

***Hsu v. County of Clark*, 123 Nev. Adv. Op. No. 60 (Dec. 27, 2007)<sup>1</sup>**

**CIVIL PROCEDURE – LAW OF THE CASE  
EMINENT DOMAIN – PER SE REGULATORY TAKINGS**

**Summary**

This case is an appeal from a district court order, entered on remand, dismissing an inverse condemnation action. While the current appeal was pending, the Nevada Supreme Court decided an intervening case with substantively similar facts which changed Nevada law when analyzing airspace takings.

**Disposition/Outcome**

The Nevada Supreme Court determined that when it issues an intervening decision that constitutes a change in controlling law, courts may depart from the decided law of the case and apply the new rule of law. Applying the new law to the present appeal, the Court vacated the district court's dismissal and directed it to enter an order finding the County liable for a per se regulatory taking. The Court also remanded the case for a new trial on the issue of just compensation.

**Factual and Procedural History**

This case began as an eminent domain action with appellant filing a cross-claim for inverse condemnation. At issue are two County ordinances placing transition zone height restrictions on property surrounding McCarran International Airport, including appellants' land. The district court determined the county ordinances were a per se regulatory taking of airspace over appellants' land. The case then proceeded to trial on the issue of just compensation resulting in a substantial verdict for appellants. On appeal, the Nevada Supreme Court reversed and remanded the case to allow appellants to exhaust their administrative remedies as required by *Penn Central Transportation Co. v. New York City*.<sup>2</sup> On remand, the district court directed appellants to submit a development plan to the County by January 1, 2006. When appellants sold the land rather than file the plan, the district court dismissed the case. Appellants then filed the present appeal.

While the current appeal was pending, the Nevada Supreme Court decided *McCarran International Airport v. Sisolak*,<sup>3</sup> a case based on similar facts. In that case, the Court concluded that the county's airport runway approach zone height restrictions constituted a per se regulatory taking as defined in *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>4</sup> and did not fall within the parameters of *Penn Central*.<sup>5</sup> Therefore, Sisolak was not required to exhaust his administrative remedies before bringing suit. This decision resulted in a substantive change to Nevada law and

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<sup>2</sup> 438 U.S. 104 (1978).

<sup>3</sup> 122 Nev. 645, 137 P.3d 1110 (2006), *cert. denied*, 127 S. Ct. 1260 (2007).

<sup>4</sup> 458 U.S. 419 (1982).

<sup>5</sup> *Sisolak*, 122 Nev. at 666-67, 137 P.3d 1124-25.

analyzing airspace takings claims. Because the facts of this case are similar to those in *Sisolak*, appellants argue that they are entitled to the benefit of the intervening decision.

## **Discussion**

### **I. Law of the Case Doctrine**

The law of the case doctrine provides that the law or ruling of a first appeal must be followed in all subsequent proceedings, both in the lower court and on any later appeal.<sup>6</sup> However, the U.S. Supreme Court has concluded that it is not improper for a court to depart from a prior holding if it is “clearly erroneous and would work a manifest injustice.”<sup>7</sup> Federal courts have adopted three specific exceptions to the law of the case doctrine: (1) new or different evidence produced in subsequent proceedings, (2) an intervening change of controlling law, or (3) the prior decision was clearly erroneous and enforcement would result in manifest injustice.<sup>8</sup> Additionally, many state courts have adopted one or all of these exceptions.<sup>9</sup> The Nevada Supreme Court has also acknowledged possible exceptions to the law of the case in *Clem v. State* and *Leslie v. Warden*.<sup>10</sup>

Referencing these exceptions adopted by both federal and state courts, the Nevada Supreme Court held that “when the controlling law of this state is substantively changed during the pendency of a remanded matter at trial or on appeal, courts of this state may apply that change to do substantial justice.”<sup>11</sup> In this case, the Court issued its opinion in *Sisolak* between the appellants’ first appeal and the current appeal and making a substantial change in Nevada law controlling airspace takings. Therefore, the Court concluded the new law from *Sisolak* should apply to appellants’ claims.

### **II. The Effect of *Sisolak***

#### **A. Liability Determination**

The Court determined in *Sisolak* that the County’s enactment of height restrictions which placed *Sisolak*’s property within McCarran Airport’s “runway approach zone” and “departure critical area” resulted in a per se regulatory taking. The Court determined that *Sisolak* had a protected property interest in the use of his airspace up to 500 feet.<sup>12</sup> However unlike *Hsu*, the Court determined *Sisolak*’s claims did not fall under *Penn Central*. Because the ordinances were a permanent physical invasion of *Sisolak*’s airspace, they preserved a permanent right to fly through the airspace above *Sisolak*’s property.<sup>13</sup> The Court further concluded that because the

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<sup>6</sup> *Clem v. State*, 119 Nev. 615, 620, 81 P.3d 521, 525 (2003).

<sup>7</sup> *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983).

<sup>8</sup> *Hsu v. County of Clark*, 123 Nev. Adv. Op. No. 60, at 7-8.

<sup>9</sup> *Id.* at 8, n.19 and n.20.

<sup>10</sup> *Id.* at 8, n.21 and n.22.

<sup>11</sup> *Hsu*, 123 Nev. Adv. Op. No. 60, at 9-10.

<sup>12</sup> *McCarran Int’l Airport v. Sisolak*, 122 Nev. 645, 655, 137 P.3d 1110, 1117 (2006), *cert. denied*, 127 S. Ct. 1260 (2007).

<sup>13</sup> *Id.* at 666-67, 137 P.3d at 1124-25.

ordinances constituted a per se regulatory taking, *Penn Central* did not apply and Sisolak need not exhaust his administrative remedies before filing a claim for inverse condemnation.<sup>14</sup>

Applying the rule from *Sisolak* to the current appeal, the Nevada Supreme Court found that the County's transition zone height restrictions, like the restrictions in *Sisolak*, resulted in a per se regulatory taking of appellants' airspace. Quoting *Sisolak*, the Court stated "when airport regulations preserve the right to fly through a landowner's airspace and planes actually make use of this airspace, this constitutes a permanent physical invasion of property and is properly categorized as a per se regulatory taking."<sup>15</sup> The Court also determined that based on the per se nature of the taking, appellants were not required to apply for a variance or exhaust their administrative remedies before bringing suit. Therefore, the Court vacated the district court's order dismissing the case and instructed the district court to enter an ordered finding the County liable for a per se regulatory taking.

### B. Just Compensation, Attorney Fees, and Prejudgment Interest

Appellants requested the Court reinstate the original district court judgment awarding just compensation, attorney fees, and prejudgment interest. The Court declined, finding the district court erred at the original trial by excluding testimony related to whether appellants could have obtained a variance from the transition zone height restrictions.<sup>16</sup> The decision in *Sisolak* confirmed that such evidence is irrelevant in determining whether or not a taking occurred. However, this evidence is pertinent to determining the amount of just compensation due.<sup>17</sup> The Court remanded the issue of just compensation to the district court in accordance with the Court's ruling in *Sisolak*.

As indicated in *Sisolak*, appellants are entitled to reasonable attorney fees actually incurred as the successful property owner in an inverse condemnation action.<sup>18</sup> The Court remanded the issue of appellants' attorney fees to the district court with instructions to determine reasonable fees based upon the traditional lodestar analysis, with adjustments left to the discretion of the district court.<sup>19</sup>

*Sisolak* further provides for prejudgment interest to a prevailing party in an inverse condemnation action from the date of taking until the entry of judgment.<sup>20</sup> The Court remanded the case for calculation and award to appellants of prejudgment interest from November 20, 1995, the stipulated date of taking.<sup>21</sup>

### Conclusion

The Court determined that when the Nevada Supreme Court issues an intervening decision that constitutes a substantial change in controlling law, Nevada courts may depart from

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<sup>14</sup> *Id.* at 664, 137 P.3d at 1123.

<sup>15</sup> *Hsu*, 123 Nev. Adv. Op. No. 60 at 14, quoting *Sisolak* at 666-67, 137 P.3d at 1124-25.

<sup>16</sup> *Hsu*, 123 Nev. Adv. Op. No. 60 at 15.

<sup>17</sup> *Id.* citing *Sisolak*, 122 Nev. at 672, 137 P.3d at 1128.

<sup>18</sup> *Sisolak*, 122 Nev. 673-75, 137 P.3d at 1129-30 (quoting 42 U.S.C. § 4654(a) (2000)).

<sup>19</sup> *Herbst v. Humana Health Ins. of Nevada*, 105 Nev. 586, 590, 781 P.2d 762, 764 (citing *Pennsylvania v. Del. Valley Citizens' Council*, 478 U.S. 546, 564-66 (1986)).

<sup>20</sup> *Sisolak*, 122 Nev. 675, 137 P.3d at 1130.

<sup>21</sup> *Hsu*, 123 Nev. Adv. Op. No. 60 at 17-18.

the decided law of the case set forth in a first appeal and apply the new rule of law in subsequent proceedings.

Applying the intervening rule of law set forth in *Sisolak* to this case, the Court found appellants properly established a claim for per se regulatory taking of their airspace and were entitled to appropriate just compensation. The Court vacated the district court's dismissal and instructed the court to enter an order finding the County liable for a per se regulatory taking. The case was remanded for a new trial on the issue of just compensation in accordance with the guidelines set forth in *Sisolak* and this opinion. The Court further instructed the district court to calculate attorney fees using a lodestar analysis and calculate prejudgment interest based upon the stipulated date of taking.