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IN THE SUPREME COURT OF THE STATE OF NEVADA

MCCARRAN INTERNATIONAL AIRPORT
and CLARK COUNTY, a political subdivision
of the State of Nevada,

Appellants,

vs.

STEVE SISOLAK,

Respondent.

Case No. 41646

On Appeal from a Final Judgment in Inverse
Condemnation of Real Property entered by
the Eighth Judicial District Court

BRIEF OF THE AMERICAN PLANNING ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

The American Planning Association (APA) is a nonprofit public interest and research organization, founded in 1978 exclusively for charitable, educational, literary, and scientific research purposes to advance the art and science of planning -- physical, economic and social -- at the local, regional, state, and national levels. APA's mission is to encourage planning that will contribute to public well-being by developing communities and environments that meet more effectively the needs of people and society. With 46 regional chapters, APA and its professional institute, the American Institute of Certified Planners, represent more than 30,000 practicing planners, officials, and citizens across the nation involved with urban and rural planning. Sixty-five percent of APA's members work for state and local government agencies. APA regularly files amicus briefs in takings cases to ensure that takings jurisprudence continues to allow for reasonable land-use planning in the public interest. A few of the cases in which APA has participated as amicus curiae include: *Agins v. Tiburon*, 447 U.S. 255 (1980), *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), *Yee v. City of Escondido*, 503 U.S. 519 (1992), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465 (2002).

This case raises critical issues of national importance. The central question is whether the Takings Clause requires local officials to compensate owners whose land is subject to zoning that implements the minimum standards for air safety specified by the Federal Aviation Administration (FAA). The challenged zoning is substantially similar to the FAA's Model Zoning Ordinance used by airports across the country to secure federal

1 funding. There can be little doubt that the ramifications of this case extend far beyond the
2 County of Clark and the State of Nevada. Planners, municipalities, and owners of land
3 near airports across the country will carefully scrutinize this Court's ruling. Adoption of
4 Sisolak's unprecedented takings theory could result in financially ruinous liability for
5 countless municipalities that seek nothing more than to meet the FAA's air safety
6 requirements. It also would severely chill planning for much-needed airport construction
7 and expansion.

8 INTRODUCTION AND SUMMARY OF ARGUMENT

9 As this Court knows, on March 18, 2002, APA filed an *amicus* brief with this Court
10 supporting the County of Clark in a case very similar to the instant case: *County of Clark*
11 *v. Tien Fu Hsu*, Case No. 38853. As in *Tien Fu Hsu*, the instant case involves a takings
12 challenge to height restrictions imposed on land near McCarran International Airport.
13 Although not alleged in the complaint, Respondent Sisolak evidently premises his claim
14 on the same height restrictions at issue in *Tien Fu Hsu*, Ordinance No. 1221 and associated
15 municipal height limitations. APA strongly believes that the takings claims in both cases
16 are thoroughly misguided for substantially the same reasons. What follows, therefore, is
17 an *amicus* brief substantially similar the brief APA submitted in *Tien Fu Hsu*, with certain
18 conforming changes.

19 The zoning challenged in this case imposes height restrictions. By its plain terms,
20 the zoning restricts the height of structures that pose a potential hazard to aviation, and
21 does nothing more. As a mere restriction on land use, the challenged zoning should be
22 analyzed under the standards for regulatory takings set forth in *Penn Central Transp. Co.*
23 *v. New York City*, 438 U.S. 104 (1978), and *Lucas v. South Carolina Coastal Council*, 505
24 U.S. 1003 (1992). Under *Penn Central*, courts consider (1) the economic impact of the
25 regulation; (2) whether it interferes with reasonable, investment-backed expectations; and
26 (3) the character of the government action. *Penn Central*, 438 U.S. at 124. Under *Lucas*,

1 a land-use restriction may effect a *per se* regulatory taking where it denies all
2 economically viable use of the claimant's entire parcel. *Lucas*, 505 U.S. at 1015-19. Just
3 two years ago, the U.S. Supreme Court reaffirmed the applicability of *Penn Central* and
4 *Lucas* to regulations that limit the use of land like the challenged ordinances. *See*
5 *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2457 (2001). For many decades, there has
6 been "no serious difference of opinion in respect of the validity of laws and regulations
7 fixing the height of buildings within reasonable limits * * *." *Village of Euclid v. Ambler*
8 *Realty Co.*, 272 U.S. 365, 388 (1926) (citing *Welch v. Swasey*, 214 U.S. 91 (1909)).

9 The district court, however, declined to evaluate the challenged height restrictions
10 under *Penn Central* and *Lucas*. Instead, the court ruled that the zoning constitutes a *per se*
11 physical-invasion taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S.
12 419 (1982). *Loretto* holds that a *per se* taking occurs where the government authorizes a
13 permanent, physical occupation of property. *Id.* at 426-41. *Loretto's per se* rule is "very
14 narrow" (*id.* at 441) and is expressly tied to the unique injury that occurs where the
15 government requires a permanent occupation of land. *Id.* at 426 (where a government-
16 compelled invasion "reaches the extreme form of a permanent physical occupation, * * *
17 the 'character of the government action' not only is an important factor in resolving
18 whether the action works a taking but also is determinative."); *accord, Yee v. City of*
19 *Escondido*, 503 U.S. 519, 527 (1992) ("The government effects a physical taking only
20 where it *requires* the landowner to submit to the physical occupation of his land.").
21 Because the challenged zoning does not require or authorize any occupation of the
22 property, the district court plainly erred in applying *Loretto's per se* rule.

23 But the district court's errors did not stop there. It failed to recognize that even
24 where physical invasions occur from government-authorized aircraft overflights, *Loretto*
25 still has no application. Rather, allegations of takings by overflights are governed by
26

1 *United States v. Causby*, 328 U.S. 256 (1946). In language that could not be clearer, the
2 *Causby* Court held:

3 Flights over private land are not a taking, unless they are so
4 low and so frequent as to be a direct and immediate
 interference with the enjoyment and use of the land.

5 *Id.* at 266.

6 As we understand it, the record in this case suggests that aircraft probably have
7 flown over Sisolak's land at an altitude lower than 500 feet on an occasional basis. There
8 has been no showing whatsoever that any such flights are so low and so frequent as to be a
9 direct and immediate interference with enjoyment and use of the land. Indeed, we
10 understand that the challenged zoning allows land uses up to 35 feet and authorizes
11 variances where the FAA determines that the proposed use would not constitute an
12 aviation hazard. Moreover, we understand that the County previously approved a
13 development plan for the land in question that included a four-story resort hotel, a 33,050
14 square foot casino, associated retail areas, and other structures.

15 The ruling below conflicts not only with *Causby*, but also with rulings from the
16 highest courts of states across the country. By ignoring the standards that apply to
17 restrictions on land use, the district court improperly blurred the longstanding distinction
18 between physical-invasion takings and regulatory takings, a distinction reaffirmed just two
19 years ago by the U.S. Supreme Court. *See Palazzolo*, 121 S. Ct. at 2457.

20 At bottom, this is a straightforward case. Sisolak argues that the challenged zoning
21 works a *per se* physical-invasion taking simply because overflights occasionally invade
22 the airspace over the subject property. But this novel physical-invasion theory flies
23 headlong into *Causby* and decades of other precedent. The County's height restrictions do
24 not authorize an invasion of the airspace, much less result in overflights "so low and so
25 frequent" that they directly and immediately interfere with the use of the land.

1 The challenged height restrictions are typical of those used by airports across the
2 country. As explained below, federal law requires these protections as a condition of
3 federal funding for airport development projects. The height restrictions help to prevent
4 catastrophic collisions, thereby protecting both the flying public and people on the ground
5 from death or injury. If the County's zoning is deemed to be a compensable taking, airport
6 authorities and planners across the state of Nevada and throughout the country would be
7 handcuffed by the threat of huge compensation awards and unable to protect the public
8 from devastating tragedies. The end result could be massive liability for existing airport
9 authorities that adhere to the FAA's minimum safety standards, as well as a sharp
10 curtailment of airport construction and expansion, yet another devastating blow to the
11 airline industry and the traveling public.

12 ARGUMENT

13 Section I of this brief shows that, even assuming *arguendo* that the challenged
14 zoning somehow “authorizes” overflights, Sisolak failed altogether to establish that any
15 invasion of the subject airspace would meet the stringent *Causby* standard that applies to
16 takings by overflight. Section II demonstrates that the *per se* rule of liability for
17 permanent physical occupations articulated in *Loretto* and other non-overflight cases does
18 not apply here. Section III explains why the takings claim fails under the *Lucas* and *Penn*
19 *Central* tests that apply to height restrictions like the challenged zoning. Finally, Section
20 IV highlights the dramatic, national implications of this case.

I. Longstanding Precedent Governing Overflights Shows that the County's Zoning Does Not Constitute a Physical-Invasion Taking.

A. Under *Causby*, Aircraft Cause a Physical-Invasion Taking Only Where Actual Overflights Are So Low and So Frequent that They Directly and Immediately Interfere with Land Use.

Because Sisolak and the district court take such liberties with it, we begin by once again quoting the U.S. Supreme Court test that governs allegations of a physical-invasion taking by aircraft overflights:

Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.

Causby, 328 U.S. at 266. *Causby* "remains unbowed today as the leading pronouncement in the field" of overflight takings. R. Meltz, et al., THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION 338 (1999).

On the facts before it, the *Causby* Court had little difficulty in finding a taking. The military overflights at issue were so low and frequent that the landowners were forced to abandon the existing use of the land as a commercial chicken farm. *Causby*, 328 U.S. at 259. Four-motored bombers, fighters, and transports "frequently passed over [the] land and buildings in considerable numbers and rather close together." *Id.* They blew the leaves off the trees, the noise was "startling," and at night the glare brightly lit up the sky. *Id.* About 150 chickens were killed by flying into the walls of the barn from fright. *Id.* "The result was the destruction of the use of the property as a commercial chicken farm." *Id.*

Causby's exacting standard reflects a balance between the needs of modern aviation and the plight of property owners who suffer frequent, disruptively low overflights that interfere with existing land uses. The *Causby* Court observed that although common law ownership of land "extended to the periphery of the universe * * *, that doctrine has no place in the modern world." *Id.* at 260-61. The Court emphasized that air travel "is part of

1 the modern environment of life, and the inconveniences which it causes are normally not
2 compensable under the Fifth Amendment." *Id.* at 266. The Court recognized, however,
3 that "[i]f, by reason of the frequency and altitude of the flights, [the owners] could not use
4 this land for any purpose, their loss would be complete," and a compensable taking would
5 occur. *Id.* at 261. To address the special concerns raised by air travel, the *Causby* test
6 contains a unique blend of trespass, nuisance, and takings law. *See Meltz, supra*, at 338.

7 In *Griggs v. County of Allegheny*, 369 U.S. 84 (1962), the U.S. Supreme Court
8 again applied the *Causby* test to find a taking where "regular and almost continuous daily
9 flights, often several minutes apart" flew so low over the claimant's home that the noise
10 was "unbearable," comparable to the noise from a riveting machine or steam hammer,
11 making it impossible to converse or sleep, rattling windows, causing plaster to fall from
12 the walls and ceilings, and impairing the health of those in the house. *Id.* at 86-87. Under
13 the *Causby* standard, it was clear that the airport glide paths resulted in actual overflights
14 so low and so frequent as to directly and immediately interfere with the use of the
15 claimant's home.

16 The *Causby* standard -- "so low and so frequent as to be a direct and immediate
17 interference with the enjoyment and use of the land" -- is a demanding test. In the words
18 of one prominent takings treatise, "the stringent *Causby* 'direct and immediate
19 interference' standard must always be satisfied." *Meltz, supra*, at 342. As stated by the
20 U.S. Court of Federal Claims -- the court with jurisdiction over most takings claims
21 against the United States -- a claimant alleging a physical-invasion taking by aircraft must
22 show "that those flights were of such frequency that they substantially interfered with the
23 use and enjoyment of the underlying land." *Persyn v. United States*, 34 Fed. Cl. 187, 196
24 (1995).

B. The County's Implementation of the FAA's Safety Standards Does Not Satisfy the *Causby* Test.

In both *Causby* and *Griggs*, the Court found a taking due to actual overflights that severely interfered with the existing surface use of the land: the chicken farm in *Causby* and the home in *Griggs*. In contrast, Sisolak cannot show that the challenged height restrictions interfere in any way with the existing surface use of the land, or even preclude reasonable future use. For this reason alone, no taking has occurred under *Causby*.

To fully understand the practical significance of the Sisolak's physical-invasion theory, it is helpful to examine the relationship between the County's zoning and the FAA's Obstruction Standards.

The FAA rules require that it be notified when anyone proposes to build or alter specified structures near an airport. 14 C.F.R. § 77.13. The regulations specify several categories of structures as "obstructions," including any structure that penetrates the various imaginary surfaces or zones defined in § 77.25. *Id.* at § 77.23(a)(5). The FAA then conducts aeronautical studies to determine whether any structure deemed to be an obstruction constitutes an actual hazard to aviation. *Id.* at §§ 77.31-.39. A determination that an obstruction constitutes an air hazard, however, has no enforceable legal effect. *See Aircraft Owners and Pilots Ass'n v. FAA*, 600 F.2d 965, 967 (D.C. Cir. 1979) ("The FAA is not empowered to prohibit or limit proposed construction it deems dangerous to air navigation."). Instead, the Congress has left the enforcement of these protections to state and local governments. *See, e.g., Commonwealth v. Rogers*, 634 A.2d 245, 250 (Pa. Super. Ct. 1993).

State and local enforcement of the FAA's safety standards and hazard determinations often is a foregone conclusion because federal law requires such enforcement to qualify for federal funding for airport development projects. *See* 49 U.S.C. § 47107(a)(9) (requiring "appropriate action * * * mitigating existing, and preventing

future, airport hazards" as a condition of federal funding). In the same vein, federal law also requires municipalities that receive federal funding to adopt appropriate, reasonable zoning laws "to restrict the use of land next to or near the airport to uses that are compatible with normal airport operations * * *." *Id.* at § 47107(a)(10).¹

To help municipalities comply with these requirements, the FAA has prepared a model zoning ordinance that contains height restrictions that implement the Part 77 standards. *See* FAA Advisory Circular 150/5190-4A (1987) ("A Model Ordinance to Limit Height of Objects Around Airports") (available at www.faa.gov/arp/pdf/5190-4a.pdf). The Model Ordinance explains that because the FAA itself cannot regulate air hazards, "[t]he enactment of this proposed model zoning ordinance will permit the local authorities to control the erection of hazards to air navigation and thus protect the community's investment in the airport." *Id.* at Par. 5(h)(i). The Model Ordinance includes height restrictions that implement all of the Part 77 Standards. *Id.* at Appendix 1, Section IV. The zoning ordinances challenged in this case are substantially similar to the FAA's Model Zoning Ordinance.

The foregoing provides two independent reasons why the challenged zoning does not work a taking under *Causby*. First, the zoning imposes only height restrictions, and does not authorize any invasion of the airspace over the land at issue. Second, occasional overflights standing alone, even those under 500 feet, do not meet the *Causby* so-low-and-so-frequent standard so as to constitute a compensable taking.

C. Courts Across the Country Have Uniformly Rejected the Sisolak's Takings Theory.

Federal and state courts across the country uniformly have rejected the Sisolak's radical theory. For example, in *Fitzgarrald v. City of Iowa City*, 492 N.W.2d 659 (Iowa

¹ These requirements were originally set forth in the Airport and Airway Improvement Act of 1982, P.L. 97-248, as amended. In 1994, this law was repealed and its provisions codified without substantive change at Title 49, U.S.C. *See* Codification of Certain U.S. Transportation Laws at 49 U.S.C., Pub. L. No. 103-272, 108 Stat. 745 (1994).

1 1992), the Supreme Court of Iowa rejected a takings challenge to land-use and height
2 restrictions on property used for a mobile home park within an approach zone of the Iowa
3 City Municipal Airport. As in the instant case, the ordinance in *Fitzgarrauld* largely
4 mirrored the restrictions contained in the FAA's Part 77 obstruction standards. While
5 recognizing that under *Causby*, "an aviation easement may be required when flights are so
6 low and so frequent as to amount to a taking of property," *id.* at 663, the court rejected the
7 landowners' physical-invasion claim because the record was "devoid of any evidence"
8 meeting the *Causby* standard. *Id.* at 664-65.

9 In *Harris v. City of Wichita*, 862 F. Supp. 287 (D. Kan. 1994), landowners alleged
10 that land-use restrictions on property within certain airport overlay districts (AODs) for
11 McConnell Air Force Base effected a taking. *Id.* at 289-90. Although aircraft flew
12 directly over the claimants' land, the claimants did not challenge those overflights, only the
13 use restrictions. *Id.* at 289. The restrictions in *Harris* allowed the claimants to continue
14 the existing use of their land, but they prohibited the claimants from pursuing their plans
15 for commercial uses. *Id.* at 290. And like the landowner here, the claimants in *Harris*
16 argued that the land-use restrictions constituted a physical invasion of their land under
17 *Loretto* by creating an easement. *Id.* at 291. The *Harris* court emphatically rejected this
18 physical-invasion theory:

19 Plaintiffs argue that the AOD restrictions actually create an easement
20 over their property for military aircraft to use and an easement on
21 their land for safer airplane crashes. The court disagrees. Although
22 military and other aircraft fly over plaintiffs' property in approach and
23 take-off, it is not the AOD regulations that permit this. Furthermore,
24 the AOD restrictions do not permit airplane crashes on plaintiffs'
25 property. Rather, they restrict land uses so that in the event of such a
26 crash, the impact is felt by as few people as possible.

Id. at 291.

27 In *Village of Willoughby Hills v. Corrigan*, 278 N.E.2d 658 (Ohio 1972), the
28 Supreme Court of Ohio rejected a takings challenge brought by owners of land in a

1 transition zone subject to a 70-foot height restriction. An intermediate appeals court had
2 held that the ordinance imposing the transition zone height restriction, in effect, "provides
3 what amounts to an air easement for approaching and leaving aircraft * * *." *Id.* at 662
4 n.7. The Ohio Supreme Court reversed, ruling that the challenge failed because "there was
5 no claim of frequent low flights over plaintiff's land as was involved in [*Causby* and
6 *Griggs*]." *Id.* at 663. Myriad other rulings are in accord.²

7 Sisolak would have this Court ignore the *Causby* standard -- "so low and so
8 frequent as to be a direct and immediate interference" -- and hold that a height restriction
9 combined with, at most, occasional overflights under 500 feet, constitute an automatic
10 taking. Even if it were certain that planes would invade the subject airspace on occasion,
11 the record in this case would still come nowhere near meeting the *Causby* standard for a
12 taking by overflights. This Court should decline Sisolak's radical invitation.

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18 ² *E.g., Garamella v. City of Bridgeport*, 63 F. Supp. 2d 198, 202 (D. Conn. 1999)
19 (physical-invasion taking from overflights occurs "[w]here the frequency and altitude of
20 the flights prevent the property owner from using the land for any purpose"); *Powell v.*
21 *United States*, 1 Cl. Ct. 669, 674 (1983) (no taking because military aircraft overflights
22 were not "sufficiently frequent or sufficiently noisy to cause substantial interference with
23 the use and enjoyment" of the land); *Moore v. United States*, 185 F. Supp. 399, 400 (N.D.
24 Tex. 1960) (no taking absent evidence of "physical invasion of plaintiffs' property by a
25 sufficient number of aircraft as to interfere with the use and enjoyment thereof"); *City of*
26 *Austin v. Travis County Landfill Co.*, 73 S.W.3d 234, 242 (Tex. 2002) (invasion of
airspace above surface land "does not *per se* constitute a taking."); *Richmond,*
Fredericksburg, & Potomac R.R. Co. v. Metropolitan Wash. Airports Auth., 468 S.E.2d
90, 97 (Va. 1996) (no taking, notwithstanding 23,000 annual overflights, due to lack of
evidence on "the types of aircraft using the runway, the height at which they passed over
the property, or the frequency of landings"); *Harrell's Candy Kitchen, Inc. v. Sarasota-*
Manatee Airport Authority, 111 So. 2d 439 (Fla. 1959) (height restrictions in airport
zoning did not effect a taking).

1 **II. The County's Zoning Does Not Constitute a *Per Se* Taking under *Loretto* and**
2 **Other Physical-Occupation Cases.**

3 As described above, a well-developed and nuanced body of overflight takings law
4 rules out the possibility of a taking on the undisputed facts of this case. Not surprisingly,
5 Sisolak avoids extensive discussion of the *Causby* standard and argues instead that
6 occasional overflights under 500 feet should be viewed as a permanent, physical
7 occupation of land and thus a *per se* taking under *Loretto*.

8 Sisolak's reliance on *Loretto* is misplaced for two reasons. First, nothing in the
9 County's zoning authorizes a physical invasion of the land. Absent such government
10 compulsion, no *Loretto* taking occurs. See *Loretto*, 458 U.S. at 440 (distinguishing cases
11 in which the government does not require a physical occupation); accord, *Yee*, 503 U.S. at
12 527 (rejecting a *Loretto* challenge to rent control absent evidence of a compelled
13 permanent occupation: "The government effects a physical taking only where it *requires*
14 the landowner to submit to the physical occupation of his land."); *Federal*
15 *Communications Comm'n v. Florida Power Corp.*, 480 U.S. 245, 252 (1987) (rejecting a
16 *Loretto* challenge to federal controls on fees paid by cable television operators for use of
17 utility poles absent evidence of a compelled permanent occupation: "This element of
18 required acquiescence is at the heart of the concept of occupation [under *Loretto's per se*
19 rule]).

20 Second, and more fundamentally, Sisolak's argument misses the entire point of
21 *Causby* and *Griggs* on the one hand, and *Loretto* on the other: there is a fundamental
22 difference between overflights and actual trespass on land by permanent physical
23 occupations.
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1 This distinction derives from the very roots of physical-invasion takings cases in
2 the common law of trespass.³ The law of trespass on land is absolute: any intentional
3 trespass on land is actionable, regardless of the extent of the invasion or the quantum of
4 damages. See RESTATEMENT (SECOND) OF TORTS, § 166. The law of trespass of airspace
5 is far more forgiving, holding a private individual liable for trespass of airspace only when
6 a flight (1) enters into the immediate reaches of the airspace next to the land; and (2)
7 interferes substantially with the owner's use and enjoyment of the land. See *id.* at § 159.

8 This is the precise distinction drawn in *Causby* and *Griggs*, and it is a distinction
9 drawn from practical necessity. In the words of *Causby*, "[c]ommon sense revolts at the
10 idea" that every invasion of airspace constitutes a taking. 328 U.S. at 260. "To recognize
11 such private claims" the Court held, "would clog these highways, seriously interfere with
12 their control and development in the public interest." *Id.* at 261. Thus, the Court held
13 "[f]lights over private land are not a taking, unless they are so low and so frequent as to be
14 a direct and immediate interference with the enjoyment and use of the land." *Id.* at 266;
15 accord, *Brown v. United States*, 73 F.3d 1100, 1104 (Fed. Cir. 1996) ("unlike a
16 government invasion of the surface land itself, an invasion of airspace above surface land
17 does not *per se* constitute a taking.")

18 While the Court in *Causby* and subsequent cases has described overflights as "in
19 the same category as invasions of the surface," 328 U.S. at 265, this does not mean that
20 any invasion of airspace is a *per se* taking. To the contrary, *Loretto* makes absolutely clear
21 that most invasions are not subject to its *per se* rule. 458 U.S. at 435 n.12 ("not every
22 physical invasion is a taking."). Under *Loretto*, there is "a distinction between a
23 permanent physical occupation, a physical invasion short of an occupation, and a
24 regulation that merely restricts the use of property." *Id.* at 430.

25 ³ For example, the first sentence of the U.S. Supreme Court's first physical-invasion
26 takings case, *Pumpelly v. Green Bay*, 80 U.S. (13 Wall.) 166 (1872), states: "This is an
action of trespass on the case * * *."

Physical invasions short of permanent physical occupations are “subject to a more complex balancing process to determine whether they are a taking.” *Id.* at 435 n.12.⁴ Examples abound. In flood cases such as *Sanguinetti v. United States*, 264 U.S. 146 (1924), the Court ruled that “to create an enforceable liability against the government it is at least necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land amounting to an appropriation of and not merely an injury to the property.” *Id.* at 149. In cases involving invasions of soot and smoke from railroads, the rule from *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914), is that such invasions are not takings unless the invasion is “direct and peculiar and substantial.” *Id.* at 557.

The universal conclusion of courts addressing airplane overflights is that invasions of airspace constitute takings only where they are so low and frequent as to interfere directly with existing uses and all reasonable future uses. No court to our knowledge (except the district court in this case) has extended the *Loretto per se* rule to cover what is, at most, occasional overflights fully consistent with reasonable use of the land. This court should decline Sisolak’s invitation to be the first high court in the country to adopt such an extreme and unworkable rule.⁵

⁴ See also *Loretto*, 458 U.S. at 433 (“in cases of physical invasion short of permanent appropriation, the fact that the government itself commits an invasion from which it directly benefits is one relevant factor in determining whether a taking has occurred.” (citing *Penn Central*)); *United States v. Cress*, 243 U.S. 316, 328 (1917) (“it is the character of the invasion * * * that determines the question whether there is a taking.”).

⁵ *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), provides no support for any argument that *Loretto’s per se* rule applies to this case. *Nollan* involved a straightforward application of *Loretto*, holding that where the government requires a landowner to permit beachfront property to be continuously traversed by strangers, there is a permanent physical occupation “even though no particular individual is permitted to station himself permanently upon the premises.” 483 U.S. at 832. *Nollan* is clearly distinguishable from the case at bar. First, *Nollan* involved actual invasions onto the land, an evisceration of the right to exclude that is qualitatively more complete than potential invasions of airspace above reasonable height restrictions. Second, in contrast to the continual access demanded by the government in *Nollan*, the regulations at issue here do not authorize anyone to invade the airspace above landowner’s property, ever. Indeed, there is no evidence that

1 **III. The County's Zoning Does Not Constitute a Regulatory Taking under *Lucas***
2 ***or Penn Central*.**

3 The County's zoning is properly analyzed under the cases that govern regulatory
4 takings challenges to restrictions on land use. To date, Sisolak has made no effort to
5 contend that the challenged zoning amounts to a regulatory taking. Indeed, we understand
6 he has expressly disavowed reliance on any such showing. His disavowal is
7 understandable.

8 Under *Lucas*, a *per se* regulatory taking may occur where regulation denies a
9 landowner all economically viable use of the claimant's entire parcel. *Lucas*, 505 U.S. at
10 1015-19; accord, *Tahoe-Sierra*, 122 S. Ct. at 1483 (no *per se* taking occurs under *Lucas*
11 unless regulation leaves land valueless). It is undisputed that the challenged zoning does
12 not interfere with Sisolak's ability to pursue economically viable uses of the land. Thus,
13 there is no *per se* taking under *Lucas*.

14 Importantly, a landowner should not be permitted to segment the property into
15 discrete portions in an attempt to show a denial of all use of the airspace over the property.
16 In assessing economic impact, takings jurisprudence requires consideration of not just the
17 affected airspace, but the landowner's entire parcel. *E.g. Fitzgarald*, 492 N.W.2d at 665-
18 66 (no taking where airport zoning ordinance did not deny the landowners economically
19 viable use of the surface of their land despite reduction in market value); *Cheyenne Airport*
20 *Bd. v. Rogers*, 707 P.2d 717, 731 (Wyo. 1985) (in assessing the economic impact of

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22 the landowner's airspace in fact will be invaded. Again, there is a qualitative difference
23 between the authorized, continuous access to a popular stretch of California beachfront
24 demanded in *Nollan*, and the mere potential for unauthorized sporadic invasions of
25 airspace. Moreover, *Nollan* cites neither *Causby* nor *Griggs*, and the Court gave
26 absolutely no indication that it was intending to change the long-established rules laid out
in *Causby* and applied by courts throughout the country in addressing overflight takings
claims. It is putting it mildly to say that reading *Nollan* to overrule the overflight-specific
test laid out in *Causby* would be an extravagant and completely unwarranted leap. More
so today than 55 years ago, "common sense revolts" at the landowners' proposed rule.
328 U.S. at 260.

1 airport zoning, the court must look to "the impact of the regulation on the plot as a
2 whole").

3 The U.S. Supreme Court expressly articulated this "parcel-as-a-whole" rule more
4 than twenty years ago in *Penn Central*, where New York City applied historic preservation
5 laws to deny the owners of Grand Central Terminal permission to build an office building
6 atop the Terminal. The Court rejected the owners' argument that takings analysis should
7 focus solely on the air rights above the Terminal, stating:

8 "Taking" jurisprudence does not divide a single parcel into discrete segments
9 and attempt to determine whether rights in a particular segment have been
10 entirely abrogated. In deciding whether a particular governmental action has
11 effected a taking, this Court focuses rather * * * on the nature and extent of
12 the interference with rights in the parcel as a whole -- here, the city tax block
13 designated as the "landmark site."

14 *Penn Central*, 438 U.S. at 130-31. Because the owners could still operate Grand Central
15 Terminal and the surrounding contiguous properties that they owned, the challenged
16 regulation did not deny them all economically viable use of their entire parcel, and the
17 Court rejected the takings claim. *Id.* at 136-38; accord, *Tahoe-Sierra*, 122 S. Ct. at 1483
18 ("in regulatory takings cases we must focus on the parcel as a whole"); *Concrete Pipe &*
19 *Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 643-
20 44 (1993) ("To the extent that any portion of property is taken, that portion is always taken
21 in its entirety; the relevant question, however, is whether the property taken is all, or only
22 a portion of, the parcel in question.); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480
23 U.S. 470, 500 (1987) (*Penn Central* precludes reliance on "legalistic distinctions" to
24 segment property rights in takings cases). Virtually all courts that have addressed the
25 issue have followed *Penn Central*, *Keystone*, and other binding precedent to hold that the
26 relevant parcel for takings analysis consists of the claimant's entire contiguous property,
not just the affected portion.⁶

⁶ E.g., *District Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 881 (D.C.
Cir. 1999) (relevant parcel includes both the affected and unaffected portions of the

Where, as here, height restrictions or other land-use controls do not deny all economically viable use of the claimant's entire parcel, they are analyzed under a multi-factor test set forth in *Penn Central*, which requires courts to examine (1) the economic impact of the regulation; (2) whether it interferes with the landowner's distinct, investment-backed expectations; and (3) the character of the challenged government action. *Penn Central*, 438 U.S. at 124. Again, Sisolak has not argued that the challenged zoning amounts to a regulatory taking under *Penn Central*. Nor could he.

There is "no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits * * *." *Village of Euclid*, 272 U.S. at 388. The authority to restrict the height of buildings is one of the most common powers granted to municipalities. The first section of the Standard State Zoning Enabling Act of 1924 ("SZEa"), which has served as the model for zoning enabling laws in all 50 states, provides: "For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures * * *." SZEa, Sec. 1, *quoted in* J. Juergensmeyer & T. Roberts, *LAND USE PLANNING AND CONTROL LAW* 46 (1998). It would be ironic indeed if the Takings Clause were read to require compensation for height restrictions imposed to

owner's parcel); *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993) ("[T]he quantum of land to be considered is not each *individual* lot containing wetlands or even the combined area of wetlands. If that were true, the Corps' protection of wetlands via a permit system would, *ipso facto*, constitute a taking in every case where it exercises its statutory authority. [*Penn Central*] negates that view * * *."); *City of Annapolis v. Waterman*, 745 A.2d 1000, 1022 (Md. 2000) ("[T]he property to be assessed for economically viable use is, as we have said, the entire tract of land."); *K & K Constr., Inc. v. Department of Natural Res.*, 575 N.W.2d 531, 537 (Mich. 1998) ("[C]ontiguity and common ownership create a common thread tying these three parcels together for the purpose of the takings analysis"), *cert. denied*, 525 U.S. 819 (1998); *Zealy v. City of Waukesha*, 548 N.W.2d 528 (Wis. 1996) (relevant parcel included about 8.2 acres zoned as wetlands and 2.1 acres of contiguous property zoned for residential and commercial development).

1 enhance air safety, even though identical height restrictions are not compensable takings
2 under longstanding precedent if imposed to enhance aesthetics or preserve historic
3 structures.

4 Regarding expectations, amicus APA is informed that Sisolak purchased the
5 Property merely for long-term investment purposes. But landowners cannot "establish a
6 'taking' simply by showing that they have been denied the ability to exploit a property
7 interest that they heretofore had believed was available for development." *See Penn*
8 *Central*, 438 U.S. at 130. The challenged height restrictions do not interfere with all
9 reasonable development expectations.

10 Nor has Sisolak shown the kind of severe economic loss sufficient to establish a
11 regulatory taking under *Penn Central*. We understand that the challenged zoning permits
12 land uses up to 35 feet and authorizes variances where the FAA determines that the
13 proposed use would not constitute an aviation hazard. We further understand that the
14 County previously approved a development plan for the land in question that included a
15 four-story resort hotel, a 33,050 square foot casino, associated retail areas, and other
16 structures. Because the land at issue indisputably retains significant value and may
17 continue to be put to economically viable use, no regulatory taking has occurred. *E.g.*
18 *District Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 883 (D.C. Cir.
19 1999) (A "claimant must put forth striking evidence of economic effects to prevail under
20 the [*Penn Central*] ad hoc inquiry."); *Animas Valley Sand & Gravel v. Board of County*
21 *Comm'rs*, 38 P.3d 59, 67 (Colo. 2001) (a non-*per se* taking under *Penn Central* occurs
22 only where regulation leaves a landowner with "a value slightly greater than de minimis").

23 Finally, the character of the government action weighs heavily against a finding of
24 a taking. The challenged air safety protections advance "the highest of public interests --
25 the prevention of death and injury." *First English Evangelical Lutheran Church v. County*
26 *of Los Angeles*, 258 Cal. Rptr. 893, 904 (Ct. App. 1989).

1 In short, every factor in the *Penn Central* inquiry weighs against a finding of a
2 taking.

3 **IV. A Ruling for Sisolak Would Have Devastating Consequences for Air Safety**
4 **and Municipal Budgets Throughout Nevada and Across the Country.**

5 The national implications of this case cannot be emphasized too strongly. In recent
6 decades, air traffic has experienced rapid growth. Airline deregulation in 1978 resulted in
7 a near doubling of traffic at U.S. airports by 1989.⁷ Because most major airports were
8 designed decades ago and did not adequately anticipate future growth, they require
9 significant expansion to keep up with increased demands. The consolidation of air traffic
10 into hub airports also necessitates the construction of new runways at many airports.⁸ In
11 the face of these and other pressing problems in the aftermath of September 11, the
12 aviation industry and the general public can ill-afford an unprecedented, wholly unjustified
13 expansion of takings liability as it relates to zoning that implements FAA minimum safety
14 standards.

15 In the wake of the \$16,617,730.68 final judgment in the district court, numerous
16 other landowners can be expected to pursue similar claims against the County. Every
17 landowner whose property is transected by an approach zone, however occasional the
18 overflights and however limited the actual interference, would have a valid takings claim
19 under the district court's ruling. Any landowner covered by a horizontal or conical zone,
20 which extend for miles beyond airports, could file a claim under the same theory, arguing
21 that because an unplanned deviation might result in the invasion of the airspace above the
22 property, compensation is due. There is little doubt that affirmance of the district court's
23 ruling would wreak havoc on municipal budgets across the state.

24 ⁷ See Steven H. Magee, *Protecting Land Around Airports: Avoiding Regulatory Takings*
25 *Claims by Comprehensive Planning and Zoning*, 62 J. AIR L. & COM. 243, 243 & n.1
(1996) (citing sources).

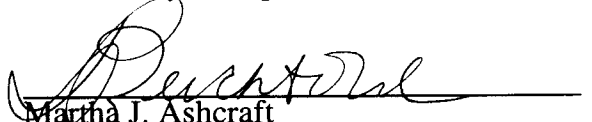
26 ⁸ *Id.* at 243-44.

1 And make no mistake, the impact of this case extends far beyond the County of
2 Clark and the State of Nevada. The County's zoning is typical of those used at airports
3 across the country. Municipalities and owners of land near airports across the country are
4 watching this case. In view of the enormous stakes involved, amicus urge this Court to
5 reject Sisolak's radical physical-invasion theory, adhere to *Causby* and progeny, and
6 reverse the ruling below. Public safety, the public fisc, and the sound development of
7 takings jurisprudence hang in the balance.

8 **CONCLUSION**

9 The judgment below should be reversed.

10
11 RESPECTFULLY SUBMITTED this 24th day of September, 2003.

12
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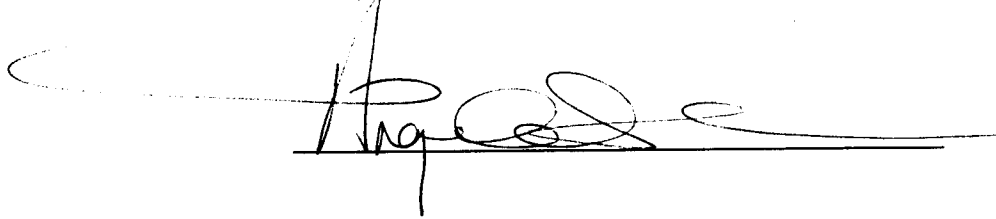
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on 24th day of September, 2003, I mailed a true copy of the **AMICUS BRIEF**, herein by placing a copy of same in a sealed envelope, postage prepaid, depositing same in the U.S. Mail, addressed as follows:

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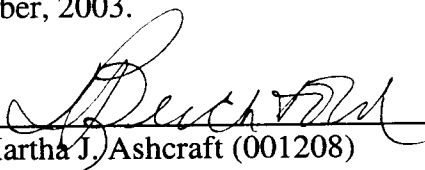
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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript of appendix where the matter relief on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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