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A CONFERENCE ON CONTROL AND PROTECTION OF AIRPORT APPROACHES

Held at the University of California, Berkeley

November 15, 1956

CO-OPERATING GROUPS

THE CALIFORNIA ASSOCIATION OF AIRPORT EXECUTIVES

THE LEAGUE OF CALIFORNIA CITIES

THE COUNTY SUPERVISORS ASSOCIATION OF CALIFORNIA

THE CALIFORNIA AERONAUTICS COMMISSION

ABOUT THE CONFERENCE

The airspace surrounding airports has been raising increasingly troublesome problems. From the flight standpoint, it is a critical region where distractions or limitations resulting from physical development adjacent to airports can be unusually hazardous to safe flight. From the standpoint of those who are on the ground below, the aircraft may—in addition to being a nuisance—constitute an actual hazard and impose actual limitation on the free use of the land. The problems growing out of these considerations have raised complex questions of law as it bears on planning for land use and air operations. The entire matter has become urgent with the rapid spread of urbanization, the rapid growth of air traffic, and the prospect of larger, faster, and noisier aircraft.

In view of this situation, the question of how to control development in airport approaches has been of increasing concern to airport managers, city and regional planning groups, and federal agencies concerned with airports and air operations. It was in response to expressions of this concern, and in cooperation with agencies representing those closest to the problem, that the Institute of Transportation and Traffic Engineering arranged this Conference.

The Conference was attended by 125 interested individuals, principally from California but also from out of state, including officials from various levels of government, representatives of air lines, airport managers, and representatives of the Department of Defense.

This Part 1 of the Conference Proceedings presents the four formal papers of the morning session.

THE OVER-ALL PROBLEM

BY SIDNEY GOLDSTEIN

General Counsel, The Port of New York Authority

MORE than a quarter of a century ago, Judge Benjamin Cardozo emphasized in words that are equally appropriate today the tremendous stake that municipalities have in the planning and development of civil airports. He said:

"The city that is without the foresight to build the ports for the new (air) traffic may soon be left behind in the race of competition. Chalcedon was called the city of the blind, because its founders rejected the nobler site of Byzantium lying at their feet. The need for vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness." (*Hesse v. Rath*, 249 N.Y. 436, 438 (1928))

Today's conference is concerned with one of the major problems presently confronting local, state and federal government officials concerned with civil aviation—the problems involved in long-range planning to protect the approaches to civil airports. According to Professor Horonjeff, my job this morning is to discuss these questions generally from the over-all point of view while later speakers will discuss certain aspects of these questions in more detail.

As I see it, our topic revolves around two connected problems:

1. the protection of airport approaches from the creation of obstructions or hazards to air navigation; and
2. the protection of the legitimate interests of persons and property located in the vicinity of public airports without undue interference with the continued development of aviation.

The complexity of these twin problems is underscored by the numerous court decisions in recent years which have dealt with various phases of them and also by the seemingly never-ending policy discussions and pronouncements of government officials concerning them. Involved in them are the answers to such basic queries as:

Is it lawful as a general proposition of law for one man to fly over the land of another? If so, are there any recognized limitations on the right of flight?

Under our federal form of government, which governmental unit has jurisdiction over the rules of the air?

Can a landowner build structures on his property to any height he desires? Can he do so even if the structures interfere with the approach pattern to a public airport?

Does the law afford any means by which an airport's approach pattern can be protected?

It is difficult to know where to begin a discussion of a topic as

involved as the subject matter of today's conference. I am dealing with the subject generally. I feel, however, that the best place to commence is at the beginning. In this case the beginning for a lawyer is not at the comparatively recent date of 1903 when the Wright Brothers completed man's first powered flight—but rather with a medieval doctrine of the English common law derived from the Latin maxim, "*cuius est solum eius est usque ad coelum et ad inferos*," he who owns the land, owns it to the periphery of the universe.

This doctrine evolved at a time when the law was concerned with the problems arising from overhanging eaves, and when air commerce was beyond the realm of practical thought. Nevertheless, in the early years of the century, there was some concern that the maxim would hinder the development of aviation.

Fortunately, however, first the text writers and later the courts have completely rejected the *ad coelum* theory as inapplicable to aircraft flight. Dean Bogert of Cornell Law School in a landmark article written in 1921, entitled "Problems in Aviation Law," said:

"All the codes now in existence and all proposed codes, . . . treat the landowner's property in the space above his land as subject to a right of passage by aircraft. None of these codes require condemnation of an aerial right of way and none provide that the mere flight through the space above shall constitute a trespass." 6 Cornell L.Q. 271, 298 (1921)

A decade later a New York court asked:

"What is . . . , the law regarding the ancient maxim '*Cujus est solum ejus est usque ad coelum*'?"

And answered its own query by asserting:

" . . . it may be confidently stated that if that maxim ever meant that the owner of land owned the space above the land, to an indefinite height, it is no longer the law." *Rochester G. & E. Corp. v. Dunlop*, 148 Misc. 849, 850 (1933)

The coup de grace to the *ad coelum* theory was given 10 years ago by the United States Supreme Court in the *Causby* case, 328 U. S. 256, 261 (1946). It categorically declared that the "doctrine has no place in the modern world."

The right of free transit has received strong additional support from the Congressional declaration in the Civil Aeronautics Act of 1938 that American citizens possess "a public right of freedom of transit in air commerce through the navigable air space of the United States."

This declaration is solidly founded in the Constitution's commerce clause. In reliance on it the CAB, the federal agency to which Congress has delegated the power to prescribe the rules of the air, has unequivocally declared that "an aircraft pursuing a normal and necessary flight path in climb after take-off or in approaching to land is operating in the navigable airspace" and is thus within the airspace through which Congress, pursuant to its far-reaching commerce powers, has granted

a free right of transit. (C.A.R., Part 60, Interpretation No. 1, 19 F.R. 4603.)

Only last year the CAB's ruling that an aircraft in taking off from, or landing at, an airport is operating within the navigable airspace through which Congress has granted a free right of transit was held to constitute a correct statement of the law in *Allegheny Air Lines v. Cedarhurst*, 132 F. Supp. 871 (E.D.N.Y. 1955), a decision to which I shall refer again.

However, the fact that the *ad coelum* maxim has been relegated to its medieval past and that the right of free transit extends to aircraft landing at or taking off from airports does not mean that the landowner possesses no rights. For example, in the *Causby* case itself, the Supreme Court held that the landowner was entitled to receive from the Government damages for a taking of his property. This the court held had occurred by the continuous flight of formations of military aircraft at such low altitudes and in such great numbers and frequency that the beneficial use of the landowner's property was destroyed. The court reached this result on the basis of a factual record which is summarized as follows:

"The noise is startling. And at night the glare from the planes brightly lights up the place. As a result . . . , respondents had to give up their chicken business. As many as six to ten of their chickens were killed in one day by flying into the walls from fright. The total chickens lost in that manner was about 150. Production also fell off. The result was the destruction of the use of the property as a commercial chicken farm."

Accordingly, the court held that the

"intrusion (was) so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it."

The *Causby* type of case might become much more common unless aircraft manufacturers are successful in designing turbo-jets which are free from excessive external noise characteristics. Because of the noise of jet aircraft, The Port of New York Authority in 1951 prohibited jets from using its air terminals. Our position is still unchanged, since we feel that the external noise characteristics of jets are unacceptable to the people who live in the neighborhood of our air terminals.

Our policy of banning jet aircraft has already proved itself, since it has forced jet manufacturers to engage in extensive research in an attempt to produce jet aircraft that will prove acceptable to people who live in the vicinity of airports.

Let us now focus specifically on the problems involved in attempts to protect the approaches to public airports from obstructions to air navigation.

The first is a novel one created by local legislative action and not involving any physical obstruction at all. I refer to the 1952 ordinance passed by the Village of Cedarhurst, New York, shortly after the tragic

series of aircraft accidents at Elizabeth, New Jersey. The ordinance enacted by the Village which is located about 4,000 feet from the easterly boundary of New York International Airport and 9,200 feet from the end of one of its principal runways prohibits the flight of aircraft over the Village at altitudes of less than 1,000 feet. The ordinance contains a preamble which alleges that aircraft using New York International Airport fly over the Village without permission of the landowners or the Village trustees, and that these flights constitute a trespass, a "taking," a public nuisance and a menace to the health and safety of the Village's inhabitants. The ordinance prescribes a maximum penalty of \$100 for each offense and specifies that its violation constitutes disorderly conduct.

Enforcement of the ordinance would have created a substantial obstruction to the operation of aircraft to and from the airport and would at times have resulted in the complete shutting down of the airport since aircraft must, on occasion, fly over the Village at altitudes somewhat under 1,000 feet when landing at or taking off from the airport. Moreover, the passage and enforcement of similar ordinances by other municipalities which adjoin important public airports might well result in the almost complete destruction of air commerce.

In June 1952, ten scheduled airlines using the airport, the Airline Pilots Association, as well as individual pilots, together with The Port of New York Authority, operator of the airport, commenced an action in the Federal District Court in New York seeking a declaration that the ordinance was invalid and an injunction preventing its enforcement. Thereafter the CAB and CAA sought and obtained permission to intervene as parties plaintiff. In essence plaintiffs asserted that the ordinance violates the Federal Constitution on three grounds:

1. It conflicts with federal law, the conflict arising from the ordinance's prohibition of flights under 1,000 feet when such flights are permitted by federal law when necessary for landing and taking-off.
2. It invades a field which the Federal Government has totally pre-empted to the exclusion of all state and local regulation.
3. It constitutes an undue and hence unconstitutional obstruction to interstate and foreign commerce in that it invades a field which by its very nature requires uniformity of regulation, possible only at the hands of the Federal Government.

In June 1955, after three years of litigation, the District Court rendered its decision holding the ordinance invalid and permanently enjoining its enforcement. In substance, the court adopted each of our three contentions. However, the case is not as yet over. The Village has appealed to the Court of Appeals for the Second Circuit, and oral argument on the law was completed only last month. We are confident that the appellate court's decision which we are awaiting will determine once and for all that an obstruction to air navigation cannot be created by local legislative activity.

The next type of obstruction that I should like to mention was

that involved in *Commonwealth v. Von Bestecki*, 30 Pa. D. & C. 137 (1937). This case arose out of an action to enjoin the owners of land adjacent to the Harrisburg airport from erecting a high tower which it was contended would constitute a menace to the traveling public using the airport.

Defendants attempted to justify the erection of the tower on the ground that aircraft using the airport had deprived them of the use of their property and that the tower would merely abate the nuisance caused by the low flying planes.

The court first noted that a landowner has no right to prevent planes from flying over his property except to the extent that they unreasonably interfere with his use of the surface, and his remedy in such event is an action founded on nuisance. Thus while the facts in the instant case might have caused unreasonable disturbance to the defendants, the court held that they were not justified in erecting a tower which, in effect, amounted to taking the law into their own hands. The court analogized the tower to pitfalls, wolf traps, and spring guns purposely erected to injure trespassers which have invariably been held to constitute nuisances. Accordingly, erection of the tower was enjoined as a nuisance.¹

To be contrasted with that case is a 1950 federal decision involving Roosevelt Field, one of the earliest airports in the United States, established in 1910. *Roosevelt Field v. North Hempstead*, 88 F. Supp. 177 (E.D.N.Y. 1950). In this case Roosevelt Field sought to enjoin the maintenance of a Village water supply tower on the theory that the tower constituted an aeronautical obstruction and hence a public and private nuisance. While Roosevelt Field did not dispute the Town's need for a water tower, its position was that a different form of construction, *i.e.*, a lower tower or one providing subsurface tanks should have been installed and that because of a defendant's failure to employ such expedients, an injunction was warranted.

The court observed that under applicable CAA standards, the tower constituted an aeronautical hazard. Nevertheless, it concluded:

"There was no regulation, ruling or standard adopted by the C.A.A. which either in terms or by implication purported to *prohibit* the erection of this water tower." (Emphasis the court's) (p. 182)

The court ended its opinion by saying:

"The parallel which plaintiff draws between the sovereignty of the Federal Government in the air space above the United States, and that over navigable waters, is true and complete. In the exercise thereof, Congress has prohibited the erection of certain structures in navigable waters, Title 33 U.S.C.A. Section 401, while it has not done so in the air space. It is that difference in the

¹ To the same effect as the *Von Bestecki* case, see also: *City of Iowa City and United Air Lines, Inc. v. Tucker, Iowa Dist. Ct., Johnson County* (Sept. 14, 1935); 1 *Avi. (C.C.H.)* 586 (1935); *United Airports Company of California, Ltd. v. Hinman et al.*, U.S.D.C.S.D. Calif. (Apr. 29, 1939); 1 *Avi. (C.C.H.)* 823 (1939).

exercise of governmental function which must govern this decision." (p. 187)

The question thus arises as to what action can or should be taken to protect the approaches to public airports from obstructions similar to that involved in the *Roosevelt Field* case.²

Before discussing the various means by which such obstructions to air navigation can be abated, I think it should prove helpful to review briefly the way in which it is determined whether a given structure actually constitutes an aeronautical hazard. The determination is made pursuant to the CAA's Technical Standard Order-N18 which lays down the criteria by which obstructions to air navigation can be identified.

TSO-N18 describes certain imaginary surfaces such as approach, horizontal, conical and transition surfaces. It specifies that objects of any sort which project upon any of these surfaces are to be classified as obstructions to air navigation. Other CAA technical standard orders describe how obstructions are to be lighted (TSO-N25) and marked (TSO-N26). In addition to the foregoing, Part 40 of the CAB's Civil Air Regulations requires an obstruction clearance plane with a slope of 20 to 1 from the end of any runway into the air as a prerequisite for the use of that runway.

In essence the various Federal rules and regulations require that any obstruction which extends above the various surfaces defined in TSO-N18 must be marked and lighted if removal is not feasible and any obstruction which extends above the slope of 20 to 1 from the end of an airport runway lessens in effect the runway's usable length. In certain instances such reduction in effective length may be sufficient to make the runway unusable for aircraft operations.

How does the Government enforce its obstruction criteria? It does so indirectly. For example, Section 11 of the Federal Airport Act—the Act pursuant to which federal funds are granted for airport purposes—obligates the airport operator who is the recipient of these funds to agree that "the aerial approaches to (its) airport will be adequately cleared and protected by removing, lowering, relocating, marking or lighting or otherwise***."

Moreover, if an airport is not considered safe for use of a given type of aircraft, the CAA can amend the air carrier's operating certificate to prevent use of the airport. While these sanctions are indirect, they have thus far proved adequate to assure compliance with federal obstruction criteria.

Accordingly, once an obstruction exists an airport operator must

² To the same effect as the *Roosevelt Field* case, see also: *Capitol Airways, Incorporated v. Indianapolis Power and Light Company*, 215 Ind. 462; 18 N.E. 2d. 776; 1 Avi. (C.C.H.) 807 (1939); *Guith et al. v. Consumers Power Company*, 36 F. Supp. 21, 1 Avi. (C.C.H.) 936 (1940); *Postal Telegraph-Cable Company v. Pennsylvania Public Utility Commission*, 154 Pa. Super. 340; 35 A. 2d 535; 1 Avi. (C.C.H.) 1125 (1944); *Aeroville Corporation v. Lincoln County Power District No. 1*, 290 P. 2d 970; 4 Avi. (C.C.H.) 17,859 (1955).

either reach a voluntary agreement with the owner of the offending structure wherein the latter consents to whatever action is necessary to comply with federal requirements or, if voluntary agreement cannot be reached, the public airport operator must exercise its power of eminent domain to assure compliance with the federal requirements. Depending upon the facts of each case, there might be acquired a fee interest or an aerial volume easement above which no obstruction can exist. In addition a restrictive covenant running with the land, preventing its utilization in a manner inconsistent with federal obstruction criteria, might be employed.

It is evident however, that compliance with federal obstruction criteria might in some instances entail the expenditure of substantial sums on the airport operator's part. Accordingly use of the zoning power has been suggested to prevent the erection of future air navigation hazards, thus avoiding the necessity of spending these sums. The zoning power cannot, of course, be used retroactively to compel the destruction of existing hazards since this would amount to a "taking" for which compensation must be paid. Nevertheless even prospective airport zoning raises serious constitutional questions.

Though airport zoning ordinances have been in existence for more than 25 years, the only case that has come to my attention which directly passes upon the constitutionality of such an ordinance is *Mutual Chemical v. Baltimore*, 1 Avi. (C.C.H.) 804 (Md. 1939). The court held the ordinance in question unconstitutional on two grounds, the first being that the height restrictions therein specified were unreasonable, amounting to a confiscation of the owner's property and the second being (p. 807) "that the zoning of an area surrounding an airport is rather for the benefit of those who desire to use aerial transportation and for those who own airplanes than for the general public."

The court was saying that, unlike other types of zoning, the benefits to be derived from airport zoning are not for the neighboring land-owners but rather for the users of the airport and hence such action constitutes "spot" zoning which has invariably been held unconstitutional as a taking of property without compensation.

In another airport zoning case, *Yara Engineering Corp. v. City of Newark, et al.*, 40 A. 2d 559 (N.J. 1945), the city had adopted an ordinance restricting the height of structures within two miles of Newark Airport. The court held the ordinance invalid on the ground that adequate enabling legislation did not exist. Nevertheless, the court rendered a gratuitous dictum to the effect that the city was attempting to accomplish by zoning what it would otherwise be required to accomplish by purchase or condemnation.

However, there exists a Federal case indirectly upholding the validity of airport zoning, *U. S. v. 357.25 Acres of Land*, 55 F. Supp. 461 (W.D. La. 1944). Here the government sought to condemn "aviation" rights over respondent's land at heights from 25 to 45 feet above the ground. The jury brought in a verdict of "no dollars" and defend-

ants appealed. In giving effect to a zoning ordinance which prohibited buildings above 25 feet in height from being constructed within a given distance from the airport, the court said:

"I do not believe that by the taking of the rights sought the property of the claimants, in view of the restriction already existing, . . . has suffered any appreciable diminution in value by the taking . . ." (p. 462)

So far our discussion has, I submit, shown:

1. That aircraft possess a free right of transit—which right is fully applicable to operations involving landings and take-offs.
2. That property owners are entitled to be free from unreasonable interference in the use of their property caused by aircraft, and that in a proper case they can enforce their rights against the offending party.
3. That the federal government has preempted the regulation of the flight of aircraft and has established definitive criteria by which aeronautical hazards can be identified.
4. That aeronautical hazards created either by local legislative activity or out of "spite" are invalid.
5. That if a structure serving a legitimate purpose amounts to aeronautical hazard, the airport operator must, depending upon the circumstances involved, have the structure properly marked, lighted or removed.
6. This can be accomplished either by agreement with the owner of the structure or via condemnation, and
7. That the use of zoning ordinances to protect airports against future hazards has been recommended but doubt remains as to the constitutionality of this device.

Before concluding I want to refer to the latest development on our subject. Last year the CAA embarked upon a policy to force airport operators to acquire extensive approach areas at the end of runways. Compliance with this policy, known as "runway clear zone policy," is enforced by making the acquisition of such land a prerequisite to obtaining federal aid. The clear zone is designed to provide open areas which are free from all buildings except those housing aids to navigation. For instrument runways this clear zone covers 70 acres of land.

The CAA has stated, however, that: "*** Exceptions will be considered (on the basis of a full statement of facts by the sponsor) where a showing of uneconomical acquisition cost, or lack of necessity for acquisition, can be made ***." In addition, the new policy specifies that a master plan layout showing runway clear zones for all runways must be approved in connection with any federally aided airport project, even though the nature of the specific project may not require the application of the runway clear zone policy.

This clear zone policy appears to combine and confuse two different problems:

1. That of providing for the safety of *aircraft operations* by protecting planes in flight from obstructions which are hazards to air navigation; and
2. That of providing for the safety and convenience of people on the ground by requiring the airport operator to acquire land adjacent to the ends of runways for the purpose of preventing assemblages of people thereon.

The policy which requires airport operators to give assurances that aerial approaches will be adequately protected from hazards to air navigation is one of long standing and is, as we have seen, specifically required by the Federal Airport Act. By proper zoning, by arranging with property owners for the lighting of obstructions, and by the acquisition of those parcels of lands which are not subject to zoning, some airport operators have been able to comply with the requirements of TSO-N18 without inordinate expense.

The policy of requiring airport operators to acquire additional land adjacent to the ends of runways for the protection of persons on the ground, had its origin in the report of the President's Airport Commission, issued in May of 1952 and commonly called the "Doolittle Report."

That report contained two specific recommendations regarding what was labeled "cleared runway extension areas." The first recommendation stated "The dominant runways of new airport approaches should be protected by cleared extensions at each end at least one-half mile in length and 1,000 feet wide. This area should be completely free from housing * * * Such extension should be considered an integral part of such airport."

The second recommendation, however, stated "Existing airports must continue to serve their communities. However, cities should go as far as is practicable toward developing the cleared areas and zoned runway approaches recommended for new airports. * * *"

After publication of the Doolittle Report, the Department of Commerce approved the runway clear zone policy enunciated therein "on the basis that it is primarily for the purpose of safety and convenience to people on the ground." The Department, however, pointed out that "Safety of aircraft operations does not depend upon cleared runway extension areas."³

In spite of the prior position of the Department of Commerce that aircraft safety does not depend upon cleared runway extension areas and contrary to the specific recommendation of the Doolittle Report that existing operators be encouraged but not required to develop cleared zones, the CAA is now attempting to force the operators of existing airports to acquire such cleared zones.

Only last month, the CAA attempted to justify its present policy on

³ From "Air Safety—An Air Coordinating Committee Review of Policies and Actions in the Fields Covered by the Doolittle Airport Commission, May 16, 1952"—dated July, 1954, page 3.

the ground that "the acquisition of runway clear zone areas is desirable from the standpoint of sound, efficient, safe and economical development, operation and protection of an airport." However, there is nothing in the past history of approach protection which supports such a broad statement. Certainly there is nothing in the Federal Airport Act which can be construed as requiring clear zones as a prerequisite to federal participation in airport development.

While everyone agrees that runway clear zones are indeed desirable, the adoption of the present CAA policy thereon presents serious problems to the operators of existing airports. Airport operators have protested the adoption of this policy as unauthorized, unnecessary and unduly burdensome. Their position is summarized as follows:⁴

1. By requiring "clear zones" as a condition precedent to any substantial improvement on an existing airport the CAA is
 - a. removing management prerogative from the airport operator as to the priority needs of his airport development
 - b. artificially boosting land costs by putting the highest priority on land acquisition
 - c. creating an obvious situation of friction by the exclusive determination by the CAA as to what is "substantial," "practical" and "feasible."
2. Although the "Doolittle Report" only recommended "clear zones" for dominant runways on new airports, and that "cities go as far as practical" toward cleared areas and zone approaches at existing airports, the CAA has now used the Federal Airport Program as a club to require cities to first acquire clear zones before any substantial airport improvement can be done with federal funds.
2. The CAA's proposed policy is considered by many to exceed its statutory authority and power under the Federal Airport Act The protection of aerial approaches has heretofore been regarded as protection to aircraft in flight and is adequately taken into account in CAA Technical Standard Order N-18; but the CAA has now combined it with "clear zones," which the Doolittle Report and Commerce Department philosophy previously has related only to protection of people on the ground.
4. The CAA has provided no . . . justification . . . for their current emphasis on land acquisition; nor is there evidence in the legislative history of the recent amendment to the Federal Airport Act indicating concern on the part of Congress or the CAA in this matter.

Because airport operators have serious doubts as to the validity and desirability of CAA clear zone policy, the operators find themselves in a difficult position when processing applications for federal aid. Some airport operators are happy to comply with the requirements of

⁴ Letter from E. Thomas Burnard, Executive Director of the Airport Operators Council to James T. Pyle, Acting Administrator of Civil Aeronautics, dated November 1, 1956.

such policy since they are anxious to obtain federal aid for runway clear zone areas which they have decided are a priority need for their airports. Others who believe that the runway clear zone areas are unnecessary at their airports or who are unable to acquire such areas because of financial burden are unwilling to request a waiver of the requirement since the application for such waiver would be an admission that the CAA policy is valid and must be complied with. In addition many airport operators are fearful that the CAA policy which ties runway clear zones to safety requirements might be harmful to them in future litigation.

Since the CAA runway clear zone policy raises such serious questions of policy and principle, it is imperative that the CAA and the airport operators cooperate in the development of a new policy which will be acceptable to all concerned.

THE MUNICIPAL VIEWPOINT

BY J. KERWIN ROONEY

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I HAVE been asked to present the municipal viewpoint on the subject of the long-range protection of civil airport facilities in the jet age, and I shall touch upon the problems of acquisition, protection, zoning and extra-territorial aspects.

As to acquisition, California law provides that the right of eminent domain may be exercised in behalf of certain specified public uses, among which are public buildings and grounds, "airports for the landing and taking off of aircraft, and for the construction and maintenance of hangars, mooring masts, flying fields, signal lights and radio equipment." (Section 1238, Code of Civil Procedure) Also, airspace above the surface of property or an air easement in such airspace may be acquired by a county, city or airport district if such taking is necessary to protect the approaches of any airport from the encroachment of structures or vegetable life of such height or character as to interfere with or be hazardous to the use of such airport. (Section 1239.2, Code of Civil Procedure) In addition, where necessary to protect the approaches of any airport from the encroachment of structures or vegetable life of such a height or character as to interfere with or be hazardous to the use of such airport, land adjacent to, or in the vicinity of, such airport may be acquired under this title by a county, city or airport district reserving to the former owner thereof an irrevocable free license to use and occupy such land for all purposes except the erection or maintenance of structures or the growth or maintenance of vegetable life above a certain prescribed height. (Section 1239.4, Code of Civil Procedure)

Other statutes provide that whether governed under general laws or charter, a local agency (and that includes a city) may acquire prop-

erty by purchase, condemnation, donation, lease, or otherwise for airport purposes and may use any real property which it owns or acquires within or without its limits as a site for an airport; that it may erect and maintain hangars, mooring masts, flying fields, and places for flying, take-off, landing, and storage of aircraft, together with signal lights, radio equipment, service shops, conveniences, appliances, works, structures, and other air navigation facilities, now known or hereafter invented, of such number and character and in such places as may be necessary or convenient. (Government Code, Section 50470) It should be noted that the acquisition of the property or facilities may be inside or outside of the city limits.

In the case of Oakland, reliance can also be placed upon certain provisions of the City Charter authorizing the Board of Port Commissioners to exercise the power of eminent domain for port purposes, which includes airport purposes.

As to zoning, in 1953 the State Legislature enacted a new law known as the "Airport Approaches Zoning Law." (Government Code, Sections 50485 *et seq.*) The act defines an "airport" as any area of land or water designed and set aside for the landing and taking off of aircraft and utilized or to be utilized in the interest of the public for such purposes, and an "airport hazard" as any structure or tree or use of land which obstructs the airspace required for the flight of aircraft in landing or taking off of aircraft. The statute contains the following declaration of legislative policy:

"50485.2. Declaration of policy. It is hereby found that an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity and also, if of the obstruction type, in effect reduces the size of the area available for the landing, taking off and maneuvering of the aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein. Accordingly, it is hereby declared: (a) that the creation or establishment of an airport hazard is a public nuisance and an injury to the community served by the airport in question; (b) that it is therefore necessary in the interest of the public health, public safety, and general welfare that the creation or establishment of airport hazards be prevented; and (c) that this should be accomplished, to the extent legally possible, by exercise of the police power. It is further declared that both the prevention of the creation or establishment of airport hazards and the elimination, removal, alteration, mitigation, or making and lighting of existing airport hazards are public purposes for which a city or county may raise and expend public funds and acquire land or property interests therein."

The statute goes on to provide in detail for the effectuation of that policy by the twin devices of zoning and eminent domain. This new statute is a step in the right direction and constitutes growing recognition of the problem at a high level of government.

A most timely and informative article upon the subject under discussion appears in the September 1956, issue of the *Municipal Law*

Journal, a monthly survey published by the National Institute of Municipal Law Officers. Its title is "Airports—Effect of Jet Aircraft on Development." Portions of that article are as follows:

"The effect of jet aircraft on the development of airports and on adjacent residents and properties has produced a considerable number of thought-provoking articles lately. One of the big problems, and one of major concern to city attorneys, is the effect the jet age will have on property values and zoning near airports.

"The American Society of Planning officials reports that about one-third of the 205 airports that will receive grants this year from the Federal Aid Airport Program will use at least part of the funds to acquire land for clear zones at the end of runways. These zones will be areas, extending outward from the ends of runways for approximately a half mile, that will be made free from houses, other buildings, trees, fences or anything that projects into the airspace above the area. These approach zones will vary in width but generally will be approximately 1,000 feet wide. The Civil Aeronautics Administration has stated that it will permit airport operators, and this of course includes municipalities that operate their own airport, to make agreements with owners of nearby land controlling the erection of would-be obstructions when they cannot take title to the land so long as the agreements provide adequate safeguards for aviation interests in the control of these approach surfaces. The Doolittle Commission of 1952 not only recommended this *clear area* but also suggested that these approach zones consist of a *controlled area* extending at least two miles beyond the half mile clear zone. Most of the lives lost in aircraft accidents, aside from those in the airplane, were in this area extending out from the end of the runway. Many authoritative sources have stated that jet aircraft will extend danger areas at the end of runways because of their need for longer runways in both landing and taking off and because of the slow rate of climb characteristic of some models immediately following take-off.

"Recommendations for the safety zoning include prohibitions against the location in this area of churches, hospitals, schools and other places where groups of people meet as well as restrictions on the location of residences in this area beyond the clear zone extending from the end of the runway

"Still another effect of the jet age that is of particular significance to city attorneys is the growing trend of cities to steer clear of agreements that would permit the use of local fields for both military and civilian traffic. The announced Presidential policy that there be joint military-civil use of airport facilities wherever possible was greeted with cheers by cities that owned facilities suitable for Air Force aircraft because of the anticipated additional revenue gained by the leasing of these facilities. However, tremendous increases in civil air traffic and the additional problems added by military jet aircraft have caused more and more jointly operated fields to conclude that joint use 'wherever possible' is a wonderful thought, but it is not possible at their particular airport Jets often require traffic priority because of their fast rate of fuel consumption and this has caused commercial airlines attempting to maintain schedules to protest joint use."

To sum up the municipal viewpoint, it seems to me that the local agency, as the owner and operator of the airport facilities, may have

an obligation, the extent of which has not been precisely defined, entirely aside from the requirements of the Civil Aeronautics Administration, to provide a landing field and areas adjacent thereto used for approaches and take-offs which are both adequate and safe for aircraft presently in use and those which it can be anticipated will be in use in the near future.

THE COUNTY VIEWPOINT

BY HAROLD W. KENNEDY

County Counsel, Los Angeles County; Chairman, Legal Advisory Committee of the County Supervisors Association of California.

AMERICA is already in the jet age. It is important therefore that public officials representing Counties, Cities, and the State Legislature, airport management, and lawyers who have specialized in the field of public law, face up to the problems resulting therefrom. In order to keep pace with the demands of the commercial airlines and the rapidly expanding number of persons flying private planes, in a practical and realistic way progress is made to probe the extent to which police power can be used to protect not only the areas immediately adjacent to airports and runways, but the approaches thereto.

Many cities and counties throughout California and other states in the Union are making plans for the expansion of existing airports, or the acquisition of new airports, and are busily engaged in the important business of preparing plans and specifications for airport facilities and runways that adequately meet the needs of the latest and most modern type of aircraft. Many such agencies are engaging in educational campaigns to secure support for the issuance of bonds in order that well organized airport facilities may be made available.

During my experience in the Los Angeles County Counsel's office, I have personally tried a large number of eminent domain cases. In addition to this practical experience in the field of acquiring property by eminent domain, I still carry with me the impact of an exercise of the police power which I witnessed while attending the University of California at Berkeley as a law student. There, I personally observed firemen dynamiting four-story buildings in the great Berkeley fire. I have never forgotten the spectacle of seeing one citizen's property being destroyed that another's might not be harmed, within the framework of police power.

In order that you may know, at the outset my basic thinking on this problem, I will state a summary. I believe that an airport zone which goes beyond a reasonable-use restriction which purports to utilize an exercise of the police power for the purpose of acquiring *for the general public the right to use the airspace immediately above privately owned land*, is an invalid exercise of police power, and that the necessary effect of such zone is a taking within the principles of

eminent domain, requiring under the Constitution "just compensation."

Before discussing the airport zone, however, I should like to present the approach recently used by the County of Los Angeles in solving the problem of protecting airport approaches from dangerous electrical power line obstructions. The County Counsel's office believed that many difficult legal problems existed, and that the most effective way to obtain the desired objective was by way of mutual agreement.

Thus, in October of 1956, the Los Angeles County Board of Supervisors adopted an order referring to the Chief Administrative Officer, the County Engineer, and the County Counsel for report and recommendation, the application of the Southern California Edison Company for a 50-year franchise. On October 22, 1956, we wrote to the Board of Supervisors as follows:

"It is our unanimous recommendation that the County should go as far as legally possible, by police power regulation, to prohibit the future erection of obstructions to air navigation in the vicinity of both publicly and privately owned airport runways. In that connection we would recommend that the County Counsel be instructed to give careful consideration to the legal problems involved and submit to the Board for your further consideration such recommendations as in his opinion will be legally effective to implement the foregoing recommendation.

"However, it is recognized that the police power of the County is only effective in the unincorporated areas of the County and any ordinances adopted by the Board on this subject would not be operative within the 49 cities of the County. Even in the unincorporated territory the County's authority to deal with the problem may be somewhat circumscribed by existing constitutional limitations.

"Inasmuch as a franchise is a contract neither the nature nor the extent of the regulations which can be included therein are subject to the limitations which exist with respect to the exercise of the County's police power. It is possible to include in the franchise provisions which are operative within cities and which require compliance with conditions which could not be imposed pursuant to the police power."

The Board of Supervisors carried out the recommendations and enacted a very satisfactory ordinance, which probably is an innovation in a public utility franchise:

THE LOS ANGELES COUNTY FRANCHISE PROVISIONS

"SECTION 44. As used in this ordinance 'airport' means any:

- (a) Publicly owned airport.
- (b) Privately owned airport from which military aircraft are permitted to operate and which is of significant military importance as determined by the Department of the United States.
- (c) Privately owned airport which is used as a landing area by scheduled commercial airlines certified by the Civil Aeronautics Board or by commercial airlines operating under a valid certificate issued by the Civil Aeronautics

Administration or by the federal agencies having jurisdiction over such matters.

Airport does not include any other airport.

"SECTION 44.1. The grantee shall not after the effective date of this ordinance construct, whether maintained pursuant to this franchise or otherwise, any pole, pole line, distribution or transmission tower or tower line, or substation structure in the vicinity of the exterior boundary of an aircraft landing area of any airport as defined in this ordinance either in the incorporated or unincorporated area of the County, in such a location with respect to such airport or airports and at such a height as to constitute an obstruction to air navigation, as an obstruction is defined in accordance with the United States Civil Aeronautics Administration Technical Standard Order N 18, as now or hereafter amended, or any corresponding rules or regulations of the United States Civil Aeronautics Administration.

"SECTION 44.2. The grantee shall submit to the County Engineer of the County one copy of plans and specifications for construction of any pole, pole line, distribution or transmission tower or tower line, or substation structure within two (2) miles of any exterior boundary of an aircraft landing area of any airport as defined in this ordinance either in the incorporated or unincorporated area of the County, before construction is commenced. The County Engineer shall, within 15 days after receipt of said plans and specifications, notify grantee as to his approval of the location and height of the proposed construction, or disapproval in the event said construction is not in compliance with Section 44.1.

"SECTION 44.3. The provisions of Section 44.1 shall not apply to the following:

- (a) In cases in which this franchise requires grantee to relocate, modify, rearrange or change any pole, pole line, distribution or transmission tower or tower line, or substation structure erected, constructed, installed or maintained by grantee pursuant to this franchise, the grantee may make such relocation, modification, rearrangement, or change so long as the height thereof is not increased, or if an increase in height is required by any ordinance, statute, rule or regulation or by such relocation, modification, rearrangement or change, such increase is not greater than so required.
- (b) Whenever the grantee finds it necessary to repair, alter, improve or replace any pole, pole line, distribution or transmission tower or tower line, or substation structure, or to install additional circuits thereon, whether erected, constructed, installed or maintained pursuant to this franchise or otherwise, the grantee shall have the right to make any such repair, alteration, improvement, replacement or addition so long as the height thereof is not increased.

"SECTION 44.4. Section 44.1 does not require the grantee to reroute, remove, relocate, rearrange, modify, alter, change, reconstruct, or place underground any pole, pole line, distribution or transmission tower or tower line, or substation structure maintained pursuant to this franchise or otherwise, upon the effective date of this ordinance, should it at any time be determined that any such works constitutes an obstruction to air navigation.

"SECTION 44.5. Section 44.1 does not require the grantee to reroute, relocate, rearrange, modify, alter, change, reconstruct, or place underground any pole, pole line, distribution or transmission tower line, or substation structure maintained pursuant to this franchise or otherwise, constructed after the effective date of this ordinance which has become an obstruction to air navigation if any such pole, pole line, distribution or transmission tower or tower line or substation structure was not an obstruction to air navigation at the time of its construction."

Thus, Los Angeles County was able to achieve the desired result by way of agreement. In the absence of an agreement, how far may the County go by way of a police power ordinance? Where is the line? When does an ordinance restricting the use of private property become a compensable taking? What is the formula that can stand the test of constitutional principles?

THE FORMULA

Unfortunately, the test, or formula, is not easy to state. There is no capsule within which to confine the problem, but the big social and legal problems have ever been thus. Many cases and text writers state that the difference between a police power interference with private property rights requiring no compensation and an interference which calls for "just compensation" under the principles of eminent domain, is one of degree, but it is the purpose of this paper to show that perhaps the true rule may be one which states a difference in kind and not of degree, and that the exceptions to the rule may then be explained upon the rule of *de minimis*.

DISTINCTION BETWEEN POLICE POWER AND EMINENT DOMAIN

Both the so-called police power and the power of eminent domain pertain to sovereign power,¹ and from a strictly academic standpoint, the power is the same. However, text writers and the courts commonly refer to these powers as if they were separate and distinct. The classification, although perhaps incorrect, is useful, and is most commonly used to designate a *result* rather than a test. Thus, when private property rights are restricted, if the restriction results from a valid exercise of the police power, the injury is non-compensable, but if the power of eminent domain is applicable, then just compensation must be paid. Adopting these terms or results for the sake of a working tool, the distinction between eminent domain and police power, al-

¹ *Jackman v. Rosenbaum Co.* (Pa.) 106 A. 238, 241, 263 Pa. 158; *Nashville Housing Authority v. City of Nashville, et al.* (Tenn.) 237 S.W. 2d 946, 949, 192 Tenn. 103; *Franco-Italian Packing Co. v. U. S.* (U.S.) 128 F. Supp. 408, 130 Ct. Cl. 736; *House v. Los Angeles County Flood Control Dist.*, 153 P. 2d 950, 25 C. 2d 384; *McGeehan, et al. v. Board of Levee Com'rs.* (La.) 115 So. 473, 165 La. 241; *State ex rel. Interstate Air-Parts, Inc. v. Minn.-St. Paul Metropolitan Airports Commission*, 25 N.W. 2d 718, 223 Minn. 175; *Cooper, et al. v. State*, 48 N.Y. S. 2d 212; *Utah v. Dickinson, et al.*, 88 N.Y. S. 2d 478, 275 App. Div. 120; *Fidelity Laboratories, Inc. v. Oklahoma City, et al.* (Okla.) 130 P. 2d 834, 191 Okla. 473; *Petition of Clinton Water Dist. of Island County*, 218 P. 2d 309, 36 Wash. 2d 284.

though difficult to state,² basically is this: When private property rights are *destroyed* for a proper governmental purpose, police power rules are applicable. When property is not destroyed, but is taken from the individual and conferred upon the general public *for the use* of the public, eminent domain principles are applicable.³ Thus, it becomes necessary to preliminarily decide two issues which are inherently present: (1) Is airspace property, and (2) If airspace is property, does the owner of the land own it?

DEFINITION OF PROPERTY

"Property has been well defined in *Spann v. Dallas*, 111 Tex. 350, 235, S.W. 513, 514; 19 A.L.R. 1387, as follows:

"'Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment, and disposal. Anything which destroys any of these elements of property, to that extent, destroys the property itself. The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right.'"

Thus, the right to use some portion of the airspace above the earth is property and so within the protection of the Fifth and Fourteenth Amendments of the United States Constitution, and the provisions of the California Constitution.

JUDICIAL APPLICATION OF AIRSPACE THEORIES

The cases are inconsistent as to the application of either the law of trespass or nuisance. The difficulty is said to be caused by conflicting views of the courts as to the applicable airspace theories. Some courts feel that if the landowner owns the airspace, then the airspace is realty and the law of trespass should be rigidly applied.⁴ Other courts feel

² *Ambler Realty Co. v. Village of Euclid*, (D.C. Ohio) 297 F. 307; *City of Des Moines v. Manhattan Oil Co.*, (Iowa) 184 N.W. 823, 193 Iowa 1096, 23 A.L.R. 1322; *Bronx Chamber of Commerce, Inc. v. Fullen, et al.* (N.Y.) 21 N.Y.S. 2d 474, 174 Misc. 524; *Appeal of White, et al.*, 134 A. 409 (Pa.) 287 Pa. 359, 53 A.L.R. 1215; *Town of Windsor v. Whitney, et al.* (Conn.) 111 A. 354, 95 Conn. 357, 12 A.L.R. 669; *Illinois Cent. Ry. Co., et al. v. Moriarity, et al.* (Tenn.) 136 S.W. 1053, 135 Tenn. 446; *Slack v. Building Inspector of Town of Wellesley* (Mass.) 160 N.E. 285, 262 Mass. 404.

³ *State v. Heller*, (Conn.) 196 A. 337, 123 Conn. 492, appeal dismissed, *Heller v. State of Connecticut*, 303 U.S. 627, 82 L. Ed. 1088; *State v. Hillman*, 147 A. 294, 110 Conn. 92; *Town of Windsor v. Whitney*, 111 A. 354, 95 Conn. 357, 12 A.L.R. 669; *State ex rel. Penrose Inv. Co., et al. v. McKelvey*, (Mo.) 256 S.W. 474, 301 Mo. 1; *Jackson v. Bell, Fire Prevention Com'r.*, 226 S.W. 207 (Tenn.) 143 Tenn. 452; *Illinois Cent. Ry. Co. v. Moriarity* (Tenn.) 186 S.W. 1053, 135 Tenn. 446; *City of Los Angeles, et al. v. Aitken, et al.* (Cal.), 52 p. 2d 585, 10 C.A. 2d 460; *City of Des Moines v. Manhattan Oil Co.*, 184 N.W. 823, 193 Iowa 1096, 23 A.L.R. 1322; *State, ex rel. Penrose Inv. Co., et al. v. McKelvey*, 256 S.W. 474, 301 Mo. 1; *Appeal of White*, 134 A. 409 (Pa.), 287 Pa. 259, 53 A.L.R. 1215; *Conger v. Pierce County, et al.* (Wash.), 198 P. 377, 116 Wash. 27, 18 A.L.R. 393; *U. S. v. Caltex*, 344 M.S. 149, 97 L. Ed. 157.

⁴ *Smith v. New England Aircraft Co.* (Mass.) 170 N.E. 385, 30 Col. L. Rev. 579; 78 U. of Pa. L. Rev. 902; 16 Va. L. Rev. 714; 270 Mass. 511; *Burnham, et al. v. Beverly Airways, Inc.*, 311 Mass. 628, 42 N.E. (2d) 575 (1942); *Rochester Gas & Electric Corp. v. Dunlop*, 148 Misc. 849, 266 N.Y. Supp. 469 (Monroe Co. Ct. N.Y. 1933); *Mohican & Reena v. Tobias*, 138 U.S. Av. R. 1, 235 C.C.H. Sec. 2303 (Super. Ct. Hampden Mass. 1938); *United Airports of California, Ltd. v. Hinman*, 140 U.S. Av. R. 1, 235 C.C.H. Sec. 1829 (U.S.D.C.S.D.).

that there is something a bit unreasonable in following the old rigid, common law concept of damages without injury, and so have refused to apply the trespass theory, but apply the nuisance theory.⁵

Proponents of the theory that airspace is not capable of private ownership point out that cases which apply the nuisance theory necessarily hold that private ownership of the airspace is not legally recognized, but whereas the cases indicate that the nuisance theory predominates judicial relief indicates that the landowner owns some property right, although perhaps ill-defined, in the airspace below normal flight altitudes.

AIRSPACE THEORIES

The ancient maxim of the common law: "Cujus est solum ejus est usque ad coelum et ab inferos," meaning, "He who owns the soil owns everything above and below from heaven to hell," has been applied in the United States in many cases. The maxim is said to have been set down by Lord Coke from Justinian's Digest of Roman Law. Blackstone then restated the maxim in his Immortal Commentaries. (See "Airports and the Courts" by Charles S. Rhyne, nationally recognized authority in the field of public law and general counsel of the National Institute of Municipal Law Officers, Washington, D. C.) Modernly, however, there are said to be five theories of airspace rights. Thus, various courts have held:

1. The landowner owns all the airspace above his property without limit;⁶
2. The landowner owns the airspace above his property without limit, but subject to a privilege of flight in the public;⁷
3. The landowner owns the airspace up to such height as is fixed by statutes, with flights under that height a trespass;⁸
4. The landowner owns the airspace to the extent to which it is possible for him to actually possess;⁹
5. The landowner owns only so much of the airspace as he actually occupies.¹⁰

In California and in other states, the second theory has been adopted.¹¹

⁵ *Gay v. Taylor*, 19 Pa. Dist. & Co. Rep. 31 (Ct. of Com. Pl. Chester Co. Pa. Sept. 8, 1932); *Warren Township School District No. 7, etc. v. City of Detroit*, 14 N.W. (2d) 134 (Mich. Sup. Ct. 1944). See also in re Matter of Petition of City of Detroit, 14 N.W. (2d) 140 (Mich. Sup. Ct. 1944). *Miles et al. v. Lee et al.*, 284 Ky. 39, 143 S.W. (2d) 843 (1940); *Mohican & Reena v. Tobias*, 138 U.S. Av. R. 1, 235 C.C.H. Sec. 2303 (Super. Ct. Hampden, Mass. 1938).

⁶ *Vanderslice et al. v. Shawn et al.*, 27 Atl. 2d 87 (Del. Ct. Chan. 1942).

⁷ *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 385.

⁸ *Thrasher v. City of Atlanta et al.*, 178 Ga. 514, 173 S.E. 817.

⁹ *Swetland v. Curtiss Airports Corp. et al.*, 41 F. 2d 929, U.S.D.C. Ohio 1930.

¹⁰ *Hinman v. Pacific Air Transport*, 84 F. 2d 755, (D.C.A. 9th 1936).

¹¹ P.U.C. Sec. 21402; *Anderson et al. v. Souza et al.*, 38 Cal. 2d 825, 243 P. 2d 497; *La Com v. Pacific Gas and Electric Co.*, 132 C.A. 2d 114, 281 P. 2d 894; *Strother et al. v. Pacific Gas and Electric Co. et al.*, 94 Cal. App. 2d 525, 211 P. 2d 624.

Public Utilities Code, Section 21402 reads:

"21402. Ownership of space above lands, etc. The ownership of the space above the land and waters of this State is vested in the several owners of the surface beneath, subject to the right of flight described in Section 21403."

and in the case of *La Com v. Pacific Gas and Electric Co.*, 132 Cal. App. 114, the court enunciated this rule:

"Primarily it should be stated that any aircraft flying over the land and the structures on the land of another is a trespasser. (*Strother v. Pacific Gas & Elec. Co.*, 94 Cal. App. 2d 525, 529 (211 p. 2d 624); Rest. Torts, Sec. 159.)

"A temporary invasion of the air space by aircraft is a privilege. So long as it 'does not interfere unreasonably with the possessor's enjoyment . . . it, is privileged.' (Rest., Torts, Sec. 159). These principles are stated in our Public Utilities Code which reads: 'Sec. 21402 . . . The ownership of the space above the land . . . is vested in the . . . owners of the surface beneath, subject to the right of flight described in Section 21403.' The latter section provides that 'Flight in aircraft . . . is lawful, unless at altitudes below those prescribed by Federal authority, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land'

"Manifestly the plane here having been operated at an altitude which was dangerous 'to persons or property lawfully on the land' was a trespasser on the land. Therefore plaintiffs' remedy, if any, must be based wholly on the issue whether the electric wires were 'lawfully on the land.'"

THE RULE OF REASONABLENESS

Before drawing a conclusion as to the precise nature, extent or existence of the landowner's ownership of the airspace, a return to basic principles of our Anglo-American jurisprudence is essential. Our law is a living, dynamic thing. The strength of the common law system is found in that delicate balance which is established somewhere between the principle of *stare decisis*, created by the need for rigid precedent, and the flexibility of overruled or distinguished cases, created by robust and changing economic, social and political forces. The holding of the case and all of the language used by the court in arriving at its decision, must be read and understood in the light of the precise issue then before the court. Applying this principle to airspace cases, "high flying" cases, are not authority for "low flying" cases.

In the recent case of *Gardner v. County of Allegheny*, 382 Penn. 88 (1955); 141 Atl. 2d 491, the court in reviewing many of the leading cases pertaining to airspace controversies, and in following and applying the leading case of *United States v. Causby*, 328 U. S. 256, 66 S. Ct. 1062, *infra*, stated at page 504:

"The Supreme Court of the United States in *United States v. Causby*, 328 U. S. 256, 66 S. Ct. 1062, *supra*, specifically decided

that flights which are so low and so frequent as to be a direct and immediate interference with the usefulness of the land, constitute a 'taking.' In that case the Court said, 328 U. S. at pages 260, 261-264, 266, 66 S. Ct. at page 1065: 'I. The United States relies on the Air Commerce Act of 1926, 44 Stat. 568, 49 U.S.C. Sec. 171, 49 U.S.C.A. Sec. 171, as amended by the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U.S.C. Sec. 401, 49 U.S.C.A. Sec. 401.' Under those statutes the United States has "complete and exclusive national sovereignty in the air space" over this country. 49 U.S.C. Sec. 176 (a), 49 U.S.C.A. Sec. 176 (a). They grant any citizen of the United States "a public right of freedom of transit in air commerce through the navigable air space of the United States." 49 U.S.C. Sec. 403, 49 U.S.C.A. Sec. 403. And "navigable air space" is defined as "airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority"*** the United States conceded on oral argument that if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment*** If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.

"We agree that in those circumstances there would be a taking. Though it would be only an easement of flight which was taken, that easement, if permanent and not merely temporary, normally would be the equivalent of a fee interest. It would be a definite exercise of complete dominion and control over the surface of the land. The fact that the planes never touched the surface would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate. The owner's right to possess and exploit the land—that is to say, his beneficial ownership of it—would be destroyed***

"*The fact that the path of glide taken by the planes was that approved by the Civil Aeronautics Authority does not change the result.****

"We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. See *Hinman v. Pacific Air Transport*, 9 Cir., 84 F. 2d 755. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. *As we have said, the flight of airplanes which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it.****

"The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is a part of the public domain. We need not determine at this time what those precise limits are. 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.***'

"(15) It is clear as crystal under the authority of *United States v. Causby* that flights over private land which are so low and so frequent as to be a direct and immediate interference with the enjoyment and the use of the land amount to a 'taking.'"

California courts appear to be directly in accord with the *Causby* case cited in *Gardner v. County of Allegheny*, *supra*. In *Anderson v. Souza*, 38 Cal. 2d 825, at page 838 appears this significant language:

" 'Further, as to the effect of regulations concerning flying operations, it has been held that such regulations do not determine the rights of the surface owners as to nuisance. (*Swetland v. Curtiss Airports Corp.*, (C.C.A. Ohio) 55 F. 2d 201, 203 (33 A.L.R. 319)), a ruling which is in line with the general principle above stated that permits and licenses are not to be considered as granting leave to maintain a private nuisance. It is not controlling that the federal government has declared that the United States of America possesses and exercises complete and exclusive national sovereignty in the air space above the United States (U.S.C.A., title 49, Sec. 176a) and that our Legislature has said "It is further declared that sovereignty in the space above the lands and waters of this State is declared to rest in the State, except where granted to and assumed by the United States pursuant to a constitutional grant from the people of the State" (State Aeronautics Com. Act, Sec. 2 (b)), for it must be said that these declarations were not intended to and do not divest owners of the surface of the soil of their lawful rights incident to ownership.

" "There is no definite yardstick that may be used in determining how low an airplane may fly over the property of others in landing or taking off; however, flying at low altitudes incident to landing and taking off may constitute trespass, as it may cause more than mere apprehension of injury. And, extensive low flying, causing unreasonable annoyance to occupants of land below, is a substantial interference with enjoyment of the property." (*Brandes v. Mitterling*, 67 Ariz. 349 (196 P. 2d 464).) "

Thus, the cases indicate that the courts recognize private ownership of the airspace but that the familiar *de minimis* rule will be applied. The net result appears to have reached the pinnacle of reasonableness, and may aptly be referred to as "the rule of reasonableness."

The application of the rule demands an analysis of the specific objectives of the particular zone under consideration. Thus, it becomes essential to determine the *effect* of the airport zone on the property right restricted. Is the restriction more like the destruction of a property right restricted? Is the restriction more like the destruction of a property right, or is it more like the condemning of an airspace easement for the *use* of the general public?

AIRPORT ZONES DISTINGUISHED FROM OTHER ZONES

In typical zoning cases, the owner of the land is denied a particular use, but notice, *not only is the property owner denied this use, but the use is denied to the general public also!* Compare this with an airport zone which seeks not only to impose height restrictions, but also to

confer a privilege of use upon the airport or general public. The use is denied the property owner. The property owner cannot use the airspace above his land, but the right is not destroyed. *The right to use the airspace is conferred upon the general public.* Were it not for the airport zone, the right to erect buildings would have a substantial economic value. *The landowner is prohibited from making a profitable use of his property.* Were it not for the airport zone the airport would be forced to expend substantial sums for the acquisition of airspace easements. *The landowner's economic loss is the airport's economic gain.*

The result appears to partake of the characteristics of an airspace easement. But if the case is so clearly one demanding the application of eminent domain principles, then why is the police power approach so often mentioned? A working knowledge of our legislative bodies reveals the cause to be the existence of a basic conflict between two pressures.

THE BASIC CONFLICT

The amount of money expended by any governmental unit is peculiarly subject to public review and criticism. Office holders are ever on the alert to point to a maximum of accomplishment with a minimum of expenditure. On the local level, the pressure to hold down expenditures is accelerated because of the closer, more intimate and democratic contract between the elector and the official, but an equally strong counter pressure demands that the administration perform difficult feats of financial management.

Thus, in determining whether a particular instance falls within the scope of police power, or within the range of eminent domain, a very natural and human tendency of responsible public officials is to consider the *amount of money involved*. Despite the commendable motive to save money, the governing body should remember the words of Justice Oliver Wendell Holmes contained in *Pennsylvania Coal Co. v. Mahon*, 67 L. Ed. 322, 260 U. S. 393, 28 A.L.R. 1321, pronounced in 1922:

"The protection of private property in the 5th Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the 14th Amendment. *Hairston v. Danville & W. R. Co.*, 208 U. S. 598, 605, 52 L. Ed. 637, 639, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008. *When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears.*

"The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule (416), whether they do not stand as much upon tradition as upon principle. *Bowditch v. Boston*, 101 U. S. 16, 26 L. Ed. 980. In general it is not plain that a man's

misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. *Spade v. Lynn & B. R. Co.*, 172 Mass. 488, 489; 43 L.R.A. 852, 70 Am. St. Rep. 298, 52 N.E. 747, 5 Ann. Neg. Rep. 368. *We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.* (Emphasis added)"

Since the words of Justice Holmes, we have arrived at a fork in the road. One prong leads to the recognition and protection of private property rights. The other leads to the possible public ownership of all property. Americans everywhere, lawyers, judges, legislators and laymen, must decide which road to take.

THE NECESSITY OF FACING BASIC ISSUES

The very slight review which a court can make of a local ordinance, places tremendous power in the local governmental unit. The *motive* of the legislative body is not subject to judicial review. The necessity or reasonableness of the ordinance is, in actual practice, virtually conclusive and

"... Except where the court can say, in the light of facts properly brought to its knowledge, that a police regulation has no just relation to the object which it purports to carry out and no reasonable tendency to preserve or protect the public safety, health, comfort or morals, the decision of the legislative body as to the necessity or reasonableness of the regulation is conclusive. . . ."

(*In re Jones*, 56 Cal. App. 2d 658, at page 665.)

Thus, the power of a local legislative body is illustrated as being, in many possible instances, checked only by the extent to which public officials are willing to squarely recognize and meet the basic issues.

THE RESPONSIBILITY OF PUBLIC OFFICIALS TO PROTECT PRIVATE PROPERTY RIGHTS

In deciding, in a close case, whether compensation must be paid for an official interference with a private property right, it is impossible to ignore basic considerations. *The greatest single distinguishing feature of the American political and legal system is the recognition and protection of private property rights.* Despite an ever-increasing recognition of social welfare needs, private property rights must be jealously guarded if the American system is to be maintained.

American public officials are charged with the solemn duty of upholding state and national constitutions. It would seem to follow that if it is not clear whether compensation must be paid for an official interference with a private property right, a decision should be made which tends to uphold the Constitution.

Thus, viewing the problem from the traditional American capitalistic, free enterprise system, unless the legal question is free from

doubt, public officials should act on the conservative side, the Constitutional side tending towards the protection of private property rights rather than their diminution.

ZONE VALIDITY WHERE PRIVATE OWNERSHIP OF AIR SPACE IS RECOGNIZED

California has a statute, Government Code Section 50485, through 50485.14, which authorizes any city or county to establish airport zones. Stating, at the outset that the result authorized by the statute is constitutional and reconciling it with this article, effectively outlines the extent to which zoning principles may be validly applied to the airport approach problem.

The term "airport zone" was defined in this article as the term appears to be understood by many lawyers and laymen alike, *i.e.*, that the "airport zone" prevents obstructions in the air space surrounding an airport which result allows airplanes to use that air space in landings and takeoffs. The preceding comparison of an airport zone with other zones revealed that the objectionable feature of the airport zone was the use by the airport or the general public of the air space immediately above privately owned land. Thus, if this feature is eliminated, it becomes profitable to examine the validity and effect of the remainder.

A literal reading of the California statute illustrates that there is nothing in the statute itself which purports to confer upon the public or airport any privilege to use the air space. The statute authorizes local agencies to restrict the property owner in the use of his land—the landowner may be prohibited from using a portion of his air space for the erection of structures which exceed a specified height, but the authority conferred by the statute terminates at this point—the *statute does not authorize low-flying aircraft to use the now safe air space.*

Applying the "use" versus "destruction" test to this analysis indicates that the sovereign appears to have destroyed the right rather than to have appropriated it for general use. Thus, the statute falls within the principles of police power rather than eminent domain, and, if the statute is otherwise valid, the landowner is not entitled to compensation.

In determining the validity of the statute, it appears that it may be supported as a typical and traditional example of an area within which police power acts are proper and constitutional—the safety of the people. It may be urged that the legislators recognized that airplanes in fact use the air space immediately above privately owned land and that obstructions in the air space are dangerous, both to the property owner and to members of the general public.

So examined, the statute is placed on familiar and traditional police power footing. Thus, the landowner is not entitled to compensation for the necessary effect of the zone, *but he still retains ownership of*

his air space, and, as a corollary, the landowner has a cause of action for an invasion which, under the rule of reasonableness, results in actual damage.

CONCLUSION

This article has attempted to draw the line between police power and eminent domain and to apply that distinction to an airport zone. The final analysis indicated that the retention in the landowner of a cause of action for an invasion of privately owned air space delineates the permissible boundaries of a valid airport zone. This conclusion is in line with the decided cases and appears to be legally and logically sound, but further it seems to equitably reconcile the conflicting interests. The life and property of a landowner is in fact protected. The life and property of those persons invading the air space is in fact protected. Traditional, constitutionally protected private property rights are in fact protected. Legislative bodies have in fact acted to check the swing away from the recognition of private property rights and, in so doing, have acted according to the mandate of the United States and California Constitutions. Air travel industries will continue to progress, *and airport approaches will in fact be protected.*

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THE FEDERAL VIEWPOINT

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IN this somewhat brief treatment I will try to present the CAA viewpoint and policy for encouraging the acquisition of runway clear zones in connection with the Federal-aid Airport Program. This is presented in three parts: (1) the background leading up to the clear zone policy, (2) a discussion of what a runway clear zone is, and (3) an outline of what CAA policy is under the Federal-aid Airport Program.

At the outset I want to stress that the objective of the Federal-aid Airport Program is the development of a national *system* of airports. In carrying out the Program, the over-all national, rather than purely local interest, is of first importance.

BACKGROUND RELATING TO RUNWAY CLEAR ZONES

Long-standing policies of the CAA have recognized the desirability of protecting the usefulness of airport runways by acquiring land in

the airport approaches. The very early issues of the CAA Airport Design Manual, even as early as 1944, recommended property acquisition at least 1,000 feet from the runway ends. Subsequent revisions of the Design Manual contain similar recommendations. Legislative policy and direction to CAA on this general problem is included in the Federal Airport Act. The Act provides that, prior to approval of a project, among other things, the Administrator shall receive assurances in writing that the aerial approaches to the airport will be adequately cleared and protected by removing, lowering, relocating, marking, lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards.

In his reference to the Federal Airport Act, Mr. Goldstein expressed the view that the sanctions available to the CAA, by reason of the commitments received under a Federal-aid airport project and by limitations on air carrier use of airports, had been proved adequate to provide protection to the nation's existing airports. I disagree. I submit to you that the encroachment on the nation's public airports by reason of residential, commercial, and industrial developments; the necessity for the continual removing, marking, or otherwise mitigating threatened obstructions; and the very real problem of providing replacement airports at a considerable number of locations throughout the country substantiate the position that the provisions of the Federal Airport Act and the assurances received under projects have not been fully effective in maintaining greater approaches to the airports improved under the Program.

Attention was really first focused on the problem of runway clear zones in the Report of the President's Airport Commission issued in May of 1952. The Commission, which was headed by General Doolittle and commonly referred to as the "Doolittle Commission," was created, as you know, after the series of tragic accidents in the Newark, New Jersey, area. The Report included much discussion of airport approach problems and two specific recommendations regarding cleared runway extension areas. Recommendation No. 4 of the Doolittle Report stated: "The dominant runways of new airport projects should be protected by cleared extensions at each end, at least one-half mile in length and 1,000 feet wide. This area should be completely freed from housing or any other form of obstruction. Such extension should be considered an integral part of the airport."

In connection with existing airports, the Doolittle Commission recommended: "Existing airports must continue to serve their communities. However, cities should go as far as is practical toward developing the cleared areas and zoned runway approaches recommended for new airports. No further building should be permitted on runway extensions and, wherever possible, objectionable structures should be removed. Operating procedures should be modified in line with Commission recommendations for minimizing hazard and nuisance to persons living in the vicinity of such airports."

I think it is an accurate statement to say that the so-called runway clear zone of which we speak today is an outgrowth and refinement of the so-called cleared runway extension area referred to in the Doolittle Report.

You will recall that at the time the Doolittle Report was published, the Federal-aid Airport Program was in a greatly reduced state and its future was uncertain. It is perhaps for that reason that the Commission recommendations regarding cleared runway extension areas were not more widely discussed at that time by the owners and operators of the nation's public airports. The Report of the Doolittle Commission was extensively studied by the intergovernmental aviation committee, the Air Coordinating Committee. A rather extensive report was published by the Air Coordinating Committee, which report was titled "Airport Safety" and which was issued in July of 1954. The Doolittle Report had recommended that Federal aid to airports should be implemented by adequate appropriations, and highest priority in the application of Federal aid should be given to runways and their protective extensions. As a member of the Air Coordinating Committee, the Department of Commerce concurred in this recommendation of the Doolittle Commission and was committed to carry out the Federal-aid Airport Program in accordance with this recommendation.

In connection with the implementation program issued by the Air Coordinating Committee, the Department of Commerce was further committed to a policy of recommending the inclusion of cleared runway extension areas in all new airport sites of a service type of Feeder or larger, with such inclusion mandatory for all new airports of this size developed under the Federal-aid Airport Program. In connection with existing airports, the Department was also committed to apply the mandatory provision for cleared runway extension areas to existing airports of a service type of Feeder or larger to the extent feasible at each location.

Again, I think that the published implementation program of the Air Coordinating Committee and the commitments made by the Department of Commerce were not given particular consideration by the airport industry generally because at that time the Federal-aid Airport Program had not reached its reactivated status.

At this point I believe it is appropriate to observe that for some 15 years prior to 1954, the CAA had been encouraging the acquisition of approach areas adjacent to the ends of runways in the conduct of its Airport Advisory Services and for some 7 or 8 years in connection with the administration of the Federal-aid Airport Program. However, the Doolittle Report and implementation programs decided upon as an aftermath of that Report emphasized the point that the promotional efforts of CAA toward acquisition of runway approach areas had not been effective to the extent desirable and that it was considered appropriate that more effective action for acquiring areas in the immediate approaches to airport runways should be taken in connection with

the administration of the Federal-aid Airport Program. This was the situation when the Federal-aid Airport Program was reactivated in 1955.

RUNWAY CLEAR ZONE — DEFINITION AND PURPOSE

Now let us consider the question of what a runway clear zone actually is. In other words, what's the nature of this beast that we have been talking so much about?

The CAA looks upon a clear zone as an open area at the ends of runways or landing strips within the inner approach area of a runway or landing strip, owned or controlled by the agency which owns or operates the airport, generally cleared to the ground, and otherwise free from objects, including terrain, which constitute obstructions. We do not regard the runway clear zone as an "overrun area" or "landing strip extension" in the same sense as those terms are applied to a military airport. From our standpoint, there is no requirement to grade the area except for the purpose of removing an obstruction. At the same time, we recognize that, ideally, a level area will further contribute to the safety of aircraft. Therefore, where a sponsor proposes to grade the area, the CAA considers the work eligible for Federal participation so long as the cost appears within reason. We further recognize that if the runway clear zone is fully cleared, leveling operations including stump removal and the filling of ditches will enhance safety and are eligible project costs. Public highways within the runway clear zone area are not considered objectionable so long as such roads comply with CAA standards for highway clearances.

As I mentioned before, when we speak of a runway clear zone we are thinking of the inner portion of the approach area to a runway or landing strip. The CAA proposes that the standard length of a runway clear zone shall be sufficient so as to normally provide 50-foot clearance over existing terrain. I believe the desirability of affording 50-foot protection is particularly appropriate for consideration in view of the statements made by Mr. Goldstein pointing out that the situation of the Causby case may become more common in the jet age and his citing of the Baltimore zoning case and expressing grave doubts as to effectiveness of height limitation zoning to provide close-in protection for airports. The standard published dimensions are based on flat terrain in a runway approach. Thus the length of a standard clear zone for an instrument runway extends for 2,700 feet from the runway end. We recognize, however, that in most instances the terrain in a runway approach is, in fact, not flat. Consequently, we are proposing to clarify our policies and provide that the length of the runway clear zone may be shortened in instances of descending terrain so long as a 50-foot clearance over flat terrain is afforded. We recognize also that the so-called standard configuration of runway clear zone will seldom be acquired since the problems of land acquisition or purchase of entire parcels and the following of existing property lines, together with the question

of man-made objects such as roads or natural features such as streams will result in variations of the dimensions of a runway clear zone.

CAA POLICY AND REQUIREMENTS IN ADMINISTRATION OF THE FEDERAL-AID AIRPORT PROGRAM

Precisely what is and shall be the policy of the CAA for requiring acquisition of runway clear zones for those airports proposed to be developed and improved under the Federal-aid Airport Program?

First, let's look at the policy as applied to new airports. As I have mentioned earlier, in 1954 the Department of Commerce agreed to a requirement that runway clear zones be included for eligible runways, on all new airports, developed under the Federal-aid Airport Program. Such a policy was announced specifically in connection with the reactivated Program in Fiscal Year 1955 and has been continued in connection with the '56 and '57 Programs. Our experience in connection with new airports since the announcement of the 1955 Program has, at least so far, demonstrated that it is entirely reasonable and practical that the acquisition of new airport sites include sufficient land to provide clear zones for eligible runways.

A considerably more difficult question arises in connection with the development of new runways on existing airports, the extension of existing runways, or other improvement to existing airports. The basic policy as established by the Department of Commerce in connection with existing airports is to apply the requirement for runway clear zones to the extent practical and feasible at each location. Obviously, words such as "practical" and "feasible" can't be precisely defined, will vary with individual cases, and require application of good judgment. Reasonable, responsible individuals may honestly differ over what is feasible and practical in a particular case. However, when reasonable, responsible individuals take a positive approach to the problem, understanding and agreement should be reached without any charge of arbitrary action on the part of either.

This problem, as you can well imagine, has been discussed at great length within the CAA. We recognize fully that the nation's public airports are owned and operated for the most part by local political subdivisions. We recognize also that in improving airports under the Federal-aid Program, there are as much or more local funds expended as there are Federal funds. At the same time, we are fully conscious of our objective of development of a nation-wide system of airports adequate to meet the needs of civil aviation.

Our solution to this problem of what is practical and feasible for a particular airport is (1) to develop some fairly specific national requirements; (2) to delegate the authority for administering those requirements to the Regional Administrators, for they are more familiar with the circumstances and practical problems relating to individual airports; and (3) to further authorize Regional Administrators to

modify requirements to the extent they deem reasonable to meet a local situation. We are trying now to state policies and give guides to our regions so that action of all regions will be consistent.

The policy adopted by the CAA in connection with acquisition of runway clear zones, when improvements to existing airports are proposed, may be stated as follows:

1. When an entirely new runway is constructed on an existing airport, we look at such runway almost as if it were on a new site, and if it is good business to protect a new investment in the new site, it would seem just as important to protect a new major investment on the old site. We propose that every reasonable effort should be taken to acquire runway clear zones for new runways and that we be cautious in participating in an entirely new runway without such being protected by fully adequate clear zones.
2. When an extension or other improvement is made to an existing runway, we propose that runway clear zone acquisition should be accomplished to the extent practical and feasible, placing somewhat less importance on this situation than if an entirely new runway were being developed.
3. In those instances where a major nonrunway expenditure is proposed on an airport, such as a new administration building on one of our major airports, we also propose that the clear zone situation be examined and that the runway clear zone for the dominant runway of the airport should be acquired when it is reasonably possible to do so. Again, it merely comes back to the question of sound business judgment and prudent action in expending a substantial amount of public funds without getting all reasonable assurance that the investment will be protected and will accomplish the result intended.

We thus have the situation that the degree of tolerance of application of the runway clear zone policy will vary between new and existing airports. A more rigid application of the policy can be expected to apply to a new airport and we propose that the initial land acquisition for a new airport include clear zones for all eligible runways. On existing airports the requirements for runway clear zone must naturally be applied with more tolerance, or, in other words, applied to the extent practical and feasible in the individual circumstances.

In determining what is practical and feasible for a particular airport, a number of factors, as appropriate, are considered. The factors which will most frequently affect the decision at an individual location may be briefly listed as follows:

1. Type and degree of use made of the airport, both now and in the future.
2. Nature and cost of the work being proposed.
3. Nature and use of terrain in the approaches.
4. Existing approach protection, particularly easements and zoning.

5. The practical problems relating to a specific airport of which the usual one is economic.

The real problem of acquiring clear zones for an existing airport usually is economic. We know that many locations have been planning specific airport development such as a new runway or a new terminal building and in many cases have completed financing arrangements to undertake the development. In many of these cases no consideration was given to the matter of runway clear zones and there is thus a shortage of local funds to do both the airport improvement and acquire the land for clear zones. In many other cases, the existing airport is almost completely surrounded by residential, commercial or industrial buildings and the acquisition of a runway clear zone will be most expensive. In some cases, admittedly, acquisition is either beyond the capability of the local airport owner or cannot be economically justified. We say these cases must be looked at individually. A cost that may be definitely excessive at a Trunk airport in a moderate size community might be reasonable for an intercontinental airport in a major community. Obviously, the economic factor is a major one to be considered along with all the other factors relating to a particular airport.

When you go into the matter, however, land will sometimes be found to cost less than you expected. All we are proposing is that none of us adopt an ostrich attitude toward the problems of clear zone acquisition but, instead, face the problem and study, with a positive attitude, those courses of action and things that can be done to afford the airport the greatest reasonable degree of protection. Sometimes we have seen proposals from sponsors which looked like an attempt to show that nothing whatsoever could be done about the problem of clear zones rather than an attempt to see what could be done.

COMMENTS ON CRITICISMS OF CAA POLICY

Mr. Goldstein indicated that airport operators oppose the position of the CAA regarding the acquisition of runway clear zones in connection with the Federal-aid Airport Program for three reasons, as follows: (1) CAA policies interfere with the prerogative of the airport operator, (2) these policies boost land values, and (3) the CAA takes arbitrary action in deciding what is practical and feasible at an individual location.

In commenting on these objections, I want to point out that when an airport qualifies for and receives Federal aid, it thereby gives up its purely local character and becomes a part of the national system of public airports. In becoming a part of the national system, some measure of local control must be given up; as for example, the airport construction must be undertaken in accordance with CAA standards and an airport master plan is required, with future development which may affect the safety and utility of the airport being undertaken

in accord with such master plan. Certainly, reasonable men cannot expect that the airport operator shall have the unlimited prerogative of determining what airport improvements are to be undertaken with Federal aid. We are all sufficiently practical to realize that when you want Federal aid, the Government will have at least some say as to what is done with that aid.

As to the charge that CAA policies are boosting land values, I can only say that I am unfamiliar with any location where this happened. Admittedly, there are usually problems in connection with acquiring land for airport expansion whether such expansion is needed for a new runway, a new building area, or a runway clear zone. The history of airport development, however, has shown a trend of continually rising land values in the vicinity of airports. That history leads to the conclusion that if there is vacant unimproved land near a public airport, it will never be any cheaper than it is today. What we are trying to say, in connection with the clear zone policy, is that each situation should be faced and a positive attitude taken of seeing what can reasonably be done under the circumstances.

As to the charge that CAA action in connection with clear zone acquisition is arbitrary, I can only leave this question up to you. This Conference is a pretty good cross-section of airport operators, and I sincerely hope and rather believe that none of you have experienced what could be classed as arbitrary action. I do not believe that any community which shall examine clear zone acquisition with the positive attitude of trying to see what can be done will ever accuse CAA of arbitrary action.

CONCLUSION

I was particularly heartened that near the end of Mr. Goldstein's discussion on runway clear zones, he made the statement that everyone agrees as to the desirability of the acquisition of runway clear zones. Actually, I think almost all airport owners and operators recognize the desirability of affording protection to the airport acquisition of runway clear zones; so often, however, they are thinking of some other airport than their own. Problems of clear zone acquisition should be examined for any airport, not just the other fellow's. If your airport is of sufficient importance to be a part of the national system and is thus needed to support the national economy in meeting the present and future needs of civil aviation, its full usefulness, protection, and perpetuation should be fully sought, and all reasonable steps to that end should be taken.