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THE AIRPORT NOISE PROBLEM
AND AIRPORT ZONING

By Erwin Seago*

I. THE AIRPORT NOISE PROBLEM.

Since the advent of jet airplanes, there has been considerable litigation over the liability of airport owners and operators to neighboring property owners for damages resulting from noise, vibration, dust, smoke, and the like. The suits have generally been brought on a theory of inverse condemnation; that is, for compensation for a taking of property.1 In part, this theory has been relied upon by persons seeking redress because the United States cannot be sued in tort, except under the limited rights of action conferred by the Federal Tort Claims Act,2 while under the Tucker Act,3 an inverse condemnation action can be brought with ease. Other governmental bodies have similarly enjoyed tort immunity, precluding actions for damages on a simple nuisance theory. Reliance is also placed on an inverse condemnation theory because injunctions against flights through navigable air space

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1. In Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962), the court defined "inverse condemnation" as: "[T]he popular description of a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." Id., 376 P.2d at 101 n.1. This definition is useful in that it makes clear that an action in inverse condemnation is merely an action to force a governmental unit to exercise its power of eminent domain and that the issue, therefore, is whether there has in fact been a "taking." The manner of the taking, be it trespassory or by nuisance, is a subsidiary matter, but is often the difficult issue in the case.

2. 28 U.S.C. § 1346(b) (1964). Of course, a plaintiff could sue the United States under a tort theory if he were prepared to prove that his injury was caused by " . . . the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (1964). See Leavell v. United States, 234 F. Supp. 734 (E.D.S.C. 1964), in which the plaintiff, seeking redress for annoyance caused by aircraft noise emanating from a nearby military airfield, brought an action in inverse condemnation under the Tucker Act and in tort under the Federal Tort Claims Act and lost on both theories. On the one hand, plaintiff failed to show that a taking had occurred and on the other hand that any government employee had been negligent. See generally Note, Wrongs and Rights in Superterraneous Airspace: Causby and the Courts, 9 WM. & MARY L. REV. 460, 468 (1967).

3. 28 U.S.C. § 1346(a) (2) (1964). This act gives the United States District Courts original jurisdiction concurrent with the Court of Claims in actions against the United States not exceeding $10,000 in amount, "founded . . . upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." A plaintiff could also bring his inverse condemnation action in the Court of Claims. 28 U.S.C. § 1491 (1964).

4. It is no longer seriously argued that flights from public airports can be enjoined. Not only would such an action constitute an interference with a federally pre-empted area, but the harm it would cause to the public interest is too great. See Loma Portal Civic Club v. American Airlines, Inc., 58 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964); Brooks v. Patterson, 159 Fla. 263, 31 So. 2d 472 (1947).
cannot be obtained because of the right to freedom of transit guaranteed to every citizen by federal statute. Although it can be argued that the United States has actually appropriated the navigable air space by this legislation and therefore that it is the proper party from which compensation should be sought by aggrieved property owners, the Supreme Court has held in *Griggs v. Allegheny County* that the local airport owner is the proper defendant. At least in most states, the difficult task is to determine when the operation of the airport and airplanes constitutes a taking.

The rationale under which recovery is allowed on an inverse condemnation theory, even without any technical trespass by overflight, has been fully examined elsewhere. As stated above, in order to sustain an action based on an inverse condemnation theory, a plaintiff must prove a taking has occurred. He may do so either on a theory of continuing trespass by overflight or on a theory of taking by nuisance. Although the recent "taking" cases do not draw a clear line between

Flights, however, have been enjoined in some circumstances. For example, in *Burnham v. Beverly Airways*, 311 Mass. 628, 42 N.E.2d 575 (1942), the court enjoined objectionable overflights originating from a seldom used runway of a public owned, but privately operated airport adjoining plaintiff's property. The injunction was granted on a continuing trespass theory since the overflights were found not to amount to a nuisance. Also, the injunction was limited to flights of below 500 feet, thus avoiding interfering with federally regulated airspace. See, e.g., *Swetland v. Curtis Airports Corp.*, 41 F.2d 929 (N.D. Ohio 1930), modified, 55 F.2d 201 (6th Cir. 1932) (private airport; injunction granted).

5. See *Aviation Act of 1958*, 49 U.S.C. §§ 1301-1542 (1964). "Navigable air-space" is defined as "airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft." 49 U.S.C. § 1301 (24) (1964). The minimum altitudes of flight are prescribed in 14 C.F.R. § 91.79 (1967). Except when necessary for take-off or landing, no person may operate an aircraft below the following altitudes:

(a) *Anywhere*. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) *Over congested areas*. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1000 feet above the highest obstacle within a horizontal radius of 2000 feet of the aircraft.

(c) *Over other than congested areas*. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

The Aviation Act also provides that: "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable air space of the United States." 49 U.S.C. § 1304 (1964).


7. See also *Ackerman v. Port of Seattle*, 55 Wash. 2d 400, 348 P.2d 664 (1960). In *Ackerman*, an overflight case, the court held that a cause of action was stated against the owners of an airport when it was alleged that the owners had provided inadequate facilities by failing to exercise their eminent domain power to secure air easements, thus necessitating damaging overflights.


9. The taking theory is usually based on a finding of nuisance. See *Stoebuck, Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 Dick. L. Rev. 207, 208-09 (1967).
that amount of interference which will be deemed a taking and that which will not, they do lend support to the general proposition that recovery will be permitted only where interference with land use is aggravated. For example, in the Griggs case there were "regular and almost continuous daily flights" as close as thirty feet above plaintiff's home, and the resulting noise, vibrations, and danger forced him and his family to move. On these facts, there was held to be a taking. In its influential decision in Batten v. United States,¹⁰ the United States Court of Appeals for the Tenth Circuit held, in a suit under the Tucker Act, that the noise and smoke of jet operations did not constitute a taking. It is not clear from the opinion whether the holding was based on the fact that there were no trespassory flights directly over plaintiff's land or on the fact that the "plaintiffs [did] not suggest that any home has been made uninhabitable or that any plaintiff has moved because of the activities at the Base." In City of Jacksonville v. Schumann,¹¹ a contrary conclusion was reached by the Florida court, which held that a cause of action was stated by a complaint which alleged both that the annoying flights were operated every day in the air space above plaintiffs' property and that as a result of the "terrific and overwhelming vibrations, concussions and sound waves" and the fumes, fuel gases, heavy black smoke, dust debris, earth and stones cast upon plaintiffs' properties, those properties were "made useless as residential property."

In Thornburg v. Port of Portland,¹² the Oregon Supreme Court expressly rejected the notion that there must be proof of a physical trespass in order for there to be a finding that a taking has occurred. On the issue of how substantial the interference had to be to constitute a taking, the court said that it was up to the jury to balance the gravity of the harm against the social utility of the airport's conduct.¹³ The court spoke of the question as being one of fact in each case as to whether the interference was "so aggravated" as to be a taking and said that, at the least, there was a taking when there was a complete ouster from use and enjoyment. The actual holding was that plaintiff should be allowed to introduce evidence as to the noise from planes which flew below 500 feet but not directly over plaintiff's land.

¹⁰. 306 F.2d 580 (10th Cir. 1962).
¹¹. 167 So. 2d 95 (Fla. 1964).
¹². 233 Ore. 178, 376 P.2d 100 (1962).
¹³. In Thornburg, on remand, the jury found for the defendant airport. Mrs. Thornburg again appealed. The Oregon Supreme Court again reversed and remanded, Thornburg v. Port of Portland, 244 Ore. 69, 415 P.2d 750 (1966), on the ground that the trial court, misled by a dictum in the supreme court's earlier opinion, had improperly instructed the jury on the weight to be given to the social utility of the airport. The court disavowed its dictum that the jury should balance the gravity of the harm to plaintiff against the social utility of the airport and stated that the proper question for the jury is "whether the interference with use and enjoyment is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to support a conclusion that the interference has reduced the fair market value of the plaintiff's land by a sum certain in money." Id., 415 P.2d at 752. This language of the court raises the question of whether an action in inverse condemnation needs to be supported by a nuisance theory, or whether "nuisance" is used, not in its common law sense as an unreasonable, annoying use of property, but rather is becoming merely a convenient label for "interference amounting to a taking." See Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964).
In *Louisville and Jefferson County Air Board v. Porter,* the Kentucky Court of Appeals, in reversing a judgment for alleged diminution in the value of plaintiff's land from noise emanating from defendant's airport, seemed to follow the same theory as the Oregon court. The trial court had instructed the jury that if there was any damage there was a nuisance as a matter of law. The court of appeals did not only hold this to be error, but also directed that the claim be dismissed. The Kentucky court considered the problem to be one of determining the equity of the case. In holding against the plaintiff, the court mentioned the early doctrine as to the non-actionable character of railroad noises and then noted four reasons for its decision: (1) the airport operations were necessary; (2) the plaintiffs had acquired their property after the airport was in operation; (3) their property had not been physically damaged or rendered uninhabitable; and (4) the inconveniences were of an ordinary nature. The court therefore concluded that there was insufficient evidence of overall inequity to allow recovery. One of the key facts undoubtedly was that the flights and noise generally occurred or emanated from runways several thousand feet away from plaintiff's property.

The state court cases since *Batten* thus seem to agree that there can be a taking without physical trespass; however, this theory may still be contrary to standing authority in many jurisdictions. Under the recent cases, the property owner will undoubtedly succeed on a theory of inverse condemnation by nuisance if his land is rendered uninhabitable; he may even succeed if the noise and other interference is of a somewhat less aggravated nature.

In the recent case of *State ex rel. Royal v. City of Columbus,* the Ohio Supreme Court affirmed a lower court writ of mandamus to compel the city to obtain easements to fly over the plaintiffs' lands. The court cited both *United States v. Causby* and *Griggs* as persuasive authority. The glide angles over the lands in question were said to be from a minimum of fifty or sixty feet to a maximum of ninety feet. The only test offered as to the required severity of disturbance was that stated in *Causby*; namely, that there is a taking when the flights "are so low and so frequent as to be a direct and immediate interference with enjoyment and use of the land." Since the plaintiffs were apparently using their lands for residential purposes and since the opinion does not suggest that their homes became uninhabitable, the decision may be authority for there being a taking even if airport neighbors are not forced to move. On the other

14. 397 S.W.2d 146 (Ky. 1965).
15. The theory of the airport cases has recently been summarized as being that "governmental activity by an entity having the power of eminent domain, which activity would constitute a nuisance according to the law of torts, is a taking of property for public use, even though such activity may be authorized by legislation." Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect,* 71 Dick. L. Rev. 207, 208-09 (1967). This statement is a particularly apt summary of the theory of the *Thornburg* and *Porter* cases.
18. 328 U.S. 256 (1946). See note 73 infra and accompanying text.
19. 328 U.S. at 266.
hand, it may be that when there is a physical trespass in the plaintiff's airspace, an actionable interference will be found on a showing of less injury than when the nuisance theory must be relied upon, since under the latter theory the public utility of the airport is generally considered an important factor which must be weighed against the gravity of the harm.\(^{20}\)

One early phrasing of the notion that public good can justify interference with the use of private land was to call certain nuisances "legalized."\(^{21}\) A refinement of this approach is found in Richards v. Washington Terminal Company.\(^{22}\) Plaintiff owned a house in southeast Washington, the rear of which faced the railroad tracks a short distance from the mouth of the tunnel under the Capitol. Plaintiff claimed that smoke, noise, and other disturbances had diminished the value of his property. The tunnel had been authorized by congressional act. The Court held that the operation of the railroad was a legalized nuisance and that plaintiff could not recover for damages which the public at large suffered, but that he might recover for inconvenience and discomfort to him personally. Even if the nuisance theory enunciated in Richards were applied to the taking cases, the case would seem to be of little help in determining what level of noise or other disturbance is actionable.

At this point in the development of the law of taking by nuisance, we can only note that the courts continue to decide the taking cases on an *ad hoc* basis and, often relying primarily on the general test enunciated by the Supreme Court in Causby,\(^{23}\) grant relief only when the interference with the use and enjoyment of the plaintiff's property is very aggravated.

II. AIRPORT ZONING

As airplanes continue to become larger and noisier, the disturbance to the areas adjoining airports will become greater. Although it is a truism that technological progress has been accompanied by certain annoyances such as noise from expressways and fumes and noise from railways, actions based on such annoyances have rarely succeeded;\(^{24}\)

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\(^{20}\) See note 13 supra, which raises the question of the extent to which the public utility of the airport is still considered an important factor.


\(^{22}\) 233 U.S. 546 (1914).

\(^{23}\) See notes 18 & 19 supra and accompanying text. It should be made clear that an *ad hoc* approach to the "taking" cases is certainly not improper. But at the same time it is to be regretted that the courts made so little progress toward providing some standard with which the results of future "taking" cases could be predicted with a degree of certainty. For an excellent analysis of the airport noise cases, see Tondel, *Noise Litigation at Public Airports*, 32 J. Air L. & Com. 387, 401 (1966), in which the author indicates that in the past decade, there have been only two overflight cases in which a taking has been found in which "the usual flights [were] more than 200 feet in altitude over plaintiffs' properties, and in both of those cases there were some flights that caused physical contact with the ground." The author concludes that in order to recover in an overflight case a claimant must not only prove low and frequent flights, "[h]e must also, and even more importantly, show that the result has been a substantial, if not complete, deprivation of the use of his property." *Id.* at 400. See generally Note, *Airplane Noise: Problems in Tort Law and Federalism*, 74 Harv. L. Rev. 1581 (1961).

\(^{24}\) See note 22 supra and accompanying text.
such inconveniences have been considered part of the cost of progress. As the preceding review of the recent aircraft noise cases has revealed, however, the magnitude of the disturbance caused by jet aircraft can be such as to be held a taking, for which airport owners and operators may be required to answer in damages.25 And if the courts are going beyond the traditional view of taking by nuisance under which the public utility of the airport is balanced against the annoyance to the plaintiff, the number of recoveries against airport owners and operators could increase.26

Airport zoning is one means of obviating annoyance to landowners as well as maintaining the costs to airport operators. However, there are some who argue that little may be done on the state level with respect to planning and zoning, as related to the navigable airspace, because of the commerce and supremacy clauses of the United States Constitution and certain provisions of the Federal Aviation Act of 1958.27 Several federal court decisions suggest that because the entire area has been pre-empted by congressional action creating a pervasive federal regulation of interstate flight, local municipalities cannot enact ordinances or regulations which have the effect of limiting the operation of airports or otherwise interfering with air commerce. In All American Airways, Inc. v. Village of Cedarhurst,28 enforcement of an ordinance prohibiting the flight of aircraft over the village at altitudes of less than one thousand feet was enjoined pendente lite. The temporary restraining order was affirmed by the United States Court of Appeals for the Second Circuit.29 In the subsequent action for a permanent injunction,30 the district court held that federal pre-emption of the regulation and control of the flight of aircraft, including the fixing of minimum safe altitudes, precluded the ordinance. The Court of Appeals for the Second Circuit again affirmed.31 The broad statements regarding federal pre-emption stated in the Cedarhurst cases were unnecessary in view of the actual issue presented.32 The Cedarhurst

25. See Comment, Airport Approach Zoning: Ad Coelum Rejuvenated, 12 U.C.L.A. L. Rev. 1451 (1965), which takes the position that the basic problem in the "taking" cases is arriving at the proper allocation of the cost of air travel between property owners and airport owners and operators, and ultimately the air travel consumer.


32. The second district court opinion in Cedarhurst concluded simply: The plaintiffs' contention that the legislative action by the Congress together with the regulations, adopted pursuant thereto, have regulated air traffic in the
ordinance was intended to be a safety measure, and it was easy for the court to find that it was precluded by federal regulations of minimum safe altitudes also promulgated in the name of safety. So limited, the Cedarhurst cases can be interpreted as establishing nothing more than that federal regulation as to air safety is supreme and exclusive; such a proposition is beyond dispute.

In City of Newark v. Eastern Airlines, the court dismissed an action brought by the city on both nuisance and trespass theories to enjoin flights over congested areas of the city at an altitude of less than twelve hundred feet. The pre-emption principle was again broadly stated, the court reasoning that enactment of the Civil Aeronautics Act clearly evidenced the intent of Congress to exercise exclusive power of regulation and control in the field of interstate air commerce. The court therefore held that it was without power to enjoin flight patterns promulgated by the CAA and that that agency had primary jurisdiction over the matter. In light of this holding, it would seem that this court also stated the preemption principle more broadly than necessary.

The most recent of the pre-emption cases is American Airlines, Inc. v. Town of Hempstead, an action brought by nine airlines, all users of Kennedy International Airport, to enjoin enforcement of a Hempstead "Unnecessary Noise Ordinance" which prohibited the operation in the town of any device which created noise above a certain level. The court granted a temporary injunction, relying heavily on Cedarhurst, and noted that compliance with the ordinance would exclude jet aircraft from Kennedy International Airport. However, the court was careful to limit its statement of the pre-emption principle "to cover such local regulation as the Hempstead ordinance." The

navigable air space in the interest of safety to such an extent as to constitute pre-emption in that field is upheld.

132 F. Supp. at 881.

However, in reaching that conclusion, the court traced in detail the history of Congressional regulation of interstate commerce in general and of air commerce in particular, citing favorably the language of Justice Jackson, in his concurring opinion in Northwest Air Lines v. Minnesota, 322 U.S. 292, 303 (1944):

Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. . . . [an aircraft's] privileges, rights, and protection so far as transit is concerned, it owes to the Federal Government alone and not to any state government.

132 F. Supp. at 875.

The court noted that this language reveals "[t]hat Congress contemplated and enacted legislation for the comprehensive regulation of air commerce. . . . " Id. at 874.

33. The ordinance had apparently been enacted soon after a series of tragic airplane crashes near Newark Airport. These crashes produced other action, including appointment of a presidential commission to study ways of preventing similar disasters in the future. See President's Airport Commission, The Airport and Its Neighbors at v (1952); 77 A.B.A. Rep. 469 (1952); E. Yokley, Zoning Law and Practice § 26-1 (3d ed. 1965).


36. "It would be difficult to visualize a more comprehensive scheme of combined regulation, subsidization and operational participation than that which the Congress has provided in the field of Aviation." 272 F. Supp. at 232. "The federal regulation of air navigation and air traffic is so complete that it leaves no room for such local legislation as the Hempstead ordinance." Id. at 233. The court then noted that Congress has not authorized the FAA to ignore noise abatement considerations. Id.
court distinguished the case of \textit{Huron Portland Cement Co. v. Detroit},\footnote{37} an earlier case in which an analogous pre-emption argument had failed, on the ground that the ordinance involved did not obstruct the right of free passage and hence was not a direct regulation of commerce.\footnote{38}

The pronouncements of the courts in these cases on the pervasiveness of federal regulation and control of aviation must be considered in light of what was at stake.\footnote{39} In any of the cases, the opposite result would have had the effect of enjoining or inhibiting flights from major international airports. Hence, although it is likely that the states and their subdivisions cannot utilize zoning to limit airport operations, the doctrine of federal pre-emption does not preclude them from limiting the use of land around airports to promote air commerce and to minimize the problems attendant to the operation of airports.

In 1964, Congress amended the Federal Airport Act of 1946\footnote{40} to require that projects and proposals for federal airport grants-in-aid receive the approval of the Administrator only if they are found to be reasonably consistent with plans of public agencies for the development of the area in which the airport is located and if the Administrator receives assurances in writing that appropriate action, including the adoption of zoning laws, has been or will be taken to reasonably restrict the use of land adjacent to or in the immediate vicinity of the airport to purposes compatible with normal airport operations.\footnote{41}

\footnote{37} 362 U.S. 440 (1960). Detroit passed a smoke abatement ordinance. The cement company owned ships, which, when docked, emitted more smoke than the city ordinance permitted. It was argued that since the ships were licensed under a comprehensive system of regulation enacted by Congress, the city could not impose additional burdens. The Supreme Court held that the federal inspection legislation had not so pre-empted the field that the Detroit ordinance was invalid. It should be noted that the Court relied on a statute, 69 Stat. 322 (1955), which stated that air pollution was a primary responsibility of state and local governments.

\footnote{38} As the court's ground for distinguishing \textit{Huron} makes clear, the sort of ordinance challenged in the "pre-emption" cases has also been attacked as imposing an unconstitutional burden on interstate commerce. The courts, however, although recognizing the force of this constitutional argument, have preferred to base their decisions on the argument that Congress has pre-empted the area of regulation and control of flight. \textit{See}, \textit{e.g.}, American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 226, 232 (E.D.N.Y. 1967).

\footnote{39} A city can in some circumstances pass a valid ordinance prohibiting noise. For example, in City of Chicago v. Reuter Bros. Ironworks, 398 Ill. 202, 75 N.E.2d 355 (1947), an ordinance prohibiting the emitting of noise "of a disagreeable or annoying nature" was upheld. Under the facts of the particular case, the court held that the noise emitted did not constitute a nuisance. Such an ordinance must, however, be definite and set forth intelligible principles to guide the officials who have the duty of administering it. Otherwise, it fails under the "void for vagueness" rule. \textit{See} Phillips Petroleum Co. v. Anderson, 74 So. 2d 544 (Fla. 1954).


This provision had its genesis in the FAA. It is actually rather limited in scope, but only because it has come about thirty years too late. It is conceded that the provision will provide no panacea to the noise problem; residential encroachment may have already occurred, the airport sponsor may not possess zoning authority, and proper zoning may not be possible because multiple jurisdictions are involved. The point of the legislation is simply to require local action where local action is possible. The federal government now insists that local municipalities acknowledge their responsibility to assure compatible use of land near airports. Action at the federal level is not contemplated.

In evaluating the scope of the zoning which the states may exercise, a brief backward look is helpful. The landmark case is Euclid v. Ambler. In 1922, the village of Euclid, a suburb of Cleveland, adopted an ordinance establishing a comprehensive zoning plan for the village. Six classes of use districts, three classes of height districts, and four classes of area districts comprised the plan. The plaintiff owned sixty-eight acres of land in the village. The lower court held that the ordinance took property from the plaintiff without due process of law and without just compensation. The Supreme Court of the United States disagreed.

The Supreme Court's reversal in Ambler came as a surprise to many people, as the general trend prior thereto had been to the contrary as illustrated in cases such as Spann v. Dallas, in which a Dallas ordinance prohibiting a business in a residential zone was challenged. The Texas Supreme Court stated that such ordinances were generally void, since they constituted an unwarranted invasion of the right to private property and were not to be suffered under the guise of the police powers.

In Ambler, the landowner claimed that the comprehensive zoning ordinance deprived him of property, contrary to the protection afforded him by both the Ohio and United States Constitutions. Justice Sutherland noted the elasticity of the application of constitutional principles to the changing complex conditions of the day. He referred to comprehensive reports on zoning. In these reports, it was stated that segrega-

42. See Hearings on S. 1153 before the Aviation Subcommittee of the Committee on Commerce of the United States Senate, 88th Cong., 1st Sess., ser. 10 at 20, 22 (1963) (Testimony of Federal Aviation Administrator Najeeb E. Halaby).

Some state airport zoning enabling acts solve the multiple jurisdiction problem by permitting political subdivisions to promulgate zoning regulations covering areas outside the boundaries of the subdivision. See, e.g., Ark. Stat. Ann. § 74-302 (1947); Mont. Rev. Codes Ann. § 1-712(3) (1947). Most state statutes go no further than providing for joint airport zoning boards, or for extra-territorial zoning regulations, subject to the approval of the political subdivision having control over the airport. See Md. Code Ann. art. 1A, § 16(1), (3), (4) (1957).

The power to zone is predicated upon the "police power" of the states which has not been surrendered to the nation, and which by the tenth amendment was expressly reserved to the states, respectively, or to the people. Jordan v. Gaines, 136 Me. 291, 8 A.2d 585 (1939). However, see Airport Zoning: A Growing Need in South Carolina, 18 S. Car. L. Rev. 609 (1966), which takes the position that some type of federal airport zoning appears inevitable. This zoning would be enacted under the commerce, war, or postal clauses of the United States Constitution.

45. 272 U.S. 365 (1926).

46. 297 F. 307 (1924).

47. 235 S.W. 513 (Tex. 1921).
tion of residential, business, and industrial buildings provided a degree of fire protection by making it easier for suitable fire apparatus to be effective and decreased traffic in residential districts, thus preventing street accidents; similarly, such segregation was said to decrease noise and other conditions producing nervous disorders and to preserve a more favorable environment in which to rear children. Justice Sutherland discussed the effects of apartment houses in residential neighborhoods, characterizing the former as parasites and almost as nuisances. He concluded that, in general, zoning was not so clearly arbitrary or unreasonable as to be void.

After Ambler, carefully drawn zoning ordinances have passed constitutional muster; however, the caveat that some minute detail might overstep the bounds between permissible regulation and taking for public use without compensation must be kept in mind. A clear example of overstepping is found in Grosso v. Board of Adjustment,\(^{48}\) where, by an amendment to the zoning map, the plaintiff’s land was made part of a street. This was found to be an invalid use of the police power; private property may not be confiscated under the guise of police regulations. Although the bounds cannot be defined with precision, the trend is clear: “As social relations become more complex, restrictions on individual rights become more common.”\(^{49}\)

Edmund Burke once said, “To make us love our country, our country ought to be lovely.” With this there can be little disagreement, and it is toward this end as well as others that the police power is employed to regulate the use of property with respect not only to airports,\(^{50}\) but also to billboards,\(^{51}\) oil drilling,\(^{52}\) brickmaking,\(^{53}\) residence,\(^{54}\) height restrictions,\(^{55}\) and many other uses.

The police power is an inherent and indispensable attribute of our society, and it was possessed by the state sovereignties prior to the adoption of the United States Constitution.\(^{56}\) It is generally defined by the courts as that power required to effectively discharge, within the scope of constitutional limitations, the states’ paramount obligation to promote and protect the public health, safety, morals, comfort, and general welfare of the people.\(^{57}\) It is under the police power that political subdivisions, when authorized by state enabling laws or constitutional provisions, may impose reasonable restrictions on the use of property by zoning.\(^{58}\)

\(^{48}\) 137 N.J.L. 630, 61 A.2d 167 (Sup. Ct. 1948).
\(^{49}\) 8 E. MCQUILLAN, MUNICIPAL CORPORATIONS § 25.05 (3d ed. 1957).
\(^{50}\) Baggett v. City of Montgomery, 276 Ala. 166, 160 So. 2d 6 (1963).
\(^{51}\) St. Louis Gunning Adv. Co. v. City of St. Louis, 235 Mo. 99, 137 S.W. 929 (1911).
\(^{52}\) Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528 (9th Cir. 1931).
\(^{54}\) Banks v. Fayette County Bd. of Airport Zoning Appeals, 313 S.W.2d 416 (Ky. 1958).
\(^{55}\) Harrell’s Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority, 111 So. 2d 439 (Fla. 1959).
\(^{56}\) Schmidt v. Board of Adjustment, 9 N.J. 405, 88 A.2d 607 (1952).
\(^{57}\) Sinclair Refining Co. v. City of Chicago, 178 F.2d 214 (7th Cir. 1949).
\(^{58}\) E.g., Schloemer v. City of Louisville, 298 Ky. 286, 182 S.W.2d 782 (1944).
In addition to the regulation and promotion of health, safety, morals, and comfort, the permissible ends of zoning have been extended in recent years to considerations such as the convenience and economy of the community. The basis for this extension is the belief that individual hardship and loss may justifiably be imposed in order to provide greater advantages to the community as a whole. Similar extensions have resulted in the regulation of aesthetic values, since the concept of public welfare is broad and inclusive, and in the enforcement of regulations beyond the geographical limits of the political subdivision where there is a need for such delegation of authority from the state to the political subdivision.

Airport zoning as to height restrictions, gas, smoke, dust, and electrical interference is a comparatively recent development in the law. Alameda County, California, is generally credited with enacting in 1928 the first zoning ordinance regulating the height of structures in close proximity to airports. This ordinance was apparently passed under the California general zoning enabling provisions. However, because of a suspicion that existing state statutes might not empower municipalities to enact airport zoning ordinances, nearly all of the states have enacted airport zoning enabling legislation. Thus far, these state statutes have been directed against hazards of navigation. The Maryland statute, which is typical, authorizes political subdivisions to “regulate and restrict the height of structures or trees and the purposes for which land may be used” for the purpose of eliminating hazards to flight or communication.

The more recent trend toward zoning by a state board may present a basis for altering this pattern. Airport zoning ordinances should be judged by the same tests that are applied to zoning ordinances in general. Accordingly, unless an airport zoning ordinance is clearly arbitrary and unreasonable, it should be upheld. This would seem to be the approach which is being taken in Kentucky where that state’s legislature in 1960 created the Kentucky Airport Zoning Commission within the Department of Aeronautics. Notwithstanding the provisions of the state laws on planning and zoning and the state laws on state and regional planning, this statewide commission is empowered to issue such regulations pertaining to the use of land within and around all

63. \textit{See}, e.g., Yara Eng’r Corp. v. City of Newark, 132 N.J.L. 370, 40 A.2d 559 (Sup. Ct. 1945), in which the court invalidated an airport zoning ordinance placing \textit{inter alia}, height restrictions on land adjoining an airport, on the ground that it was not authorized by the state’s zoning enabling legislation, and also on the ground that the ordinance, which had the effect of rendering the plaintiff’s land of nominal value, was an unconstitutional taking.
68. BAlDWIN’S KY. REV. STAT. §§ 147.010-147.990 (1963).
publicly owned airports as will promote the public interest and foster the proper use of such airports and their facilities. The legislature delegated all zoning power over "land, structures, and airspace within and around [all] public airports" and also all power relating to the use of the navigable airspace in the state to the commission, subject to the power of governmental units to acquire airports, airport facilities and the like and "to eliminate airport hazards, either alone or jointly with the commission." At the same time, the legislature enumerated factors which the commission must consider in exercising its zoning power; such factors include the Technical Standard Orders of the Federal Aviation Administration, "the character of flying operations conducted at the airport," the future development of the airport, the public interest in "developing a sound public air transportation system," and "the views and opinions of those owning land in [the affected] areas." The Illinois experience was furnished a qualifying example.

Reasonable airport zoning restrictions have generally been upheld. In sustaining a local height restriction ordinance enacted by the Joint Airport Zoning Board of the City of Lakeland and County of Polk pursuant to the Florida statute, the Florida Supreme Court held, in *Waring v. Peterson,* that the police power could be validly exercised to limit vertical development of surrounding properties and prohibit

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71. In 1945 the Illinois legislature enacted an airport zoning act which was patterned after the Model Airport Zoning Act promulgated in 1944 by the National Institute of Municipal Law Officers. Under this act, as amended, the airport operator (if a political subdivision), the surrounding communities, and the State Department of Aeronautics, if it saw fit, could zone the environs of an airport for a distance of two miles from the boundaries of the airport where the zoning regulations were related to existing runways. Act of July 17, 1945, §§ 13, 17, [1945] Ill. Laws 319-20 as amended, Act of Aug. 3, 1949, § 1, [1949] Ill. Laws 328; Act of July 9, 1951, § 1, [1951] Ill. Laws 989. The Illinois Attorney General subsequently ruled that neither the two-mile limitation nor the existing runway requirements would be obstacles to state-adopted and administered zoning regulations. 1956 ILL. ATT'Y GEN. REP. & OP'N. 240. In 1961 the State Airport Zoning Act was amended to require that the State Department of Aeronautics zone an airport if requested to do so by the political subdivision or subdivisions owning or operating the airport. Act of Aug. 8, 1961, § 1, [1961] Ill. Laws 2907. The current Airport Zoning Act appears as ILL. REV. STAT. ch. 15Y2, §§ 48.1-48.37, 48.101-48.112 (1965). The Department of Aeronautics subsequently issued regulations, to become effective January 20, 1965, which avoided the noise problem, even though the inclusion of regulations concerning the noise problem had been considered.

The widespread publicity of such efforts as zoning at the state level under the police power is believed, however, to have had several advantages:

1. It reminded the public in the airport environs of the importance of the airport to their economic well-being and that of the state.
2. The removal of the matter from an area of local controversy brought to the attention of the public the fact that a right possessed was not necessarily unrestricted.
3. It emphasized the need for positive and cooperative planning.
4. It showed that if an operating airport is allowed to remain static it may be rendered useless, and
5. It showed that there is a need on the part of the airport community to educate and attempt to achieve a compatibility with airport operations. See Strunck, *An Analysis of the Advantages and Difficulties of Zoning Regulations for Chicago O'Hare International Airport,* Science and Technology Panel, Washington, D.C., Oct. 29, 1965.

72. 137 So. 2d 268 (Fla. 1962).
manufacturing establishments producing smoke in the vicinity of the airport, even though the effect of the ordinance was to depreciate the market value of the land as an industrial site.\textsuperscript{73} The exercise of the police power in \textit{Waring} was validated on the grounds that (1) the need for limiting vertical development was patent; (2) generally, limitations of use or diminution of property values will not render a zoning ordinance void;\textsuperscript{74} (3) when a limitation is reasonably applied, individual hardship must be endured for greater advantage to the community;\textsuperscript{75} and (4) validity of a regulation must depend upon the facts in each particular case.\textsuperscript{76}

The highest courts of two states, however, have held, contrary to the Florida decision in \textit{Waring}, that zoning of the environs of an airport against structures interfering with glide paths constituted unconstitutional attempts to take private property without compensation. The grandfather case on the “taking” issue is \textit{United States v. Causby}.\textsuperscript{77} In that case, Causby sued for damages resulting from the regular flight of planes so close over his farm as to render it uninhabitable; the government conceded this to be a taking. In \textit{Roark v. City of Caldwell},\textsuperscript{78} the Idaho Supreme Court held invalid a zoning ordinance whose ultimate result was said to be to limit certain portions of Roark’s land to use for agriculture and to prohibit erection of structures of various heights on other portions. Roark had been in the process of subdividing the land at the time of enactment of the ordinance. Idaho statutes vested ownership of air rights in the owner of the surface subject to the right of flight. The right of flight was qualified to exclude flight “so low as to interfere with the then existing use” or to constitute a hazard. Like the overflights in \textit{Causby}, the zoning ordinance, by placing limitations on the construction of buildings in portions of the land, would render the land “uninhabitable.” Such severe limitation of use can be viewed either as being impermissibly unreasonable or as a taking of part of the property. Where a more reasonable regulation, such as that in \textit{Harrell’s Candy Kitchen v. Sarasota-Manatee Airport Authority}\textsuperscript{79} which operated to require the lowering of a forty-one foot tower used only as decoration, is challenged, it is more difficult to say

\textsuperscript{73} Id. at 270.  
\textsuperscript{74} Id. at 271.  
\textsuperscript{75} Id.  
\textsuperscript{76} Id. at 272.  
\textsuperscript{78} 87 Idaho 557, 394 P.2d 641 (1964). The only Maryland authority on the validity of airport zoning is a 1939 decision of the Baltimore City Circuit Court #2, Mutual Chemical Co. of America v. Mayor and City Council of Baltimore, 1939 U.S. Av. 11, in which the court overruled a demurrer to a bill challenging on constitutional grounds Maryland’s airport zoning enabling act. The court reasoned that a state or city cannot confiscate property by use of a zoning ordinance, but must either condemn and purchase the land or an easement. The court said that to be valid, a zoning ordinance must bear a substantial relation to the public health, morals, safety, and welfare, whereas airport zoning was not for the public benefit, but rather for the benefit of those who own or use airplanes. The challenged ordinance imposed height restrictions on plaintiff’s land such that at a distance of one hundred feet from the airport boundary, he could erect a building having a maximum height of 6\% feet. On these facts the ordinance was viewed as tantamount to a taking.  
\textsuperscript{79} 111 So. 2d 439 (Fla. 1959).
that there is a taking. The Roark decision, including its suggestion that even limitation of use to single dwelling units is unconstitutional, may be explainable on the basis of the particular Idaho statute as to air rights.

The other prime authority holding airport zoning to be unconstitutional is Indiana Toll Road v. Jankovich. The particular point in issue was a twenty-five foot high road in an area zoned for only eighteen and one half feet. The scheme of regulation also provided that in the event a runway was extended to the edge of an airport, the adjoining landowner could build no structure near that edge. Thus it would seem that the ordinance overstepped the bounds between regulating and taking, as did the ordinance involved in Roark. In invalidating the ordinance as an unconstitutional attempt to appropriate "the ordinarily usable air space above property adjacent to the Gary Airport without the payment of compensation," the court relied upon an Indiana statute vesting air rights in the owner of the surface and an earlier Indiana decision which construed the statute as conferring on the surface owner the right to use the superadjacent airspace in any manner and for any purpose. Despite this reliance on authorities which seem to vest unlimited air rights in the surface owner, the court concluded only that "the reasonable and ordinary use of air space above land is a property right which cannot be taken without the payment of compensation." Hence, the decision does not seem to preclude all restrictions on use of airspace, but only on "reasonable and ordinary" use. And yet if "reasonable and ordinary" is read broadly, the decision could represent a significant limitation on the airport zoning power. It is submitted that the United States Supreme Court properly interpreted the Indiana court’s opinion in Jankovich when, in its opinion concluding that certiorari had been improvidently granted, the Court stated:

Although it recognized that zoning regulations may be upheld as a reasonable exercise of the police power 'where the owner of property is merely restricted in the use and enjoyment of his property,' . . . the court held that a taking requiring compensation — rather than mere regulation — was effected here because 'the City of Gary has attempted, by the passage of the ordinance under consideration, to take and appropriate to its own use the ordinarily usable air space of property adjacent to the Gary Airport. . . .' As we read the opinion of the Indiana Supreme Court, it certainly does not portend the wholesale invalidation of all airport zoning laws.

81. 244 Ind. 574, 193 N.E.2d at 241.
82. 244 Ind. 574, 193 N.E.2d at 239, citing Capitol Airways, Inc. v. Indianapolis Power & Light Co., 215 Ind. 462, 18 N.E.2d 776 (1938).
83. 244 Ind. 574, 193 N.E.2d at 240.
84. 379 U.S. 487, 493 (1965). For a somewhat different approach urging that all airport zoning should be upheld but leaving the neighbors with the right to collect actual damages, see Comment, The Validity of Airport Zoning Ordinances, 1965 DUKE L.J. 792.
Although the reported litigation has concerned height limitations, there are other matters which can affect the operation of an airport and which would seem to be proper subjects of zoning. High voltage electrical lines can distort signals emanating from an airport. Smoke or dust can be a navigation hazard. As with height limitations, reasonable limitations of such matters affecting air commerce should be upheld.

In the discussion of the cases involving airport noise, it was concluded that there is no unconstitutional taking by some undefined, moderate amount of noise. Airports serve a public purpose, and the public must bear some inconvenience without compensation. Similarly, it was concluded in the discussion of airport zoning imposing height restrictions that reasonable limitations may be imposed on adjoining land. From these two conclusions, it would seem that zoning could be used to minimize the damages which result from airport noise. By zoning airport environs for industrial use, for example, the possibility of a taking through noise should substantially be reduced.\textsuperscript{85} The possibility of such zoning would depend to some extent on local over-all planning, and the necessary height limitations would place an additional limit on use.

In addition, although the details will have to be worked out in the ordinances of the local political subdivisions or in the regulations of a state zoning body, the time has come for state legislation authorizing airport zoning for more than the traditional purpose of preventing hazards to navigation. The zoning authorities should be given the power to prohibit land uses incompatible with the operation of the airport. Such incompatible land use may interfere with the general welfare of owners or occupants of land in the vicinity of the airport and may be adverse to the orderly development of the airport and the area in the vicinity of the airport and the public investment therein.

In this spirit, it is recommended that airport zoning legislation be enacted, incorporating not only the principle of utilizing the police power to protect the airport and its environs from hazards to navigation, but also the principle that the police power may be utilized to control land uses inconsistent with airport operations and hence not in the public interest.\textsuperscript{86} Such a positive approach is necessary if the full

\textsuperscript{85} See Smith v. County of Santa Barbara, 243 Cal. App. 2d 126, 52 Cal. Rptr. 292 (1965). In Morse v. County of San Luis Obispo, 247 Cal. App. 2d 678, 55 Cal. Rptr. 710 (1967), an inverse condemnation action was brought against a county for rezoning plaintiff's land, located near an airport, from A-1 (one residence per acre, the predominant zoning of the area) to A-1-5 (one residence per five acres). Plaintiff had asked the county Planning Commission to rezone his land to R-1 (five residences per acre). In upholding the action of the Board, the court said:

Absent any showing to the contrary, we are entitled to presume that decision of the County to preserve the agricultural nature of the area and to deny an intensification of habitation near the airport was a reasonable exercise of the zoning power designed to prevent urban sprawl and to forestall the development of residential zones in areas of the county susceptible to excessive noise or above average hazards.

\textsuperscript{86} Unfortunately, existing airport zoning legislation as well as the model airport zoning ordinances promulgated by the National Institute of Municipal Law Officers and others, despite recent amendments, do not incorporate this principle. However, a
potential of zoning as a planning device is to be realized as a means for the solution of problems raised by the other aspects of airport operation and for the protection of the ever-increasing public interest in maintaining a safe and efficient air transportation system. In the past, pleas for increased utilization of airport zoning have generally been ignored. Although it cannot be said with absolute certainty that proper planning and zoning of airport areas in the past would have ameliorated the noise problem, it can be said that reasonable action to exclude residential neighborhoods, churches, and schools from airport areas would have saved airport operators from considerable litigation and, more importantly, the neighbors of large airports from unnecessary annoyance.

Model state airport zoning enabling statute was submitted by this author as a consultant to the Federal Aviation Agency on May 10, 1966, which, in addition to provisions for enforcement and remedies, authorizes (1) the enactment of zoning limitations on land adjoining airports both for the traditional purpose of eliminating hazards to navigation, but also for the purpose of reasonably controlling land uses around airports which are inconsistent with airport operations; (2) the adoption of airport regulations concerning noise, vibrations, fumes, dust, fuel particles, glare and electronic interferences; and (3) the acquisition of easements or other property rights by local subdivisions where such acquisition may be preferable to regulation by zoning.

87. General William F. McKee, Federal Aviation Administrator has cited fear of noise as the main threat to airport expansion. 3 Trial 5 (Oct.-Nov. 1967). See "Noise, Traffic in Airport Growth Are Big Concern to Neighbors," Baltimore Sun, Dec. 20, 1967, § D1, col. 5, which discusses the increasing noise problem at Friendship International Airport.