ORAL ARGUMENT – 00-0944
10/17/01
CITY OF AUSTIN V. TRAVIS CO. LANDFILL CO.

BARON: This is a taking by overflight case, which is not your typical takings case. Unlike an entry onto the surface of land, the mere passage of aircraft through airspace above property is not in and of itself a taking. Because the air is a public highway, a taking occurs if and only if the flights are so low and so frequent that the flights themselves result in a direct, immediate and substantial interference with use and enjoyment of the property.

The issue in this case is whether the landfill company has met the constitutionally required showing of substantial interference with use and enjoyment of its property by reason of civilian flights in and out of Austin Berg. Airport.

O'NEILL: I was a bit surprised in reading the response brief in this case at the way the issue was framed, and I would like to hear your take on that. In the summary of the argument, TCLC claims that its takings case is not predicated on the loss of its ability to expand the landfill. And they specifically say when TCLC bought the property it acquired the right to exclude overflights by civilian cargo and passenger jetliners, period. Where do they derive that right to exclude from they seem they seem to be indicating that they don't need to show any sort of interference, that when they bought the property there was somehow a right to exclude civilian flights.

BARON: There is no right to exclude. I think the SC clearly said in Causby and it was reiterated in the Brown v. US case out of the federal circuit in 1996, that there is no per se taking just from airplanes passing over your property. But I think you're right in observing that the nature of the dispute has changed substantially and narrowed quite a bit based on the response brief on the merits. Because in the TC, counsel for the landfill company was arguing that the inability to vertically expand supported the substantial interference prong of the takings test.

O'NEILL: Well that's the way I had read it up until this point.

BARON: Right. And that's what we've been arguing about is whether or not preexisting limitations on height, like the clearance easement that the city owns that prevents them from vertically expanding, could show substantial interference when they were already in place on the property. Now what they are saying is that liability was not predicated on the inability to vertically expand. And instead they are now submitting that just potential risk and hazards from operating near the airport and under the glide slope standing alone constitutes substantial interference.

O'NEILL: Are you aware of any authority to support that proposition?

BARON: No, and I don't think it fits in with the overflight case jurisprudence that we have. And all three CA Justices recognized that this case doesn't look like a typical overflight case.

In all of those cases there was some effect of the airplanes themselves, like noise or vibrations, or jet fuel spray or something that materially altered the way the plaintiff could use the property.

O'NEILL: And that gets to my next question. How are we to evaluate this case? Is this a defective charge case, or a no evidence case?

BARON: It's a no evidence case. Because, where the particular facts rise to the level of taking is a question of law. The court stated that very recently in the General Service Comm. v. Little Tex case, 39 S.W.3d 598. And before that in Mahew v. Town of Sunnyvale. Same analysis. And in fact the court relied on the US SC's decision in a overflight case - Causby - for the proposition that whether a particular facts give to a level of interference necessary to prove a taking is a question of law.

ENOCH: But there is the argument that the charge was incorrect because it asked the jury as a part of the takings whether or not there was a takings to determine if there was an diminution in value of the property. Is there some evidence that supports that finding?

BARON: The jury was asked whether there was a substantial decrease in market value. And if you look at the record, almost all of the testimony in the record does not relate to the effect of just the overflights. Their expert appraisal witness was asked to compare two scenarios, and those were the land with the airport, and the land without the airport, not the land with the overflights and the land without the overflights.

ENOCH: Even if the charge is a correct charge, there is still no evidence supporting that?

BARON: That is correct.

BAKER: The majority opinion in the CA said there was preservation problem and held that the city didn't preserve it. The dissent talks about charge error and says, well yes they did. But it looked like they were talking about two different things. Do I understand your charge error is the 'or' phrase of part 3 of that question as opposed to part 2?

BARON: I think there were two complaints about the charge. One was that a change in market value standing alone does not constitute taking. But the other is that it failed to exclude changes in value or interference attributable to the existing clearance easement that limited the height of the landfill anyway. And so the jury was permitted to base a finding of substantial on what the appraiser testified was really a substantial change by raising(?) up the airport and these other restrictions on the property, not a change based on just the flights themselves. So I think there were two different complaints on the charge.

HANKINSON: If you're complaint about the charge is an alternative _____ for reversal and need not be reached if we agree that there is no evidence in the taking?

BARON: That's correct.

HANKINSON: If we agree that there is no evidence in the physical taking by the overflights, which are the first issues that you present, is there any need to reach the regulatory taking issue, or is that too an alternative argument?

BARON: The regulatory takings issue is not so much an issue as an example of how it can be avoided by claiming that there are airplanes through the property, but the airplanes themselves aren't causing the harm. It's really the regulation that's causing the harm, so it's an end-run on a regulatory taking. It's not a direct issue. It's just showing the problem with this case when you allow a lack of causation basically between the flights and _____ claimed.

And if you put this case in the context of the overflight cases, which as I said the CA recognized this doesn't fit. In Causby, for example, the plaintiff could no longer use their land as a commercial chicken farm. And in Griggs and McFadden, residential property was rendered just uninhabitable. And even in Brown v. United States, which is the most recent overflight case we have from the federal circuit in 1996, there wasn't very much current use of the property except for hunting, but the plaintiffs nonetheless alleged that noise from jet military flights over the property fundamentally altered the nature of the property, so that it's no longer fit for recreational development, but could only be put to agricultural use.

HECHT: The landowner cites Brown for the proposition that the substantial interference test may be met by showing a current decrease in market value, or by proof of adverse impact on some reasonably foreseeable future use. What's your comment on that?

BARON: I think what Brown says is that a significant decline in market value, which decline is directly attributable to the overflights is strong support but they don't go so far as to say standing alone it's enough. But in that case, there was an indication that the overflights or an allegation that the overflights changed the use from recreational to agricultural. Here, we don't have that situation. First, the landfill company is not complaining about any physical effects of the overflight like noise and vibrations, which you see in these other cases. They are also not saying that the fundamental nature of their property has changed. It's undisputed in the record that the highest and best use of the property both before and after the alleged taking is as a landfill. And Mr. Mace, the GM of the company, admitted at trial that there was no impediment to moving forward under the permit as issued.

So under these cases, the types of claims we have here - potential risk and hazards - don't rise to the constitutional level of substantial interference.

Even if we get there, there is no showing in this record that potential risks and hazards rise to the level of substantial. When you look at this record, you have to keep in mind that very little of the testimony relates just to the overflights.

PHILLIPS: $3 million is substantial.

BARON: It's substantial, but you have to remember that what they were comparing is the land with no airport, as if there were no airport near it, no clearance easement, no military flights over the property verses the land with all of those items in place. And so most if not all appears to be attributable to the height restrictions on the property, because most of the testimony had to do with how the landfill property could be expanded under an expanded permit, how much more capacity they would have, they would have had 6 years longer license and so forth.

If you look behind Tab 1, this is the testimony from Clint Sayers, who is the expert appraisal witness for the plaintiff. On the bottom of the first page highlighted in orange, you will see here's what the task he was asked to do. And it was to compare two scenarios with and without the airport. And I think you will probably hear in the response argument that the testified that there was a 5% increased risk factor between his two scenarios. But you have to keep in mind that that's risk with and without the airport, not with and without the overflights.

If you turn to page 185, which should be after that little passage, I will just show you what he says about the effect of just the overflights on the property. First he is asked, well is it going to affect people coming and using the landfill? And he says, no, overflights are not going to affect that.

On the next page, here is comparing apples to apples and not apples to oranges. And he says, the risk on the property after the alleged taking is exactly the same as it was in 1988 when the permit issued. So there is not a change in risk from the property burdened and then with the overflights.

And then finally, is kind of a group of questions. First, he's asked: were you asked to look at just the overflights as part of your assignment? And he says, no. But then counsel for the landfill company says, well do you have an opinion anyway about whether or not these flights constitute a direct and immediate interference? And he wasn't asked if it was substantial. And all he could come up with is, well yeah only to the extent that it adds potential hazards to the property. And then when asked if he had ever calculated what the costs of those hazards are, he says, no, I've not calculated that.

So at best in this record, the direct effect of overflights is unquantified potential hazards that are never testified to as being substantial. And for that reason we have no evidence of substantial interference even by potential risks and hazards assuming they met the constitutional level of substantial interference in the first place.

ENOCH: Going back to the charge, your argument about a substantial impact on the property. It seems to me a lot of the argument is whether or not that could be shown simply by showing a diminution in value of the property. If there is some evidence of diminution in value of the property, it seems to me we would have to address whether or not that is an element of the

takings claim as opposed to the damages part of it. Are you basically agreeing that under Brown, the diminution in value is some evidence of the taking, or some part of an element of taking?

BARON: I think there's two parts to Brown. Brown says it's strong support. Normally you're not going to have a significant decline in market value directly attributable to overflight unless there's some fundamental change in the way the property can be used.

But what Brown also says is, that minor, indirect, speculative changes in value don't get you there. If you might remember, the courts used sort of a similar analysis in State v. Heel, which was the materially and substantially impaired access to property.

ENOCH: So if the charge is incorrect it would be the failure to say a substantial diminution in value as opposed to a diminution in value?

BARON: It says substantial, but there's no evidence that it is substantial. But in State v. Heel, for example, the issue there is materially and substantially impaired access. And there there was expert testimony that the road improvements or changes did add more confusion, add more hazard, made it more difficult and did affect market value. And this court held as a matter of law that that doesn't get you to materially and substantially.

ENOCH: It seems to be substantial would be a major problem in determining what is substantial. If you look at Brown would it be not a diminution in value, but a substantial change in the use of the property or affecting a substantial change in the use of the property? If that is an element, wouldn't that be against(?) your element to evaluate the jury's fact finding process than saying substantial drop in value of the property?

BARON: I agree with that. I do think that Brown says that a significant decline attributable to overflights is support, but it doesn't get you all the way there. And in that case, there was a change in use. And that is easier to evaluate. But in Mahew, for example, and State v. Hill, this court deals with those issues in a constitutional setting all the time. And it may not be easy, but you do it.

BAKER: It appears in this case there was a negotiated avigation easement, which is in that deed. Meaning that it's a compensable theory that they have to buy from the landowner the right to do what they bargained for here. By the same token, can there be the elements of an avigation easement that brings about a taking would cause the state actor to be liable for whatever damages a jury might find? Is that how that could work?

BARON: I think if they showed a substantial new and different interference with the property that wasn't preexisting, that there could be...

BAKER: That if the avigation easement didn't exist in this deed in this case could they prove a taking by showing the elements of what an avigation is and say, and therefore, we are

entitled to compensation under that theory?

BARON: You have to show three things to get an avigation easement. You have to show the flights are directly over the property, that they are low and frequent, and that they result in a substantial interference. So if they met that, yes. But they haven't.

BAKER: So the jury question that was involved here with the three parts is basically submitting the elements of an avigation easement?

BARON: Basically it's submitting the question of a taking. It's really just a question of law that was submitted to the jury.

BAKER: And so part two in there has to do with the regulatory limits of 500 ft. in uncongested areas?

BARON: That really just goes to whether or not they are low enough to be a compensable taking.

O'NEILL: There didn't have to be an avigation easement. There's no requirement that an airport before they begin operation, military or civilian, go out and acquire airspace rights over _____ property is there?

BARON: That's correct.

O'NEILL: And so if there were no military avigation easement, then there would be a burden of proof of taking in order for their to be compensation for the landowners. Is it fair to say that the avigation easement is bought just as a precaution against the takings claim, that there's no requirement that it be bought?

BARON: There is no requirement. It often is when there are uses that are incompatible with loud airplanes going overhead like a school, or residences...

O'NEILL: And the purpose of that is to avoid times like this?

BARON: Yes, to protect against a taking claim.

O'NEILL: But there's no right to have those bought out?

BARON: No, and there's no right to exclude.

BAKER: What about their argument that the city can't rely on that avigation easement because it's limited to military aircraft?

BARON: Well I think that's correct. I don't think it protects the city if there's a showing that the civilian flights result in substantial interference under these cases. I will note though that there still are military flights in and out of Austin/Bergstrom under that military avigation easement.

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RESPONDENT

MCCLISH: At the time of trial, the evidence was 25 military flights had used the airstrip. Almost 6500 civilian flights have used the airstrip outside the scope of the avigation easement, the overflight easement.

HANKINSON: Would you just go right to the heart of the matter and tell us what evidence there is in the record of a substantial interruption of the use and enjoyment of the property as a result of the overflights themselves as opposed to anything else?

MCCLISH: There are three elements of damages that both sides proved to the court and the jury. Because these overflights are so low, because they come so close to the surface, the ability of a landowner to expand this landfill is gone.

O'NEILL: This is where I'm confused, and this was my original question. My understanding is you're not relying on the inability to vertically expand to constitute a taking.

MCCLISH: As a part of the analysis for liability for a taking, that's part of the damages that the landowner suffers.

O'NEILL: So the inability to expand the landfill vertically is not an interference that you're claiming forms the basis of the takings claim?

MCCLISH: It forms a basis of a part of the takings claim to the extent that proof of damages is proof of substantial interference, because that's the way we have to calculate damages in Texas condemnation cases.

HECHT: Well the statement in your brief is, TCLC's liability case is not predicated upon the loss of its ability to expand the landfill. Your liability case is not predicated on that.

MCCLISH: It's predicated on the right to exclude, which our US SC says is the basis of the common law right to property ownership.

HECHT: But you just now said that the ability to expand shows substantial interference which shows liability.

MCCLISH: It's part of the evidence that supports that allegation.

HECHT: Then I don't understand the statement "is not predicated upon". What does that mean?

MCCLISH: The proof that the landowner has to make, the second showing, the second hurdle he has to get by to even get to the question of substantial interference and damages, is whether his airspace is uniquely impacted as opposed to all of the other people out there. Everybody has to agree to put up with flights that are above the level of 500 ft. But in federal jurisprudence where flights come below the level of 500 ft., the 500 ft. rule, the courts find that that is an invasion of the landowner's airspace that he is entitled to use and control for his benefit. And that I think is the predicate for a finding before you ever get to the issue of substantial interference and damages, that's the predicate for the landowner's claim.

O'NEILL: Is your theory that once it's established that that airspace is invaded, that there is automatically a right to compensation?

MCCLISH: No. I personally think there should be. Because I don't know why a overflight case should be treated differently than any other physical invasion case. If you read the SC's physical invasion cases...

O'NEILL: I understand you disagree...

MCCLISH: I agree there has to be proof of a substantial interference with the landowner's use and enjoyment of his property. That's another burden.

O'NEILL: And what is the substantial interference that you're relying on here?

MCCLISH: Reduction in the size of the landfill, increased risk in operating it and increased cost in operating it.

O'NEILL: No, no, not reduction. Inability to expand.

MCCLISH: He wasn't able to build his landfill as large as he would have been able to.

O'NEILL: Now why does the overflight change that situation? Let's say that this airport was still as it originally was, it was still a military operation.

MCCLISH: They were still flying military planes through this airspace.

O'NEILL: Just as it was.

MCCLISH: They would be privileged. If they were flying within the scope of the easement that they have, they would be privileged. As long as they didn't fly more than 60,900 flights per year, the military would be privileged.

O'NEILL: So you have to show then that there is an incremental difference between the civilian overflights and the way the airport was before in order to show a substantial taking?

MCCLISH: I think we have to show invasions of the airspace that are outside of the scope of the easement that privileges those overflights.

O'NEILL: And that does not appear to be what the proof at trial was. It appears that the proof at trial was between airport/no airport verses civilian airport/military airport.

MCCLISH: That's the way that damages are required to be calculated in Texas condemnation law. And in federal condemnation law and the law of every jurisprudence in the US that I am aware of, the measure of damages is the difference between the value of the property before the taking and excluding consideration of the project that's charged with the taking.

O'NEILL: Before the taking. And the taking here was from the civilian use.

MCCLISH: When the city started flying on June 15, 1997.

O'NEILL: That's yes, right?

MCCLISH: Yes.

O'NEILL: So it was the civilian use. So immediately before the civilian use was the military use.

MCCLISH: There was no use. The airport was closed. If the US gov't had ordered the airport closed, they would have ordered the real property assets there sold, including the easement that burdened my clients' property. And under federal law that easement is offered first to them as the owners of the fee(?) unless somebody comes forward and says they need it for gov't purposes.

O'NEILL: Whether it was closed or not, there was a right to use it for military overflights. So then the point in time you have to look at, I would think, would be at the time of the taking is the right to use it for military verses civilian.

MCCLISH: Yes.

O'NEILL: And it seems the proof at trial ignored the fact there was a right to use it for military and just presumed no airport.

MCCLISH: No, ma'am. The proof at trial from their witness was, that the few military flights they were using at that time were purely transient military flights. But they were only coming there because the city was operating the airport. The proof at trial was, as of the date of taking, but for the project charged with the taking, but for the city's deciding to use this for a civilian airport,

as of the date of taking, that military avigation easement didn't mean anything anymore.

HANKINSON: It still existed.

MCCLISH: It did exist.

HANKINSON: I mean there still was the right of the gov't to fly military flights over that property under the avigation easement. That had not gone away?

MCCLISH: That avigation easement existed. And it's like any other restriction on the landowners ability to use his property when you're analyzing the value of the whole property.

HANKINSON: You said that there were three pieces of evidence that showed substantial interference with the use of and enjoyment of the property. First you said was the ability to expand vertically. What are the other two?

MCCLISH: The increased risk of operating because the flights are so low that there's an enhanced risk of burden, and increased operating costs. All of the witnesses that have testified on this issue agreed that all three of those things were present as an adverse impact directly of the overflghts. Because the airplanes were coming so near the ground at this point that you had to incur additional costs in operating your landfill. You had additional risk from bird strike...

O'NEILL: Was that quantified? Was there a dollar figure put on the risk of just the possibility of _____ bird strikes? I understand that there's a lot of confusion about the bird strike issue. It appears that you can't get your type 4 permit without showing birds are not a problem, and also this is a type 4 landfill that there's argument that it doesn't attract birds. But in any event, assuming that there is a bird problem and an increase hazard was there a quantifiable amount put on that before the taking and after the taking?

MCCLISH: No. There was not an allocation among all these issues of what the value was, of which element contributed what amount to the decrease in value. Both appraisers found that these three elements contributed to a decrease in the value of the property. The city's appraiser $2.3 million. Our guy $3.6 million.

O'NEILL: But again, that was based on no airport verses airport rather than military verses civilian.

MCCLISH: Yes, but I hasten to point out to you, the only evidence in the record that there was any adverse impact on this property because of the operation of the airport, was because of the overflights. If you look at the exhibits that I have given you, ex. 1, and roll it out there and see all the property around this airport that's impacted by one of the height(?) hazard ordinances that the city has enacted, the evidence at this trial is that almost all of those properties are enhanced by the operation of this airport.

HANKINSON: When you talked about increased risk of operating the airport as evidence of substantial interference, before the civilian flights started it was being used as a landfill. And now that the civilian flights are going over the property it's still being used as a landfill. There's been no difference in the use of the way the property is used or the way it can be used since the civilian flights started. I have a hard time understanding how that can be substantial interference if in fact it in no way has affected the use of the property.

MCCLISH: It's not worth as much. Both sides agree to that.

HANKINSON: You said that the increased risk of operating was evidence of substantial interference. And I'm not understanding how that does interfere when in fact a landfill was being operated on the property before the overflights began, a landfill is being operated now that the flights are occurring on a daily basis. So what I need to know is why that is evidence under the US SC jurisprudence in the overflight area of evidence of substantial interference of use and enjoyment.

MCCLISH: I want to read to you from the US SC's jurisprudence, because I think it's real important.

HANKINSON: I need for you to just explain - I'm just not connecting in terms of how increased risk of operating amounts to substantial interference when in fact you're still operating the landfill. No difference.

MCCLISH: You can still operate a landfill but there's a big difference if it's worth $3 million less because of these overflight operations. And the undisputed evidence at trial was it's worth less.

HANKINSON: But it's not worth less because of the increased risk. In answer to Justice O'Neill's question, you said that there was no evidence quantifying that. And in fact wasn't the evidence of the diminution in value associated with the fact that you're unable to expand the landfill vertically?

MCCLISH: No. As a matter of fact there are three elements that both appraisers found contributed to the decrease in market value of the property. Neither of the appraisers, quite properly under Texas law - the Westgate opinion - neither of the appraisers segregated the elements of damages and found this amount for one purpose and this amount for another. They found the value of the property before and the value of the property after. One of them thought it was $2.3 million; one of them thought it was $3.6 million....

HANKINSON: And what was the cause of the diminution in value?

MCCLISH: Increased risk was one of the causes to both of the appraisers. Increased capacity was one of the causes to both of the appraisers. Decreased capacity was one of the causes to both of the appraisers. Their's and mine.

HANKINSON: But how was that evidence connected to overflights as opposed to being connected to the fact that this landfill is next to an airport and as a result there are zoning restrictions in terms of what you can build and how you can build it. There was a clearance easement that was part of the easement in this property with respect to this property that preexisted your clients owning the property. Again, it ties back to yes diminution in value can be evidence of damage, but before you get to that you've got to show the substantial interference caused by the overflights as opposed to something else. And that's what I'm having a hard time understanding and why I keep repeating questions so I understand your position clearly. How does it tie specifically to the overflights?

MCCLISH: My first answer is substantial diminution in market value according to the US SC decision in Causby is conclusive evidence of substantial interference with the use and enjoyment of the land.

HANKINSON: As long as it's caused by the overflights as opposed to something else. And that's what I' read in Causby and that's what I read in Brown and that's what I read in Griggs. And that's the connecting piece that I would like for you to help me with if you can.

MCCLISH: The first thing I need to say about that is, it's not the jury's finding of that that the court should be analyzing. It is the courts finding of fact no. 5, in which she found both a substantial interference with TCLC's ability to use and enjoy its land; and a substantial decrease in market value. Both of those caused by...

HANKINSON: Then are you agreeing that this is a question of law for the court to decide and we should be disregarding the jury findings?

MCCLISH: Absolutely. On the issue of liability, absolutely I agree. We submitted a question to the jury because of the stay of the federal jurisprudence at the time. It has been clarified. Nobody thinks that an inverse case is a cause of action in common law under the 7th amendment anymore. I thought at the time that that was a question for the judge, and I certainly think so now.

HECHT: Is it true that at the time of trial, the property was still undeveloped raw land?

MCCLISH: No, it was not raw land. It was not developed as a landfill, but it was permitted as a landfill. The evidence is that the landowner has spent almost $1 million obtaining the entitlements to operate it as a landfill.

HECHT: Have they done anything on the land to operate it as a landfill?

MCCLISH: No, they have not.

HECHT: So when it says undeveloped raw land, you take issue with undeveloped?

MCCLISH: Yes.

HECHT: Anything that happened out there besides getting a permit?

MCCLISH: I think there's a big difference in Texas law between property that's zoned, permitted and platted for a residential subdivision, and property that just has that potential. And I think that's the difference here.

HECHT: I'm just trying to understand. Questions have been asked about the operation of a landfill, but a landfill has never been operated there. Is that true?

MCCLISH: As of the time of trial no landfill had been operated there.

HECHT: Well has it changed?

MCCLISH: That's outside the record, but yes there's a landfill operating there now. We do not contest the fact that the property was still suitable to be used for a landfill after the taking. That was our evidence at trial. That was their evidence at trial. The evidence of decrease in market value is - although the parties had a different number - they both had the same evidence on that issue.

ENOCH: When the landfill was permitted, there was an anticipation they could pile up the garbage so many feet high. They could not have done that with the military flights. But there was some period of time when the military shut down the airbase and it was abandoned, and before the city took over that there was some anticipation by the people who bought the property that they could now pile up the garbage higher than under the avigation easement. So they did that. And then they buy the property, and the city comes in and starts operating the airport and now these overflights start in. And the diminution in the value is because they no longer can pile the garbage up as high as they thought they otherwise be able to in the absence of the avigation easement. Is that what the diminution in the value is? It's because they cannot now pile it up as high as they thought they could have prior to the city opening the airport?

MCCLISH: Their damages include that element because...

ENOCH: But that is the element. That is their damage.

MCCLISH: That's one of the pre-elements of damages.

ENOCH: What other elements of damages are there?

MCCLISH: Increased operating costs and increased risk of operating with the low overflights going by. Everybody said that was true. The director of solid waste for the city of Austin testified that that was true.

ENOCH: Increased risk that they would build the pile too high and a plane will hit it?

MCCLISH: That a plane will hit a bird that happened to be hanging around your landfill where you have the requirement to disburse the birds, and you get sued.

ENOCH: Except that permit 4 took care of that.

MCCLISH: No. That's an allegation that's not supported by the evidence in this case. And you need to look at...

ENOCH: So you take on some liability that your operations might do something that interferes with planes flying there independent of the height of the pile.

MCCLISH: Absolutely. And the evidence makes it very specific. The city of Austin's landfill which is shown on the exhibits I've give the courts, it's immediately adjacent to our property to the east. But it's outside the glide slope. It's outside the slope of where the airplanes fly. And the evidence was they were not restricted by one cubic yard in the quantity of fill that they were allowed to put on their property. Nevertheless, the city recognized when it put its airport out there that there was going to be a diminution in the value of the landfill that the city owned and operated out there of a $1.5 million, even though they did not lose one single yard.

O'NEILL: Was that property burdened by an avigation easement?

MCCLISH: No. It was burdened by a clearance easement interestingly enough. But not one that impacted the ability of the city to go as high as engineering constraints would allow. They were allowed to permit their landfill...

O'NEILL: What did they base the diminution in value on there?

MCCLISH: Increased cost of operation and the risk that they might have a bird strike hazard. That's undisputed testimony from their own director of solid waste.

HANKINSON: What are the increased costs in this record regarding this piece of property?

MCCLISH: The daily way in which the landowner has to - that they have to cover up their fill a lot faster and they can't compact it as well. So they get lower yield and they have to have more people working and more equipment working all the time.

HANKINSON: Is that because of the nature of the permit and the type of landfill that they are operating, the issue that developed over birds and what kinds of things could be put in a landfill?

MCCLISH: This is a special requirement imposed on this landfill permit, and not imposed on others because of the overflights. Because the airplanes were flying so close.

HANKINSON: Because of the potential for birds to be on the property?

MCCLISH: Yes, that's one of the reasons.

HANKINSON: And that had to do with getting the type 4 landfill permit that you got as opposed to a type 1 landfill permit?

MCCLISH: We were not allowed to get a type 1 landfill permit at all. A type 4 landfill permit was only issued with the understanding that the agreement by both my clients and by the city, the permanent bird disbursing programs would be maintained.

HANKINSON: So those increased costs are the result of the permitting process, not the result of overflights going over the property every day?

MCCLISH: I guess it depends on which end of the telescope you are looking through.

HANKINSON: I'm still working on this causation piece of it. In order for you to run the landfill, it had to be permitted?

MCCLISH: Yes.

HANKINSON: And you were permitted to run a certain type of landfill which required you to undertake certain operations if you wanted to run a landfill. But the overflights were still happening everyday and the overflights are not causing the increased costs. Aren't the permits causing you to do it?

MCCLISH: The overflights were the only reason that that was included in the permit.

O'NEILL: It was permitted under the military avigation easement, right?

MCCLISH: Yes it was.

O'NEILL: And so, therefore, you had to have a bird disbursing program because of the military avigation easement.

MCCLISH: Yes, we did.

O'NEILL: What's changed then? Where is the proof that somehow the bird problem has increased because it's now civilian in nature?

MCCLISH: There is proof on that point. The military users of the airport allowed permitting for type 4 back in 1988. In 1988, the FAA had an absolute rule prohibiting any kind of a landfill within 10,000 feet of the end of the strip. Type 1, Type 4, no kind of landfill got to be at the end of the strip. They were absolutely prohibited. So historically at least, the FAA, the civil arm of the airport controllers if you will...

O'NEILL: Under the avigation easement in place they could have completely forbidden you to build any sort of a landfill.

MCCLISH: And they proposed to.

O'NEILL: And you would have no claim.

MCCLISH: What they did was budget enough money in their budget to buy our entire permit, to buy our whole property. And the reason that they were going to the federal gov't to try to get them to let us operate on a limited basis, because they didn't want to have to pay for the entire permit. That's the testimony in the case. That's the evidence in the case. They admitted that in the trial of the case, that the reason they went to the federal gov't and got this change in the FAA's regulations to allow a landfill this close to the end of the runway was so they wouldn't have to buy the whole thing. They recognized their obligation to buy it and budgeted money for it in their first budget to build this airport. That's the evidence in our case.

O'NEILL: Under what authority would they have been required to go out and buy that property considering the fact they had the avigation easement?

MCCLISH: Riggs v. Allegheny Co., is the US SC most recent writing on this subject. It's about a civilian airport. It's about a property that's exactly the same distance from the end of the airport as our property and a civilian airport. And what the US SC said in Griggs v. Allegheny County, what it implied very clearly was that the approach area, which is what our property is in this case, it is the final approach area, the area where the planes fly too close to the ground, the approach area is as much a part of the airport as the land that the strip sits on, and the failure to acquire the avigation easements or the property rights that are needed to fly airplanes through the approach area is a constitutionally deficient acquisition. What the US SC said was, in designing the airport they had to acquire some property. Our conclusion is that by constitutionals standards they did not acquire enough. And they were talking about exactly the approach area, at exactly the same distance from the runway as our property is in relation to this airport, to this strip.

O'NEILL: Is that briefed?

MCCLISH: Yes. I've cited in our reply brief on the merits...

PHILLIPS: That makes all the rest of your argument irrelevant if that's true. I mean you don't have to prove these three elements.

MCCLISH: Because the US court claims and in response to that the federal CA's have typically fallen back on the three tests in Causby and have not been willing to take the argument in Griggs to the next step. I will say that I am unaware of any case in federal jurisprudence that has held there was not a taking where the landowner showed repeated flights below the level of safe avigation and made some proof that his property had been decreased in value.

O'NEILL: In none of those cases was there an avigation easement preexisting.

MCCLISH: Yes, in many of those cases there were avigation preexisting. In many of those cases there was an easement already acquired. Many times through limitations by the flights of military airplanes into an airport. And when they came later and began to fly more airplanes or when they became later and began to fly bigger and heavier airplanes, the court determined that there had been a second taking of an avigation easement that required the gov't to pay additional damages to the landowner. And in the court of claims jurisprudence, because the court of claims hears cases against the US and they typically hear these military cases, most of the overflight avigation cases are those kinds of cases where somebody comes to the court and says there's been another taking, a second taking, an increased taking because...

O'NEILL: And that's because there is a substantial interference with the use of the property and those have all involved fumes, smoke, noise, vibrations, businesses going under. Whereas, here I'm having a hard times as Justice Hankinson is with seeing where the difference is before it was a type 4 landfill, after it was a type 4 landfill. Before it couldn't expand vertically. After it couldn't expand vertically. So where is the substantial change?

MCCLISH: I can only tell you that in those cases, the airplanes were flying the same glide slope, bigger airplanes were flying the same glide slope as the littler airplanes were flying, or they were flying more airplanes. They were flying F 4's which were louder. For some reason there was a reason for the landowner to complain and the court of claims did not characterize it in terms of substantial interference.

HANKINSON: But in Griggs, as in the other cases, as Justice O'NEILL just said, a substantial interference for example in Griggs dealt with the homeowner who had the problem with the noise and the rattling and they can't sleep at night, and all of those kinds of things that were caused by the overflights themselves. So we still have the substantial interference evident as a result of the overflight in Griggs as we do in all the other cases. Which interfered then with the use of the property as a residential property.

MCCLISH: Same thing in Causby. But when the US SC set out to decide what evidence it takes to meet the substantial interference test, right after the part of that case they liked the best, which is private flights over land are not a taking unless they are so low that they interfere with the landowners enjoyment. The US SC in its next sentence says, the court of claims found there was a substantial reduction in the market value of the property. And that's enough. We don't have to talk about _____.

HANKINSON: That was because in Causby there was actual evidence of the overflights affecting the property, then you could look to the diminution in value as result of the overflight. The kind of evidence is noise, etc, that we see in the overflight cases. So you can't just take that sentence out of context when it's concluding as a result of those activities of the overflight. And that's the part that I'm having a hard time with.

MCCLISH: My best answer to that is, that the TC really makes this factually determination that if there's evidence in the record to support it, if there's any evidence in the record to support it binds this court. The TC found that because of the overflights...

HANKINSON: If there's no evidence then that finding doesn't stand?

MCCLISH: That's the gov't burden to show you in this case that there's no evidence to support the _____.

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REBUTTAL

BARON: I want to talk a little bit about those second takings cases in the respondent's brief on the merits. They cite the Avery and Davis cases. And in both of those case, we had very similar effects: B-52 bombers and similar very loud and heavy aircraft have been introduced over the property; noise vibrations; can't sleep'; can't talk on the phone; can't get telephone reception. And it was over residential property that basically became not usable as a residence.

I think what we have here is a disjunct between the constitutional standard and then the damages question. They cannot be commingled. The burden is to come forward and show that the overflights as opposed to something else came in and substantially impacted the use of the property, which we don't have in this case.

RODRIGUEZ: Can additional costs associated with overflights be enough for us to conclude there has been substantial interference? What if we accept the argument that because of the overflights much more money that has to be spent on costs associated with litigation for potential hazards from the birds over the landfill, other things that would impact the business interests of the landowner. Could that be substantial interference?

BARON: I think it would be a tough showing. We're talking about significant decreases in market value. Assuming market value is the proper standard it would have to be at least significant, immediate and attributable to the overflights. And when you just have increased operating costs, I think it's going to be a rare case where that rises to significant decrease without a fundamental change in the underlying way you can use the property like we see in these other overflight cases where homes can't be used anymore or commercial chicken farms can't no longer be viable under the _____ as operating.

None of these cases do we have a preexisting easement that prevents the building up above the ceiling of the airspace. And this easement has been in place since 1982. So any hopes that they are going to be able to expand this landfill have been false hopes through this case and expectations that they never had a right to expect. And Mr. Mayes, the general manager of the company, did testify at trial that he understood that this easement was on the property, that it was assignable and that it was perpetual, and perpetual means forever.

O'NEILL: Counsel made the statement that one of the reasons that they helped get this landfill permitted was so they wouldn't have to go out and buy the property. I don't understand that argument.

BARON: I think the reasoning of the city at that time was the FAA regulations did prohibit landfills within 10,000 feet of the runway. That would be a significant change in their ability to use the property, because it would reduce it from a valid landfill site to nothing pretty much, to agricultural use. So I think they did feel like they would have to come in and purchase the property in that situation.

RODRIGUEZ: Is there evidence in the record that the city initially budgeted monies to purchase the land in lieu of the permit?

BARON: What there is is there is a line item in the budget that says, in connection with operating the new airport acquisition of landfill purchases, and it's plural. So you can interpret that how you want. I think there is testimony that the city did feel like they were going to have to buy this property.

ENOCH: Mr. McClish made the comment that the Griggs case demonstrated that when using land for an airport, the gov't is obligated to take the land for the approach because it is just as much a part of the airport as not, and they can't avoid trying to buy the property just because that's not where the airstrip goes. Now he seems to indicate the Griggs case would be squarely on this case. You've got this that's in the approach to the runway and the city is just trying to avoid buying it and they are trying to say well you can use it for a landfill, but as a practical matter they cut the use in half because there is an approach. And he says the Griggs case says you've got to do that, which prompted the question from the court saying well if that's it then why are we arguing about everything else. So what your response to that?

BARON: That certainly reads the substantial interference test out of the 3 part test that was most recently confirmed in Brown and which they've submitted is the correct standard. So I think we would be changing the law pretty significantly so that the air is no longer a public highway.

ENOCH: You could say that when an airplane is 100 ft off the ground that that is essentially - because the airplane hasn't literally touched the ground, you can't claim that the ground hasn't been taken for the use of the airport just because somebody might be able to go in and use landfill as a foot high or something. Isn't the Griggs basically saying if you're talking about the approach to the runway in a certain circumstance, that's as a matter of law means the test of Brown and Causby a substantial change in use of the land. It becomes the front door to an airport.

BARON: I don't read it that way. I read it as the substantial interference test is still the third part of the test, that just because they are low and frequent that's not a gotcha. You've got a taking in that situation. There are going to be situations where flying at that level will definitely be a substantial interference and we've seen those in these cases where there's a change in use. But

with landfill property there has not been. And so it doesn't get you there.

O'NEILL: I'm still confused as to why the city felt like they would have needed to go out there and buy that property if the permit was not given. The easement was dated in 1982 right?

BARON: Yes.

O'NEILL: And so therefore it was burdened with an avigation easement?

BARON: It wouldn't be a problem of the flights over the property. It would be the problem from the FAA regulations that say you can't use it the way you are permitted. You can have no landfill there at all.

O'NEILL: And in 1982 when that easement was given you could not have a landfill.

BARON: No, you could. It just was limited in height.

O'NEILL: By the FAA?

BARON: No, the FAA regulations apparently don't apply near military airports. So they were allowed in 1988 to obtain a permit even though it was within 10,000 ft. of the runway of a military airport. The FAA regulations kicked in when the airport converted from military to civilian.

RODRIGUEZ: So doesn't that impact the analysis that is being offered here by questions that we have to compare this as a preexisting military installation and now is a civilian installation? Don't we really compare civilian installation per FAA rules with now a civilian installation?

BARON: I don't think so because the easement has continually been in place. The FAA regulations have changed. The easement has always been in place. So there's never been an ability to build higher than the limits in the easement. There have always been military flights over the property and contrary to what Mr. McClish said, there is testimony that between the time that keys were handed over in 1993, and at least through 1996, there continued to be 33,000 flights over the property that were military flights.

O'NEILL: So the military height restrictions in the easement are what kept it from vertically expanding?

BARON: In the clearance easement and the avigation easement. Yes. But it's mostly the clearance easement because you can't build anything over the ceiling. That's what the clearance easement says. That's always been in place on the property. You can have a landfill. It just can't go up past the ceiling.

O'NEILL: And the FAA would have said no landfill with a civilian airport, but they

made an exception where they changed the regulations here to allow it at least as a floor what was contained in the easement?

BARON: Yes.