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THE POWER OF LOS ANGELES COUNTY TO REGULATE AIRCRAFT NOISE— OPINION OF THE COUNTY COUNSEL

THE Journal is happy to publish herewith the opinion of Harold W. Kennedy, Esq., County Counsel, Los Angeles County, relating to the legal power of the county to regulate the matter of aircraft noise. Because of the dominant position of Los Angeles County in regard to this problem, the opinion is of national interest.

—The Editors

Honorable Kenneth Hahn
Supervisor, 2nd District
501 Hall of Records
Los Angeles 12, California

Re: Power of County to regulate jet aircraft noise

Dear Supervisor Hahn:

By letter of September 21, 1959, you pose the following four questions:

"1. When the operation of jet aircraft in landing and taking off from the Los Angeles International Airport produces such excessive noise that the noise constitutes a nuisance of such magnitude that it seriously disrupts the normal life of a community, does the Board of Supervisors have the power to regulate the amount of noise which the jet aircraft can produce while passing over County unincorporated territory?

"2. If so, can the Board of Supervisors establish maximum decibel rating standards which must not be exceeded by these aircraft in order to fly over County unincorporated area?

"3. When the operation of jet aircraft under the conditions described above creates a serious hazard to the people living under the approaches and take-off areas through the increased danger of potential air crashes and by objects falling off of and from these aircraft, would the Board of Supervisors have the power to establish regulations for the flight of these aircraft over County unincorporated territory?

"4. Would the Board of Supervisors have the power to establish 'aerial rights of way' at prescribed heights?"

Your questions generally relate to two specific problems. First, whether or not the County has the power to regulate noise emanating from jet aircraft which pass over County unincorporated territory; and secondly, whether or not the County has the power to regulate the flight characteristics or patterns taken by aircraft over County unincorporated territory.

OPINION

It is our opinion that the County cannot regulate the noise emanating from jet aircraft or control the flight thereof by reason of the limitations imposed by the Supremacy of Federal regulations and power in this field.

ANALYSIS

1. *Power of County to regulate jet aircraft noise.*

In analyzing the first question posed, the initial inquiry must be directed to the existence and scope of the power of the County to regulate noise that interferes with the health, welfare and tranquility of its citizens.

By Section 11 of Article 11 of the California Constitution, the power to make and enforce within its limits "police" regulations has been granted to the County. This power has been defined by the Courts as "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominion." It includes "the regulation of the conduct of business, or the use of property, to the end that the public health or morals may not be impaired or endangered." *Laurel Hill Cemetery vs. City and County of San Francisco*, 152 Cal. 464, 1907. Affirmed in 54 L. Ed. 518.

There is no doubt that the annoyance and disturbance caused by low-flying airplanes can constitute a legal nuisance or cause such irreparable harm to a landowner that an injunction would lie. See *Anderson v. Sauza*, 38 Cal. 2d 825, 243 P. 2d 497 (1952).

It is also well settled that frequent low flights by planes owned by public entities which constitute a direct and immediate interference with the enjoyment and use of the land may constitute a "taking" within the meaning of the Fifth Amendment which would give rise to a cause of action in the land owner for compensation. *U.S. v. Causby* (1945) 328 U.S. 256, 90 L. Ed. 206. However, this power is not restricted to the suppression of nuisances. As stated by the Court in the *Odd Fellows Cemetery case*, 140 Cal. 231, "whenever a thing or act is of such a nature that it may become a nuisance, or may be injurious to the public health if not suppressed or regulated, the legislative body may, in the exercise of its police powers, make and enforce ordinances to regulate or prohibit such act or thing, although it may never have been offensive or injurious in the past. * * *"

There is no doubt that noise may be injurious to the public health and welfare if not suppressed or regulated. In *Haggerty vs. Associated Farmers of California*, 44 Cal. 2d page 60, (1955), the California Supreme Court had before it the "Fresno County anti-noise ordinance," which made unlawful "any loud or raucous noise upon or from any public highway * * * or from any aircraft of any kind whatsoever."

The Supreme Court is reversing the decision of the lower court which enjoined the enforcement of this ordinance, stated,

"The County, in the exercise of the police power of the State, has a legitimate interest in the preservation of the safety and tranquility of its citizens. It cannot be said that the present ordinance is not reasonably directed to that end."

This power was tacitly recognized by the Court in *Smith vs. Peterson*, 131 Cal. App. 2d 241, 280 P. 2d 522 (1955), when it upheld the constitutionality of Section 27150 of the California Vehicle Code, which provides that "every motor vehicle * * * shall at all times be equipped with an adequate muffler * * * to prevent any excessive or unusual noise. * * *"

It is apparent that the police power of the State and County have traditionally included the power to regulate or prohibit noise where such noise is offensive to the public health, safety or welfare.

The exercise of this power is, however, limited to those areas of the County outside the bounds of incorporated cities, *In re Knight*, 55 Cal. App. 511, and *ex parte Roach*, 134 Cal. 145, and thus there is no doubt that noises emanating within the confines of unincorporated territory would fall within the prohibition of an anti-noise ordinance. A question arises, however, as

to the applicability of such an ordinance to noise affecting the inhabitants of unincorporated County territory but which has its source elsewhere. This factual situation necessarily arises at Los Angeles International Airport which is within the City of Los Angeles but contiguous to unincorporated County territory. During the run-up and maintenance phases aircraft noise, although having its source within the City, affects residents in the unincorporated area of the County.

It is our opinion that the County would likewise have the power to proscribe by ordinance this noise. The rationale underlying the *Knight* decision supports this view. It was there expressed that the County does not have the power to enforce a penal ordinance within the bounds of a city on the ground that "there cannot be at the same time within the same territory two distinct municipal corporations exercising the same powers, jurisdictions and privileges." Under the facts above, however, the noise affects both jurisdictions, the incorporated and unincorporated, and since it would be an offense to the residents of each, the power to control would reside in each.

This principle was recognized by the Court in *People vs. Selby Smelting and Lead Company*, 163 Cal. 84 (1912). The Court upheld the judgment of the lower court enjoining the defendant from permitting fumes from its cement works in Contra Costa County to blow over and upon parts of Solano County, on the theory that the nuisance was the thing proscribed and that it existed within the jurisdiction of the Court although having its source elsewhere.

The power of the County pursuant to Article 11, Section 11 of the California Constitution, to regulate noise that adversely affects its residents, is clear. The question then becomes, has this power been limited or restricted in any manner with respect to the regulation of noise emanating from aircraft?

Article 11, Section 11 of the California Constitution is not only a grant of power to the County to make specified regulations but also contains a limitation on the exercise of such power by providing that the regulations authorized shall not be "in conflict with general law."

The question is immediately posed as to whether or not a general law exists at the State level which might possibly conflict with an ordinance of the County on the subject of control of aircraft noise. The rule is well settled that, a county or city may enact a regulatory ordinance if the State has not *affirmatively* acted evidencing an intent to occupy the field to the exclusion of the subordinate legislative body. *Ex parte Daniels*, 183 Cal. 636, 192 P. 442 (1920).

The principal State law relating to aircraft is the State Aeronautics Commission Act, Chapter 1379, Stats. 1947, found in the Public Utilities Code, Section 21,000, *et seq.*

The Act establishes the State Aeronautics Commission and grants it power to make rules generally for the purpose of "protecting and insuring the general public interest and the safety of persons operating, using or traveling in aircraft, and developing airlines in this State." See Sections 21002, 21243 and 21244 of the Public Utilities Code. It further provides that "sovereignty in the space above the land and water of this State rests in the State, except where granted to and used by the United States pursuant to a constitutional grant from the people of the State." Although the grant of rule making power is broad there is no section or rule directly relating to or proscribing aircraft noise. The intent to prohibit a subordinate legislative body from enacting such restrictions by ordinance is likewise lacking.

Section 21002, which sets out the purposes of the Act, provides:

"Section 21002. The purpose of this part is to further and protect the public interest in aeronautics and aeronautical progress by the following means:

"(a) Encouraging the development of private flying and the general use of air transportation.

"(b) Fostering and promoting safety in aeronautics.

"(c) Effecting uniformity of the laws and regulations relating to aeronautics consistent with federal aeronautics laws and regulations.

"(d) Granting to a state agency such powers and imposing upon it such duties that the State may properly perform its functions relative to aeronautics and effectively exercise its jurisdiction over persons and property, assist in the development of a state-wide system of airports, encourage the flow of private capital into aviation facilities, and cooperate with and assist political subdivisions and others engaged in aeronautics in the development and encouragement of aeronautics.

"(e) Establishing only those regulations which are essential and clearly within the scope of the authority granted by the Legislature, in order that persons may engage in every phase of aeronautics with the least possible restriction consistent with the safety and the rights of others.

"(f) Providing for cooperation with the federal authorities in the development of a national system of civil aviation and for coordination of the aeronautical activities of those authorities and the authorities of this State."

From the reading of this section it cannot be concluded that the Legislature intended to prohibit counties from regulating aircraft noise.

The doctrine of supremacy of the general law ingrained in Section 11, Article 11 of the California Constitution exists on the federal level by reason of the "supremacy clause" found in Article 6, Section 2 of the United States Constitution. It is well established that if Congress has legislated in a field in which it has authority that any attempt by a state or local legislative body to regulate the same area would be invalid if in conflict therewith.

By Article 1, Section 8, Clause 3 of the United States Constitution, Congress was granted the authority " * * * to regulate commerce with foreign nations and among the several states * * *." There is no doubt that this grant gives Congress the power to regulate "navigation," see *Gibbins vs. Ogden* (1824) 9 Wheat 1, and more particularly the power to regulate all means and instrumentalities by which commerce is carried on including traffic by air. *Alleghany Airlines vs. Village of Cedarhurst*, (1955) 132 Fed. Supp. 871; *Braniff Airways vs. Nebraska State Board* (1953) 347 U.S. 590, 98 L. Ed. 415. The question is then resolved by asking — to what extent has Congress occupied the field of aircraft regulation?

It has been held in *Alleghany Airlines vs. Cedarhurst, supra*, that the Civil Aeronautics Act of 1938, together with the regulations adopted pursuant thereto, have regulated *air traffic in* the navigable air space in the interest of safety to such an extent as to constitute pre-emption in that field. The case factually challenged the constitutionality of an ordinance of the Village of Cedarhurst which prohibited the flight of aircraft below one thousand feet. The village was within the flight pattern of Idlewild Airport operated by the New York Port Authority on land owned by the City of New York. The Civil Aeronautics Administrator had established instrument approach rules to be followed by aircraft landing at Idlewild and under certain meteorological conditions the routes taken by aircraft would take them over the Village of Cedarhurst at altitudes less than one thousand feet.

Thus it is clear that a conflict existed between the Civil Aeronautics Act of 1938 and the local ordinance which would invalidate the latter.

Under the Civil Aeronautics Act of 1938 it devolved upon the Board to promote safety of flight in air commerce by proscribing minimum standards for construction of aircraft and aircraft appliances, reasonable rules and minimum standards for the inspection, servicing and overhauling of aircraft, rules governing the reserve supply of aircraft, parts and fuel and the maximum hours of airmen and other employees, air traffic rules and such other rules and standards as might be found necessary to promote safety and air commerce. See *Alleghany Airlines vs. Village of Cedarhurst, supra*. By Section 601 of the Act, the Board was empowered to prescribe "air traffic rules governing the flight of, and for the navigation, protection and identification of, aircraft, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft and land or water vehicles."

It seems clear from reading this section that the safety rules set out in the Civil Aeronautics Act of 1938 and the rules passed pursuant thereto were intended primarily for the protection and safety of aircraft and their passengers, crew and cargo. This purpose must be distinguished from an ordinance which would be designed primarily for the purpose of protecting welfare of inhabitants of houses on the ground. The purpose of the federal legislation necessarily limits the field which it has occupied. However, as stated by the Court, in *California vs. Zook* (1948) 336 U.S. 725, 93 L. Ed. 1005,

"There is no longer any question that Congress can redefine the areas of local and national predominance. * * *. When Congress enters the field by legislation we try to discover to what extent it intended to exercise its power of redefinition. * * *."

Last year Congress passed the Federal Aviation Act of 1958, P.L. 85-726, which supersedes the Civil Aeronautics Act of 1938. Section 601 of the 1938 Act, *supra*, was amended by the addition of the following —

"The Administrator is further authorized and directed to prepare air traffic rules and regulations * * * for the protection of persons and property on the ground. * * *."

It is clear that this delegation of power is broad enough to include rules regulating noise emanating from aircraft and affecting inhabitants of any local area.

However, it is also well settled that a mere delegation by Congress to an administrative agency of certain national powers over interstate commerce is not the equivalent of specific action by Congress. On the contrary, in order to supersede state regulations or to prevent their taking effect there must be specific action by the agency on the particular subject under the powers conferred by Congress. In other words, the mere grant of power from Congress to the Federal Aviation Agency does not in and of itself, and in the absence of action by the agency, interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens. *Missouri P.R. Co. vs. Larabee Flour Mills Company* (1908) 53 L. Ed. 352. As a corollary to this rule, however, it must be made clear that if the Federal Aviation Agency regulates in this area, occupation of the field would be complete and any local ordinance would be invalid.

Aside from this power of the Federal Aviation Agency to regulate flight to promote safety, the Agency has the comprehensive power to regulate the design, materials, workmanship, construction and performance of aircraft, aircraft engines, propellers, or any appliance that might be required in the interest of safety. (Section 601 (a), (1), (2) of the Federal Aviation Act

of 1958.) It is clear that any control device designed to comply with an anti-noise ordinance would have to be an integral part of the aircraft and would have a definite effect on its operational characteristics. Since this power is all inclusive and when viewed with the power to promote safety of flight above it must be concluded that Congress has intended by this Act to occupy the field to the exclusion of State and local legislation and that any local regulation of noise would be in conflict therewith.

It is also well settled that whether Congress has or has not expressed itself a further limitation upon state action is inherent in the commerce clause itself. As stated by the court in *California vs. Zook, supra*, "Absent congressional action, the familiar test is that of uniformity versus locality: if a case falls within an area in commerce brought to demand a uniform national rule, state action is struck down. If the activity is one of predominantly local interest, state action is sustained. More accurately, the question is whether the state interest is outweighed by a national interest in the unhampered operation of interstate commerce."

This rule is further spelled out in *Southern Pacific R.R. vs. Arizona*, 325 U.S. 761, 89 L. Ed. 1915, where the Court states,

"The states have not been deemed to have the authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need for national uniformity, demand that their regulation, if any, be prescribed by a single authority."

Whether this power is predicated upon the implications of the commerce clause itself or upon the presumed intention of Congress, where it has not spoken the result is the same.

It is therefore clear that an appraisal of the respective interests and burdens must be made. On the one hand the people within this state have the right as noted above to be free from noise if such amounts to a legal nuisance or a right to compensation if the flight of governmental aircraft over their land amounts to a taking. There is no doubt that such noise seriously interferes with the health, safety and welfare of these people.

On the other hand the effect on interstate commerce in view of present technology would amount to a serious burden upon the flight of aircraft if not a prohibition.

Furthermore, if one state could regulate the noise emanating from aircraft other states would be free to do likewise. The standards might vary from jurisdiction to jurisdiction.

The serious impediment to the free flow of commerce by a multitude of local anti-noise ordinances and the practical necessity of one uniform rule having nation-wide applicability are apparent.

It is therefore our opinion that the County cannot exercise its police power to regulate noise produced by jet aircraft in view of the supremacy of the Federal Aviation Act of 1958 and the inherent power of Congress to control interstate commerce.

2. Power of the County to regulate flight of aircraft.

The second area of inquiry is to the power of the County to regulate flight or flight patterns of aircraft over unincorporated County territory. It is our opinion based upon the reasoning above and the *Alleghany Airlines case, supra*, that the County would be restricted in exercising its police power in this area.

Very truly yours,

HAROLD W. KENNEDY
County Counsel