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# Protecting airports from height obstructions: **Should we be scared?**

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# Today's Presentation

- Law, regulations and best practices on protecting airports from height hazards
- Recent case from Nevada – *Sisolak v. Clark County*
- Implications for the future of height limitations



# Established Existing Law

- The United States has exclusive sovereignty of airspace of the United States (49 USC 40103)
- There is a public right of transit through navigable airspace (same)
- Navigable airspace = airspace above the minimum altitudes of flight prescribed by FAA regulations, including airspace needed to ensure safety in the taking off and landing of aircraft (49 USC 40102)
- Congress directed FAA to prescribe rules for the safe and efficient use of navigable airspace.



# FAA Regulations

- Navigable airspace (in uncongested areas) begins at an altitude of 500' AGL (14 CFR 91.119) *plus* lower levels needed for takeoff or landing
- Before building a structure near an airport, notice must be given to FAA who is responsible for determining whether the structure will pose a hazard to navigable airspace (14 CFR Part 77)
- An obstruction = structure exceeds certain absolute height thresholds or would encroach on *imaginary surfaces* (same).
- *Note:* A Part 77 hazard determination *does not* prohibit construction; that is a function of local law and the marketplace



# Grant Assurances

- Additional height/hazard protection requirements imposed on federally obligated airports
- Airport must commit to ensure that airspace is cleared of present and future hazards (Assurance 19)
- Airport must adopt zoning laws to the extent reasonable to restrict the use of land next to or near the airport to uses that are compatible with normal airport operations (Assurance 10)
- Airports must comply with Uniform Act (URARPAPA) in land acquisitions (42 USC 4654)



# Local and State Role

- More than half the states implement Part 77 (or similar) requirements through zoning
- FAA has issued model zoning ordinance to assist in implementing Part 77 – to prohibit obstructions to air navigation
- As development encroaches closer and closer to urban airports, zoning becomes more important
  - Both GA and commercial service airports
  - Often as great a problem for smaller airports with constrained physical footprints



# Industry Standard Practice

- FAA Policy
  - Proprietor obligated to protect approach surfaces
  - Zoning and other land use restrictions are useful/important/critical
- Best Practices
  - Zoning
  - Height limitation ordinances (since 1928)
  - Purchases (where feasible) *outside* safety areas
  - Avigation easements



# Las Vegas McCarran International Airport



- Gradual urban encroachment over last 50 years (especially last dozen)
- 2800 acres adjacent to The Strip
- Fifth or sixth largest US airport in passengers



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# Clark County's Height Protections

- Comprehensive zoning to protect against encroachment
- Ord. 728
  - Height limit of 150' near airport
  - Variance OK if no hazard determination
- Ord. 1221 (1990)
  - Approach zone protection
  - Further height limit to protect areas for potential runway expansion
  - Variance OK
- Ord. 1599 (1994)
  - Height limit in Airport Departure Critical Area
  - Variance OK



# Purposes of height ordinances

- Protect existing approach surfaces
- Protect County in event of runway expansion
- Insure against unwarranted encroachment in a superheated real estate market
- Allow an individualized determination of 'no hazard'



# Sisolak Case – Background

- Plaintiff owns land one mile south of Runway 1/19 complex, directly on runway centerline
- Runway – 1947; plaintiff purchased property in 1993
- Prior owner conveyed an aviation easement which expressly authorizes overflights
  
- Plaintiff challenged airport zoning height restriction
- Long and convoluted history – plaintiff was allowed to build something but not the height he wanted on his property
- Plaintiff won in the trial court



# Sisolak – NV Supreme Court

- Plaintiff owns first 500' of airspace above his land
  - Period.
  - No recognition of federal law on airspace for landing/takeoffs
- Ordinance is a *per se* taking by Clark County
  - Allowing flights below 500' constitutes a permanent physical occupation of privately owned airspace
  - No need to show interference with use of property (federal law)
- Avigation easement an uncompensated (impermissible) taking
- Decision rested on *both* Nevada and US Constitutions
- Awarded damages, interest and attorney fees under federal Uniform Act totaling \$17 million
- Effect on nearby property could cost Clark County \$10-20 Billion



# Just Nevada, Right?

- Yes, but cheered by property rights advocates everywhere
  - Property rights movement has momentum in many states
    - even those with strong land use traditions (FL, OR, CA)
- Based on both federal and state constitutions
  - Not formally a precedent but can be used as guidance elsewhere
- Per se taking: airport cannot mitigate damages (e.g., variance, exceptions)
- Avigation easements ineffective
- Damages + interest - \$17 mil for one parcel (measured from date ordinance was enacted) – untolled millions at airports surrounded by valuable real estate
- Enormous litigation cost – even if successful



# What's Next

- US Supreme Court denied review (ACI amicus)
- CCDOA paying award
- Several new lawsuits filed in Nevada, elsewhere
- Exploring federal legislative solutions
- Airport management strategies
  - Examine existing protections in light of *Sisolak*
  - Ask counsel for analysis of applicability of *Sisolak* principles in your state
  - Protect aviation easements with compensation
  - Purchases!



# Sources

- Sisolak v. McCarran International Airport and Clark County, 137 P.3d 1110 (2006) available at [www.airportattorneys.com](http://www.airportattorneys.com)
- FAA Advisory Circular, Proposed Construction or Alteration of Objects that May Affect the Navigable Airspace (A/C 70/7460.2K)
- FAA Advisory Circular, Model Zoning Ordinance to Limit Height of Objects Around Airports (A/C 150/5190.4A)

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