

THE VALIDITY OF AIRPORT ZONING ORDINANCES

THE PROBLEM of distinguishing between valid restrictions on the use of land under the police power and unconstitutional taking of property for public use without compensation has long troubled the courts. This problem has been particularly evident in the case of airport zoning ordinances which seek to prevent interference with airport operations by imposing height and use restrictions on surrounding land. A majority of the state courts considering the per se validity of these ordinances has declared them repugnant to state or federal constitutional "taking" provisions.¹

THE POLICE POWER CONCEPT

It is settled that physical invasion or appropriation of private property by the government constitutes a "taking" for which "just compensation" must be paid.² A government regulation such as a zoning ordinance, which involves no physical appropriation, is not prima facie a taking. The government may *regulate* property under the police power without paying compensation to those regulated.³ However, to be a valid exercise of the police power a regula-

¹ Most ordinances have been invalidated as violative of both state and federal constitutional provisions. *Dutton v. Mendocino County*, 1949 U.S. Av. 1 (Cal. Super. Ct. 1948); *Roark v. City of Caldwell*, 87 Idaho 557, 394 P.2d 641 (1964); *Indiana Toll Rd. Comm'n v. Jankovich*, 244 Ind. 574, 193 N.E.2d 237 (1963), cert. dismissed, 379 U.S. 487 (1965); *Mutual Chem. Co. of America v. Mayor of Baltimore*, 1939 U.S. Av. 11 (Md. Cir. Ct. 1939); [1937-1938] MICH. ATT'Y GEN. BIENNIAL REP. 257. *Contra*, *Waring v. Peterson*, 137 So. 2d 268 (Fla. Dist. Ct. App. 1962); *Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority*, 111 So. 2d 439 (Fla. 1959); cf. *United States v. 357.25 Acres of Land*, 55 F. Supp. 461 (W.D. La. 1944).

One ordinance has been held unreasonable as applied. *Banks v. Fayette County Bd. of Airport Zoning Appeals*, 313 S.W.2d 416 (Ky. 1958) (ordinance excluding all commercial uses held arbitrary and unreasonable because apartment houses and hospitals allowed). Others have been deemed repugnant to a state statute. *Yara Eng'r Corp. v. City of Newark*, 132 N.J.L. 370, 40 A.2d 559 (Sup. Ct. 1945) (ordinance invalid as not authorized by enabling statute); *Rice v. City of Newark*, 132 N.J.L. 387, 40 A.2d 561 (Sup. Ct. 1945) (same).

² *E.g.*, *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871); see U.S. CONST. amend. V and amend. XIV, § 1.

"[W]here real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution . . ." *Pumpelly v. Green Bay Co.*, *supra* at 181.

³ See, *e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (city ordinance prohibiting industrial use of property within specified areas of city); *Hadacheck v. Sebastian*, 239 U.S. 394, 408 (1915) (ordinance prohibiting brick manufacturing

tion must satisfy several vaguely enunciated tests. (1) It must be imposed in order to promote the general ends of public health, safety, morals, or general welfare⁴ and (2) must be reasonably necessary and related to the furtherance of one such end.⁵ (3) Further, the regulation must not deprive the landowner of every beneficial use of his property,⁶ and (4) it must confer upon the public a benefit which is on balance commensurate with the burden imposed on private property.⁷

Regulations failing to satisfy these tests when applied to particular property have been consistently invalidated as transgressing the bounds of the police power.⁸ In such cases it has been held that the regulation effects a "taking" to the extent that it diminishes the value of the subject property and is unconstitutional absent payment of just compensation to the owner.⁹

within specified areas upheld as applied to existing brickyard); *Mugler v. Kansas*, 123 U.S. 623 (1887) (statute prohibiting manufacture of intoxicating liquors upheld as applied to owner of existing brewery); *Consolidated Rock Prods. Co. v. City of Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, *appeal dismissed*, 371 U.S. 36 (1962) (city ordinance prohibiting rock and gravel quarrying within specified areas).

⁴ *E.g.*, *Berman v. Parker*, 348 U.S. 26, 31-33 (1954); *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928); *Village of Euclid v. Ambler Realty Co.*, *supra* note 3, at 395; *City of San Antonio v. Pidgeonhole Parking, Inc.*, 158 Tex. 318, 325, 311 S.W.2d 218, 219 (1958); see *Milwaukie Co. of Jehovah's Witnesses v. Mullen*, 214 Ore. 281, 306, 330 P.2d 5, 16 (1958).

⁵ See, *e.g.*, *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.*, 40 Cal. 2d 436, 441, 254 P.2d 29, 32 (1953); *Serve Yourself Gasoline Stations Ass'n v. Brock*, 39 Cal. 2d 813, 817, 249 P.2d 545, 548 (1952), *appeal dismissed*, 345 U.S. 980 (1953); *Dutton v. Mendocino County*, 1949 U.S. Av. 1, 14 (Cal. Super. Ct. 1948); *Bond Bros. v. Louisville & Jefferson County Metropolitan Sewer Dist.*, 307 Ky. 689, 699, 211 S.W.2d 867, 872 (1948), *cert. denied*, 339 U.S. 943 (1950).

⁶ See, *e.g.*, *Esgebeen v. Sonnenburg*, 239 Wis. 213, 1 N.W.2d 84 (1941). "For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot *wholly useless*, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain." *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908). (Emphasis added.)

⁷ *E.g.*, *Richardson v. Beattie*, 98 N.H. 71, 75-76, 95 A.2d 122, 125 (1953); *Milwaukie Co. of Jehovah's Witnesses v. Mullen*, 214 Ore. 281, 307, 330 P.2d 5, 17 (1958); see *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413-14 (1922).

⁸ *E.g.*, *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (ordinance not reasonably related to the public welfare); *Pennsylvania Coal Co. v. Mahon*, *supra* note 7 (benefit to public not commensurate with burden on private property); *Eubanks v. City of Richmond*, 226 U.S. 137 (1912) (ordinance not reasonably related to the public welfare).

⁹ See, *e.g.*, *Grosso v. Board of Adjustment*, 137 N.J.L. 630, 61 A.2d 167 (1948); *State ex rel. George v. Hull*, 65 Wyo. 251, 199 P.2d 832 (1948); cases cited note 8 *supra*. The measure of damages for injury to property by government action is, in general, the difference between the fair market value of the property before and after the in-

THE AIRPORT ZONING CASES

While the airport zoning cases have utilized the police power tests to evaluate the ordinances *as applied*, these decisions in general have transcended the police power rationale and found ordinances invalid *per se*. The Florida Supreme Court has been the only tribunal to hold such ordinances valid.¹⁰ In the dispositive case, the Florida court found in the challenged ordinance a promotion of public safety accorded to both area residents and users of the airport facilities.¹¹ Further, the court concluded that the general welfare of the state and community was served by the ordinance.¹² In the majority of cases, however, airport zoning ordinances have been invalidated *per se*, and on various grounds.¹³ The first case to consider such an ordinance, *Mutual Chem. Co. of America v. Mayor of Baltimore*¹⁴ held the ordinance invalid as benefitting only users of aerial transportation rather than the general public.¹⁵ A Cali-

jury. *E.g.*, *Snyder v. Platte Valley Pub. Power & Irrigation Dist.*, 144 Neb. 308, 13 N.W.2d 160 (1944); *Armstrong v. City of Seattle*, 180 Wash. 39, 38 P.2d 377 (1934).

¹⁰ *Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority*, 111 So. 2d 439 (Fla. 1959).

¹¹ *Id.* at 444-45; *accord*, *Waring v. Peterson*, 137 So. 2d 268 (Fla. Dist. Ct. App. 1962).

See also *United States v. 357.25 Acres of Land*, 55 F. Supp. 461 (W.D. La. 1944). There a verdict of no damages in a condemnation proceeding to obtain an easement of flight over defendant's land was upheld on grounds that the present use of land would not seriously be interfered with and that the height of structures on the land was already restricted by an airport zoning ordinance. In *Banks v. Fayette County Bd. of Airport Zoning Appeals*, 313 S.W.2d 416 (Ky. 1958), an ordinance was held unreasonable as applied to the plaintiff, but airport zoning ordinances in general were not declared invalid.

¹² *Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Air Authority*, 111 So. 2d 439, 443 (Fla. 1959).

¹³ The validity of an airport zoning ordinance was first considered by the Attorney General of Michigan in 1937. He recommended that the Michigan governor veto as unconstitutional an act of the legislature restricting the erection of structures on land surrounding airports, considering the act to effect the taking of an easement over the restricted land. [1937-1938] MICH. ATT'Y GEN. BIENNIAL REP. 257. This view of *per se* invalidity of height restrictions seems erroneous, since such restrictions have been upheld in other contexts for more than fifty years. See *Welch v. Swasey*, 214 U.S. 91 (1909); *Annot.*, 8 A.L.R.2d 963 (1949), and cases therein cited. Further, the case relied upon as authority by the Attorney General, *Piper v. Ekern*, 180 Wis. 586, 194 N.W. 159 (1923), may be read as holding height restrictions invalid only where they are imposed solely for the benefit of a building owned by the state and not void *per se*. See *id.* at 594-98, 194 N.W. at 162-63.

¹⁴ 1939 U.S. Av. 11 (Md. Cir. Ct. 1939).

¹⁵ *Id.* at 16. The Maryland court also asserted that the restrictions upon the landowner in effect made impossible the erection of any building upon the land and was thus "too extreme" to be imposed without payment of compensation. *Id.* at 15-16.

fornia court in *Dutton v. Mendocino County*¹⁶ subsequently cited the *Mutual Chem. Co.* case for the proposition that airport zoning ordinances are invalid per se because they conferred no benefit upon the general public.¹⁷ While tacitly sanctioning the public benefit test, the *Dutton* court chose to rely on the rationale of *United States v. Causby*,¹⁸ in which the Supreme Court had held that a landowner has a property interest in the air space immediately above his land for the physical violation of which he must be compensated.¹⁹ The *Dutton* court invoked *Causby* to buttress its holding that an ordinance restricting the height of buildings on the plaintiff's land in order to permit aircraft to use overhead air space constituted the "taking" of an easement across the land and was unconstitutional without payment of compensation.²⁰

Later cases invalidating airport zoning ordinances have not been posited on lack of benefit to the general public.²¹ Rather, relying on *Causby* and a later decision²² for the proposition that a landowner has a constitutionally protected interest in the air space above his land,²³ these cases have purported to distinguish "between zoning regulations which merely restrict the enjoyment and use of property" and those which effect a "taking of property for a public use for which compensation must be paid."²⁴ The test posed for determining whether a zoning ordinance merely restricts the use of property or effects a taking was asserted to be whether private property

¹⁶ 1949 U.S. Av. 1 (Cal. Super. Ct. 1948).

¹⁷ *Id.* at 14.

¹⁸ 328 U.S. 256 (1946).

¹⁹ *Id.* at 264-65. The *Causby* Court found a violation of a landowner's air space due to airplane operations immediately above the property. The Supreme Court ruled that "the landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land." *Id.* at 264.

²⁰ 1949 U.S. Av. at 11-13. The court also grounded its decision on the absence of any showing that the ordinance was necessary to promote the public safety, *id.* at 14, and that the diminution of the value of the property was so extreme as to constitute a "taking," *id.* at 11.

²¹ *Roark v. City of Caldwell*, 87 Idaho 557, 394 P.2d 641 (1964); *Indiana Toll Rd. Comm'n v. Jankovich*, 244 Ind. 574, 193 N.E.2d 237 (1963), *cert. dismissed*, 379 U.S. 487 (1965).

²² *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

²³ See *id.* at 88-89; *United States v. Causby*, 328 U.S. at 264-65.

²⁴ *Roark v. City of Caldwell*, 87 Idaho 557, 564, 394 P.2d 641, 645 (1964), quoting *Indiana Toll Rd. Comm'n v. Jankovich*, 244 Ind. 574, 581, 193 N.E.2d 237, 240 (1963).

In *Roark v. City of Caldwell*, *supra*, part of the plaintiff's land had been restricted to agricultural uses. The Idaho court held these and the height restrictions invalid, applying the same test to both. 87 Idaho at 566-67, 394 P.2d at 646-47.

rights are " 'actually destroyed' " or are " 'taken from the individual and conferred upon the public for public use.' " ²⁵ Thus, under this test if a zoning ordinance merely "destroys" property rights, the ordinance, if otherwise unobjectionable, will constitute a valid exercise of the police power. However, if the ordinance, in addition to destroying private property rights, also establishes public rights in the property and thus "transfers property rights" from the individual to the public for public use, it will be struck down per se as a taking of property without compensation. ²⁶ This distinction between "destruction" and "public use" of property derives its lexicon and form from traditional police power concepts, but has become a generic airport zoning doctrine.

RATIONALE OF ZONING INVALIDATION

Airport zoning ordinances have thus been invalidated on a variety of grounds. Apart from the finding in the *Dutton* case that the ordinance was enacted in order to grant airplanes the physical use of the air space above the zoned land, ²⁷ *Dutton* and other cases invalidating airport zoning ordinances rested primarily on two grounds: earlier cases held that airport zoning ordinances are for the benefit of users of aerial transportation rather than the general public, ²⁸ while more current decisions reasoned that airport zoning ordinances confer property rights upon the public for public use rather than "merely destroying" such rights. ²⁹

²⁵ *Id.* at 561-62, 394 P.2d at 643, quoting *Ackerman v. Port of Seattle*, 55 Wash. 2d 400, 408, 348 P.2d 664, 669 (1960). See *Indiana Toll Rd. Comm'n v. Jankovich*, *supra* note 24, at 581-82, 193 N.E.2d at 240. In that case, the court did not formulate a test for determining which regulations "merely restrict the enjoyment and use" of property and which regulations effect a "taking," though the court apparently had in mind a test similar to the one stated in the above case.

²⁶ See *Roark v. City of Caldwell*, *supra* note 24, at 561-62, 394 P.2d at 643.

²⁷ 1949 U.S. Av. at 11-13. For a discussion of this ground see text accompanying notes 44-56, *infra*.

²⁸ *Id.* at 1. The first case to hold that airport zoning ordinances benefited only users of aerial transportation was *Mutual Chem. Co. of America*. See notes 14-15 *supra* and accompanying text.

²⁹ *Roark v. City of Caldwell*, 87 Idaho 557, 394 P.2d 641 (1964); *Indiana Toll Rd. Comm'n v. Jankovich*, 244 Ind. 574, 193 N.E.2d 237 (1963), *cert. dismissed*, 379 U.S. 487 (1965).

Holdings in other cases have been based upon the particular facts present. *Banks v. Fayette County Bd. of Airport Zoning Appeals*, 313 S.W.2d 416 (Ky. 1958) (ordinance excluding all commercial uses held arbitrary and unreasonable because apartment houses and hospitals allowed); *Yara Eng'r Corp. v. City of Newark*, 132 N.J.L. 370, 40 A.2d 559 (Sup. Ct. 1945) (ordinance invalid as not authorized by enabling statute); *Rice v. City of Newark*, 132 N.J.L. 387, 40 A.2d 561 (Sup. Ct. 1945) (same).

A. *Lack of Benefit to the General Public*

The holdings that airport zoning ordinances are invalid because they benefit users of aerial transportation rather than the general public seem clearly unfounded. It is an accepted tenet that the police power may validly be exercised only for the benefit of the general public as opposed to a special group or class.³⁰ However, even if only users of aerial transportation derive benefit from airport zoning ordinances, and even if their number be considered so small as to constitute a special class, the general public may at times benefit from a regulation protecting the interests of a particular group.³¹ Clearly this is so when regulations are enacted to protect the lives and safety of a substantial portion of the public.³² Moreover, users of aerial transportation are *in fact* not the only beneficiaries of airport zoning ordinances. The safety of those living in the area is promoted by limiting the height of buildings and prohibiting uses which would endanger airplanes landing and taking off. Furthermore, the welfare of the entire community is furthered by enabling people to travel by air to and from the community in safety, thereby enhancing commercial development.³³ Recent decisions have not applied the public benefit test,³⁴ which indicates that its persuasiveness has waned in light of the counter arguments which have been interposed.

B. *Destruction or Public Use of Property*

It is difficult to evaluate the reasoning which buttresses the holdings that airport zoning ordinances are invalid as conferring property rights upon the public for public use rather than merely destroying

³⁰ *E.g.*, *Mayor of Savannah v. Savannah Distrib. Co.*, 202 Ga. 559, 43 S.E.2d 704 (1947); *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949).

³¹ See, *e.g.*, *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (statute extending time under existing mortgage foreclosure and sale held valid); *Ballarini v. Schlage Lock Co.*, 226 P.2d 771 (App. Dep't Super. Ct. Cal. 1950) (statute requiring employers to allow employees time off to vote without reducing wages upheld); *People v. Ford Motor Co.*, 271 App. Div. 141, 63 N.Y.S.2d 697 (1946) (same).

³² *Cf.* *Dowell v. City of Tulsa*, 273 P.2d 859 (Okla. 1954), where an ordinance authorizing flouridation of city water to reduce tooth decay in persons under sixteen years of age was held valid. The Oklahoma court found that the group benefiting from the ordinance was a substantial proportion of the public.

³³ See *Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority*, 111 So. 2d 439, 443 (Fla. 1959).

³⁴ See *Roark v. City of Caldwell*, 87 Idaho 557, 394 P.2d 641 (1964); *Indiana Toll Rd. Comm'n v. Jankovich*, 244 Ind. 574, 193 N.E.2d 237 (1962), *cert. dismissed*, 379 U.S. 487 (1965).

them. This "test" is not one which has traditionally been applied in police power cases, and judicial articulation of its foundations is not clear. Where "public use" connotes actual physical "use by the public," there is an isolable distinction between governmental action which merely "destroys" property rights and governmental action which grants the public the "use" of property.³⁵ As thus limited, this "test" merely states the conceptual distinction between "regulating" and "taking." It has not provided a discernable analytic base for reviewing airport zoning ordinances. These ordinances do not grant the public the physical use of any property rights.³⁶ The only way in which the public can be said to "use" the property right of which the landowner is deprived is by virtue of the fact that the public receives the benefit of the landowner's deprivation. However, this does not appear to be the meaning which the courts have placed upon "public use." All zoning regulations deprive the landowner of property rights in order to benefit the public. As applied in the airport zoning cases the "test" of destruction-or-public-use of property rights appears to be merely a formula for stating the result that an ordinance is or is not a taking, rather than a test for determining that result.

C. *The Governmental Enterprise Theory*

It has been suggested³⁷ that the cases invalidating airport zoning ordinances can be explained by a formula which can be applied in all zoning cases: where a landowner is deprived of property rights by a regulation enhancing the value of some governmental enterprise (such as an airport), the regulation will be characterized as a taking for which compensation is required. However, where the regulation merely resolves conflicting interests in a private sector of

³⁵ For example, an ordinance imposing building set-back restrictions for aesthetic purposes would merely "destroy" property rights—the landowner would be deprived of the right to use part of his land for building purposes, but no right to use that portion of the land would be granted to the public. However, an ordinance imposing building set-back restrictions in order to grant to the public an easement of passage across the land would "confer property rights upon the public for public use,"—there would be a transfer of property rights to the public and, therefore, a "taking."

³⁶ Where there are continuous overflights at low altitudes, as where the regulated land is situated at the end of an airport runway, it has been held that there is a physical use of the air space and, consequently, a taking. *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946). However, it is the actual *physical invasion* and not the *zoning ordinance* which effects the taking.

³⁷ See Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 67-69 (1964).

society, no compensation is required, for private citizens rather than a governmental enterprise derive the benefit.³⁸ As applied to the airport zoning cases, however, this test provides neither predictive validity nor a rational basis for resolution of future cases. This can best be illustrated by viewing previous decisions in governmental enterprise terms.

It is true that all the airports involved in these cases have been government-owned.³⁹ Moreover, these airports benefited economically from the zoning ordinances in the sense that, had no zoning ordinance been enacted, the airport would have been forced to pay compensation to surrounding landowners to prevent their interference with airport operations. However, under the governmental enterprise test, an exception is made in the case of "incidental" benefits to a government enterprise:⁴⁰ where a zoning regulation is

³⁸ *Id.* at 67.

"[The] . . . answer suggested here requires an attempt to isolate and define the two different kinds of private economic loss resulting from government activity and the two different respective roles played by the government in the process of completion from which these losses arise. This analysis rests upon the distinction between the role of government as participant and the government as mediator in the process of competition among economic claims. The losses to individual property owners arising from government activity of the first type result in a benefit to a government enterprise; losses arising from the second type of activity are the result of government mediating conflicts between competing private economic claims and produces no benefit to any governmental enterprise.

. . . .

"In addition to its enterprise capacity, in which government acquires resources for its own account, government also plays another and quite different role. It 'governs.' That is, it mediates the disputes of various citizens and groups within the society, and it resolves the conflict among competing and conflicting alternatives. Typically in this function it says, as between neighbors, that one fellow must cease keeping pigs in his backyard The essence of this function is that the government serves only as arbiter, defining standards to reconcile differences among the private interests in the community." *Id.* at 62-63.

³⁹ See *Dutton v. Mendocino County*, 1949 U.S. Av. at 2; *Roark v. City of Caldwell*, 87 Idaho 557, 558, 394 P.2d 641, 642 (1964); *Indiana Toll Rd. Comm'n v. Jankovich*, 244 Ind. 574, 575-76, 193 N.E.2d 237, 238 (1963), *cert. dismissed*, 379 U.S. 487 (1965); *Mutual Chem. Co. of America v. Mayor of Baltimore*, 1939 U.S. Av. at 15. The airports involved in the Florida cases were apparently also government-owned. See *Waring v. Peterson*, 137 So. 2d 268, 269 (Fla. Dist. Ct. App. 1962); *Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority*, 111 So. 2d 439, 440 n.1 (2) (Fla. 1959).

⁴⁰ An example of an incidental benefit might be afforded in the case of a hypothetical town which passes an ordinance requiring all mining properties to be operated so as to maintain subjacent support for all adjacent property, and a state highway adjoins a mine. The value of a governmental enterprise, the highway, is enhanced, but the government might be merely the incidental beneficiary of a regulation enacted to protect private landowners whose property adjoins a mine. See *Sax*, *supra* note 37, at 74.

enacted essentially to resolve conflicting private interests, no compensation is required if the governmental enterprise merely benefits "incidentally" and in common with all the private citizens of the community.⁴¹ Consequently, in any case where both a governmental enterprise *and* the general public benefit from a zoning ordinance there must be an inquiry into whether or not the benefit to the governmental enterprise is "incidental." In factual application, this dual benefit will be present in all situations involving a governmental benefit, since the general public presumably profits from any benefit to a governmental enterprise.

It is not clear under the incidental benefit exception whether the *purpose* of the ordinance or merely its *economic consequences* are to be considered; that is, whether the benefit to the governmental enterprise is incidental when the *primary purpose* of the ordinance is to resolve conflicting private interests regardless of tangible benefit to government enterprise, or whether the benefit is incidental when the *primary economic effect* of the ordinance is the benefit to private interests. In either event, airport zoning ordinances would appear to fall within the incidental benefit exception to the governmental benefit test. While airports clearly benefit from airport zoning ordinances, neither the primary purpose nor the primary effect of these ordinances is to benefit the airport. The *primary* purposes of the airport zoning ordinances would seem to be to promote safety for aerial transportation users and the safety of those living in the vicinity of the airport, and to promote the general welfare by encouraging aerial commerce, rather than to stimulate the business of the airport.⁴² Similarly, the *primary* economic benefit from the ordinance would seem to accrue not to the airport but to the general public. Improved air safety results in fewer airplane accidents and their attendant economic losses to society, and also results in the stimulation of commerce to the benefit of the community. It thus appears that the governmental benefit test, even if assumed to be a valid one, does not explain the airport cases. Further, its application in these cases founders on the attempt to sever analytically two basically covariant entities, the government itself and the public polity which it serves.

⁴¹ *Ibid.*

⁴² See *Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority*, 111 So. 2d 439, 443 (Fla. 1959).

D. *The Invasion of Air Space Rationale*

Since the decisions invalidating airport zoning ordinances cannot satisfactorily be explained by traditional police power tests⁴³ or by any new police power test of general applicability, it appears that the real bases for these decisions are policy considerations not involved in the usual zoning case. These considerations are revealed and given emphasis by the finding in the *Dutton* case that the ordinance was enacted in order to permit airplanes to use the air space above the zoned land.⁴⁴ The court held that to permit such use without compensation would be inconsistent with the case of *United States v. Causby*.⁴⁵ The later cases⁴⁶ also relied heavily upon *Causby* and upon the case of *Griggs v. Allegheny County*,⁴⁷ both of which held that a landowner has a constitutionally protected interest in the air space above his land for the physical violation of which he must be compensated.⁴⁸

The decisions thus appear to reflect the conclusion that airport zoning ordinances are an attempt to avoid paying the compensation required by *Causby* and *Griggs*.⁴⁹ If there were a zoning ordinance prohibiting use by the landowner of the very air space subsequently invaded by aircraft, the limitations imposed by the ordinance would

⁴³ There has been some application of traditional police power tests, but no definitive pattern has been exhibited. See notes 15, 20 *supra*.

⁴⁴ See text accompanying note 20 *supra*.

⁴⁵ 328 U.S. 256 (1946). For the facts of *Causby* see text accompanying note 48 *infra*.

The actual ground of the *Causby* decision was that the invaded air space had not been declared by Congress to be in the public domain. See 328 U.S. at 263-64. There was no square holding by the Supreme Court that the government cannot appropriate air space without payment of compensation until 1962, when the Court held on similar facts that there had been a taking despite the fact that Congress had declared the invaded air space to be within the public domain. *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

⁴⁶ *Roark v. City of Caldwell*, 87 Idaho 557, 394 P.2d 641 (1964); *Indiana Toll Rd. Comm'n v. Jankovich*, 244 Ind. 574, 193 N.E.2d 237 (1963), *cert. dismissed*, 379 U.S. 487 (1965).

⁴⁷ 369 U.S. 84 (1962).

⁴⁸ In both *Causby* and *Griggs*, owners of land adjacent to government airports sued the government for damages caused by continuous low-level airplane flights. The Supreme Court in both cases held that a landowner has title to as much of the air space above his land as he can make beneficial use of and that continuous physical invasion by the airplanes constituted the taking of an easement for which the landowner must be compensated. *Griggs v. Allegheny County*, 369 U.S. at 88-90; *United States v. Causby*, 328 U.S. at 264-66. The Court in *Griggs* so ruled despite the fact that Congress had declared the violated air space to be in the public domain. 72 Stat. 739, 49 U.S.C. § 1301 (24) (1964).

⁴⁹ As *Causby* and *Griggs* involved physical invasions, they are readily distinguishable from the airport zoning cases. See note 36 *supra*.

dictate that the landowner would be entitled at best only to nominal compensation for the invasion⁵⁰ in the absence of additional factors such as excessive smoke or noise. The courts apparently feel that to allow such a result would be inconsistent with the *Griggs* case, where the fact that Congress had declared the invaded air space to be in the public domain was not mentioned as a relevant factor in assessing damages.⁵¹

A RATIONALE FOR VALIDATION

In order to effectuate the policy of the *Griggs* and *Causby* cases it is not necessary to invalidate per se an airport zoning ordinance in its entirety. The traditional "police power" tests offer the landowner sufficient protection.⁵² The fact that the courts anticipate a subsequent physical invasion of the air space over some of the regulated property does not necessitate invalidation of an ordinance per se, thus giving more protection to the landowner than would otherwise be required. The per se validity of airport zoning ordinances should be determined by means of the traditional "police power" tests. If the ordinance is upheld with respect to a particular landowner, that landowner in any subsequent physical invasion case will still be entitled to compensation to the extent that the physical invasion imposes upon the property burdens which are greater than those imposed by the zoning ordinance.⁵³

Under such an approach the only thing which the landowner will have lost is compensation for the bare loss of air space itself.

⁵⁰ See *United States v. 357.25 Acres of Land*, 55 F. Supp. 461 (W.D. La. 1944).

⁵¹ See 369 U.S. at 85.

The rationale implicit in *Causby* and *Griggs* also explains the holdings that use restrictions on land surrounding an airport are invalid. See *Roark v. City of Caldwell*, 87 Idaho 557, 564-67, 394 P.2d 641, 645-47 (1964). In *Causby* the landowner was awarded compensation for actual damage to his business caused by the overflights. If the use of land surrounding an airport were to be severely restricted (in *Roark* portions of the land were limited to agricultural uses, *id.* at 560, 394 P.2d at 642), the possibility of such damages being incurred would be greatly reduced.

⁵² See text accompanying notes 4-9 *supra*. If a particular airport zoning ordinance deprives a landowner of every beneficial use of his property or if it imposes upon him a burden which is unreasonable when measured against the benefit to the public, it is invalid with respect to that particular landowner under traditional police power tests. Such a situation would arise in the usual airport ordinance case only where land is situated under the glidepath of airplanes using the airport and the height restrictions imposed are so extreme as to prevent a landowner from making any substantial beneficial use of his property.

⁵³ For example, where invading airplanes cause excessive smoke or noise this damage is compensable in a tortious action for trespass.

Moreover, if this loss is *unreasonable* the landowner will be entitled to compensation under traditional "police power" tests.⁵⁴ It is difficult to justify the compensation of a landowner for mere loss of air space rights due to airport zoning restrictions when he is not entitled to compensation for such a loss under similar height and use restrictions designed to further such purposes as prevention of fire hazards.⁵⁵

An alternate method according even more weight to the policy of the *Griggs* and *Causby* cases would be to evaluate airport zoning ordinances by traditional "police power" tests, but in any subsequent eminent domain case to assess damages on the basis of the fair market value of the land before the existence of the zoning ordinance. Such a tack would compensate the landowner for restrictions imposed by the zoning ordinances whenever they are followed by a physical invasion. However, to allow compensation for the loss of fair market value only to those landowners whose air space is physically violated appears anomalous, since the same restrictions are applied to all. However, this method is in line with the cases which suggest that whether or not a "taking" occurs when the value of property is

⁵⁴ See text accompanying notes 4-9 *supra*.

⁵⁵ See, e.g., *Rohrs v. Zabriskie*, 102 N.J.L. 473, 133 Atl. 65 (1926); *Atkinson v. Piper*, 181 Wis. 519, 195 N.W. 544 (1923); Annot., 8 A.L.R.2d 963 (1949).

For an example of the suggested approach, see *McCarthy v. City of Manhattan Beach*, 41 Cal. 2d 879, 264 P.2d 932 (1953), when plaintiffs' beach property, upon which plaintiffs planned to build houses, was restricted to recreational uses. After holding the ordinance to be a reasonable exercise of the police power as a measure to prevent flood damage the California court stated:

"The trial court properly disregarded plaintiffs' contention that the . . . restriction of their property was . . . a scheme . . . to depress the value of plaintiffs' beach property so that it could eventually be acquired by the public authorities at the lowest price possible, and meanwhile be used for public recreational purpose

"Plaintiffs' claims are entirely immaterial in view of the settled rule that 'the purpose or motive of the city officials in passing an ordinance is irrelevant to any inquiry concerning the reasonableness of the ordinance If the conditions justify the enactment of the ordinance, the motives prompting its enactment are of no consequence.'" *Id.* at 893-94.

Of course, if the *only* ground upon which the ordinance can be upheld is that it will freeze the value of the property and thereby lower the cost of acquisition, the ordinance is invalid. *Hager v. Louisville & Jefferson County Planning & Zoning Comm'n*, 261 S.W.2d 619 (Ky. Ct. App. 1953); *Messina v. Mayor of Lodi*, 18 N.J. Super. 503, 87 A.2d 729 (Sup. Ct. 1948); *Miller v. Beaver Falls*, 368 Pa. 189, 82 A.2d 34 (1951). *Contra*, *Headley v. City of Rochester*, 272 N.Y. 197, 5 N.E.2d 198 (1936); *In the Matter of Opening Furman Street*, 17 Wend. 649 (N.Y. Sup. Ct. 1836); *Scattergood v. Comm'rs*, 311 Pa. 490, 167 Atl. 40 (1933); *In re Philadelphia Parkway*, 295 Pa. 538, 145 Atl. 600 (1929). All of the latter grouping of cases dealt with restricting property for the sole purpose of later acquiring it for *street* uses. The doctrine of these cases may be limited to those facts. See *Miller v. Beaver Falls*, *supra*.

decreased by airplane smoke, noise, or shock waves depends upon whether the property owner's air space has been physically violated.⁶⁰ The anomalous prejudice to adjoining landowners whose air space is not invaded militates toward the scheme of compensation for any actual damage posed in the former method.

CONCLUSION

The issue of the constitutionality of airport zoning ordinances will continue to grow in importance as urban expansion leads to airports which are surrounded by cities and as the amount of uninhabited land available for new airports decreases. If municipalities are forced to pay compensation for necessary safety restrictions upon land surrounding airports, the financial burden will be staggering. This burden will in all probability be passed on to the airlines and thence to the traveling public through increased fares, to the resulting detriment of aerial commerce. Since it is no longer denied that airport zoning ordinances bear a substantial relationship to the promotion of public safety and general welfare, and since these ordinances can be upheld without subverting the policy of the *Causby* and *Griggs* cases, airport zoning ordinances should be measured by the same tests applied to zoning ordinances in general and, unless clearly unreasonable *in a given factual situation*, should be upheld.

⁶⁰ See *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963); *Avery v. United States*, 330 F.2d 640 (Ct. Cl. 1964).