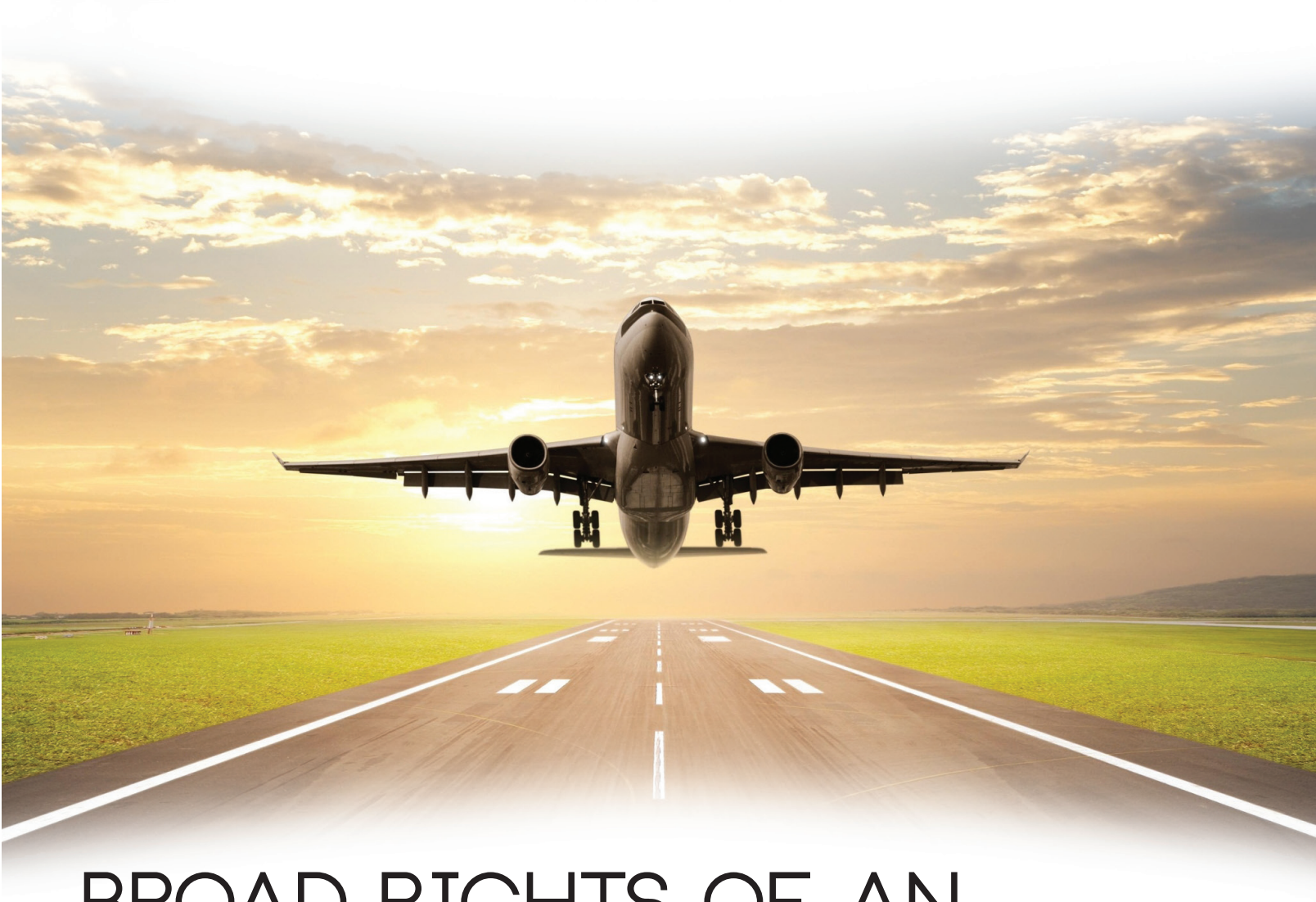


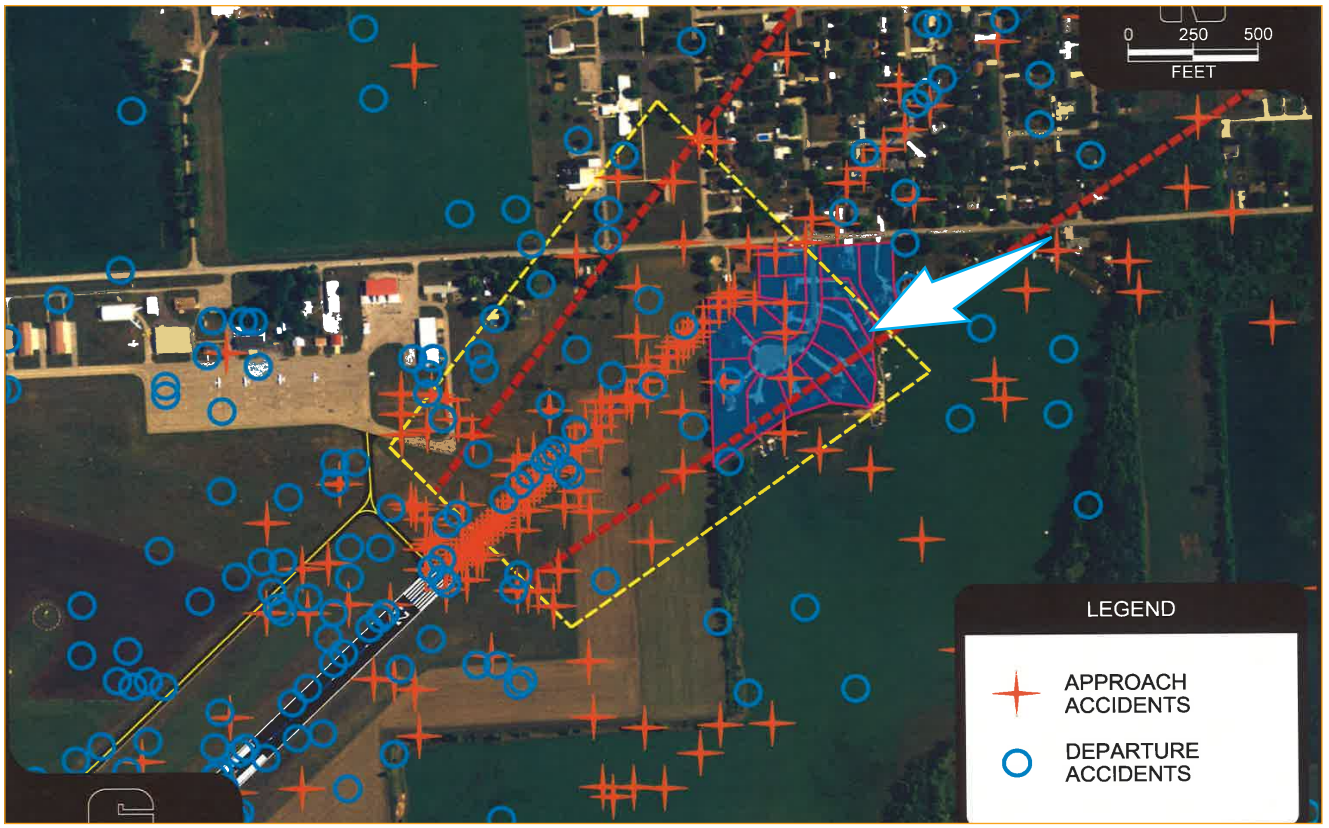
BROAD RIGHTS OF AN AVIGATION EASEMENT

Just compensation is based on rights, not use

BY STEPHON BAGNE, ESQ.

Condemning agencies are frequently tempted to impose easements that provide extensive controls over properties and address every conceivable future scenario no matter how unlikely. This temptation must be counterbalanced by the nearly universal rule that just compensation must be paid based upon the assumption that the agency will use acquired rights to the fullest extent allowed by law. If unnecessary rights are acquired, the agency may end up overpaying. Alternatively, agencies may be tempted to downplay the impact of takings by claiming that rights may not be used. This rule protects owners from such tactics, which merely increase the agency's legal expenses.

Recent litigation involving the imposition of avigation easements over residential homes adjacent to a small Michigan airport provides a cautionary tale that highlights the need for agencies to be careful about the restrictions that they impose. In two separate trials, juries awarded the property owners $590,000 and $470,000 (the full home values) compared to the original good faith offers of $25,000 and $50,000. Those juries disregarded the county's assertion that it merely wished to trim trees, instead agreeing with the homeowners that the extremely broad avigation easements imposed by the county destroyed the practical value or utility of their homes. While this example relates to an airport, the principles illustrated by these cases relate to any partial taking.



The property owners presented a map in which the location of accidents from airports across the country were superimposed upon the county's airport, their homes, and other adjacent areas. The subdivision containing the owners' homes is indicated by the white arrow. The clustering of accidents on airport property and within the RPZ emphasize why the RPZ is subject to special precautions.

Lenawee County Airport

In 1994, the Federal Aviation Administration (FAA) and the Michigan Transportation Bureau of Aeronautics approved an Airport Layout Plan for the Lenawee County Airport. The original design included a plan to lengthen the runway by 1,000 feet, relocate it 500 feet away from residential homes to the northeast and eliminate all homes to the southwest of the runway. It also imposed a Runway Protection Zone (RPZ) that was not overlaid upon any homes. An RPZ is an area at the foot of a runway in which aircraft travel at low altitudes during take-offs and landings resulting in heightened safety concerns for both the aircraft and people on the ground.

In 2001, the Airport Layout Plan was revised to upgrade the class of the airport, thus inviting use by larger, faster, lower flying aircraft and requiring a larger RPZ that encompassed homes in the northeast quadrant. During eight years of litigation, the county never produced any document that evaluated the propriety of homes remaining the in the RPZ. Nonetheless, rather than acquiring the homes in accord with FAA planning documents that deem residential homes in the RPZ to be "incompatible" and "prohibited," the county imposed avigation easements.

The avigation easements provided a "right of way for the free, unobstructed passage of aircraft, by whomsoever owned or operated, in and through the airspace," ranging from three to 23 feet above the rooftops of the homes in the RPZ. The county argued unsuccessfully that no pilot would actually fly that low due to the danger involved – an argument that both contradicted the legal instruction that the jury must assume that aircraft would fly at the heights allowed by the easements and supported the owners' assertions that their homes were rendered unsafe by the easements.

The easement explicitly placed the homes in the RPZ, inviting testimony about the characteristics of an RPZ. The owners' safety arguments were buttressed by the county airport planner's testimony. She confirmed in her written report that the RPZ "was primarily for the purpose of safety for people on the ground," that it "ideally, should be controlled by the airport… preferably… by acquisition of sufficient property interest to achieve... an area that is clear of all incompatible uses," and that "the entire RPZ [should] be owned by the airport and be clear of all obstructions where practicable."

Finally, the easement also included various restrictions to uses that could be made on the property. For example, the easement prohibited creating glare, electrical interference and included a broad catchall that barred anything that could interfere with airport operations. Unable to identify any limits to these generic limitations, the county was consistently dismissive of these issues, arguing throughout the trials and subsequent appeals that it merely desired to trim trees.

The Lenawee County cases involved multiple appeals. The first interlocutory appeal reversed a trial court holding requiring total takings because it invaded the province of the jury and an issue of fact existed about the impact of the avigation easements on the remainders. A second appeal barred the owners from asserting that FAA requirements mandated a total taking, allowed the owners to assert that the imposition of the rights contained in the easement itself justified a total taking, and excluded hearsay evidence cited

"…just compensation must be paid based upon the assumption that the agency will use acquired rights to the fullest extent allowed by law."

by the county and relied upon in the first appellate decision. The final appeal resulted in a published opinion that upheld the first jury verdict awarding a total taking after providing extensive quotations from the trial testimony (Lenawee v. Wagley, 301 Mich. App. 134, 836 N.W.2d 193 (2013)).

Acquiring Unnecessary Rights

The lessons from the Lenawee County cases are broadly applicable. Any time that a partial taking occurs, the agency must ask itself whether it actually wants to pay for the rights it is acquiring.

A few years ago, I handled a lawsuit in which a pipeline company imposed an easement allowing it to construct a new underground pipeline on a parcel of farmland that included a house. While the easement identified the location of the pipeline being constructed as a result of the acquisition, it also included language allowing the company to relocate the pipeline anywhere else on the property at any time without paying compensation for damages that ensued. As a result, the owner's real estate appraiser applied the literal language of easement, determined that the existing home must be treated as an interim use of unknown duration, and that the highest and best use of the property was as vacant farmland. This resulted in a just compensation claim of approximately 85 percent of the value of the property, including the home. The pipeline company's protestations that it did not intend to move the pipeline underneath the home were irrelevant because it actually acquired the right to do so. The pipeline company ultimately paid approximately 60 percent of the value of the property and voluntarily modified the easement to prevent relocation of the pipeline underneath the home.

In Conclusion

Agencies cannot impose rights and then seek to reduce their just compensation payments by later claiming that they will not actually use those rights. If the agency truly believes that it will not need to use the rights, then the rights should simply not be acquired. Otherwise, the agency may be imposing an easement gilded with property rights that appear hypothetically useful but in practice provide small value for a large cost. ✪

Stephon is a Member of Clark Hill, PLC, a full-service law firm. He represents property owners in eminent domain proceedings and has successfully argued multiple appeals.

INTERPRETING THE RULE

In the Lenawee County cases, the parties agreed to use a standard jury instruction stating in pertinent part that just compensation in a partial taking case is premised upon the assumption that the agency will use its "newly acquired rights to the fullest extent allowed by law." Mi. Civ. JI 90.12. Other states apply the same rule.

- In New York, "upon the taking of a permanent easement, the damages must be determined based upon what the condemnor has the right to do under the terms of the easement." New York Cent. Lines, LLC v. State of New York, 101 A.D.3d 966, 969 (2012).

- In Florida, Houston Texas Gas & Oil Corp. v. Hoeffner, 132 So. 2d 38, 39-40 (1961), holds that that the condemning authority may not present testimony to the jury concerning a nonobligatory, permissive policy of allowing the condemnee to continue certain uses of the taken property.

- California requires that when "determining severance damage, the jury must assume 'the most serious damage' which will be caused to the remainder" because "the condemnee is permitted only one opportunity to seek compensation for all foreseeable damage to his property." San Diego Gas & Elec. Co. v. Daley, 205 Cal. App. 3d 1334, 1345 (1988).

- Missouri recognizes that "it is presumed that the appropriator will exercise his rights to the full extent. Mere promises of intention not to use a right or a privilege specified or reasonably implied are not sufficient to exclude the consideration thereof in the assessment of damages." Union Elec. Co. v. Levin, 304 S.W.2d 478, 481 (1957).

- Massachusetts recognizes that the only exception to this rule comes when "the limitation is lawfully enforceable by the condemnee." Portland Natural Gas Transmission Sys. v. 19.2 Acres of Land, 195 F. Supp. 2d 314, 322 (2002).

Note: The author would like to acknowledge Clark Hill associate Andrew Mast for conducting legal research in jurisdictions outside Michigan.