that a taking could occur in the absence of direct

23. *See* also United States v. General Motors Corp., 323 U.S. 373 (1945). There the court held that governmental action short of occupancy was a taking if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter.

24. See note 22 *supra* at 323.

25. *E.g.*, City of Jacksonville v. Schumann, 167 So. 2d 95 (Fla. App. 1st, 1964); Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962); Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989 (1965).

26. 233 Ore. 178, 376 P.2d 100 (1962).

27. 238 A.2d (N.H. 1968).

28. 376 P.2d at 109.

overflight, the court in *Thornburg* found that substantial interference must be shown in order to obtain relief.[29]

In *Martin v. Port of Seattle*,[30] the Supreme Court of Washington extended the doctrine of inverse condemnation to new lengths unheard of in previous state or federal cases. The court there ruled that damages may be recovered not only in the absence of overflight but also without the showing of substantial damages. Under the Washington constitution, which allows recovery for taking or damaging of private property for public use, the court held that the Port was liable for any damages caused by the operation of the offending aircraft.[31] According to the Washington court, the measure of recovery in inverse condemnation is the "injury to market value, and that alone." One writer has severely criticized the *Martin* decision in that, "while it reflects sympathy for the affected community and excitement over the newness of jet flight, it is lacking in perspective."[32] The writer further argues that the effect of the decision is to put an unequal burden on the reasonable development of air transportation as compared with that of other modern facilities. The test in *Martin*, which excludes "substantial interference" as a criterion for allowing recovery for a "taking" may effectively preclude the consideration of the "public good" that the air transportation industry may afford society in general when determining damages in inverse condemnation. However, the requirement of "substantial interference" is a far more rational criterion for determining whether a taking has occurred than merely whether or not a wing tip has violated the airspace over a plaintiff's private property.

In *Ferguson*, it was alleged that twenty window panes were broken during one winter; telephoning and sleep were made not only diffi-

29. For a more extensive discussion of *Thornburg, see* Tondel, *Noise Litigation at Public Airports,* 32 J. Air L. & Com. 387 (1966). Justice Perry, dissenting in *Thornburg,* argues that while a nuisance may cause as much damage as a trespass, it does not mean this damage requires compensation by the public. He points out that there are no Oregon cases which will support the theory that a "mere" nuisance can be considered a taking that must be compensated under the Oregon constitution. The Oregon constitution provides, as does the Federal Constitution, that private property shall not be taken for public use without compensation. As many as twenty five states have constitutional clauses providing that private property shall not be taken or "damaged" without compensation. *See* Note, *Jet Noise in Airport Areas: A National Solution Required,* 51 Minn. L. Rev. 1087 (1967), *citing,* J. Sackman, 2 Nichols' Eminent Domain § 6.1(3) (rev. 3rd ed. 1963).

30. 64 Wash. 2d 309, 391 P.2d 540 (1964), *cert. denied,* 379 U.S. 989 (1965); Note, 39 Wash. L. Rev 398 (1964); Comment, *Inverse Condemnation in Washington—Is the Lid off Pandora's Box?,* 39 Wash. L. Rev. 920 (1965).

31. Wash. Const. art. I, § 16, amend. 9.

32. Tondel, *Noise Litigation at Public Airports,* 32 J. Air L. & Com. 387, 407 (1966).

cult, but at times impossible.[33] This interference with the enjoyment of private property would seem to be "sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause us to conclude that fairness and justice, as between the State and the citizen, requires the burden imposed to be borne by the public and not by the individual alone."[34]

In determining the elements that must be shown to allow recovery for a taking, the Supreme Court of Oregon had this to say:

> The idea that must be expressed to the jury is that before the plaintiff may recover for a taking of his property he must show by the necessary proof that the activities of the government are unreasonably interfering with his use of his property, and in so substantial a way as to deprive him of the practical enjoyment of his land. This loss must then be translated factually by the jury into a reduction in the market value of the land.[35]

The question of the degree of damage is more difficult to determine than merely whether or not an aircraft did in fact fly over the owner's land; nonetheless, it would appear the far more reasonable test to apply in an action for inverse condemnation. It is difficult to believe that the damage to the property in *Ferguson* was any less a taking than occurred in *Thornburg* or even *Causby* or *Griggs*. In all cases the property was no longer useful for its primary purpose, whether it be chicken farming, as in *Causby*, or residential use, as in *Ferguson* and *Griggs*.

In both *Causby* and *Griggs*, the Supreme Court held that the noise from the aircraft flying overhead made the property "unusable" for the "purpose" that it had been used for and that therefore there had been a taking for which compensation must be paid. Is it any less a taking when residential property has been rendered unfit for living purposes merely because the sound waves which have caused the interference with the enjoyment of the property come from a horizontal vector rather than a vertical vector?

At the present time there seems to be no uniform rule laid down by the courts of this country by which the relative rights of the private landowner versus the rights of air facility owners may be determined. As to the issue of the necessity of overflight in an action for inverse condemnation, the state courts are divided; so too the

33. 238 A.2d 1, 4 (N.H. 1968) (dissent).

34. Ferguson v. City of Keene, 238 A.2d 1, 5 (N.H. 1968) (dissent), *citing*, Batten v. United States, 306 F.2d 580, 587 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963), (dissent).

35. Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100, 110 (1962).

federal courts have differed from the state courts. The United States Supreme Court has not passed on the question. At first viewing, the overall costs of compensating landowners in inverse condemnation would seem to pose an enormous economic burden on airport owners.[36] One writer argues that the costs of airport services must be made "internal" to the enterprise and "airport services must be made available at fees and charges equal to the (long-run marginal) costs of production."[37] He believes that the costs which cannot either be passed along to the airport users or absorbed by federal or state grants-in-aid should be paid for by the airport sponsor and if the sponsor's benefit does not equal the subsidy required, the enterprise should be abandoned. However, regardless of who must pay the overall costs of air transportation, once it is determined that one of the costs is the compensation for "takings" which occur due to noise interference with the enjoyment of property rights, the determination of who should receive the compensation should not be based on the superficial test of the direction from which sound waves are sent. Using the distinction of overflight to determine compensation would seem to lead to an unrealistic allocation of the costs of doing business by the air transportation industry. It must be recognized that damage to property can be as severe when caused by sound waves directed from the side as when caused by sound waves from above.

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36. For an extensive discussion of the economic effects of airplane noise, *see* Dygert, *An Economic Approach to Airport Noise*, 30 J. Air L. & Com. 207 (1964).

37. *Id.* at 219.