Legal

Taking of Air Navigation Easements —Timing May Be Everything

By Gideon Kanner

We have known for several decades now that governmental operations of airports in such a way as to cause the flight of aircraft to interfere with the use and enjoyment of privately owned nearby land can constitute a taking of what has become known as an avigation easement. Ever since the famous encounter of Tom Causby's chickens with the Army Air Corps in World War II (see *U.S. v. Causby* (1946) 328 U.S. 256) that has been the law. We also know that in spite of the airport operators' plaint that it is the aircraft and not airports that make the noise that is the prime culprit in such cases, the courts have placed the liability for such takings on the airport operator whose decision where to place an airport and how to lay out its runways is determinative of the subsequent operational noise patterns and their impact on the surrounding communities (*Griggs v. Allegheny County* (1962) 369 U.S. 84). But these rules leave open an interesting question: if an avigation easement can be "taken," when does such a taking occur? Moreover, once such a taking occurs, what does it do to the time in which a landowner must sue to recover just compensation?

Early aviation cases dealt with this problem by taking the position that an avigation easement could not be acquired by prescription (e.g., *Smith v. New England Aircraft Co.* (1930, Mass.) 170 N.E. 385, *Hinman v. Pacific Air Transport* (1936, 9th Cir.) 84 F. 2d 755). These decisions effectively took the position that the practicalities of confronting an airborne trespasser and enjoining him from overflight were too complex to allow the same treatment as in the case of surface invasions. Moreover, as aviation developed, various statutes made overflight at certain altitudes privileged. However, more recent cases, possibly in recognition of the expanded legal remedies afforded to aggrieved landowners after *Causby,* have at times taken a different view. The courts of California and Washington have dealt with this problem recently, and their decisions indicate some of the new subtleties.

In *Smart v. City of Los Angeles* (1980, Cal. App.) 169 Cal. Rptr. 174, the owner had a vacant piece of land which he left unused for a number of years. In the meantime, the expanded operations of the Los Angeles International Airport impacted on the area, but this was of no concern to the owner because he made no use of his land. It was only in 1972 that he tried to sell his land, only to discover that lenders had "redlined" the area because of the jet aircraft noise. At that time he sued. The City defended on the grounds that its activities had effected a "taking" of an avigation easement over the area back in 1966 when the expanded airport flight operations had stabilized, and therefore the present action was barred by the statute of limitations. The trial court agreed, but its judgment was reversed on appeal. The appellate court reasoned that since the subject property was vacant land, the airport operations caused no interference with the owner's actual use and enjoyment of his land. This, in turn, led to the conclusion that the owner's cause of action in inverse condemnation did not accrue until 1972 when he learned that his property was not saleable on the open market because of unavailability of financing. Thus, the date on which expanded airport operations stabilized was not a fair criterion by which to judge when the statute of limitations started running in this case, even though the result was different in the case of developed land.

A somewhat different approach was taken by the Supreme Court of Washington in *Petersen v. Port of Seattle* (1980, Was.) 618 P.2d 67. There the owner sued the Port for damages arising from the operation of the Sea-Tac Airport. The Port defended on the grounds that it had acquired a prescriptive avigation easement and the owner's action was barred by the 10-year statute of limitations. The trial court rejected this defense, and the State Supreme Court affirmed. The court took into consideration the constitutional ingredient of inverse condemnation actions; it relied on an early case holding that the constitutional right to just compensation is required by the constitution and therefore it cannot be avoided by mere passage of time. However, the court did note that if a prescriptive easement was in fact obtained, that would defeat the right to receive compensation, at least as to any period of time preceding the 10-year limitations period.

As it turned out, however, an application of this rule to the facts of the controversy before the court did not provide much comfort to the Port. Evidently, the Port had been paying fair market values (unimpacted by airport operations) to nearby owners who chose to sell their land. Additionally, the Port had been participating in a community committee that sought to find alternative remedies for owners of land adversely affected by airport operations. Considering these facts, the court concluded that the Port's use of the pertinent airspace could not be considered "hostile" to the property interests of the owner. And, it follows as a matter of property law that if the use of land that is claimed to have given rise to a prescriptive easement is not "hostile" (i.e., not in conflict with the rights of the landowner) it cannot ripen into a prescriptive easement, no matter how long continued. Finally, the court noted that during the 10 years preceding this action (1964–1974) the increased use of jet aircraft created "an entirely new noise environment" and thus any arguable prescriptive avigation easement acquired before that time would not significantly decrease the owner's damages for airport operations in 1974.