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Compensation for Damage to Property Caused by Low-Flying Aircraft

Recent developments in the law of compensation for property under the fifth amendment and similar state constitutional provisions have left unclear the requisites for recovery by a private party for damage caused by low-flying aircraft. The author of this Note examines the application of trespass and nuisance concepts in aircraft cases and concludes that use of these tort concepts as ultimate constitutional requirements leads to arbitrariness and confusion. He therefore proposes the abandonment of trespass and nuisance as ultimate requirements for compensation in favor of a test that examines all factors relevant to balancing the public interest in the complained-of activity against the public interest in preserving the sanctity of private property.

INTRODUCTION

The recent expansion in air traffic has produced a concomitant increase in the number of claims for injuries to private property caused by low overflights. The major portion of this expansion emanates from military installations and municipally-owned civil terminals constructed with the aid of federal subsidies.¹ The landowners injured by these overflights have had to rely largely upon constitutional theories providing compensation under the power of eminent domain to remedy this taking of private property.² Tort actions for trespass or nuisance, the traditional grounds for recovery from private defendants,³ are often unavailable against any governmental body. The doctrine of sovereign immunity and the Tucker Act⁴ generally bar such tort claims, while

1. See Federal Aid for Public Development Act, 60 Stat. 170 (1946), as amended, 49 U.S.C. §§ 1101-19 (Supp. 1962).

2. See Note, 24 U. PITT. L. REV. 603, 606 (1963); 63 COLUM. L. REV. 755, 756 (1963).

3. See 1 ORGEL, VALUATION UNDER EMINENT DOMAIN §§ 1-10 (1953); PROSSER, TORTS §§ 13-15, 70-74 (2d ed. 1955); RESTATEMENT, TORTS §§ 159, 194 (1934). See also UNIFORM AERONAUTICS ACT (1923). Although the Uniform Aeronautics Act has been withdrawn by the Commissioners of Uniform State Laws, it has been enacted at various times by 23 states. See Anderson, *Some Aspects of Airspace Trespass*, 27 J. AIR L. & COM. 341 (1960), for a summary of tort remedies for trespass and nuisance. See also Note, 24 U. PITT. L. REV. 603, 606-08 (1963).

4. 28 U.S.C. § 1346(a)(2) (1958). This act, which grants jurisdiction

the Federal Tort Claims Act⁵ provides no remedy for non-negligent or discretionary acts of federal employees. The purpose of this Note is to examine the requirements necessary to establish a constitutional taking of property by low-flying airplanes, to evaluate the effect of these requirements on the rights of landowners, and to suggest ways to eliminate some of the inequities in the present application of eminent domain to airspace.

I.

Under present constitutional provisions, a landowner must establish that there has been a taking before he can recover for an interference with the use of his land. The fifth amendment to the United States Constitution provides that private property shall not "be taken for public use, without just compensation." The fourteenth amendment extends this protection to the taking of property by the states.⁶ In addition, all state constitutions⁷ but two⁸ explicitly require compensation for property appropriated to public use. Moreover, some states have gone further by adding constitutional provisions that allow compensation for an interference with the use of, or an injury to, property.⁹

Under all of these provisions, courts traditionally have required an actual physical invasion of private property—a trespass—before finding a constitutional taking.¹⁰ Strict adherence to this trespass requirement in highway condemnations has often led to arbitrary and consequently inequitable distinctions even in those jurisdictions having constitutional "injury" provisions. For example, if a highway is relocated and made into a limited access highway, the landowners who have property adjoining the old

over suits brought against the United States to the federal district courts, specifically excludes tort actions.

5. 28 U.S.C. §§ 1346(b), 2680(a) (1958); see *Dalelite v. United States*, 346 U.S. 15 (1953).

6. See *Chicago, B. & Q.R.R. v. Chicago*, 166 U.S. 226 (1897).

7. See 1 ORGEL, *op. cit. supra* note 3, § 1.

8. N.H. CONST. pt. I, art. XII; N.C. CONST. art. 1, § 17. Both these states, however, have judicially extended protection against uncompensated taking. *Petition of Mount Washington Rd. Co.*, 35 N.H. 134 (1856); *Staton v. Norfolk & C.R.R.*, 111 N.C. 278, 16 S.E. 181 (1892); see Note, 1962 WASH. U.L.Q. 210, 236-37.

9. See, e.g., MINN. CONST. art. 1, § 13, which provides: "Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured." Nichols lists 25 states with essentially the same provisions. E.g., CALIF. CONST. art. I, § 14; ILL. CONST. art. II, § 13; see 2 NICHOLS, EMINENT DOMAIN § 6.1[3] n.23 (3d ed. 1950).

10. See, e.g., *City of Crookston v. Erickson*, 244 Minn. 321, 69 N.W. 2d 909 (1955); *In re Hull*, 163 Minn. 439, 204 N.W. 534 (1925); 2 NICHOLS, *op. cit. supra* note 9, §§ 6.1, .2, .38.

highway will suffer a great loss of business. Under present law, if the new highway takes any portion of a landowner's property, he will recover for the land taken and for the resulting loss of business. If the highway does not take any part of his property, however, the landowner will receive no compensation even though he may lose more business than one whose land is physically taken.¹¹

Surely a person should be awarded compensation for land physically appropriated. But to the extent that the courts choose to compensate further for any injury to business or residence caused by a taking, they should not preclude recovery merely because no property has been appropriated. Yet, strict adherence to trespass doctrines has led the courts to just this anomaly.¹² The anomaly is heightened by holding that once a partial taking is established, injuries such as the loss of the flow of traffic, which would seem to be separate elements of recovery, are considered factors in measuring market value of the property to determine compensation for the partial taking.¹³ These injuries are usually deemed consequential and thus unavailable to one whose land is not physically taken.¹⁴

While the trespass requirement is still rigidly enforced in highway cases,¹⁵ an inspection of cases involving the taking of air easements reveals somewhat more flexible standards being used to determine compensability.¹⁶ The opinions in these cases reflect the fact that courts have imported elements of tort recovery in nuisance cases—excessive noise and dangerously low overflights—into the determination of whether an interference with the use of land by low-flying aircraft amounts to the taking of an air easement.¹⁷ Indeed, some opinions have suggested bypassing the

11. See *Pike County v. Whittington*, 263 Ala. 47, 51, 81 So. 2d 288, 292 (1955) (dissent); *Jehoda v. State Rd. Dept.*, 106 So. 2d 870 (Fla. 1958); *Riddle v. State Highway Comm'n*, 184 Kan. 603, 623, 339 P.2d 301, 317 (1959) (dissenting in part). But cf. *Hendrickson v. State*, 31 U.S.L. WEEK 2559 (Minn. May 3, 1963).

12. See, e.g., *Board of Comm'rs v. Slaughter*, 49 N.M. 141, 158 P.2d 859 (1945); *Nelson v. State Highway Bd.*, 110 Vt. 44, 1 A.2d 689 (1938).

13. See *Riddle v. State Highway Comm'n*, 184 Kan. 603, 339 P.2d 301 (1959); Comment, 14 RUTGERS L. REV. 202 (1959).

14. See, e.g., *United States v. Willow River Power Co.*, 324 U.S. 499 (1945); *Transportation Co. v. Chicago*, 99 U.S. 635 (1879); *Harris v. United States*, 205 F.2d 765 (10th Cir. 1953); JAHR, EMINENT DOMAIN § 51 (1953). See generally Note, 1960 U. ILL. L.F. 313.

15. See note 10 *supra* and accompanying text.

16. See Note, 74 HARV. L. REV. 1581, 1582-85 (1961).

17. Many of these cases stress the noise and fear caused by low-flying aircraft: See, e.g., *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946); *Batten v. United States*, 306 F.2d 580, 585-87 (10th Cir. 1962) (dissent); *Ackerman v. Port of Seattle*, 55

trespass requirement altogether in this area and looking directly to the nature of the injuries to determine if there has been a taking.¹⁸

The Supreme Court in *United States v. Causby*¹⁹ provided the modern basis for the law of eminent domain in airspace when it rejected the common-law *ad coelum* doctrine that ownership of land extended upwards to infinity.²⁰ It thus supported the thesis of the Air Commerce Act²¹ that airspace above the minimum al-

Wash. 2d 400, 401, 348 P.2d 664, 665 (1958); Anderson, *supra* note 3, at 350-55; Harvey, *Landowners Rights in the Air Age: The Airport Dilemma*, 56 MICH. L. REV. 1313, 1315-16 (1958); Note, *Airplane Noise: Problem in Tort Law and Federalism*, 74 HARV. L. REV. 1581, 1583-85 (1961); cf. *Swetland v. Curtiss Airports Corp.*, 55 F.2d 201, 203 (6th Cir. 1962); *Atkinson v. Bernard, Inc.*, 223 Ore. 624, 631-34, 355 P.2d 229, 232-33 (1960); RHYNE, AIRPORTS AND THE COURTS 133 (1944). *But see* *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963), criticized in 63 COLUM. L. REV. 755, 761-62 (1963), 111 U. PA. L. REV. 837, 839 (1963).

18. "It is my thesis that a constitutional taking does not necessarily depend on whether the Government physically invaded the property damaged." *Batten v. United States*, 306 F.2d 580, 586 (10th Cir. 1962) (dissenting opinion), *cert. denied*, 371 U.S. 955 (1963). Cf. *Atkinson v. Bernard, Inc.*, 223 Ore. 624, 631-32, 355 P.2d 229, 232 (1960):

Whether Oregon courts should meet the airport problem with the ancient and formal doctrine of trespass . . . is still an open question.

. . . [W]e are impressed with the logic of those cases which have met the problem frankly as a matter for the application of the law of nuisance.

Although the *Atkinson* case involved a private airport and thus does not deal with a taking, its reasoning is equally applicable to cases that allege nuisance injuries as a taking. See *Jacobs v. City of Seattle*, 93 Wash. 171, 178, 160 Pac. 299, 302 (1916); cf. *Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUPREME COURT REVIEW 63, 89.

19. 328 U.S. 256 (1946). Respondents purchased a 2.8 acre chicken farm outside of Greensboro, North Carolina, in 1934 near an airport that had been in existence since 1928. Beginning in 1942, the United States by contract with the airport authority flew military planes to and from the airport. These flights passed over respondents' property at a height of 83 feet, disturbing respondents and frightening their chickens to such an extent that many were killed. The Supreme Court agreed with the Court of Claims that an easement was taken, but remanded to the Court of Claims to make findings of fact as to whether the easement was permanent or temporary.

20. *Cujus est solum ejus est usque ad coelum*, or "he who owns the soil owns everything above." 2 BLACKSTONE, COMMENTARIES *18. The *ad coelum* interest was protected at common law by the writ of trespass *quare clausum fregit*. See *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922); *Pickering v. Rudd*, 4 Camp. 219, 171 Eng. Rep. 70 (1815); *Penruddock's Case*, 5 Coke 100, 77 Eng. Rep. 210 (1597). The development of the *ad coelum* doctrine is well summarized in Anderson, *supra* note 3, at 341-43. See also Klein, *Cujus Est Solum Ejus Est . . . Quousque Tandem?*, 26 J. AIR L. & COM. 237 (1959).

21. 52 Stat. 973 (1938), 49 U.S.C. §§ 1301-1542 (1958).

titudes of flight prescribed by the Civil Aeronautics Board²² constitutes navigable airspace in which there exists "a public right of freedom of transit."²³ The Court declared airspace, "apart from the immediate reaches above the land," to be in the public domain;²⁴ thus, overflights are not a taking of private property unless they are a "direct and immediate interference with the enjoyment and use of the land."²⁵ Applying this test, the Court found that the overflights in *Causby* constituted the taking of an easement because they affected the nerves of the landowners and destroyed their business.²⁶

Although the Court did not find it necessary to define what are the "immediate reaches above the land" or to specify how low and frequent flights must be to constitute a taking,²⁷ it did find that "navigable air space" did not include glide paths.²⁸ Congress responded to this decision by amending the Air Commerce Act to make navigable airspace "include airspace needed to insure safety in take-off and landing of aircraft."²⁹ The effect of this amendment was considered by the Supreme Court in the recent case of *Griggs v. Allegheny County*.³⁰ While the Court recognized that Congress acted in response to *Causby*, it nevertheless reiterated what it said in that case: "The use of land presupposes the use of some of the airspace above it. . . . An invasion of the 'super-adjacent airspace' will often 'affect the use of the surface of the land itself.'"³¹ The Court then held that because the approachway to the airport caused flights to pass as low as 30 feet over the appellant's property, it constituted a taking of an air easement for which the county, as owner of the airport, must compensate the appellant.³²

22. These minimum altitudes are now established by the administrator of the Federal Aviation Agency. 52 Stat. 980 (1938), as amended, 49 U.S.C. § 1301 (1958). The minimum altitude for congested areas is 1000 feet, for noncongested areas is 500 feet. 14 C.F.R. § 60.17 (1962).

23. 52 Stat. 979 (1938), as amended, 49 U.S.C. § 1304 (1958).

24. 328 U.S. at 266.

25. *Ibid.*

26. *Id.* at 259, 263.

27. This was unnecessary because the findings of the Court of Claims had clearly established a causal connection between the flights and the decrease in the value of respondents' property. See 328 U.S. at 266-67.

28. *Id.* at 263-64. See Harvey, *supra* note 17, at 1314 for a definition of glide paths.

29. 72 Stat. 739 (1958), 49 U.S.C. § 1301 (1958).

30. 369 U.S. 84 (1962).

31. 369 U.S. at 89. *Ackerman v. Port of Seattle*, 55 Wash. 2d 400, 348 P.2d 664 (1960), also declared approachways not to be within navigable airspace. The court in that case seemed to imply that such congressional appropriation of airspace would be unconstitutional. *Id.* at 411-12, 348 P.2d at 670.

32. The county was held liable on the theory that since it designed and

Causby has been interpreted to require proof of actual damage before recovery will be allowed for a taking. For example, flights over property by propellor-driven planes were not a taking because they did not interfere with the use and enjoyment of property, but a subsequent conversion to jet flights at the same altitude, since it created greater noise and vibration, was a taking.³³ Thus, a landowner who succeeded in establishing the requisite trespass would still have to prove enough overflights of a deleterious nature to establish the actual damage necessary to constitute a taking under the fifth amendment. Once a physical trespass is established and the landowner proves sufficient damage to constitute a taking, however, the measure of damages is not limited to the value of the easement taken, but includes damage to the remainder of the property.³⁴ The measure of damages thus includes any depreciation in the fair market value of the property that is attributable to the taking of the easement.³⁵

II.

While the Court in both *Causby*³⁶ and *Griggs*³⁷ emphasized the nuisance concepts of noise and danger as the primary interference with the use of the property, it premised recovery on the continuing trespass by the approachway on the property.³⁸ This fact

constructed the airport, it was bound to condemn enough property to provide the necessary approachways. 369 U.S. at 89-90; *accord*, *Ackerman v. Port of Seattle*, 55 Wash. 2d 400, 413, 348 P.2d 664, 671 (1960); *cf.* *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934). Mr. Justice Black, in dissent, argued that the federal government should be liable for the taking because the airport expansion was undertaken pursuant to a federal program and financed largely with federal funds. 369 U.S. at 90-94.

33. *Highland Park, Inc. v. United States*, 142 Ct. Cl. 269, 161 F. Supp. 597 (1958); *cf.* *Matson v. United States*, 145 Ct. Cl. 225, 171 F. Supp. 283 (1958); *Anderson*, *supra* note 3, at 351-52.

34. See, e.g., *City of Chicago v. Koff*, 341 Ill. 520, 173 N.E. 666 (1930); *Riddle v. State Highway Comm'n*, 184 Kan. 603, 339 P.2d 301 (1959); 1 ORGEL, *op. cit. supra* note 3, § 52; Note, 72 YALE L.J. 392, 395 (1963).

35. *United States v. Miller*, 317 U.S. 369 (1943). The fair market value test assumes a natural bargaining situation with a voluntary buyer and seller. *Roberts v. New York*, 295 U.S. 264 (1935). See 1 BONBRIGHT, *VALUATION OF PROPERTY* 66-97 (1937); 4 NICHOLS, *op. cit. supra* note 9, § 12.2 [1]; 1 ORGEL, *op. cit. supra* note 3, §§ 22-23. In a partial taking situation where the severed part does not have a value equal to its proportionate share of the value of the unsevered whole, the owner is compensated for the entire value he has lost. This is computed either by adding the damage to the value of the remainder to the actual value of the property taken, or by subtracting the value of the remainder from the total value before the taking. Note, 72 YALE L.J. 392, 395 (1963).

36. 369 U.S. at 86-87.

37. 328 U.S. at 258-59.

38. 369 U.S. at 88-89; 328 U.S. at 264-65; see *Batten v. United States*,

could indicate that the physical trespass requirement will be read into the federal constitution, making the determination of a taking a mere question of wing span. Indeed, the Tenth Circuit, in *Batten v. United States*,³⁹ interpreted *Causby* and *Griggs* to require direct overflights before there could be a taking of an air easement. The court denied recovery to landowners who had established interference with the use of their property. The noise and danger from the overflights were of apparently greater magnitude than that found in either *Griggs* or *Causby*,⁴⁰ but the landowners were not able to prove that the flights passed directly over their property.

The court in *Batten* indicated, however, that if the operations had forced the landowners to vacate their homes there might have been a compensable taking.⁴¹ This restriction that a taking without a trespass must amount to an ouster of possession is contrary to the recognition in *Causby*⁴² and *Griggs*⁴³ of property rights in the use and enjoyment of land.⁴⁴ Moreover, it presents the landowner with a three-pronged dilemma. If he remains on the property, he will be precluded from recovery under *Batten*; if he sells the property at a depreciated price, he loses his standing to claim full compensation; if he abandons the property at a complete loss, he will incur the expense of substitute housing while awaiting a determination of whether he was forced to leave or chose to do so because of mere inconvenience.

Landowners who suffer injury from low-flying airplanes but cannot establish an actual trespass may be denied recovery in the federal courts unless the courts follow the dissenting opinion of Chief Judge Murrah in *Batten* and regard the presence or absence of nuisance injuries as determinative of a taking. Judge Murrah considered the takings in *Causby* and *Griggs* to be based upon nuisance-type injuries; a physical trespass is merely a coincidental factor common, but not essential to, a majority of decisions finding constitutional takings.⁴⁵ He therefore found no com-

306 F.2d 580 (10th Cir. 1962), cert. denied, 371 U.S. 955 (1963), 63 COLUM. L. REV. 755, 761 (1963).

39. 306 F.2d 580 (10th Cir. 1962), cert. denied, 371 U.S. 955 (1963).

40. *Id.* at 581-83.

41. *Id.* at 585.

42. 328 U.S. at 266.

43. 369 U.S. at 89.

44. See Dunham, *supra* note 18, at 87, who states that "there is no justification in the precedents for a requirement that the condemnor actually go upon or over or under the objector's surface land." He would call the "right to interfere with enjoyment of the claimant's property . . . an easement . . ." *Ibid.*

45. *Id.* at 586.

elling reason to adhere to a strict trespass requirement, but prescribed a test that would award compensation if an interference with the use and enjoyment of property was of sufficient directness, peculiarity, and magnitude "that fairness and justice . . . requires the burden imposed to be borne by the public and not by the individual alone."⁴⁶

Even if the federal courts follow the *Batten* decision and impose a strict trespass requirement, the landowners who will be precluded from recovery in the federal courts may be able to recover in a state court, especially if the state constitution permits recovery for injury to property in the absence of a taking.⁴⁷ In *Ackerman v. Port of Seattle*,⁴⁸ 61 property owners sought compensation for the encroachment of an airport approachway. Although the Washington Supreme Court found the frequent low flights to be a taking, it recognized that this finding was not essential to recovery.⁴⁹ If the landowners could establish that the noise and fear caused by the flights was substantial and unreasonable, they could recover under the Washington constitutional provision that requires compensation for damage to private property.⁵⁰

These state constitutional provisions may provide a broader basis for recovery than the fifth amendment. State courts need not be bound by the implication that *Batten* drew from *Griggs* and *Causby* that a taking requires an actual physical invasion. State constitutional provisions requiring compensation for the taking of property need not be limited to an actual trespass; courts interpreting these provisions can openly reject trespass and adopt the balancing of interests method utilized in the nuisance approach.⁵¹ Moreover, the purpose of provisions in certain state constitutions that allow compensation for injury to property was to expand the limits of compensability beyond a physical trespass.⁵²

III.

The availability of a broader remedy in state courts should not minimize the significance of the trespass requirement. Both the state and federal courts should abandon the requirement of an

46. *Id.* at 587; 63 COLUM. L. REV. 755, 761-62 (1963).

47. See note 9 *supra* and accompanying text.

48. 55 Wash. 2d 400, 348 P.2d 664 (1960).

49. *Id.* at 404, 406, 348 P.2d at 666, 667.

50. WASH. CONST. art. 1, § 16; see note 9 *supra* and accompanying text. Recovery under this provision was not allowed, however, because the three year statute of limitations had expired. *Ackerman v. Port of Seattle*, 55 Wash. 2d at 406, 348 P.2d at 667.

51. See note 18 *supra*.

52. See *Chicago v. Taylor*, 125 U.S. 161, 168 (1888); *Brown v. City of Seattle*, 5 Wash. 35, 39, 31 Pac., 313, 314 (1892).

actual trespass to establish the taking of an air easement because the imposition of that requirement will lead to injustice in many cases. A nuisance test will usually be more equitable. For example, if airplanes continually pass within 50 feet of both *A*'s and *B*'s houses, the noise and fear should be the same for both even though no airplane flies directly over any of *B*'s property. Yet if the trespass requirement is imposed, *A* will be able to recover the value of the easement taken as well as for any resulting depreciation in the market value of his property,⁵³ while *B* will recover nothing.⁵⁴ If, instead of trespass, nuisance is the test, both *A* and *B* would be entitled to compensation.⁵⁵ The injuries suffered by *A* and *B* are identical, and the public interest in maintaining these flights is the same; absent trespass, there is no basis for distinguishing between them.

Closer analysis of this problem, however, reveals that this reference to nuisance is superfluous. Nuisance has been characterized as being a traditionally vague remedy that "has meant all things to all men," and serves as an "excellent . . . illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem."⁵⁶ Insofar as courts utilize nuisance concepts, they are in fact determining the reasonableness of the interference by weighing the public utility against the private harm.⁵⁷ All these relevant interests could be balanced, and the presence or absence of a taking thereby determined, through direct reference to the constitutional provisions that require compensation for a taking.

Once a balancing test is adopted, whether openly or under the guise of nuisance, a delineation of those factors that should be balanced is important. The basic interests involved are the public interest in air travel and the public interest in maintaining the sanctity of private property. In a specific case, the effect that the noise, glare and fear of crash from the low-flying air-

53. See, e.g., *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

54. *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), cert. denied, 371 U.S. 955 (1963).

55. *Atkinson v. Bernard, Inc.*, 223 Ore. 624, 355 P.2d 229 (1960); see *Batten v. United States*, 306 F.2d 580, 585 (10th Cir. 1962) (dissent).

56. PROSSER, TORTS § 70, at 389 (2d ed. 1955).

57.

Reasonableness is so inherent in the judicial balancing of interests in the airport cases that most of the decisions . . . simply proceed to investigate the facts and then grant or deny relief upon the basis of the reasonableness of one interest yielding to another in a given case. . . . In following such a balancing of interests as a means of reaching a decision, the courts employ nuisance concepts with only a passing gesture in the direction of the law of trespass.

Atkinson v. Bernard, Inc., 223 Ore. 624, 632, 355 P.2d 229, 232 (1960).

planes has upon the owner's enjoyment of his property for residential or business purposes should be balanced against the public interest in maintaining these flights. The latter interest may depend upon the need for an airport to promote civic growth,⁵⁸ military and defense needs,⁵⁹ or the national interest in commercial air terminals.⁶⁰

One factor that should be considered in the balancing test is the notice of any planned expansion of the airport's facilities the property owners had at the time they purchased land adjacent to the airport.⁶¹ If the landowners did have notice, arguably they should not be compensated for the damage to the use of the land because they assumed the risk of the expansion.⁶² The price that such landowners paid for their property would presumably reflect the risk of damage from future expansion of the airport; to allow compensation in such a case would give the purchaser a windfall. For example, a speculator could purchase vacant property adjacent to an airport at a price reflecting the possibility that airport expansion might destroy the value of the property for commercial use. If the expansion is not made, he will have bought the property at a depreciated value; if the expansion is made and the speculator is compensated for the full market value of the property, he will also enjoy a profit. Yet, if the airport only pays him the amount he paid for the property, the airport will enjoy a windfall because it did not compensate prior owners for the depreciation they suffered from the airport's publicizing the possibility of expansion.

A possible solution to this windfall to the airport would be to allow the owner of property threatened by possible encroachment of an expanding airport to demand immediate appraisal of his land. The appraised value could then be filed and would serve to preserve his right to compensation for the deficiency between this value and the price received in any subsequent good faith sale. The subsequent purchaser could then only receive compensation for any depreciation incurred subsequent to his purchase of the property. Preserving the rights of prior owners in this way would

58. See *Brooks v. Patterson*, 159 Fla. 263, 31 So. 2d 472 (1947).

59. See *Stengel v. Crandon*, 156 Fla. 592, 23 So. 2d 835 (1945).

60. See *Griggs v. Allegheny County*, 369 U.S. 84, 90 (1962) (dissenting opinion); Comment, *Air Law—The Federal Aviation Act of 1958*, 57 MICH. L. REV. 1214 (1959).

61. See *Brooks v. Patterson*, 159 Fla. 263, 266, 31 So. 2d 472, 473 (1947).

62. *But cf. Atkinson v. Bernard, Inc.*, 223 Ore. 624, 355 P.2d 229 (1960), where the court granted an injunction against certain overflights. The court passed over the fact that the airport was built in 1918, while the plaintiffs' homes, located only 1000 feet from the end of the runway, were built in 1948.

prevent a windfall to both the speculator and the airport. In addition, this method would allow the owner of property threatened by such expansion to escape the dilemma of maintaining property of no value to himself for fear of losing full compensation.⁶³ Thus, the threatened property could be sold and put to a valuable use by the purchaser without the seller losing money as a result of the possibility of airport expansion.

CONCLUSION

The law of eminent domain in airspace has generally followed the law of eminent domain in highway condemnations—the landowner must establish a trespass before he can recover for the interference with the use of his land. Yet, even under this trespass requirement, most courts have imported nuisance concepts into the determination of a taking. In deciding whether a landowner has a right to compensation, they balance the public interest in the use and enjoyment of property against the public interest in promoting air travel. The equitable results that may be obtained under this balancing test alone justify abolition of the trespass requirement. Moreover, the reference to nuisance that courts make in applying this balancing test is confusing and superfluous and, therefore, it should also be abandoned.

Perhaps even this balancing test is not the ultimate equitable solution to the problem of adjusting landowners' rights to the taking of air easements. Even if the public interest in a particular flight outweighs the interest of a particular landowner, or if the public interest in freedom of air travel outweighs the public interest in protecting the use of private property, the conclusion that the landowner should not be compensated for the damage from low overflights is not necessarily justifiable. The public interest in promoting air travel should certainly not be used to shift the cost of developing this interest from the public to the injured landowners by denying them compensation for their injuries.⁶⁴

63. See text accompanying note 44 *supra*.

64. "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (Holmes, J.). Cf. *Harvey*, *supra* note 17, at 1332, who suggests that the solution to the airport problem lies in legislative action.

Increasingly we must turn to preventive techniques which forestall the development of sharp conflicts of legitimate interests by wise planning of much broader areas than are conventionally considered in zoning regulations. . . . Neither the welfare of aviation nor our traditional respect for the owner's rights in his land can be summarily sacrificed.

Ibid.