IN THE SUPREME COURT OF THE STATE OF NEVADA

COUNTY OF CLARK, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,
Appellant/Cross-Respondent,
vs.
TIEN FU HSU; LISA SU FAMILY TRUST; LISA SU TRUSTEE; PETER B. LIAO; WESTPARK, INC.; LUCKY LAND COMPANY; LUCKY LAND COMPANY INVESTMENTS; LUCKY LAND COMPANY ENTERPRISES LIMITED PARTNERSHIP; AND WEST PARK COMPANY 1,
Respondents/Cross-Appellants.

No. 38853

FILED

SEP 30 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Clark County appeals from an inverse condemnation judgment adjudicating a taking of airspace over real property owned by respondents, Tien Fu Hsu, et al. ("the landowners"). The judgment contained a substantial award of damages pursuant to a jury verdict. The County argues on appeal that the district court erroneously granted partial summary judgment on the issue of liability based upon its conclusion that county airport height restriction/zoning ordinances effected a "per se" physical taking of the easement. We agree and conclude that this case raises regulatory, not per se physical takings issues. However, we are unable to conclude whether a compensable regulatory taking occurred because the landowners' inverse condemnation claims are not yet ripe for review on the merits. Therefore, we reverse the district court's judgment and remand this case to the district court for further proceedings to determine whether and the extent to which the height

zoning regulations prevent new development of the subject property. On remand, the landowners may ripen their case by submitting meaningful development plans and seeking a variance from the County. Only then will the district court be able to adjudicate the takings issue pursuant to the criteria for regulatory takings.

FACTUAL AND PROCEDURAL HISTORY

This case involves an alleged inverse condemnation of airspace rights near McCarran Airport in Clark County, Nevada. More specifically, the landowners contend that the County's imposition by ordinance of height restrictions near the end of runway 19R/1L at McCarran constitutes a physical "taking" of their property. The affected property consists of seven separate assembled parcels owned by separate individuals or entities, totaling approximately thirty-seven acres.[1]

The County has restricted the height of buildings on property surrounding the airport since 1955 to avoid hazards to air navigation. These restrictions were accomplished by use of four types of zones, the most restrictive being the "runway approach" zone, and decreasing restrictions through "transition," "horizontal," and "conical" zones. These restrictions depend upon proximity to the airport runways.

On January 20, 1981, the County passed Ordinance No. 728, which extended the horizontal zone over the subject property, effectively

[1]The record does not contain the price paid for these parcels of land. The landowners assert that they purchased these parcels between 1984 and 1992.

limiting structures to a height of 150 feet, and placed one corner of the subject property in a transition zone.[2]

The landowners describe a transition zone[3] as an area

> adjacent to the runway "Approach Zone" (i.e., the area actually designed for aircraft to use in normal approach and departure), and is used when aircraft are unable to confine their flight within the Approach Zone and stray beyond it.

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[2]Ordinance No. 429, passed in 1974, also placed a portion of the landowners' property in the transition zone.

[3]Section 29.50.020(B) of Ordinance No. 728 defined a "transition zone":

> Transition zones are established adjacent to each runway and approach zone and are the areas beneath the transitional surfaces. Transition zones extend outward from the primary surface and shall slope upward and outward one (1) foot vertically for each seven (7) feet horizontally to the point where they intersect the surface of the horizontal zone. Transition zones are also established adjacent to approach zones for the entire length of the approach zones. Such transition zones flare symetrically [sic] with either side of the runway approach zones from the base of such zones, and slope upward and outward at the rate of one (1) foot vertically for each seven (7) feet horizontally to the points where they intersect the surface of the horizontal and conical zones. Transition zones are also established adjacent to a precision instrument approach zone where it projects through and beyond the limits of the conical zone, extending a distance of 5,000 feet measured horizontally from the edge of the instrument approach zone at right angles to the runway centerline.

Ordinance No. 728 affected the property below the "transition surface"[4] by generally prohibiting the construction of structures into the transition zone. In any of the various height zones, a landowner could build structures up to thirty-five feet in height.[5] However, no buildings could be constructed in any zone unless the Federal Aviation Administration (FAA) and the Clark County Director of Aviation determined that the proposed building was situated or marked so as not to constitute a hazard to aircraft navigation. All construction within any of the zones was subject to the requirement that property owners grant an avigation easement in favor of the County.[6]

Ordinance No. 728 did not entirely prohibit non-conforming uses. It established a variance process, which allowed application to the

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[4]An imaginary line running one foot vertically for seven feet horizontally from the approach zone extending to the horizontal and conical zones.

[5]The property was zoned "T-C" (trailer court) at this time. That designation prohibited building structures above thirty-five feet.

[6]The Texas Court of Appeals defines such easements generally as the right to fly over a subject property, and specifically as the "'right to the navigation of airspace over designated land and to the use of land as an incident to [n]avigation. . . . It provides not just for flights in the air as a public highway, but for flights that may be so low and so frequent as to amount to a taking of the property.'" City of Austin v. Travis County Landfill, 25 S.W. 3d 191, 195 n.2 (Tex. App. 1999) (quoting 2A CJS Aeronautics & Aerospace § 2 (1972), reversed on other grounds by City of Austin v. Travis County Landfill, 73 S.W. 3d 234 (Tex. 2002)). Also, in United States v. Brondum, 272 F.2d 642, 645 (5th Cir. 1959), the Federal Court of Appeals for the Fifth Circuit noted that an avigation easement "provides not just for flights in the air as a public highway—in that sense no easement would be necessary, it provides for flights that may be so low and so frequent as to amount to a taking of the property."

Clark County Planning Commission when an affected property owner desired to build a structure that would exceed the height limitations. This process allowed variances where

> a literal application or enforcement of these regulations would result in practical difficulty or unnecessary hardship, and the relief granted would not be contrary to the public interest, but would do substantial justice and be in accordance with the spirit of these regulations and of Chapter 29.66 of the Clark County Code.

In 1981, Tropicana Enterprises, prior owners of some of the later assembled parcels, requested a zone change from T-C (trailer court) to H-1[7] (limited resort and apartment). It also sought a special use permit and height variance to construct a 1,000 room high-rise hotel with a proposed height of 230 feet; 50,000 square feet of casino, shops and offices; and a five-story parking garage. The prior owner additionally sought a zone change from T-C to R-5 (apartment residential) with regard to another portion of the property, and a special use permit and height variance to construct a 250-unit apartment complex, also with a proposed height of 230 feet. Although the planning commission and the airport authority initially approved the project, the director of aviation lodged written opposition to the project after further review on the basis that the project exceeded transition-zone height restrictions. The applicant modified the proposal to address the opposition by reducing the height of the proposed buildings. However, at a July 7, 1981, meeting, the Clark County Board of Commissioners denied the requests because Tropicana

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[7]H-1 zoning permits structures to 100 feet in height.

Enterprises refused to pay relocation costs of the mobile home residents on the property.[8]

In 1990, McCarran began upgrading runway 19R/1L for use by commercial jet aircraft, including expansion of the runway in conformity with the 1979 Clark County master plan. Ordinance No. 1221, effective August 1, 1990, amended Ordinance No. 728, reflecting the changes in the use of the runway.[9]

Ordinance No. 1221 expanded the transition zone. This provision placed the landowners' property further into the zone and thus subjected the property to additional height restrictions.[10] The ordinance required that any person proposing to construct a structure exceeding a height of 200 feet, or one exceeding "[t]he plane of an imaginary surface extending outward and upward at a slope of 100 to 1 for a horizontal

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[8]In this, the County was not placed in a position of sustaining or overruling an objection to development by the airport authority involving penetration of transition surfaces. However, this interaction is suggestive of the notion embraced by the district court in its futility findings, that the County would not override airport recommendations, and that transition zone restrictions were of paramount importance to land use approval issues. See discussion infra.

[9]In September 1996, McCarran received two federal grants to extend the runway. Construction was finished in 1997. The landowners assert that the expansion of the transition zones via Ordinances Nos. 728 and 1221 satisfies FAA requirements for grant approval. In turn, the federal nature of the project implicated the Uniform Relocation Assistance and Real Property Acquisitions Policies Act ("Federal Relocation Act") (42 U.S.C. §§ 4601-55 (2000) (adopted in Nevada by NRS chapter 342)). See infra note 29.

[10]Height restrictions on the property following imposition of Ordinance No. 1221 ranged from approximately 35 feet to 200 feet.

distance of 20,000 feet from the nearest point of the nearest runway," notify the FAA of the proposed construction. The ordinance also provided that the Clark County Board of County Commissioners held final authority to grant variances from the height restrictions. While the slope described in this provision did not precisely correspond to the slope of the transition surface, it provided the minimum criteria for when proposed construction implicated FAA notification.

In 1994, Lisa Su, one of the landowners, granted the County a perpetual avigation easement as a condition of a zone change from T-C to C-2 (general commercial) to place a pair of fifty-foot billboards on one corner of her property.[11] The easement provided for flight across the affected portion of the property (the area over the billboards), as well as the right to cause noise inherent with aircraft flight. She also agreed to release the County and aircraft operators from any loss or psychological harm associated with overflight noise.

On April 23 and June 26, 1994, the County filed separate actions in district court, seeking condemnation of a portion of the subject property for road widening. On November 20, 1995, the landowners counterclaimed, seeking a separate inverse condemnation award.[12] The counterclaim alleged that the County, through the height restrictions in

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[11]These billboards exceeded transition zone height limitations at their location.

[12]On January 17, 1997, the district court entered a judgment by stipulation of the parties allowing for the condemnation in aid of the road-building project. The court entered a final order of condemnation on May 12, 1997. Thus, the only remaining issues left to litigate below stemmed from the inverse condemnation action.

County Ordinance Nos. 728 and 1221, imposed an avigation easement over the property, which resulted in an uncompensated taking due to a substantial reduction in its potential use and value. The landowners contended that they were unaware of the height restrictions on their property until October 1995, and alleged that the ordinances restricted the highest and best use of their property—a hotel/casino facility. Additionally, the landowners alleged that they were not obligated to exhaust their administrative remedies through the variance procedures "because the ordinance provides no variance will be given."[13] Finally, the landowners contended that the avigation easement would lead to increased noise and dust over their property.[14] The landowners requested compensation for the taking, as well as litigation costs and expenses.[15]

In early January 1997, the County moved for summary judgment, arguing that the case raised regulatory takings issues, and that the landowners could not maintain a claim for a regulatory taking without first exhausting their administrative remedies, i.e., by seeking relief from the regulatory measures through a variance application. Without

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[13]The landowners' complaint did not expand on this statement. They later argued in pretrial proceedings that the ordinance provided no variance procedure for proposed construction above the height restrictions, and that the Clark County Board of Commissioners had denied the 1981 variance application submitted by the prior owner. The landowners also later argued that they were not obligated to exhaust their administrative remedies because that requirement did not apply to eminent domain actions concerning per se physical takings.

[14]This portion of the counterclaim was later dismissed without prejudice by stipulation of the parties.

[15]See 42 U.S.C. §§ 4601-55 (2000).

exhaustion, the County asserted, the inverse condemnation claim was not yet ripe for judicial determination. On June 17, 1997, the district court concluded that any attempt by the landowners to obtain a variance would be futile and relieved the landowners from further exhausting their administrative remedies.[16] The district court based its ruling in part upon the County's refusal of the 1981 variance application by Tropicana Enterprises. The district court also precluded the County from introducing any evidence at trial of the landowners' knowledge of the height restrictions imposed by Ordinance Nos. 728 or 1221 when they purchased their property. The court concluded that this evidence had no material bearing on the landowners' ability to obtain compensation.

In August 1997, for litigation purposes only, the landowners submitted a hypothetical 240-foot building plan to the FAA.[17] The proposal placed the building ten feet east of the landowners' eastern property line, into an area severely affected by the height restrictions. The FAA concluded that while the proposed building exceeded the

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[16]The district court relied upon Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997), in reaching this conclusion.

[17]The landowners later stated that they submitted these plans to the FAA "only to get a preliminary reading from the FAA as to what criteria would be used by the FAA to determine whether a structure on the landowners[']' property would be permitted." The landowners also explained that the "sole purpose in submitting [the plans] to the FAA was to find out whether there were any surfaces, in addition to the height restrictions placed on the property by ordinance, that would impact the ability to construct a high rise hotel on the property."

The County unsuccessfully sought to admit the landowners' plans and subsequent FAA ruling at trial to discount the landowners' argument that the transition slope was impenetrable.

transition slope by 148 feet, this finding alone did not mean that the building would constitute a hazard to aircraft navigation. After further study, the FAA concluded that the hypothetical 240-foot building would exceed "Terminal Instrument Procedures" criteria for runway 19R/1L by seventy-one feet, thus adversely impacting new minimum clearances for precision landings. Accordingly, the FAA explicitly indicated that, if the landowners would reduce the height of the proposed structure by seventy-one feet, or locate the structure 225 feet to the west, it would have no impact on aeronautical operations or aircraft navigation.[18] Implicitly then, the FAA would conceivably approve the construction of structures on the subject property that would penetrate the transition zone.[19]

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[18]It appears from the record that moving the proposed building location 225 feet west would place it on the landowners' property.

[19]An affidavit in the record of William Keller, Principal Planner for the Clark County Department of Aviation, submitted in support of a pre-trial offer of proof by the County, indicates that the Stratosphere Tower near downtown Las Vegas penetrates the transition zone for runway 19R at McCarran International Airport, and that the Hard Rock Hotel and Casino located on south Paradise Road in Clark County penetrates the approach and transition surfaces for runway 19R. The district court did not have this information available to it when it made its futility ruling. However, as discussed below, this information is relevant to our examination of the regulatory takings issues.

Further, the affidavit by Teresa Arnold, an airport planner in the Planning and Environment Division of McCarran, established that between early 1995 and 1997, the County considered at least fourteen applications for height variances, ranging from eighty feet (the Homewood Suites) to 1,149 feet (the Stratosphere tower). Of these, all gained approval, except one, which was withdrawn prior to a determination. We note that these variances were not restricted to the close proximity of the airport.

In September 2000, Lisa Su testified by deposition that, as of 1986, she owned an interest in the subject property through her involvement with the Lucky Land Company. Litigation arose in 1987 between several owners of the property, which precluded Su from engaging in any development. Su acquired title to her parcels in the name of her trust in 1992 following litigation. She stated that she did not develop the property at that time, because she lacked sufficient funds. She testified that she never commissioned feasibility studies, pro forma statements or financial calculations, never spoke with hotel operators about possible utilizations of the property, and never applied for a height variance to allow for a hotel/casino project. She did, however, testify to discussions of some kind concerning a possible hotel/casino project and that, with adequate financial resources, she would have proposed a building of maximum height to optimize the property's economic potential.

Su derived monthly income of $15,000 from two of the mobile home parks and a bar on the property, as well as the two billboard sign rentals. She also confirmed that no changes in the use of the assembled properties had occurred since 1986, and that, at the time of trial, no current development plans were actually contemplated. She testified that she was unaware of any height restrictions on the property until 1995 or 1996, at which time she abandoned any plans for a hotel/casino.

Tien Fu Hsu also testified by way of deposition to his ownership/management of a nine-unit apartment building and a third mobile home park on his portion of the assembled property. Hsu stated that he had considered development, but did not aggressively pursue any project. Hsu had developed architectural plans for a hotel/casino with a previous owner, but as of September 2000, he entertained no plans to

build anything higher than twenty-two stories. He testified he had not commissioned a study to determine how to best develop the property, never filed an application for a zone change, and had left any plans for the property "to the future."

West Park, Inc., a closely held corporation controlled by Mr. Hsu, owned some of the subject parcels. In answers to written interrogatories, West Park denied creating plans for development outside of this litigation. Although renouncing any intent to develop the parcels on its own, West Park's interrogatory answers indicated Mr. Hsu's desire to join the corporate property with adjacent property to the west for development as a hotel/casino.

Tami Campa, a commercial real estate appraiser and licensed broker for the landowners, provided a pretrial affidavit regarding her appraisal of the property. She concluded that "a typical buyer would have the expectation of having the potential to build to a height of 400 feet, or over." She based this conclusion on her observation of the market, personal interviews, maps of the hotel towers near the property, and the deposition testimony of former Clark County Zoning Administrator Greg Borgel that: "everybody would like to go at least 400 feet." Based upon this 400-foot figure, Charles Brechler, the landowners' consulting engineer, calculated that the County took 4.4 percent of the landowners' airspace under Ordinance No. 728, and 59.3 percent under Ordinance No. 1221.[20]

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[20]These calculations were attached to the landowners' appraisal report. Other appraisers hired by the landowners (e.g., James Himes) relied upon Brechler's conclusions in calculating the amount of airspace taken by the ordinances.

On December 19, 2000, the landowners renewed a prior motion for partial summary judgment on the issue of liability. They contended that the loss of airspace through the height restrictions constituted a "per se" physical taking of their property, thus entitling them to compensation. In this, the landowners relied upon the deposition testimony of William Dunlay, the County's aviation expert:

> Q. Your understanding of that transition zone is that it creates a surface above which there are going to be issues about whether or not somebody can penetrate it from below. Correct?
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> A. Yes.
>
> Q. And the reason that's done is because planes may on occasion need to go into that area for aeronautical operations. Correct?
>
> A. Yes. That's my understanding, just to provide some maneuvering room down close to the runway.
>
> Q. For airplanes to go into if they need to; correct?
>
> A. Yes.
>
> Q. And that may happen twice in a month or it may happen never in a year; is that correct? You just don't know?
>
> A. Don't know . . . .
>
> Q. And is there any way, in your mind, of knowing when that actual transition zone surface is used by an airplane?
>
> A. Not really, no.

The County filed a countermotion for summary judgment on liability and argued, in part, that the landowners' claims were not yet seasonable for judicial resolution. The County based its ripeness arguments on the landowners' failure to submit development plans or seek

a variance from the County and, thus, their failure to obtain a "final decision" regarding the application of the ordinances to the subject property. In this, the County sought de facto reconsideration of the district court's previous futility ruling relieving the landowners from exhaustion of administrative remedies through a variance process.[21]

The landowners responded with the deposition testimony of Robert Broadbent, former Director of Aviation at McCarran, in which he described the airport zoning variance processes. He testified that in 1995, the landowners would have had to file any proposal for construction with the FAA. The landowners' counsel sought to establish what McCarran's stance would have been regarding proposed construction on the subject property:

> Q [landowners' counsel]: And if my clients had wanted to build a hotel/casino on their property that was, let's just say 22 stories in height, can you tell me what your response would have been?
>
> A [Broadbent]: No.
>
> Q: You can't tell me what it would have been, or it would have been "no"?
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> A: I couldn't tell you what it would have been, because I don't know. I mean, you might get in the west part of the property and be able to go 22 stories.
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> Q: Let's say that my clients wanted to build some structure on that property that went above what the ordinance said for the transition zone?
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> A: The airport would oppose it.

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[21]See NRCP 54(b).

> Q: And do you feel that – again, I understand nobody can –
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> A: It was interpreted by FAA to be a hazard.
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> Q: What if it wasn't? Did you have somebody at McCarran who actually looked at the ordinances?
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> A: If it didn't meet the qualifications of the ordinances in place, we would oppose it.

The landowners' counsel also sought to establish whether McCarran uniformly disapproved of transition zone variance applications:

> Q: Can you think of a time from March of 1986 until your retirement as Director of Aviation in May of this year [1997] where McCarran opposed an application for a variance or a special-use permit so that somebody could build above the height restrictions set forth in the ordinance concerning airport height limits?
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> A: I don't remember the County Commission going against the recommendation of the airport, if the airport could show that it was the position of FAA and reasonably might limit the ability of airplanes to land or take off at McCarran.
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> . . . .
>
> Q: Can you remember as your tenure of Director of Aviation the County Commission ever granting a variance from the height restriction ordinance - - for the airport height restriction ordinance for the transition zone?
>
> A: No.

While the landowners asserted that Mr. Broadbent's testimony established that they could never have obtained a transition zone variance, Mr. Broadbent's testimony on this point is equivocal, and other evidence in the record suggests that the transition surface was

permeable, conditional upon an FAA determination that proposed construction would not create a hazard to aircraft navigation.[22]

In an order dated January 26, 2001, the district court concluded that it could determine whether the ordinances constituted a taking through summary judgment, that condemnable airspace rights existed,[23] that "aircraft do go through the airspace above the Landowners' properties[,] and that the airspace is necessary and used by the airport [for the public good]." The court also noted that, while it was unclear how often airplanes invaded the airspace over the property, it was clear that "the space is necessary and that it is used." Also, notwithstanding Mr. Broadbent's testimony as described above, the court commented that Mr. Broadbent's testimony was that "he would have personally blocked any request for a variance" on the landowners' property and that the County was unable to produce any evidence that transition-zone properties could gain variances. The court ruled:

> The Supreme Court has repeatedly held that cases involving intrusions onto the land or airspace of others are different from other regulatory cases. In Nollan[24] . . . the Court points to the fact that not only is the landowner

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[22]In fact, as noted, a transition zone variance was granted for the billboards on Ms. Hsu's parcel and other property owners obtained variances for property surrounding the airport. See supra note 19. As also noted, the FAA approved theoretical penetrations into the transition zone for the purpose of this litigation.

[23]For these conclusions, the district court relied on Buckles v. King County, 191 F.3d 1127 (9th Cir. 1999); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); and NRS 497.270.

[24]Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

> limited in his use of the property, but that the landowner is required to allow access onto his land for the benefit of the public and then holds that just compensation is required. The Court held that an essential right of ownership was the right to exclude others from the property. In Loretto,[25] the small metal boxes and cable wires/waves constitute enough of an invasion to property to fall into the Causby[26] type takings and require compensation.

The district court went on to determine that

> the governmental action in this case denies the Landowners the right to use the air rights and it denies the right to exclusive possession of the air rights and it allows the airport to use the air rights of the [landowners]. This results is a "per se" taking that requires just compensation.

On this basis, the court granted partial summary judgment on liability in favor of the landowners. Because per se physical takings do not implicate "exhaustion" of administrative remedies, the district court impliedly rejected the County's countermotion for summary judgment based upon the landowners' failure to seek a variance from the height restrictions.[27]

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[25]Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[26]United States v. Causby, 328 U.S. 256 (1946).

[27]We note in passing that the district court's futility ruling bolstered its ultimate finding that a per se taking had occurred, i.e., the court's finding that the landowners could not obtain a variance to build into the transition zone confirmed that the county took a complete easement over the landowners' property. However, as noted below, the futility and per se takings findings were made in error.

Before trial on the issue of damages, the district court ruled that the County could not present the following evidence to the jury: evidence of zoning and variance procedures, or that the case involved zoning ordinances; evidence of airport zoning height restrictions preexisting November 20, 1995, that may have impacted the landowners' property;[28] evidence related to the avigation easement Lisa Su granted to the County contingent on her request for the two billboards; any evidence relating to Ordinance Nos. 728 and 1221; and any information related to FAA issues or procedures. The district court also denied a majority of the County's offers of proof, including proof that the airport zoning regulations only served to trigger analysis by the FAA, and proofs concerning variances actually given.

The case proceeded to jury trial on February 27, 2001. James Himes, a real estate appraiser for the landowners, testified that the highest and best use of the property was a 400-foot hotel, concluding that the height restrictions devalued the property by $24,027,000. Himes also stated that "all hotels" could obtain a height waiver or use permit to exceed the 100-foot limit under H-1 zoning, if the proposed construction was compatible with the surrounding neighborhood. The landowners' second appraiser, Campa, concluded that the landowners were entitled to $25,000,000 of just compensation due to the height restrictions, based upon a "feasibility test" for the highest and best use in the area of the airport.

Greg Borgel testified for the County that H-1 zoning allows limited resort and apartment development, and requires a conditional use

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[28]November 20, 1995, was the date of taking utilized at trial.

permit for gaming or structures over 100 feet in height. He stated that, in 1995, the landowners likely could have obtained a change in zoning from T-C to H-1. However, he did not believe the County would approve a conditional use permit for a 40-story/400-foot structure because of incompatibility with the character of adjacent, low-rise uses. He believed a low to mid-rise structure would have been compatible.

Shelli Lowe, an independent real estate appraiser, testified for the County that the height restrictions effectively devalued the assembled property by $5,320,000. She stated that the landowners only suffered a fourteen percent diminution in value because the restrictions caused no loss of property footage, and because they could still develop the property in the after condition, albeit under the height limitations. Consistent with pre-trial evidentiary rulings, Lowe did not testify as to the development potential of the property under the airport zoning variance process.

The jury returned a $13,000,000 verdict in favor of the landowners. Thereafter, the district court entered its final judgment in the case: $22,107.674.13 (the thirteen million dollar verdict plus prejudgment interest, costs and attorney fees),[29] with post-judgment interest to accrue daily until satisfaction of judgment. The judgment also provided a legal description of the easement, and ordered immediate deposit of the total judgment amount with the district court clerk.

The County appeals and the landowners cross-appeal. Amicus curiae briefs in support of the County's position on appeal were filed by

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[29]The district court also awarded the landowners attorney fees and costs based upon the Federal Relocation Act. Additionally, the court reduced the jury award by the value of the avigation easement over the property for billboards. The landowners disputed this reduction.

the City of Las Vegas, the International Municipal Lawyers Association, the State of Nevada, the Airports Council International-North America, the American Planning Association and its Nevada Chapter, the Tahoe Regional Planning Agency, and the Airport Authority of Washoe County. Defenders of Property Rights, Inns Nevada, LLC, Hotels Nevada, LLC, and the Pacific Legal Foundation filed amicus curiae briefs in support of the landowners.

DISCUSSION

The County seeks reversal, in large part, based upon the district court's futility findings and its partial summary judgment order declaring that the ordinances constituted a per se physical taking under the Fifth Amendment to the United States Constitution. We review a district court's grant of summary judgment and any questions of law de novo.[30] "On appeal from a summary judgment, this court may 'be required to determine whether the law has been correctly perceived and applied by the district court.'"[31] At the outset, we note that there are two general types of takings under the Fifth Amendment, takings by physical acquisition and takings by virtue of government regulation.

Lines of demarcation in this appeal

Three main issues are presented in this case: first, whether the landowners enjoyed property rights in the airspace over the assembled parcels; second, whether the height restrictions constituted a per se

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[30]Pressler v. City of Reno, 118 Nev. 506, 509, 50 P.3d 1096, 1098 (2002).

[31]Calloway v. City of Reno, 116 Nev. 250, 256, 993 P.2d 1259, 1263 (2000) (quoting Mullis v. Nevada National Bank, 98 Nev. 510, 512, 654 P.2d 533, 535 (1982)).

physical taking of an "avigation easement" over the property; and third, if no per se physical taking occurred, whether the ordinances have effected a regulatory taking of the property. Here, the County argues that the landowners enjoyed no rights in the airspace over the property, but assuming they did enjoy such rights, no taking, either physical or regulatory, occurred as a matter of law. In this, the County urges that the takings issue must be resolved under regulatory takings jurisprudence. On the other hand, the landowners argue the existence of airspace rights under state and federal law, but also argue that the height ordinances effected a per se physical taking as a matter of law. Thus, the landowners contend that the laws governing regulatory takings are not at all implicated.[32]

Accordingly, the parties urge diametrically opposed legal constructs as governing the resolution of this appeal, and both sides claim that they are entitled to a determination on the takings issue as a matter of law.

Because the cases cited by both parties are factually intensive, and because different states have applied discrete state constitutional and state policy considerations to such claims, we must determine under the evidence presented below whether either side is entitled to judgment as a matter of law on the takings issue.

We conclude that the district court erroneously determined that the ordinances passed in aid of the various airport expansions over the years since 1955 effected a per se physical taking of the subject

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[32]The landowners alternatively argue that the partial summary judgment was correct in its result under a regulatory takings analysis.

properties. We also conclude that this case raises regulatory takings issues, not per se physical takings issues. Generally, subject to certain exceptions, a landowner must first pursue, or exhaust, all available administrative remedies in order to establish a regulatory taking. Thus, before undertaking any analysis of the regulatory takings issue, we must resolve whether the landowners were required to take advantage of the variance process. As discussed below, we conclude that the district court also erred in determining, as a matter of law, that any attempts at approval of a high-rise project would have been futile,[33] and also conclude that the landowners' failure to seek regulatory redress in this instance is fatal to a regulatory takings claim. In this we recognize that the ordinances may have limited the possible range of development on the subject assembled parcels, but we cannot conclude that a regulatory taking has occurred because the landowners failed to submit a meaningful and concrete plan for high-rise development for County approval. Therefore, the failure to exhaust administrative remedies provided by the variance processes set forth in the ordinances renders the entire controversy unripe. Accordingly, we reverse the district court's judgment and remand this matter for exhaustion of administrative remedies. Once that process is completed, the district court may consider the takings issue under Penn Central Transportation Company v. New York City,[34] the

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[33]The order granting partial summary judgment finding that a per se taking occurred rendered the previous futility finding moot with respect to the trial proceedings. Exhaustion of administrative remedies is only pertinent to a regulatory takings case.

[34]438 U.S. 104 (1978).

seminal authority defining landowner rights in the context of regulatory takings claims.

Property interest

The County contends that the district court erred in failing to conduct a preliminary investigation addressing whether the landowners owned a vested property right in the airspace above the property. We disagree.

NRS 37.010(14) recognizes that eminent domain may be exercised for "[a]irports, facilities for air navigation and aerial rights-of-way." Additionally, while NRS 493.030 declares state government sovereignty in the airspace above the land and water in the State of Nevada,[35] NRS 493.040 qualifiedly vests ownership of the space above land and water in the owners of that property, subject to the right of flight.[36] Thus, the landowners owned the airspace above their property, subject to intrusion by lawful air flight.

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[35]NRS 493.030 states:

> Sovereignty in the space above the lands and waters of this State is declared to rest in the state, except where granted to and assumed by the United States pursuant to a constitutional grant from the people of the State.

"Sovereignty" is defined, in part, as "freedom from external control" or "one that is sovereign, especially an autonomous state." Merriam-Webster's Collegiate Dictionary 1125 (10th ed. 1993).

[36]NRS 493.040 states:

> The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in NRS 493.050.

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NRS 493.050(1)(a) states that air flight is lawful unless it interferes with the "then existing use to which the land or water, or the space over the land or water, is put by the owner." Therefore, airplanes may fly over the landowners' property so long as they do not interfere with the current use of the property.[37] NRS 493.030, NRS 493.040 and NRS 493.050 do not eliminate the landowners' right to their airspace. Thus, the district court properly found that the landowners held a property right in the airspace above their property.[38] However, this conclusion does not, of necessity, result in a right of compensation under state or federal law.[39]

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"Ownership" is defined as "the state, relation, or fact of being an owner." Merriam-Webster's Collegiate Dictionary 1125 (10th ed. 1993).

[37]While the County contends it obtained a prescriptive easement over the airspace, we conclude that the facts of this case did not establish the existence of such an easement. The ordinances in question do not constitute an adverse occupation of the airspace in this case.

[38]The County also argues that the landowners never obtained a vested property right in their airspace because they failed to obtain zoning or use permit approvals to undertake a project to use the airspace, and thus their airspace was not constitutionally protected from uncompensated takings. This argument lacks merit. NRS 493.040 vests the ownership in the space above land and water in the owners of that property.

[39]See, e.g., Penn Central, 438 U.S. at 130 (landowners argued that regulations prohibiting construction of a high-rise office building deprived them of "air rights"; Court concluded that landowners could not establish a taking simply by showing they were denied the ability to use a property interest they previously believed was available for development); see also Hadacheck v. Los Angeles, 239 U.S. 394 (1915) (ordinance valid although it prohibited highest and best use of property as a brickyard).

We must therefore consider whether the district court applied the correct legal analysis in granting summary judgment on liability.

Physical and regulatory takings

The United States and Nevada Constitutions require the payment of "just compensation" when private property is taken for public use.[40] Before 1922, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'"[41] However, in Pennsylvania Coal Co. v. Mahon, the United States Supreme Court determined that state regulation of property may also require just compensation, observing that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[42] Thus, two categories of takings may occur for which just compensation is required: "physical takings," where the government physically occupies or invades property or authorizes another to do so; and "regulatory takings," where government regulation goes "too far." In a physical taking, government has an automatic categorical duty to compensate an affected property owner to the extent of the intrusion. With regard to regulatory takings, not all situations in which government has removed some value

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[40][P]rivate property [shall not] be taken for public use, without just compensation"; U.S. Const. amend. V. "Private property shall not be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made." Nev. Const. art. 1, § 8, cl. 6.

[41]Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992) (quoting Legal Tender Cases, 12 Wall. 457, 551 (1871)) (quoting Transportation Co. v. Chicago, 99 U.S. 635, 642 (1879)).

[42]260 U.S. 393, 415 (1922).

from property by regulation require compensation.[43] As the Court has noted, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[44] A trial court must draw a discrete balance[45] based upon judgment and logic to determine when a land use regulation effects a compensable taking.[46]

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[43]See William C. Haas v. City & Cty. of San Francisco, 605 F.2d 1117 (9th Cir. 1979) (zoning regulations were not a taking although they reduced the value of property from $2,000,000 to $100,000).

[44]Pennsylvania Coal, 260 U.S. at 413.

[45]See Marshall v. Dept. of Water and Power, 268 Cal. Rptr. 559, 568 (Ct. App. 1990) ("'[t]he determination of whether an inverse taking has occurred is a nonjury question, even when there are factual questions involved'") (quoting Redevelopment Agency v. Tobriner, 200 Cal. Rptr 364, 370-71 (Ct. App. 1984)); see also San Diego Gas & Elec. Co. v. Superior Ct., 920 P.2d 669, 705 (Cal. 1996); Cumberland Farms, Inc. v. Town of Groton, 808 A.2d 1107, 1124-27 (Conn. 2002); Foster v. City of Gainesville, 579 So.2d 774, 776 n.2 (Fla. Dist. Ct. App. 1991); Rueth v. State, 596 P.2d 75, 94-95 (Idaho 1979); Van Dissel v. Jersey Central Power & Light Co., 438 A.2d 563, 568-69 (N.J. Super. Ct. App. Div. 1981); Alevizos v. Metropolitan Air. Com'n of Mpls. & St. P., 216 N.W.2d 651, 660-61 (Minn. 1974). But see Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) (jury trial required in 42 U.S.C. § 1983 action on question of whether landowner had been denied all economically viable use of land); Thornburg v. Port of Portland, 415 P.2d 750, 752-53 (Or. 1966) (jury decides whether interference with use and enjoyment of land is sufficiently substantial to result in a loss of value and therefore constitute a taking).

[46]MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 349 1986) (in determining where mere regulation ends and taking begins, the Court relies "'as much [on] the exercise of judgment as [on] the application of logic'") (quoting Andrus v. Allard, 444 U.S. 51, 65 (1979)).

Physical occupations and invasions

Physical occupation and invasion cases are "relatively rare [and] easily identified,"[47] and "[w]hen the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed."[48] For situations where the government specifically condemns or physically occupies property, straightforward per se rules apply.[49] Such an occupation effects a taking "to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[50] Thus, the government "has a categorical duty to compensate the former owner."[51]

The United States Supreme Court has held in several situations that just compensation was due for a per se physical invasion or occupation, as when government dams a river and floods upland parcels,[52] government seizes and operates a coal mine,[53] airplanes make frequent

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[47]Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 324 (2002).

[48]Id. at 322 n.17.

[49]Brown v. Legal Foundation of Wash., 538 U.S. 216, 233 (2003).

[50]Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982).

[51]Tahoe-Sierra, 535 U.S. at 322.

[52]United States v. Cress, 243 U.S. 316 (1917); Pumpelly v. Green Bay Company, 80 U.S. 166 (1871).

[53]United States v. Pewee Coal Co., 341 U.S. 114 (1951).

and low over-flights of property,[54] government attempts to require public access to private property,[55] or when government authorizes a cable company to install cable boxes on apartment buildings.[56] However, other measures taken by government have not resulted in physical takings, e.g., mobile home rent control ordinances restricting evictions,[57] ordinances requiring a shopping center to permit distribution of literature on its property during business hours,[58] or when buildings are damaged during riots while under the protection of federal officers.[59]

Here, in determining that the zoning ordinances expanding the McCarran transition zone effected a per se physical taking of the landowners' property, the district court observed that "[t]he Supreme Court has repeatedly held that cases involving intrusions onto the land or airspace of others are different from other regulatory cases." In reaching this conclusion, the district court performed a combined analysis of the United States Supreme Court's per se takings overflight cases, United States v. Causby[60] and Griggs v. Allegheny County,[61] with Loretto v.

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[54]Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946).

[55]Kaiser Aetna v. United States, 444 U.S. 164 (1979).

[56]Loretto, 458 U.S. 419.

[57]Yee v. Escondido, 503 U.S. 519 (1992).

[58]Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

[59]YMCA v. United States, 395 U.S. 85 (1969).

[60]328 U.S. 256.

[61]369 U.S. 84.

Teleprompter Manhattan CATV Corp.,[62] a case involving a physical occupation of property, and Nollan v. California Coastal Commission,[63] a case involving an easement imposed by government authorities as a condition to issuance of a building permit. While the district court's analysis of the Causby-type overflights cases, the Loretto-type physical occupation cases, and the Nollan-type dedication/exaction cases was a novel approach, the district court erred in its amalgamated reliance upon them.

The United States Supreme Court's physical takings cases involving overflights show a common theme: that when frequent and low airplane overflights substantially devalue the current use and enjoyment of property, a compensable event occurs. In Causby, a chicken farming business was destroyed after low and frequent overflights by military aircraft caused the chickens to reduce egg production and to die from fright.[64] The Court noted that, if the flights rendered the farmer's land uninhabitable, it would be as if the government "had entered upon the surface of the land and taken exclusive possession of it."[65] Certainly, the limitation on the land's utility profoundly diminished its value.[66] The Court therefore held that "[f]lights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate

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[62]458 U.S. 419.

[63]483 U.S. 825 (1987).

[64]Causby, 328 U.S. at 259.

[65]Id. at 261.

[66]Id. at 262.

interference with the enjoyment and use of the land."[67] Because the findings of the lower court in Causby established that the flights directly caused the diminution in value, the Court agreed that a servitude had been placed upon the land for which the farmer was entitled to compensation.[68]

In Griggs, the Court considered whether a county-operated airport took an easement over a house through noise and air pollution from frequent and low overflights.[69] The Court noted that "use of land presupposes the use of some of the airspace above it. Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected. An invasion of the 'superadjacent airspace' will often 'affect the use of the surface of the land itself.'"[70] Based upon evidence that the homeowners abandoned their residence because they became "nervous and distraught" from extreme noise generated by airplane overflights,[71] the Court held that a compensable event had taken place.[72]

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[67]Id. at 266.

[68]Id. at 266-67.

[69]Griggs, 369 U.S. at 85, 87. The Court stated that the holding in Causby was "that the United States by low flights of its military planes over a chicken farm made the property unusable for that purpose and that therefore there had been a 'taking,' in the constitutional sense, of an air easement for which compensation must be made." Id. at 88.

[70]Id. at 89 (citation omitted) (quoting Causby, 328 U.S. at 265).

[71]Id. at 87.

[72]Id. at 90; see also id. at 91 (Black, J., dissenting) (agreeing "with the Court that the noise, vibrations and fear caused by constant and extremely low overflights in this case have so interfered with the use and

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In Causby and Griggs, landowners presented evidence of frequent and low overflights, which diminished the value of the existing use of their property. Thus, other courts have interpreted Causby and Griggs to require that a prima facie case for inverse condemnation based upon a physical taking must include evidence of low and frequent overflights causing a direct and immediate interference with the enjoyment and use of the land.[73] We agree. Causby and Griggs did not concern the regulation of property as implied by the district court, but rather the resultant effect of overflights upon subjacent land. In actuality, Causby and Griggs are physical takings cases.

The landowners in this instance chose not to pursue their noise claim and presented insufficient evidence of direct overflights to establish a case under Causby or Griggs.[74] The only evidence the

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enjoyment of petitioner's property as to amount to a 'taking' of it under the Causby holding").

[73]See Brown v. U.S., 73 F.3d 1100 (Fed Cir. 1996); Village of Willoughby Hills v. Corrigan, 278 N.E.2d 658 (Ohio 1972).

[74]See Brown, 73 F.3d at 1104, which states:

> [U]nlike a government invasion of the surface land itself, an invasion of airspace above surface land does not per se constitute a taking. However, under Causby and its progeny, once the surface owner proves that low-level overflights result in direct, immediate, and substantial interference with the enjoyment and use of the property, the owner establishes a taking for which the Constitution mandates just compensation.

See also La Salle National Bank v. County of Cook, 340 N.E.2d 79, 89 (Ill. App. Ct. 1975) (considering an airport height zoning ordinance and noting

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landowners provided to the district court regarding overflights was Dunlay's testimony that overflights might occur, but at what interval he did not know. While the landowners may be able to establish a Causby-type takings case in the future, Dunlay's testimony was insufficient to establish a physical invasion or occupation requiring just compensation. Further, it is undisputed that the use of the property in the "before" condition has remained unaffected by the ordinances and, certainly, the height restrictions have not displaced these landowners. Thus, the district court erred in relying upon Causby and Griggs.

The district court also erroneously relied upon Loretto. In that case, a New York statute required landlords to permit a cable television company to install cables and junction boxes in their buildings. The landowner in Loretto did not discover the cables until after purchasing the building. The Court concluded that the installed cable constituted a permanent physical occupation, which required compensation. The Court narrowly defined its holding to "affirm the traditional rule that a permanent physical occupation of property is a taking."[75] In the present case, the district court viewed the zoning ordinances not as valid height restrictions, but rather as permitting physical occupation of the property through airplane overflights. The County ordinances at issue did not permit third parties (airplanes) to use

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that "interpreting overflights as 'takings' within the meaning of the fifth amendment would seem to be more the exception than the rule").

[75]Loretto, 458 U.S. at 441; see also Kaiser Aetna, 444 U.S. 164 (government attempt to grant public access to a private marina without cost).

or occupy the landowners' property to the extent that a per se physical taking has occurred, however, because NRS 493.050[76] establishes a right of flight across private property in Nevada.[77] Thus, Loretto is inapposite to this inquiry.

The district court also relied upon Nollan for its analysis of the County ordinances. In Nollan, property owners sought a permit to replace a beachfront home with a larger one. The California Coastal Commission conditioned issuance of the permit on the transfer of an easement that would allow public access to adjacent public beaches. The rationale for the condition was protection of the public's ability to see the beach, and that the larger structure would worsen the visual barrier between a public road serving the area and the beaches and, thus, create a "psychological barrier" to beach access.

The Court noted that, had the California Coastal Commission simply and unconditionally required the Nollans to convey an easement across their property, eminent domain principles would have been implicated;[78] but that, because the Coastal Commission could forbid construction altogether, it could also impose conditions on construction in harmony with the police power considerations empowering it to deny construction permits without running afoul of the Fifth Amendment. From this, the Court reasoned that a condition would be valid, i.e., no

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[76]See also 49 U.S.C. § 40103 (2000).

[77]Cheyenne Airport Bd. v. Rogers, 707 P.2d 717, 722-25 (Wyo. 1985) (airport zoning ordinances did not permit overflights; rather, permission came from state and federal statutes permitting aircraft navigation).

[78]Nollan, 483 U.S. at 836.

inverse condemnation would occur, if, for example, it required the property owners to provide or dedicate a viewpoint on their property for passersby to see the ocean,[79] but that [t]he evident constitutional propriety disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."[80] Under these principles, the Court went on to hold that requiring an easement as a condition for permit approval constituted a taking because the dedication of the easement bore no "essential nexus" to the harm the local government sought to address, i.e., the easement did not improve the view.[81]

The case before us does not concern exaction of a condition to the approval of a development proposal. Rather, the ordinances at issue here are of general applicability to airport area property owners and constitute a legitimate exercise of the County's police powers to prevent public hazards.[82] While the County may at some future time exact

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[79]Id. at 836-37.

[80]Id. at 837.

[81]Id. at 838-41 (holding in part that the commission's imposition of the access-easement condition could not be treated as an exercise of land-use police power since the condition did not serve public purposes related to the condition;—of the rationales put forth to justify the condition, protection of the public's ability to see the beach and ameliorating a "psychological barrier" to beach use, none was plausible); see also Dolan v. City of Tigard, 512 U.S. 374 (1994) (government must demonstrate that condition sought for granting a development permit meets essential nexus test and is roughly proportional to the problem created by development).

[82]Of course, each parcel in the area may be affected by the ordinances in different ways and to different extents, depending upon location.

conditions on granting a variance to construct a hotel/casino that would constitute a taking, the landowners have not yet attempted to obtain such a variance.[83] Thus, while Nollan is a physical takings case, it is not implicated in this matter and the district court erred in relying on it.

The landowners rely upon several state court decisions to support their argument that airport height restrictions effect a per se physical taking of property. However, many of the cases cited by the landowners do not support the proposition that, in and of themselves, airport height ordinances automatically create a right of compensation. The affected parties in some of the cases alleged or presented sufficient facts to state a cause of action, i.e., frequent and low overflights;[84] in others, which are actually regulatory takings cases, the airport height regulations completely deprived the landowner of any beneficial use in the property,[85] the regulating body attempted to pass retroactive limitations

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[83]See discussion of regulatory takings below.

[84]Sneed v. County of Riverside, 32 Cal. Rptr. 318 (Ct. App. 1963) (court overruled demurrer to complaint for inverse condemnation; complaint stated causes of action by alleging low and frequent overflights and through airport zoning height regulation); Ackerman v. Port of Seattle 348 P.2d 664 (Wash. 1960), abrogated by Highline Sch. Dist. No. 401, King Cty. v. Port of Seattle, 548 P.2d 1085 (Wash. 1976) (overruling a district court's dismissal of property owners' complaint and holding that frequent and low overflights over property amounted to a taking). But see United States v. 48.10 Acres of Land, Etc., 144 F. Supp. 258, 265 (S.D.N.Y. 1956) (federal government required to pay for devaluation of property following height restrictions and an easement it purchased because property was less valuable for residential development due to easements).

[85]Peacock v. County of Sacramento, 77 Cal. Rptr. 391 (Ct. App. 1969) (airport zoning ordinance and subsequent government action that

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on property,[86] or the regulatory body lacked statutory authority to pass airport zoning ordinances to restrict structure height and the use of property.[87] We conclude that a rule supporting the notion that airport height-restriction ordinances, of necessity, effect per se physical takings, is overbroad in its reach and thus, not in harmony with the condemnation laws of this state.[88] We therefore embrace the modern trend that airport

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prevented landowner from any development and left landowner with no beneficial use in property for several years was a compensable taking).

[86]Ky. Airport Zoning Com'n v. Ky. Power Co., 651 S.W.2d 121 (Ky. 1983) (court concluded that the airport zoning commission could not impose regulations retrospectively; to enforce its orders, the zoning commission was required to pay just compensation).

[87]Yara Engineering Corporation v. City of Newark, 40 A.2d 559 (N.J. 1945) (state enabling statute did not give city authority to pass airport zoning ordinances; accordingly, such ordinances interfered with existing property rights requiring compensation to affected landowners).

[88]But see Roark v. City of Caldwell, 394 P.2d 641 (Idaho 1964) (holding that airport height ordinance was not a valid exercise of police power because it took property for a public use without just compensation); Indiana Toll Road Commission v. Jankovich, 193 N.E.2d 237 (Ind. 1963) (structures and toll road encroached into an airport height limitation zoning area—court concluded that limitation was not an exercise of police power, but a taking for public use); McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980) (because zoning regulations were designed to benefit a specific government enterprise, landowners who suffered a substantial diminution in the value of their property were entitled to compensation); Jackson Municipal Airport Authority v. Evans, 191 So. 2d 126 (Miss. 1966) (although finding that airport zoning ordinance was generally valid, airport authority could not remove the tops of trees that grew into a restricted height elevation without paying compensation).

height zoning ordinances, as a valid exercise of police power, are not the definitional equivalent of a per se physical taking.[89]

In this instance, there was no per se physical taking as there was no actual physical appropriation of, or physical ouster from, the airspace or any other portion of the subject property. First, the property was and could be further developed within the height restrictions.[90] Second, the landowners could still conceivably develop structures within

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[89]See Harrell's Candy Kitchen v. Sarasota-Manatee Air. A., 111 So. 2d 439, 443 (Fla. 1959) (upholding validity of airport height restrictions without payment of just compensation. The court stated, "We can think of no situation which more clearly authorizes the exercise of . . . the police power than that involved here. Such regulations not only promote the general welfare of the state and community served but, contribute to the proper and orderly development of land areas in the vicinity of airports. Such regulations stabilize values and provide safety to those who use the airport facilities in taking off and landing as well as those living in the vicinity thereof."); La Salle National Bank, 340 N.E.2d 79 (airport height zoning regulations were a proper exercise of police power to protect the public from air hazards; the regulations were not an appropriation of private property for public use); Fitzgarrald v. City of Iowa City, 492 N.W.2d 659 (Iowa 1992) (airport zoning ordinance did not create a physical invasion taking); Village of Willoughby Hills, 278 N.E.2d 658 (regulations were a proper exercise of police power and no compensable taking because landowners did not allege low and frequent flights over their property); Cheyenne Airport Bd., 707 P.2d 717 (ordinances did not create flight easement; rather, they were created by state and federal declarations of navigability and ordinances were a proper exercise of police power to protect the easement from surface activities); see also Clyde L. MacGowan, Note, Airport Zoning as a Height Restriction, Vol. 13 Hastings L.J. 397 (1962) (urging courts to uphold the validity of height zoning as a proper exercise of the police power).

[90]See supra note 19.

the affected airspace via the variance process.[91] Additionally, no avigation easement was created by the ordinances in question here. Under City of Austin and Brondum, a general right to fly over property does not necessitate an easement but, rather, an avigation easement is created by low and frequent overflights amounting to a taking of the property.[92] As noted in our discussion of Causby, such was not established as to the subject property. These ordinances, which did not create an avigation easement as to the subject property, are in reality height restrictions not amounting to a physical taking. As noted above, the fact that no per se physical taking was established does not end our analysis in this matter.

Regulatory takings

As discussed above, two general takings categories exist: physical and regulatory. Thus, even when government does not physically "take" property, but rather regulates the use of property, the property owner may still be entitled to just compensation if the regulation goes "too far." Two regulatory taking analytical constructs have emerged: categorical regulatory takings, and takings resolved under an ad hoc factual analysis pursuant to Penn Central.[93]

A categorical regulatory taking occurs when a regulation deprives land of all economically beneficial or productive use and, as with per se physical takings, the only issue to resolve at trial is damages.[94]

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[91]Id.

[92]See supra note 6.

[93]438 U.S. 104.

[94]See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992). However, the Court provided that, even if a regulation removes all

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Additionally, a categorical or per se regulatory taking may occur if the regulation fails to substantially advance a legitimate government interest.[95]

We conclude that no categorical regulatory taking has been shown in this instance. First, the landowners did not allege that the County ordinances deprived them of their property's entire economic value; they conceded below that an economically viable use of their property remains in spite of the height restrictions. Second, the

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economic value from property, a compensable taking may not occur if "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." Id. at 1027; see also Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (discussing the three-part ad hoc factual analysis utilized in the absence of a per se physical taking or a categorical regulatory taking).

[95]Lucas, 505 U.S. at 1016; Agins v. Tiburon, 447 U.S. 255, 260 (1980). But see Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 732 n.2 (1999) (Scalia, J., concurring in part and concurring in the judgment) (expressing no view as to the propriety of the legitimate government interest test); id. at 753 n.12 (Souter, J., concurring in part and dissenting in part) ("I offer no opinion here on whether Agins was correct in assuming that this prong of liability was properly cognizable as flowing from the Just Compensation Clause of the Fifth Amendment, as distinct from the Due Process Clauses of the Fifth and Fourteenth Amendments."); Eastern Enterprises v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (suggesting that Agins' legitimate government interest test is one more appropriately considered under general due process principles than the Takings Clause). Thus, it is possible that the Court no longer recognizes the legitimate government interest test as viable in the context of a regulatory takings analysis. However, because we do not rest our decision on this test, we need not express our views concerning its continuing validity.

landowners conceded below that the ordinances were a legitimate exercise of the County's police power. Third, it is not clear, without exhaustion of administrative remedies by the landowners, whether and the extent to which the zoning ordinances here have denigrated the economic value of the airspace in question.

Because the landowners did not establish or attempt to assert a categorical regulatory takings case, we must examine the ordinances to determine whether the landowners are entitled to just compensation under the fact-based analysis provided by the United States Supreme Court in Penn Central.

The Supreme Court has not provided a "set formula to determine where regulation ends and taking begins."[96] In Penn Central, the Court established three guideposts for examination of whether a regulation, that does not deprive the owner of all viable economic use, effects a compensable partial taking: (a) the regulation's economic impact, (b) the regulation's interference with investment-backed expectations, and (c) the character of the government action.[97] All relevant facts are considered on an ad hoc basis. The Court has instructed that, in examining whether a taking has occurred, a reviewing court must consider the property as a whole.[98] Additionally, an allegation that a regulation

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[96]Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).

[97]Penn Central, 438 U.S. at 124.

[98]Id. at 130-31 ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, [the] Court focuses rather both on the character of the action and on the nature and extent of

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has diminished the property's value, or destroyed the potential for its highest and best use, does not, without more, constitute a taking.[99]

While the Penn Central ad hoc approach is the proper legal framework for an analysis of whether the landowners in this matter are entitled to compensation, we cannot yet consider the landowners' taking claim, as their case is not yet ripe for review on the merits. We require an actual case or controversy as a predicate to judicial relief.[100] "We will decide only actual controversies, in which the parties are adverse and the issues ripe."[101] An unripe case presents a situation where there is no concrete controversy and an alleged injury is merely speculative.[102]

. . . *continued*
the interference with rights in the parcel as a whole."). Thus, the denominator for takings analysis is the parcel of property as a whole and not portions of property. See also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 331 (2002) (district court erred by disaggregating property into a thirty-two month segment of time from the remainder of the property owner's fee simple estate and considering whether property owners were deprived of all economically viable use during that period).

[99]See Euclid v. Ambler Co., 272 U.S. 365 (1926) (regulations valid although they effected a seventy-five percent diminution in value of property); Hadacheck v. Los Angeles, 239 U.S. 394 (1915) (ordinance prohibiting highest and best use of land as a brickworks was valid, although it reduced the value of property from $800,000 to $60,000); William C. Haas v. City & Cty. of San Francisco, 605 F.2d 1117 (9th Cir. 1979) (zoning regulations were not a taking although they reduced the value of property from $2,000,000 to $100,000).

[100]Resnick v. Nevada Gaming Commission, 104 Nev. 60, 65-66, 752 P.2d 229, 233 (1988).

[101]Boulet v. City of Las Vegas, 96 Nev. 611, 613, 614 P.2d 8, 9 (1980).

[102]Resnick, 104 Nev. at 65-66, 752 P.2d at 232-33.

A regulatory takings claim under Penn Central is generally not ripe without a "final decision" regarding the property owner's ability to develop its property.[103] In Williamson Planning Comm'n v. Hamilton Bank, the Supreme Court observed:

> Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty, this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.[104]

The final decision requirement "responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer."[105] Accordingly, without a

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[103]Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 190, 195 (1985) (two-part test for ripeness prior to seeking federal relief on a as applied basis: (1) the agency charged with administering the challenged ordinances must have reached a final decision regarding the application of the regulations to the property at issue, and (2) the plaintiff has sought compensation through available state procedures); see also Daniel v. County of Santa Barbara, 288 F.3d 375, 381 (9th Cir. 2002).

[104]473 U.S. at 190 (citations omitted).

[105]Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 738 (1997); see also MacDonald, Sommer & Frates v. Yolo County, 477 U.S.

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final regulatory decision applying the challenged regulation, a court cannot evaluate the economic impact of the regulation with regard to the extent it interferes with reasonable investment-backed expectations and, thus, cannot conduct the Penn Central examination without resorting to speculation.[106] A final decision requires, at a minimum, "(1) a rejected development plan, and (2) a denial of a variance."[107] Further, the application for development must be one that is meaningful, i.e., not one that is for "exceedingly grandiose development."[108] Additionally, government "may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision."[109]

A limited exception exists to "the final decision [exhaustion] requirement if attempts to comply with that requirement would be

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340, 348 (1986) ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes.").

[106]Hamilton Bank, 473 U.S. at 191.

[107]Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1454, 1455 (9th Cir. 1987) (even if a landowner has submitted development plans and been rejected, an applied regulatory taking case might still not be ripe; a landowner must submit a "meaningful" application for development.); see MacDonald, 477 U.S. at 352 n.8, 353 n.9 (the rejection of "exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews").

[108]Kinzli, 818 F.2d at 1455 (the futility exception is not triggered until at least one meaningful application for development is submitted and rejected; "[a] 'meaningful application' does not include a request for 'exceedingly grandiose development'") (quoting MacDonald, 477 U.S. at 353 n.9).

[109]Palazzolo v. Rhode Island, 533 U.S. 606, 621 (2001).

futile."[110] However, as one court has explained, a landowner seeking to establish futility carries the burden of proving that the exception applies. The landowner must establish that the potential denial of a development permit is more than a mere possibility; rather, "a sort of inevitability is required: the prospect of refusal must be certain (or nearly so)."[111] Thus, for example, in Lucas, the Court noted that it would have been futile for the landowner to submit a request for a "special permit" when the regulatory agency stipulated that it would not grant such a permit.[112]

The district court in this case erred by ruling that the futility exception applied and that the landowners were excused from exhausting their administrative remedies. The district court's futility determination was erroneous as a matter of law because the district court (1) placed too much reliance in its futility findings upon the County's ruling on the 1981 variance request by predecessor landowners, a ruling entered some fourteen years prior to the date of valuation in this dispute; (2) failed to consider whether any meaningful alternative for development over and above the existing use in 1995 might be approved through the ordinance variance process;[113] and (3) apparently determined the transition zone surface to be an impenetrable line for development purposes. While the

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[110]Herrington v. County of Sonoma, 857 F.2d 567, 569 (9th Cir. 1988); see also Strickland v. Alderman, 74 F.3d 260, 265 (11th Cir. 1996).

[111]Gilbert v. City of Cambridge, 932 F.2d 51, 61 (1st Cir. 1991) (citations omitted).

[112]Lucas, 505 U.S. at 1012 n.3.

[113] It appears by implication that the district court believed that it would have been futile to apply for any variance.

landowners are correct that McCarran opposed the 1981 variance request, they are incorrect in arguing that the denial of the request occurred because of McCarran's opposition. The record of the Board of Commissioner's meeting reveals that the predecessor landowners agreed to height restrictions requested by the airport. The Board, however, apparently denied the variance request because the predecessor landowners refused to pay the moving costs of the mobile home tenants on the property. As noted in the margin above, the ruling was suggestive of the fact that the County would not override airport recommendations or objections to a project, where the objections were based upon transition-zone restrictions. However, given the total body of evidence on this point, the 1981 rejection by the County does not establish that it would have denied any application for a variance.

We note that the district court did not consider former Aviation Director Broadbent's deposition testimony in making the original futility findings. His deposition was only later used to bolster the landowners' takings argument in support of partial summary judgment and to oppose the County's renewed attack on the ripeness of their claims.[114] As noted, Mr. Broadbent testified that the airport routinely opposed height restriction variances whenever the FAA interpreted a proposed structure as hazardous to aircraft navigation. He could not recall a situation during his tenure at the airport where the Clark County Commission approved an application for a variance or special use permit over an adverse FAA determination.

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[114]See supra note 33.

The district court, in its summary judgment order reciting the landowners' arguments, stated:

> As to the issue of a "variance," it is inapplicable because this is not a regulatory taking so there is no necessity for "finality." Additionally, this Court has already ruled that to make application would be futile especially in light of the fact that the prior owner did make application and was rejected for a 240 foot structure. Additionally, the former Airport Director, Robert Broadbent testified that he would have personally blocked any request for a variance for this property. The County fails to mention that no properties in the Transition Zone have been granted a variance.

The district court's order does not precisely track the equivocal testimony of Mr. Broadbent and was made without the benefit of the subsequent pre-trial offer of proof showing other variances.[115] While one might infer from Mr. Broadbent's statements that McCarran would have opposed any variance application for the property and this opposition would result in a variance denial, the entire context of Mr. Broadbent's testimony suggests that airport opposition to development proposals was tied to FAA objections concerning hazards to air navigation. Also, as noted, the record does not support a conclusion that it would have been futile for the landowners to request a variance. First, the landowners gained a variance in the transition zone for their billboards. Second, evidence from the pre-trial offer of proof found in the record discloses that other property owners have gained variances to construct structures that not only exceed the transition slope, but also extend into the approach

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[115]See supra note 19.

zone.[116] Third, Mr. Broadbent testified that he could not remember the County ever going against McCarran's recommendation if the airport could show that the FAA supported its recommendation. Fourth, the record indicates that the FAA would have permitted at least some development on the subject property that would penetrate the transition slope.

The FAA responded to the landowners' hypothetical plans, indicating that, while the landowners' proposed structure exceeded the transition slope by 148 feet, it would have no impact on aeronautical operations if lowered by seventy-one feet (i.e., to a height seventy-seven feet into the transition zone). More particularly,

> [i]t should be understood . . . that a penetration of a FAR Part 77 imaginary surface is not reason to determine a structure to be a hazard to air navigation. This is just an indication that further study is required to determine the exact impact the structure would have on aeronautical operations.

Accordingly, the mere fact that a proposed structure may exceed the slope of a height restriction zone is apparently insufficient for the FAA to conclude that the structure will present an aircraft navigation hazard. Thus, the transition zone was, at least ostensibly, permeable through the

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[116]We again note that the information later provided in the County's pre-trial offer of proof was not provided to the district court at the time of its pre-trial rulings on the takings and futility issues. We also note that the district court rejected the offer of proof, ostensibly because it had resolved the futility and takings issues. However, the variances noted in the offer of proof support the other evidence in the record undermining the district court's futility and takings rulings, both of which were subject to revision at any time under NRCP 54(b).

variance process.[117] However, a determination as to how far a structure could exceed the zone was subject to FAA analysis and a final decision on a variance request by the County Commission. In light of the above, we conclude that whether the current Board of County Commissioners would permit a variance remains to be seen.

We also note that the landowners apparently had no concrete plans to develop the assembled parcels to submit for exhaustion of their administrative remedies, here the variance process. Tien Fu Hsu stated he held no formal plans to develop his corporate and non-corporate parcels into a hotel/casino. Lisa Su testified that she did not attempt to develop the property because she lacked the funds to do so, and had no specific plans to develop the property, except in a generalized sense, which she discarded.

It was incumbent upon these landowners to submit a meaningful application for development and resort to the variance process to determine whether, and to what extent, they could penetrate the transition zone. Their failure to do so prevents any analysis as to whether the ordinances went too far in frustrating the investment-backed expectations in assembling the subject parcels, and whether the County would have approved a realistic variant use for the landowners' property. Accordingly, the controversy below was not justiciable because a taking in this case can only be established under a Penn Central analysis, and such an analysis cannot be judicially undertaken without a controversy that is ripe for decision. Because the takings issue should have been resolved under Penn Central, and because the Penn Central issue was not ripe for

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[117]See supra note 19.

a decision, the district court erred in not dismissing the action below. However, given the passage of time since the trial, recognizing that the landowners may now be in a position to submit meaningful plans for the further development of the assembled parcels to the FAA and the County, we have determined to reverse and remand this case for further proceedings consistent with this order. Upon remand, the landowners may, if they so choose, submit meaningful development plans to the County with an application for a variance. If the County denies their application and a "final decision" results, the landowners may bring their case back to district court for adjudication of whether a Penn Central-type regulatory taking has occurred through the application of the County ordinances to their property.[118] If an attempt at exhaustion is not made on remand, the district court is instructed to dismiss the matter without prejudice. Based on our conclusion that the landowners' case is not yet ripe for judicial determination, we need not consider the County's remaining arguments, and we dismiss the landowners' cross-appeal as moot.

Finally, in the event the landowners, on remand, exhaust their administrative remedies, the district court must conduct an evidentiary hearing on the takings issue in which any party may introduce a full body of relevant evidence to a regulatory taking. In a regulatory taking case, several formerly excluded facts become relevant in aid of the district court's determination of the takings issue: the landowners' knowledge of

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[118]We conclude that any failure on remand to exhaust administrative remedies through a variance process will not constitute an abandonment of the action for the purposes of awarding attorney fees and costs under NRS 37.180.

the height restrictions when they purchased their property, their development intentions and steps they took to effect these intentions, the feasibility of constructing a viable high-rise hotel/casino, the purchase price of the properties, the variance procedures under the airport zoning ordinances and other County ordinances affecting the property, preexisting height restrictions on the property, and the FAA's role in the variance process. In the further event that the district court finds a regulatory taking to have occurred, a jury may then determine the question of damages, to wit: the extent to which the reasonable investment-backed expectations have been impaired.[119]

CONCLUSION

The district court erroneously concluded that the County's height-restriction ordinances created a per se physical taking of the landowners' property. Although ordinances like those at issue in this case may potentially give rise to a fact-based regulatory taking, we cannot conclude at this time whether the application of the County's regulations to their property requires just compensation, as this case is not yet ripe for review on the merits. Accordingly, we

[119]See supra note 45.

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[120]

_____, J.
Agosti

_____, J.
Becker

_____, J.
Maupin

_____, Sr.J.
Young

_____, D.J.
Polaha

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[120]The Honorable Cliff Young, Senior Justice, was appointed by the court to sit in place of the Honorable Miriam Shearing, Chief Justice. Nev. Const. art. 6, § 19; SCR 10. The Honorable Jerome M. Polaha, Judge of the Second Judicial District Court, was designated by the Governor to sit in place of the Honorable Robert Rose, Justice. Nev. Const. art. 6, § 4.

The Honorable Myron E. Leavitt, Justice, who died in office on January 9, 2004, had voluntarily recused himself from participation in the decision of this matter when it was docketed in this court in November 2001. The Honorable Mark Gibbons, Justice, also voluntarily recused himself from participation in the decision of this matter. Accordingly, this matter was submitted for decision by a five-justice court made up of Justices Agosti, Becker and Maupin, Senior Justice Young and District Judge Polaha.

cc: Hon. Stewart L. Bell, District Judge
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