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Plaintiffs, owners of land adjacent to a private airport, brought suit against the defendant county on the theory of inverse condemnation. The plaintiffs contended that the county, through a series of ordinances and administrative actions, deprived plaintiffs of the use and value of their property. In an attempt to develop a countywide system of airports to serve all the aviation needs of the community, the county expressed an intention to purchase Phoenix Field, a small private airfield. In furtherance of this basic idea, in April of 1960, a zoning ordinance was passed, applying only to the land around Phoenix Field, which was designed to protect the approach paths from obstructions. The adjacent landowners were required to maintain a clear airspace ratio of 20:1; that is, the ordinance limited the height of structures or vegetation to one foot of elevation for every twenty feet of distance extending from either end of the runway for 10,000 feet.[1] In 1963, the area was re-zoned so as to be slightly more restrictive in height limitations. At this same time, the county adopted definite plans to procure the airfield and the surrounding land, including portions of plaintiff's property. However, in 1965, the county abandoned its Phoenix Field Plan, due to difficulties in the negotiation over the price of the airport proper, and rescinded the height ordinance. In plaintiff's suit against the county, the trial court held that the acts by the county constituted inverse condemnation. The court found that the "taking" had occurred in November of 1963 when the county formally adopted a general plan. The defendant county appealed the judgment rendered for the plaintiffs. *Held, affirmed*: A height restrictive, zoning ordinance coupled with administrative action by a county constitutes a taking of private property when the impact of these actions is to prevent development of the property. *Peacock v. County of Sacramento*, 271 Cal. App. 487, 77 Cal. Rptr. 391 (Cal. Ct. App. 1969).

Zoning has traditionally been viewed as a legitimate exercise of police power when reasonably related to the public health, safety, morals or general welfare.[2] But, when a zoning ordinance unreasonably restricts the use or enjoyment of property or bears no reasonable relation to the public health, safety, morals or general welfare, it is unconstitutional because the individual is deprived of property without due process of law.[3] It should be noted that the police power involved in zoning is distinguishable from the power of eminent domain, both because the eminent domain power

[1] *See* Technical Standard Order of the Civil Aeronautics Administration of the Department of Commerce, TSO-N18.

[2] Euclid v. Amber Realty Co., 272 365, 47 S. Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016 (1926); *see also* Charles S. Rhyme, Municipal Corporations § 32-2 (1957).

[3] Euclid v. Amber Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016 (1926); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L.Ed. 322 (1922).

presupposes no requirement of reasonableness, and because it "involves a *taking* of private property for a public use or a public purpose; whereas the police power, when exerted with respect of property rights, involves a regulation of private property in the public interest."[4] The inverse condemnation action is available to aid in maintaining the distinction between the two, that is, inverse condemnation has been defined as a "term used to describe a course of action against a governmental defendant to recover the value of property which has been taken in fact, even though no formal exercise of the power of eminent domain has been attempted by the taking agency."[5] Thus, when a local government exercises its police power in enacting a zoning ordinance which deprives a property owner of all beneficial use of his property for the sake of the public good, the governmental body has in effect "taken" the property without just compensation.[6] In many cases such an ordinance is said to be unconstitutional because it is unreasonable.[7] This is the test generally applied in zoning cases.[8] However, in certain instances zoning ordinances have been held to be unconstitutional as constituting a "taking" without ever reaching the test of reasonableness.[9] The test of reasonableness seems to be completely avoided where the court feels the questioned ordinance clearly constitutes a "taking" of private property without the formal exercise of the power of eminent domain.

Thus, the cases dealing with the constitutionality of airport approach height zoning can be divided into two basic groups.[10] The minority[11] cases[12] view such zoning as mere regulation and apply a test of reasonableness, just as applied in other zoning cases. The leading minority case is *Harrell's Candy Kitchen Inc. v. Sarasota-Manatee Airport Authority.*[13] In that case, the Supreme Court of Florida held an airport approach height zoning ordinance to be a valid exercise of police power. The court stated that the applicable principles of law were that "zoning regulations duly enacted pursuant to lawful authority are presumptively valid and that the burden is upon him who attacks such regulation to carry the extraordinary burden of both alleging and proving that it is *unreasonable* and bears no substantial relation to public health, safety, morals or general welfare."[14]

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[4] C. Rhyme, Municipal Corporations, § 26-3 (1957).

[5] Ferguson v. City of Keene, 108 N.H. 409, 238 A.2d 1, 2 (1967).

[6] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L.Ed. 322 (1922).

[7] C.J.S. Zoning § 68, 29.

[8] Id. at § 5.

[9] Indiana Toll Road Commission v. Jankovich, 193 N.E. 2d 237 (Ind. 1963); Sneed v. County of Riverside, 218 Cal. App. 2d 205 32 Cal. Rptr. 710 (Cal. Ct. App. 1967).

[10] The exceptions to this generalization are decided on the basis of the lack of an enabling act authorizing any airport height zoning. *See* Yara Engineering Corp. v. City of Newark, 132 N.J.L. 370, 40 A.2d 559 (1945) and Rice v. City of Newark, 132 N.J.L. 387, 40 A.2d 561 (1945).

[11] The majority—minority designation is employed merely as an indication of the number of cases falling into each group.

[12] Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority, 111 So.2d 439 (Fla. 1959); Waring v. Peterson, 137 So.2d 268 (Fla. Dist. Ct. 1962); Mutual Chemical Co. v. City of Baltimore, 1939 U.S. Av. 11 (Md. Cir. Ct. 1939).

[13] 111 So.2d 439 (Fla. 1959).

[14] *Id.* at 443. *See also* Waring v. Peterson, 137 So.2d 268 Fla. Dist. Ct. 1962); Mutual Chemical Co. v. City of Baltimore, 1939 U.S. Av. 11 (Md. Cir. Ct. 1939).

The court held specifically that the ordinance which restricted the height of structures in approach paths was reasonable.

The majority[15] of courts, however, seem to distinguish the normal zoning ordinance, which *regulates* use of property, from the airport, height zoning ordinance which *prohibits* all use of portions of property by the property owner.[16] In the case of *Indiana Toll Road Commission v. Jankovich*,[17] the court noted, in passing on the validity of an airport approach height zoning ordinance, that "mere regulation under police power which can be modified at the discretion of the regulation authority is wholly different from taking or appropriating of private property by the government for a specific use."[18] The California court in *Sneed v. County of Riverside*[19] found a "distinction between the commonly accepted and traditional height restrictions zoning regulation of buildings and zoning of buildings and zoning of airport approaches in that the latter contemplates actual use by aircraft of the airspace zoned, whereas in the building cases there is no invasion or trespass to the area above the restricted zone."[20] In the *Sneed* case, the plaintiff appealed from an order of dismissal and contended that the airport approach height zoning ordinance, in effect, gave the county an air easement over property. The court stated the basic issue to be whether the "ordinance is in reality a height limit ordinance authorized under the police power or whether it takes an air easement over plaintiff's property without payment of compensation therefore."[21]

In the instant case,[22] the defendant county appealed from the trial court's finding of inverse condemnation. The trial court had found that the actions of the county were "unreasonable and oppressive, constituting a compensable taking of plaintiff's land."[23] On appeal the county first argued that its action in zoning the area was of no additional restrictive effect because the California Public Utilities Code, Section 21402 and 21403, provides for public right of flight over land and an unobstructed right of access to public airports. The court dismissed the contention by citing *Anderson v. Souza*,[24] where the court held that "The State Aeronautics Commission Act . . . contemplates the use of power of condemnation."[25] As a further argument against the county's contention, the court pointed out that the California Government Code, Sections 50485-504.14, the very provision which authorizes local airport, height zoning, contemplates the use of

[15] Supra note 11.

[16] *Allocation of Property Interest in Airspace*, 20 Univ. of Fla. Law Rev. 237 (1968).

[17] 193 N.E.2d 237 (Ind. 1963).

[18] *Id.* at 241. This case found a Taking of private property. *See also* Roark v. City of Caldwell, 394 P.2d 641 (Idaho 1964); Jackson Municipal Airport Authority v. Evans, 191 So.2d 126 (Miss. 1966). Dutton v. Mendocino County, 1949 U.S. Av. 1 (Cal. Superior Ct. 1949); Opinion of Michigan Attorney-General, 1939 U.S. Av. 18 (1939); Ackerman v. Port of Seattle, 55 Wash.2d 401, 348 P.2d 664, 77 A.L.R.2d 1344) (1960).

[19] 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (Cal. Ct. App. 1963).

[20] *Id.* at 320. *See also* Morse v. County of San Luis Obispo, 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (Cal. Ct. App. 1967); *Validity of Building Height Restrictions*, 8 A.L.R.2d 963 (1949).

[21] *Id.* at 319. The appellate court remanded the case to the trial court.

[22] *Peacock v. County of Sacramento*, 271 Cal. App. 2d 987, 77 Cal. Rptr. 391 (Cal. Ct. App. 1968).

[23] *Id.*

[24] 38 Cal. 2d 825, 243 P.2d 498 (1952).

[25] *Id.* at 842.

condemnation where constitutional limitations preclude the exercise of the zoning power. The court also noted that the California code of Civil Procedure, section 1239.4, authorizes condemnation of property to protect airport approaches.

Second, the county argued that its actions were a valid exercise of police power which did not amount to a compensable taking. The cases cited by the county were distinguished on the basis of facts and findings of reasonableness. While the county obviously has some power to zone, the court avoided the issue of just how much power the county possessed and avoided segregating the issue of the constitutionality of airport approach height zoning. In effect, the county was merely arguing against the findings of fact.

The county relied heavily upon *Harrell's Candy Kitchen*[26] to support its argument that its actions were a valid exercise of police power. In defending the trial court's finding, the appellate court pointed out, by quoting a previous decision, that reasonableness was the proper test.[27] The *Candy Kitchen*[28] case had employed the reasonableness test, yet the court attempted to distinguish *Candy Kitchen* as a minority decision.[29] The *Candy Kitchen* case found a contested ordinance reasonable while the Peacock court merely found its ordinance unreasonable. The Peacock court viewed the majority cases as merely consisting of the group which had found such ordinances invalid and the minority cases as those upholding such ordinances; while, in fact, the distinction goes to the basic reasoning of the cases, that is whether or not the reasonableness test is employed.

There seems to be no decision which clearly expresses the basic distinctions between airport aproach height zoning and the ordinary zoning situation. In fact, the confusion surrounding the whole area of police power has been criticized.[30] The point of signifigence to the still unresolved position of airport approach height zoning is that most courts, in dealing with the question, have indicated that airport approach height zoning does not conform with traditional views and purposes of zoning.

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[26] 111 So. 2d 439 (Fla. 1959).
[27] 77 Cal. Rptr. 391 (Cal. Ct. App. 1968).
[28] 111 So. 2d 439 (Fla. 1959).
[29] 271 Cal. App. 2d 987, 77 Cal. Rptr. 391 (Cal. Ct. App. 1968).
[30] Jax, Takings and the Police Power, 74 Yale L.J. 36 (1964).