Slug Signorino

Tower Cranes, Trespass, *and* Temporary Airspace Use Agreements

By Jesse S. Ishikawa

The most majestic piece of equipment at a construction site is usually the tower crane. Tower cranes transport steel, concrete, large tools, and other building materials over the building site. The tower crane often stands more than 250 feet tall, and its horizontal member, known as the "jib," may reach horizontally more than 200 feet. When not in use, the jib must be left free to swing in the wind; otherwise, a high wind may knock the crane over.

In compact urban areas, the free-swinging jib typically intrudes into the airspace over neighboring properties. If the intrusion is a trespass and is enjoined, the developer's construction costs will increase substantially. The project probably will be delayed and the developer forced to use more expensive construction methods. If the intrusion is not a trespass, the developer's neighbor will bear the increased (and uncompensated) risk of falling materials and crane collapse, to say nothing of the indignity of having its airspace violated.

The purpose of this article is to describe the current state of the law, such as it is, regarding intrusions by tower cranes into neighboring airspace and to identify the issues that lawyers should consider in drafting agreements between adjoining landowners regarding use of tower cranes.

Current State of the Law

In considering whether intrusions into airspace by improvements located on a neighbor's property are trespasses, the courts have wrestled with a number of issues.

How High Does Ownership of Airspace Extend?

Intrusions into a neighbor's airspace at a level between the ground and tree height have generally been held to be trespasses. Courts have found trespass-

Jesse S. Ishikawa is a shareholder in the Madison, Wisconsin, office of Reinhart Boerner Van Deuren s.c.

es, for example, when shotgun shells were shot across, tree limbs extended over, and an arm thrust into, neighboring airspace. See, e.g., *Herrin v. Sutherland,* 241 P. 328 (Mont. 1925); *Cannon v. Dunn,* 700 P.2d 502 (Ariz. Ct. App. 1985); *Hannabalson v. Sessions,* 90 N.W. 93 (Iowa 1902).

The higher the intrusion, the fuzzier the law becomes. Part of this uncertainty comes from *United States v. Causby,* 328 U.S. 256 (1946), a frequently cited American air rights case. In an opinion written by Justice Douglas, the U.S. Supreme Court held that the use by the United States of airspace over a farm for flights by military aircraft at elevations as low as 83 feet constituted the taking of a property right entitling the landowner to compensation. The Court stated that a landowner "owns at least as much of the space above the ground as he can occupy or use in connection with the land." Id. at 264. The Court broadly defined the terms "occupy" and "use": "[t]he fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. . . . While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used." Id. at 265–66.

Causby's observations offer little practical guidance for determining what airspace is "owned" or "not owned" by the landowner. Although there appear to be no reported American cases that consider whether a tower crane's intrusion into neighboring airspace is a trespass, several American cases address analogous intrusions. Some reported English cases deal specifically with tower cranes.

In *Slotoroff v. Nassau Associates,* 428 A.2d 956 (N.J. Super. Ct. Ch. Div. 1980), two buildings, a tall one and a short one, stood next to each other. Both buildings were built to the lot line with their walls touching on the common boundary line. The owner of the tall building used a movable scaffold that extended over the neighbor's building for renovating the exterior wall of the tall building. At times, the scaffolding was only six vertical inches above the roof of the short building. In denying a demand for an injunction, the court observed that the "[p]laintiffs have not shown any express grant of property rights in the airspace." This suggests that a deed that does not specifically grant air rights will not automatically convey them, which will certainly come as a surprise to real estate lawyers and title insurers.

Slotoroff took pains to bar the defendant from doing anything to permanently invade the airspace above the shorter building. But why do so, if, as the court held, the plaintiff did not own that airspace? Presumably the court thought that if the shorter building were razed and replaced with a taller, new building, the ownership rights would be expanded to include the space occupied by the new, taller building because the owner would now be "practicably using" the additional space within the new building. But if the owner of the surface can own only as much airspace as it can practicably use, then what right does the owner have to erect a new building into space that it previously could not use and therefore does not own?

In another scaffold case with facts similar to *Slotoroff*'s, a court denied injunctive relief to the owner of the small building against an invasion of his airspace by scaffolding on the neighboring tall building. The court held that there was no trespass because there was no interference with the owner's use. *Geller v. Brownstone Condominium Ass'n,* 402 N.E.2d 807 (Ill. App. Ct. 1980). *Geller* relied on the "fundamental principle" it claimed to find in *Causby* that "a property owner owns only as much airspace above his property as he can practicably use." Id. at 809. *Causby*, however, actually said that a property owner owns *at least* as much of the space as he can use, together with an undefined additional cushion of space beyond that which is occupied or used in the conventional sense.

In contrast to *Causby, Slotoroff,* and *Geller,* each of which evaluated the specific facts before it against the vaguest of standards, an English tower crane case established a "bright line" test by holding that *any* invasion of airspace by a structure standing on the land of a neighbor is a trespass. *Anchor Brewhouse Developments Ltd. v. Berkley House (Docklands Developments) Ltd.*, [1987] 38 Build. L.R. 82. If a defendant can build something up into the air to a given height, the court reasoned, the plaintiff ought to be able to do the same on its own land. "If an adjoining owner places a structure on his (the adjoining owner's) land that overhangs his neighbour's land, he thereby takes into his possession airspace to which his neighbour is entitled. That, in my judgment, is trespass."

Should the Courts Balance the Competing Rights?

An alternative approach to trespass cases is the balancing test, which weighs the harm that each party would suffer if it lost the case. Because the harm the neighbor would suffer from an intrusion into its airspace pales next to the harm the developer would suffer if it could not use the airspace, a "balancing of rights" approach would almost always favor the developer. In fact, legislation in other countries authorizes courts to grant a temporary easement over one owner's property in favor of another, in return for which the grantee must pay reasonable compensation to the involuntary grantor. See, e.g., Conveyancing Act 1919 (NSW), s.88K. Such legislation in effect gives one private party the right to temporarily condemn property interests held by another private party.

So far, the American courts have not applied balancing tests to trespass cases. Accordingly, there is no need to show harm in a trespass action in the United States; it is enough that the plaintiff prove interference with its right to peaceably enjoy full, exclusive use of its property. *Jones v. Wagner,* 624 A.2d 166, 169 (Pa. Super. Ct. 1993). This property rights perspective is grounded in the time-honored belief that the landowner's right to exclude others from its land remains "one of the most essential sticks in the bundle of rights

that are commonly characterized as property." *Dolan v. City of Tigard,* 512 U.S. 374, 384 (1994). This right would be diminished if a landowner's possessory rights could be compromised every time a neighbor could demonstrate that its use of the land would be more productive or serve a higher public purpose than that of the owner. An English court in another tower crane case held that a defendant's request that the court use a balancing test was tantamount to declaring, "Allow us to commit a trespass." *Woollerton and Wilson Ltd. v. Richard Costain Ltd.,* [1970] 1 W.L.R. 411.

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Adoption of a balancing test, or of private condemnation legislation, would take American property rights down a very slippery slope. One can imagine the arguments:

> Your Honor, my clients have desperate need of their neighbors' swimming pool for their daughter's graduation party. My clients are willing to pay top dollar, provide security and post-party cleanup services, and provide an indemnity backed by plenty of insurance. Besides, the neighbors are going to be out of town that week anyway. So how about it?

Does It Matter Whether the Intrusion Is Temporary or Permanent?

Although *Slotoroff* refused to enjoin a temporary intrusion of defendant's scaffold into the airspace over the plaintiff's land, *Slotoroff* prohibited permanent intrusions. 428 A.2d at 958. The practical problem with the temporary/permanent distinction is that temporary intrusions can ripen into permanent rights. If, for example, the defendant in *Slotoroff* used its scaffolding continuously over the prescriptive period, at the end of the period it would own a prescriptive easement to continued use of its scaffolding. Then, if the plaintiff decided to expand its building upward into space that had been used by the scaffolding, the defendant could justifiably claim interference with its prescriptive easement.

Isn't It Usually Difficult for the Plaintiff to Show Monetary Damages?

Generally, the plaintiff can show no more than nominal damages. Even when the plaintiff's demonstrable actual damages are low, however, courts may grant punitive damages. See, e.g., *Jacque v. Steenberg Homes, Inc.,* 563 N.W.2d 154, 161 (Wis. 1997) (upholding punitive damages of $100,000 when actual damages were $1 in landowner's intentional trespass action against seller of mobile home who plowed path through owner's snow-covered property and used that path to deliver mobile home to third party).

The lack of actual monetary damages may actually strengthen the plaintiff's case for an injunction because it shows that there is no adequate remedy at law. If there is no damage, the most that can be recovered as actual damages is a nominal amount, meaning that if the injunction is denied, the defendant will have purchased the license to trespass at a bargain-basement price. See *Woollerton,* [1970] 1 W.L.R. 411.

Current State of the Law

The two American scaffolding cases (both rendered by state appellate courts) denied injunctions because the scaffolding did not unreasonably interfere with the plaintiff's then-existing use of its property. *Slotoroff* denies a landowner "ownership" of space it cannot practically enjoy but suggests that once the landowner constructs a structure into that space, "ownership" to the space magically springs forth.

The English tower crane cases establish a landowner's rights to airspace to a level at least as high as the structures on the lands of its neighbors and reject use of balancing tests. Still, even in the English cases, it is apparent that the judges did not relish shutting down a major construction project because of an obstinate neighbor. In fact, the judge who so eloquently rejected the "balancing" approach and who issued the injunction in *Woollerton* postponed the injunction's effective date for a year to give the defendants "a proper opportunity of finishing the job"!

Outside of the Illinois Appellate Court's First District and New Jersey's Atlantic County Chancery Division, American law is simply too sparse at this point to enable one to predict whether a tower crane's intrusion into neighboring airspace would be held to be a trespass. One would hope that the next appellate court to address this issue would make some attempt at crafting a rule that would provide more predictability than currently exists in this area.

In the meantime, the best way a developer can avoid an unpleasant surprise is to strike an agreement with the neighbors before the construction start date. The rest of this article describes what the agreement should contain.

Issues to be Considered in Airspace Agreements

Following is a list of issues that a lawyer might wish to consider in preparing an airspace agreement.

Form of Agreement

Typically, airspace rights are crafted either as easements or as licenses. Licenses generally have short terms, are not considered an interest in real property (and thus generally not insurable by title insurance), are personal to the grantee, and are less frequently recorded. Easements generally have longer terms (many being perpetual), run with the land, and are recorded. A license is appropriate when the neighbor is willing to grant only short-term rights; an easement is appropriate when the neighbor is willing to grant long-term rights (such as the ongoing

right to come onto the neighbor's property to perform maintenance to those portions of the developer's property that are accessible only from the neighbor's property).

Nature of Rights Granted

In ascending order of intrusiveness, the specific rights that the neighbor might grant may include those to:

- give the jib the room to swing with the wind when not in use;
- allow for the passage of the jib for the purpose of constructing improvements on the developer's property;
- transport construction materials within the neighbor's airspace;
- use specified portions of the neighbor's property for access to portions of the developer's project that are accessible only from the neighbor's property; and
- use specified portions of the neighbor's property as a construction staging area.

Reciprocity

One inexpensive incentive the developer can offer its neighbor in exchange for an air rights agreement is reciprocal air rights over the developer's property. Under this arrangement, if the neighbor someday develops its property, the developer guarantees the neighbor the same rights over the developer's property that the neighbor is granting the developer over its own. Because these reciprocal arrangements are generally of long duration, it makes more sense to draft them as easements rather than licenses.

Identification of Beneficiaries

The drafter of the airspace agreement should consider naming as beneficiaries the developer, the developer's contractors, subcontractors, suppliers, and mortgagees.

Minimum Vertical Clearance

The agreement should specify, in vertical feet, the minimum clearance that must be maintained at all times between improvements on the neighbor's property and the horizontal arm of the crane (as well as materials transported by the crane).

Indemnification

The developer should indemnify the neighboring owner and its related parties (such as mortgagees, tenants, invitees, officers, directors, and so on) from any losses to persons and property resulting from the developer's construction activities. Specific risks that can be identified include damages from crane collapse, collisions, materials falling from the crane onto the neighbor's property, excavations, pile driving, disruption of utility service, and disruption of access.

Insurance

The agreement should provide that while the airspace rights are being used, the developer shall maintain a stated amount of liability insurance naming the neighbor and the neighbor's mortgagees and tenants as additional insureds. If the agreement is long-term rather than short-term, the agreement should provide that any stated amounts of required coverage are subject to increase from time to time in accordance with commercially reasonable practices prevailing in the community.

Flexible Definition of Airspace

The neighbor's lawyer should take care to make sure that the "airspace" within which the developer can operate is defined to be that space over the neighbor's improvements, *as such improvements may change over time.* Otherwise, the developer may have obtained rights to a specific stratum of air that precludes further development within that stratum by the neighbor. The agreement should explicitly reserve the neighbor's right to vertically expand its improvements in the future without the consent of the developer.

Conclusion

The current state of the law regarding intrusions by tower cranes into neighboring airspace is far from clear. Although two courts have found in favor of developers using scaffolding that extended over the neighbor's airspace, the reasoning of those cases is not entirely sound. Accordingly, neighboring property owners would be well-advised to enter into airspace agreements to clarify their rights before the tower crane arrives. ■

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