

COUNTY COUNSEL
LOUIS B. GREEN

CHIEF ASS'T. COUNTY COUNSEL
EDWARD L. KNAPP

PRINCIPAL ASS'T COUNTY COUNSEL
PATRICIA E. BECK

DEPUTY COUNTY COUNSEL
JUDITH M. KERR
REBECCA C. SUDTELL
PAULA F. FRANTZ
MICHAEL J. CICCOTZI

**EL DORADO COUNTY
OFFICE OF
THE COUNTY COUNSEL**



COUNTY GOVERNMENT
CENTER
330 FAIR LANE
PLACERVILLE, CA
95667
(530) 621-5770
FAX# (530) 621-2937

DEPUTY COUNTY COUNSEL
BETH A. MCCOURT
DAVID A. LIVINGSTON
SCOTT C. STARR
TERI M. MONTEROSSO
LESLEY B. GOMES

June 5, 2008

Board of Supervisors
County of El Dorado
330 Fair Lane
Placerville, CA 95667

Honorable Board:

SUBJECT:

Adoption of an urgency ordinance to temporarily suspend Ordinance Code Section 17.38.062, Avigation and Noise Easement Required, to allow the Department and County Counsel staff to immediately study the possible revision of the section so as to comply with constitutional limitations as interpreted by court decisions since the original adoption of the section.

RECOMMENDATION:

Adopt the urgency ordinance suspending Ordinance Code section 17.38.062 for a period of 45 days to allow the Department and County Counsel staff to study possible revisions of section 17.38.062 so as to comply with the constitutional limitations the courts have expressed concerning similar regulations.

REASON FOR RECOMMENDATION:

There are four municipal airports in El Dorado County, the Cameron Airpark Airport, the South Lake Tahoe Airport, the Georgetown Airport and the Placerville Airport. In or about 1986, the Airport Land Use Commission adopted Comprehensive Land Use Plans ("CLUP") for each of the airports. The purpose of the CLUPs was to establish a specific boundary map and comprehensive land use plan that defines compatible types and patterns for future development that might occur in the area surrounding the Airports. The policies so developed in the CLUPs were designed to protect the safety and general welfare of people in the vicinity of the airport and to assure the safety of air navigation.

In 1987, subsequent to the adoption of the CLUPs, the County adopted Ordinance 3721 which was then codified as Chapter 17.38 of the Ordinance Code.

Recently, the Board of Supervisors has been required to address two situations in which a member of the public has challenged the breadth of the avigation and noise easement as a valid exercise of the police power of the County when a particular project, development or activity proposed for a property within an Airport Safety District is not deemed to specifically interfere with the airport operations or the safety of persons on the ground. This in turn has led to discussions about the effect of court decisions since the original adoption of Section 17.38.062 in 1987 on Ordinance Code section 17.38.062. That section reads in pertinent part:

“No permit of any type shall be issued for any development or activity subject to the airport safety (AA) regulations until the county is provided with an avigation and noise easement granting the right of flight over and above the subject property. Such easement shall be supplied in a form prescribed by the county and shall be recorded on the title of the subject property.”

The form of the avigation easement presently required by the county grants the free and unobstructed passage an flight of aircraft in, through, over and across the airspace above the owner’s property including the tight to make and emit noise, light, vibrations, fumes, exhaust, smoke, air currents, dust, fuel particles and communication signals and all other effects inherent to the operation of aircraft. It also includes limitations on the height of structures or other objects on the property, restrictions on electrical interference with radio communications, lighting restrictions, a release of all claims against the County and an agreement to indemnify the County against any claims arising from the property owner’s failure to comply with the terms of the easement.

In addition to the requirement for an avigation and noise easement, Chapter 17.38 of the Ordinance Code has sections which set forth height restrictions (section 17.38.051), noise attenuation requirements (section 17.38.052), a requirement that the development be consistent with the land use compatibility guidelines for safety contained in the applicable airport comprehensive land use plan (section 17.38.041) and additional restrictions based upon the location of the property within certain airport safety areas of the Airport Safety District (17.38.041).

In order for the required easement to pass constitutional muster, it must be shown that there is an essential nexus between the conditions of the easement and the impacts of a proposed project on public facilities. The California Supreme Court in Ehrlich v. City of Culver City (1996) 12 Cal.4th 854, held that a local government must demonstrate a factually sustainable proportionality between the effects of a proposed land use and a given exaction which furthers the assurance that the condition at issue is more than theoretically or plausibly related to a legitimate regulatory end. In other words, any condition on land use must be proportionally related to the harm sought to be averted.

In the two recent matters, the nexus requirement was challenged. In one case, the property owner wished to build a swimming pool. In the other situation the property owner sought to build a garage/carport. Neither the pool nor the garage/carport violated the height restrictions for structures in the Airport Safety District. Neither the pool nor the garage/carport contemplated any distracting lighting or glare, any significant source of smoke, any electronic

interference with radio communications or any great concentration of birds. In both cases, the property owner questioned the necessity of the proposed easement, in light of the fact that the proposed structures complied with all of the requirements of the Ordinance Code related to Airport Safety Districts (Chapter 17.38).

After careful consideration of the matter by staff and counsel, it was determined that there existed a significant question as to whether the requirement for a noise and aviation easement in every instance where the property owner seeks a permit for any development or activity in an Airport Safety District goes beyond what is necessary for the protection of the public health and safety to the point that it is conflict with the constitutional limitations upon the police power of the county as interpreted by state and federal courts in decisions since the original adoption of Ordinance Code section 17.38.062.

The adoption of this urgency ordinance staying/suspending Ordinance Code section 17.38.062 is necessary to protect the public health, welfare and safety. The facts supporting the urgency are that the continued enforcement of Ordinance Code section 17.38.062 may result in an undue intrusion upon the property rights of individuals seeking to engage in otherwise lawful development or activity within an Airport Safety District that does not interfere with the airport operations or the safety of the persons on the ground in the area of the airport.

FISCAL IMPACT:

The temporary suspension of Ordinance Code section 17.38.062 will have no fiscal impact on the County.

ACTION TO BE TAKEN FOLLOWING APPROVAL:

Department staff and County Counsel will review existing section 17.38.062 to determine what if any revisions to section 17.38.062 should be brought to the Board for approval.

Very Truly Yours,

LOUIS B. GREEN
County Counsel

By: _____


Michael J. Ciccozzi
Deputy County Counsel

Encl.