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Requiring dedication of overflight easement as condition to issuance of building permits does not constitute an unconstitutional exaction

A recent California Court of Appeal decision considered the argument that a county requiring property owners to dedicate an overflight easement as a condition to issuance of a building permit was an unconstitutional exaction. The court concluded that the owners could not establish a taking because they were unable to show that the government simply appropriating the overflight easement, instead of requiring it as a condition of approval for the permit, would have been an unconstitutional taking. *Powell v. County of Humboldt*, No. A137238 (First Dist., Jan 16, 2014).

In 1993, Humboldt County adopted an Airport Land Use Compatibility Plan for the Arcata-Eureka Airport. In 2004, the Powells purchased property roughly one mile from the airport, located in "Airport Compatibility Zone C" of the Airport Land Use Compatibility Plan. The Plan required that all owners of residential real property located in Zone C dedicate an overflight easement as a condition to issuance of a building permit. The purpose of these easements was to ensure that any improvement was compatible with the safe operation of the airport.

The Powells filed a petition for a writ of mandate contending that the overflight easement condition, as applied to their building permit application, was an unconstitutional exaction under *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*. The appellate court concluded that the *Nollan*/*Dolan* analysis applied only if the public easement required as a condition of the permit was so onerous that it would have constituted a compensable taking if the property right had simply been appropriated by the government outside the permitting process. This required the Powells to establish, as a threshold matter, that the overflight easement condition completely deprived them of any beneficial use of their property, interfered with their investment-backed expectations, or was a permanent physical occupation of their physical property (a *per se* physical taking). Unless that test was satisfied, the court reasoned, the government was not demanding that the landowner trade a constitutional right—the right to just compensation for the taking of property—in order to receive a discretionary government benefit.

The court concluded that the Powells failed to provide evidence to meet this threshold requirement. They put forth no evidence that the easement deprived them of the beneficial use of their property or interfered with their investment-backed expectations. The court also found that the overflight easement was not a *per se* physical taking, reasoning that unless the overflight easement, by its express terms, authorized frequent incursions into the Powell's private airspace at altitudes causing noise and disturbance to the Powells, it would not amount to a taking under federal or state law. Because the easement did not expressly permit such overflights -- and the Powells' property rights did not include a right to exclude airplanes from using the navigable airspace above their property in accordance with applicable safety regulations -- the court found no basis to conclude that the overflight easement was a *per se* physical taking.

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