

1942

Airport Legal Developments of Interest to Municipalities - 1941

John M. Hunter Jr.

Lewis H. Ulman

Recommended Citation

John M. Hunter Jr. et al., *Airport Legal Developments of Interest to Municipalities - 1941*, 13 J. AIR L. & COM. 116 (1942)

<https://scholar.smu.edu/jalc/vol13/iss2/2>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

AIRPORT LEGAL DEVELOPMENTS OF INTEREST TO MUNICIPALITIES—1941†

BY JOHN M. HUNTER, JR. AND LEWIS H. ULMAN*

Just as the national defense emergency has made itself felt in many other fields, so was it largely responsible during the past year for many legal developments of particular interest to city attorneys, of which a large number have had to do with airports. In large measure, it appears that these developments may be attributed to the airport needs of the Army and Navy, many of them either filling such needs directly or facilitating the defense airport programs of the Civil Aeronautics Administration and other Federal agencies.

With 43 State Legislatures meeting last year in regular session, these developments include a large volume of State legislation designed to correct deficiencies in the laws relating to airports, particularly those giving municipalities and other political subdivisions the powers necessary to permit them to effectively establish, develop, operate, maintain, protect, and regulate airports. In addition, the year 1941 saw several Federal statutes enacted, Federal regulations promulgated, State cases decided, and legal opinions rendered which should be of interest to municipal law officers.

These developments will be discussed under three main headings, as follows: (1) Airport Development; (2) Airport Operation and Regulation; and (3) Airport Protection.

(1) AIRPORT DEVELOPMENT

Federal Airport Programs

As was pointed out in our review of airport legal developments for 1940,¹ the passage of the First Supplemental Civil Functions Appropriation Act, by the 76th Congress on October 9, 1940,² containing an appropriation to the Administrator of Civil Aeronautics

† Substantially as prepared by the authors for the Committee on Airports of the National Institute of Municipal Law Officers and used by that Committee in making its report at the annual meeting of the Institute in Washington, December 4-8, 1941, to be published in the Institute's "Municipalities and the Law in Action for 1941."

* Attorneys with Civil Aeronautics Administration, U. S. Department of Commerce; Members of District of Columbia Bar.

1. 12 Journal of Air Law and Commerce 148.

2. Public 812, 76th Congress, 3d Session.

of \$40,000,000 for public airport development, heralded a new day for municipal airports. By this Act, Congress for the first time recognized the vital place of the public airport in civil aeronautics and in the national defense.

The passage of this Act and of three subsequent appropriations for the same purpose³ is selected as a starting point in this report; since a large number of recent airport legal developments of interest to municipal law officers are connected with or incidental to the operation of the CAA airport programs.

Since October 9, 1940, \$199,593,050 has been appropriated and 479 airports and airport sites have been selected by the Administrator of Civil Aeronautics for development and approved by a board consisting of the Secretaries of War, Navy, and Commerce, as necessary for national defense. The mechanics of the program are undoubtedly familiar to many municipal law officers as a result of first hand experience; however, for the uninitiate, it should be noted that the following legal steps are taken after the selection of the project: (1) The principal officer of the city selected as sponsor of the project is notified of the selection and is requested to advise the Administrator by letter whether the city is willing to sponsor the project. (2) When this answer is received, if in the affirmative, plans for development are prepared by the Civil Aeronautics Administration and the city is advised what land will be necessary for the proposed development. (3) After the city has acquired fee simple unencumbered title to all the lands to be developed, a resolution must be adopted by the project sponsor agreeing to assume certain obligations in connection with the operation and maintenance of the airport. When this resolution is accepted by the Administrator, construction contracts may be awarded, or funds released to the WPA, according to the nature of the project, and the actual construction may be placed under way.

Under the terms of the CAA form resolution the project sponsor must agree to allow the Government a free hand in development of the project, to indemnify the Government for any claims arising out of the project other than claims for material furnished or services performed; to operate the airport during its useful life in the public interest; to grant no exclusive right within the meaning of Section 303 of the Civil Aeronautics Act; to maintain and keep in repair the entire landing area; to protect the airport's aerial approaches insofar as is legally possible; and not to enter into any transaction

3. Public Laws 135, 247, and 353, 77th Congress, 1st Session.

which would render the sponsor unable to carry out the covenants and agreements of the resolution. In addition, the sponsor must warrant, inter alia, that it has unencumbered fee simple title to the property and the power to adopt the resolution.

No attempt will be made at this point to show how the provisions and these agreements are correlated with the State legislation, court actions, and legal opinions of the past year; however, it is believed that if the reader will keep in mind the CAA project eligibility requirements, he will see that they explain many of these State and local airport legal developments.

Lease of Public Lands

In addition to the above, there was one other legal development during the year with respect to Federal action in the field of civil airport development which is deserving of mention here. This was the enactment by the 77th Congress of an act approved August 16, 1941,⁴ which amended the Act of May 24, 1928,⁵ authorizing lease of public lands for public airport purposes, by changing the limitation on the area that may be leased for any particular airport from 640 acres to 2,560. As a result, in those States where public lands are still available, it is now possible for a city, other public agency, or private person to lease as much as four sections of such lands for development as a public airport.

State Legislation

Turning to State legislation it is apparent that such legislation is highly important to the development of municipal airports. For one thing, political subdivisions are generally dependent upon State enabling legislation for many of the powers necessary to permit them to establish and develop airports, this being true even of "home-rule" cities to some extent. And secondly, the States are often in a position to be of considerable assistance to their political subdivisions in this regard, both legislatively and administratively.

Consequently, it should be gratifying to all city attorneys that the past year has witnessed an unprecedented volume of State legislation designed to correct deficiencies in State airport laws and otherwise facilitate the development of municipal airports and the Federal airport development programs.⁶ It is believed that these acts indicate

4. Public 205, 77th Congress, 1st Session.

5. 45 Stat. 728.

6. In this report alone, mention is made of no less than 78 acts adopted during 1941 in 33 States.

a growing realization and acceptance of the place and responsibilities of State government in the airport picture.

State Aid

This is particularly true of the statutes enacted providing for administrative action by an agency of the State Government in the field of airport development. These included acts adopted in ten States authorizing State agencies to acquire land and construct and operate airports thereon,⁷ together with an act passed in another State which provided that the aviation gasoline tax refund, unclaimed for four months, could be used to construct flight strips adjacent to public highways.⁸ In addition three other States by legislation directed their aviation bodies to encourage and promote the development of airports and the establishment of air navigation facilities.⁹

Of greater interest to municipal law officers, however, are the several statutes which have been enacted, providing for State assistance, financial and other, to political subdivisions in the development of municipal airports. These include five acts which authorize the four new State aeronautics commissions created last year to assist the political subdivisions of the State in the development of their airports,¹⁰ as well as several authorizing use of State owned or controlled lands for municipal airport purposes. As examples of the latter, New York has adopted an act authorizing the State Department of Mental Hygiene to turn over twenty-two acres of land to the City of Utica for expansion of its airports,¹¹ New Jersey an act permitting acquisition of land adjacent to municipal water land for public airport purposes,¹² Idaho a statute authorizing lease of State owned land, adjacent to public airports, for use in connection therewith,¹³ and Texas a law increasing the amount of State lands that may be leased for an airport from 640 acres to 1,280.¹⁴

In this connection, two recent State Attorney General opinions should be noted which indicate that State Governmental agencies,

7. Ariz. L. 1941, c. 6; Ark. Acts 1941, no. 457; Calif. Stats. 1941, c. 753 (Ntl. Guard); Ga. L. 1941, no. 393; Mass. L. 1941, c. 268 (Bedford); Mich. Acts 1941, no. 333; N. H. L. 1941, c. 199; Oreg. L. 1941, c. 54; Tenn. Acts 1941, c. 164; Vt. L. 1941, no. 100 and 101.

8. Minn. L. 1941, c. 491.

9. Kans. L. 1941, H. J. Res. 7; Me. L. 1941, c. 236; N. C. L. 1941, S. B. 291.

10. Ark. Acts 1941, no. 457; Me. L. 1941, c. 236; N. H. L. 1941, c. 199; Vt. L. 1941 no. 100 and 101.

11. N. Y. L. 1941, c. 597.

12. N. J. L. 1941, c. 11.

13. Idaho L. 1941, c. 6.

14. Tex. L. 1941, H. B. 216.

like municipalities, sometimes find themselves without sufficient authority to take some particular action in connection with the development of an airport. One of these was an opinion given by the Attorney General of Vermont in connection with the development of an airport at West Lebanon, New Hampshire.¹⁵ This airport, which serves White River Junction, Vermont, and the surrounding territory as well as West Lebanon and Hanover on the New Hampshire side of the Connecticut River, was selected for development under the Civil Aeronautics Administration airport program and \$409,000 in Federal funds was allocated for this purpose. The question then was presented, could the Vermont Aeronautics Board share a portion of the expense entailed in the acquisition of the necessary land? Two acts were passed in Vermont during 1941 to authorize cooperation with the Federal Government on airport projects;¹⁶ however, the Attorney General in his opinion held the language used in these acts precluded extra-state expenditures.

Still another restriction on the power of the States was expressed in a recent opinion of the Attorney General of Georgia.¹⁷ It was his opinion that the Governor, in the absence of statutory authorization, could not properly lease certain prison lands to the Federal Government for development as an airport.

Airport Enabling Legislation

This same desire on the part of the State Legislatures to facilitate the development of airports is evidenced by the many acts passed during the year designed to provide municipalities and other political subdivisions with the basic authority to develop airports, or to cure defects in, or further implement, existing airport development enabling legislation. No less than 42 acts of this type were passed last year.¹⁸ Of these, 14 apply to all cities and

15. Vt. Att. Gen. Op. to Vt. Aeronautics Board, June 16, 1941, 235 CCH 1906.

16. *Supra*, n. 7.

17. Ga. Att. Gen. Op., Feb. 25, 1941, 235 CCH 4034.

18. Ariz. L. 1941, c. 5 (cities, towns, and counties) and c. 28 (cities and towns); Calif. L. 1941, c. 265 (counties), c. 630 (irrigation districts), and c. 52 (Monterey airport district); Del. L. 1941 S. B. 207 (New Castle County) and S. B. 243 (Sussex County); Fla. L. 1941 c. 20861 (cities where two or more counties act jointly); Ga. L. 1941, S. B. 214 (counties bordering on another State and cities in such counties); Idaho L. 1941, c. 103 (cities and counties) and c. 172 (first class cities); Ill. L. 1941, S. B. 61 (counties), S. B. 511 (cities and villages over 150,000 bordering on public waters), and S. B. 372 (aviation districts); Kans. L. 1941, S. B. 37 (counties bordering on or contiguous to two or more cities of over 115,000), S. B. 38 (cities), S. B. 265 (first class cities), and H. B. 366 (cities acting jointly) and H. B. 177 (certain cities); Me. L. 1941, c. 173 (cities and counties); Md. L. 1941, c. 651 (City of Cumberland); Mass. L. 1941, c. 469 (Beverly); Mich. L. 1941, Pub. Acts 333 (State Administrative Board, cities, counties, villages, and townships); Minn. L. 1941, c. 264 (certain classes of counties); Mont. L. 1941, c. 54 (counties, cities, and towns); N. H. L. 1941, c. 272 (Laconia) and c. 199 (cities and counties); N. J. L.

counties,¹⁹ 3 to all counties,²⁰ 6 to all cities,²¹ 1 to irrigation districts,²² 1 to park districts,²³ 1 to certain classes of cities and counties,²⁴ 3 to certain classes of counties,²⁵ 4 to certain classes of cities,²⁶ 3 to particular cities and counties,²⁷ 3 to particular counties,²⁸ and 3 to particular cities.²⁹

While it would no doubt be desirable, it is not possible in a report of this type to discuss these acts in detail, State by State, pointing out the changes that have been effected. We shall, however, make reference to several of them below in discussing certain of the most important features of this airport enabling legislation.

Thus, to supply a deficiency pointed out in our last year's review of airport legal developments,³⁰ no less than sixteen acts were passed last year, granting to classes of political subdivisions previously without such authority the basic power to establish and develop airports.³¹ Included, it is interesting to note, is an act of the Illinois Legislature authorizing all counties of the State to develop airports,³² which was apparently occasioned by an opinion of the Attorney General of Illinois reported in our article last year.³³

In addition to this general authorization, airport enabling acts almost invariably contain provisions expressly authorizing the political subdivisions with which they are concerned to do certain

1941, c. 8 (cities); N. M. L. 1941, c. 60 (cities); N. Y. L. 1941, c. 606 (counties, cities, towns, and villages); N. C. L. 1941, c. 292 (Raleigh-Durham) and S. B. 138 (Greensboro-High Point); N. D. L. 1941, H. B. 176 (park districts) and H. B. 186 (cities); Oreg. L. 1941, c. 189 (cities and counties); Pa. L. 1941, c. 144 (second through seventh class counties); S. D. L. 1941, c. 250 (counties, cities, and towns); Tex. L. 1941, H. B. 216 (counties and cities) and S. B. 129 (cities over 40,000); Vt. L. 1941, c. 53 (cities and counties); Wash. L. 1941, c. 21 (cities, towns, counties, and port districts); Wyo. L. 1941, c. 35 (counties). See also Ill. L. 1941, S. B. 702 and S. B. 10, and Pa. L. 1941, c. 321 and 334. Copies of these acts were not available at the time this article was prepared.

19. *Supra*, n. 18. Ariz. L. 1941, c. 5; Fla. L. 1941, c. 20861; Idaho L. 1941, c. 103; Ill. L. 1941, S. B. 372; Me. L. 1941, c. 173; Mich. L. 1941, Pub. Acts 333; Mont. L. 1941, c. 54; N. H. L. 1941, c. 199; N. Y. L. 1941, c. 606; Oreg. L. 1941, c. 189; S. D. L. 1941, c. 250; Tex. L. 1941, H. B. 216; Vt. L. 1941, c. 53; Wash. L. 1941, c. 21.

20. *Supra*, n. 18. Calif. L. 1941, c. 265; Ill. L. 1941, S. B. 61; Wyo. L. 1941, c. 35.

21. *Supra*, n. 18. Ariz. L. 1941, c. 28; Kans. L. 1941, S. B. 38 and H. B. 366; N. J. L. 1941, c. 8; N. M. L. 1941, c. 60; N. D. L. 1941, H. B. 186.

22. *Supra*, n. 18. Calif. L. 1941, c. 630.

23. N. D. L. 1941, H. B. 176.

24. Ga. L. 1941, S. B. 214.

25. *Supra*, n. 18. Kans. L. 1941, S. B. 37; Minn. L. 1941, c. 264; Pa. L. 1941, c. 144.

26. *Supra*, n. 18. Ill. L. 1941, S. B. 511; Idaho L. 1941, c. 172; Kans. L. 1941, S. B. 265; Tex. L. 1941, S. B. 129.

27. *Supra*, n. 18. N. H. L. 1941, c. 272; N. C. L. 1941, c. 292 and S. B. 138.

28. *Supra*, n. 18. Calif. L. 1941, c. 52; Del. L. 1941, S. B. 207 and S. B. 243.

29. *Supra*, n. 18. Kans. L. 1941, H. B. 177; Md. L. 1941, c. 651; Mass. L. 1941, c. 469.

30. *Supra*, n. 1, at p. 149.

31. Calif. L. 1941, c. 630 and c. 52; Del. L. 1941, S. B. 207 and S. B. 243; Fla. L. 1941, c. 20861; Ill. L. 1941, S. B. 61 and S. B. 372; Kans. L. 1941, S. B. 37, S. B. 265, and H. B. 366; Md. L. 1941, c. 651; N. H. L. 1941, c. 272; N. C. L. 1941, S. B. 138; Oreg. L. 1941, c. 189; Pa. L. 1941, c. 144; Wyo. L. 1941, c. 35.

32. *Supra*, n. 18. Ill. L. 1941, S. B. 61.

33. *Supra*, n. 1, at p. 149.

things and exercise certain particular powers in connection with the development of their airports. Such provisions are found in all of the new airport enabling acts and amendments to prior acts of this type which were passed last year.³⁴

Acquisition of Land

One such power, that to acquire the land to be developed as an airport, whether by grant, purchase, condemnation or other means, would seem to be inherent in the basic power to establish and develop airports and to need no express legislative authorization. This view finds authoritative support in the case of *Burnham v. Beverly*³⁵ decided June 24, 1941, by the Supreme Judicial Court of Massachusetts. In that case Justice Rowan held that a municipality could properly condemn land for airport purposes even though no express authorization to such effect was contained in the municipal airport enabling act if the municipality was otherwise authorized to condemn land for public purposes. The opinion is notable for its collection of the decided cases holding that the development of a municipal airport is a proper public purpose,³⁶ on which ground the holding was of course based.

Nevertheless, most of the States have obviated this question by including in their airport enabling acts provisions expressly granting political subdivisions the power to acquire land for airport purposes by the several usual methods. This is true of all of the 16 basic airport enabling acts adopted last year,³⁷ while 8 of the remaining acts mentioned above as general enabling legislation, contained like provisions.³⁸

Condemnation

In addition, the need for speed in the acquisition of lands required for airport development, particularly in the national defense program, has resulted in several enactments amending State condemnation laws to provide a more expeditious condemnation procedure than that previously in effect. Unlike the Federal procedure, which permits the condemnor to take immediate possession of the property upon the filing of a "declaration of taking,"³⁹ and that of

34. *Supra*, n. 18.

35. 35 N. E. (2d) 242 (June 24, 1941).

36. See article cited *supra*, n. 1, at p. 151; also Lewis H. Ulman, "The Public Nature of Airports," *Georgetown Law Journal*, Vol. 30, No. 2, at p. 198 (December, 1941).

37. *Supra*, n. 31.

38. Calif. L. 1941, c. 265; Me. L. 1941, c. 173; Mass. L. 1941, c. 469; Mont. L. 1941, c. 54; N. M. L. 1941, c. 60; Tex. L. 1941, S. B. 129; Vt. L. 1941, c. 53; Wash. L. 1941, c. 21.

39. 45 Stat. 1421, 40 U. S. C. A. §§258a-258e.

several of the States, which also provides for the taking of possession without awaiting determination of the amount of the award, many of the States still require that the condemnation proceedings be completed before the condemnor may take possession. It is understood that the existence of condemnation laws of this type has seriously delayed several national defense projects, including some projects involving acquisition by a municipality of land to be used by the military services and some projects for the development of municipal airports.

However, the number of States having such condemnation laws has been somewhat reduced during the present year, at least so far as condemnation for airport purposes is concerned. For example, in New Mexico an act was passed amending the general condemnation laws to permit possession prior to determination of the award, thus making possible entry upon land to begin construction of an airport thereon, when condemnation proceedings have been instituted but not finally adjudicated.⁴⁰ And, in New Hampshire, the same result was obtained by inclusion in the State's general aeronautics act of a provision authorizing the Governor and council, upon recommendation of the director of aeronautics, to acquire, by purchase, grant, or condemnation, land needed for airport purposes and to convey such land to a town "for such a consideration as the Governor and Council may determine."⁴¹ It is understood that the procedure authorized in cases of condemnation by the Governor and Council permits immediate possession to be taken whereas that followed where land is condemned by a town does not.

In addition to these acts, Delaware⁴² in a special act applying to one county, authorized "pretakings," and Arkansas⁴³ applied the principle generally to removal of airport approach obstructions.

It is suggested that the States requiring determination of the award before possession may be taken in condemnation proceedings would considerably expedite and facilitate the national defense program and at the same time advance the cause of aviation and their own interests, if they were to amend their condemnation laws to permit "pre-takings" in the cases of land needed by a political subdivision for airport purposes.

In this connection, mention should be made of a case decided last year on the power of a municipality to condemn lesser interests

40. N. M. L. 1941, c. 60.

41. N. H. L. 1941, c. 199, §11.

42. Del. L. 1941, S. B. 207.

43. Ark. L. 1941, c. 116.

in airport land. This was the case of *Danbury Airport Corporation v. Danbury*,⁴⁴ in which the Superior Court of Connecticut at Bridgeport upheld the power of the Town of Danbury to condemn a twenty year lease which it had granted to the plaintiff corporation. This case may prove of value to some of the many municipalities faced with the necessity of cancelling or amending airport leases or other airport agreements or extinguishing other encumbrances upon their cities' title to airport property, in order to meet the project eligibility requirements established by the Government in connection with its several airport programs.

Extraterritorial Powers

Still another airport power which must often be expressly granted to political subdivisions is the power to exercise their other airport powers outside their territorial limits. During the past year, no less than 11 States found it necessary to enact legislation granting such extraterritorial powers,⁴⁵ and in two of these cases, authorizing their political subdivisions to establish and develop airports not only outside their corporate limits but in adjoining States as well.⁴⁶ Of these latter two acts, that of Maryland is of particular interest in that it provides an excellent example of inter-State cooperation in airport development. The City of Cumberland, Maryland, had been selected as a sponsor of a WPA airport defense project and \$2,030,212 of Federal funds had been allocated for development of the project. The most suitable site, however, was at Ridgeley, across the Potomac River, in West Virginia, and Maryland municipalities were not authorized to locate their airport without the State. The Maryland Legislature, however, solved the problem by granting legislative authority to locate the airport outside the State and expend municipal funds therefor,⁴⁷ and West Virginia reciprocated by enacting a statute authorizing political subdivisions of adjoining States to locate their airports within the limits of the State of West Virginia.⁴⁸ As another method of solving this problem, Massachusetts this year enacted a statute changing the boundary between Fitchburg and Leominster so that a proposed airport site would be situated entirely within the corporate limits of the former.⁴⁹ Similarly, al-

44. No official citation available. See Bridgeport Post, Bridgeport, Conn., April 15, 1941.

45. Fla. L. 1941, c. 20861; Idaho L. 1941, c. 172; Ill. L. 1941, S. B. 511; Md. L. 1941, c. 651; Mich. Acts 1941, no. 333; N. Y. L. 1941, c. 606; Okla. L. 1941, S. B. 152; Oreg. L. 1941, c. 189; S. D. L. 1941, H. B. 250; Tex. L. 1941, S. B. 129; Wash. L. 1941, c. 21.

46. Md. L. 1941, c. 651; S. D. L. 1941, H. B. 250.

47. *Supra*, n. 46.

48. W. Va. L. 1941, H. B. 368.

49. Mass. L. 1941, c. 37.

though available records do not indicate whether this was the purpose of the statute, a legislative change has been made in the boundaries of Carson City, Nevada, resulting in inclusion of a proposed airport site within the city limits.⁵⁰

Airport Financing

Another problem that received considerable legislative attention last year was that of financing the development of municipal and other public airports. While the major portion of the cost of such development is borne by the Federal Government in connection with the WPA and CAA airport programs, most of the cost of construction of hangars, administration buildings, and other structures and facilities necessary to such an airport, and all of that of acquiring the necessary land, must still be borne by the municipality or other political subdivision.

To provide a means of meeting these capital expenses, most of the States have included in their airport enabling acts provisions authorizing the political subdivisions empowered to establish airports to sell long term bonds. This is the case with respect to 19 of the 42 airport enabling acts passed last year,⁵¹ all of these 19 authorizing such borrowing to finance the acquisition of land and 15⁵² to defray the costs of the airport construction or development.

Usually, a statute authorizing such borrowing provides that the bonds may be issued on the general credit of the political subdivision in question, to be repaid either from general revenues or from the revenues from special taxes levied each year in an amount sufficient to pay the year's principal and interest. This is true of all 1941 acts mentioned in the preceding paragraph except three,⁵³ which specify that the bonds shall not be a general obligation of the political subdivision but instead shall be secured by a lien on the airport revenues or on the airport property.

In this connection, it should be noted that in addition to the 16 acts authorizing political subdivisions to borrow on their general

50. Nev. L. 1941, c. 86.

51. Ariz. L. 1941, c. 28; Calif. L. 1941, c. 52; Del. L. 1941, S. B. 207 and S. B. 243; Fla. L. 1941, c. 20861; Idaho L. 1941, c. 103 and c. 172; Ill. L. 1941, S. B. 61, S. B. 511, and S. B. 372; Kans. L. 1941, S. B. 37, S. B. 38, and H. B. 366; Md. L. 1941, c. 651; Mich. L. 1941, Pub. Acts 333; Mont. L. 1941, c. 54; N. C. L. 1941, S. B. 138; Oreg. L. 1941, c. 189; Tex. L. 1941, S. B. 129. Note: The Pennsylvania Act, L. 1941, c. 144, is not included since a copy of this Act is not available at this time and consequently it is not possible to determine its financial provisions.

52. Calif. L. 1941, c. 52; Del. L. 1941, S. B. 207 and S. B. 243; Idaho L. 1941, c. 103 and c. 172; Ill. L. 1941, S. B. 61, S. B. 511, and S. B. 372; Kans. L. 1941, S. B. 38 and H. B. 366; Md. L. 1941, c. 651; Mich. L. 1941, Pub. Acts 333; Mont. L. 1941, c. 54; N. C. L. 1941, S. D. 138; Tex. L. 1941, S. B. 129.

53. Ill. L. 1941, S. B. 511 and S. B. 372; N. C. L. 1941, S. B. 138.

credit, which also expressly or impliedly authorize the levying of taxes either to meet airport costs without borrowing or to repay airport bonds, 3 do not authorize borrowing but do expressly empower the political subdivisions in question to raise the funds needed for airport acquisition and development either by appropriating funds from their general revenues or by levying special airport taxes.⁵⁴

However, there are often constitutional or statutory limitations on the power of political subdivisions to tax and borrow making it impossible in a particular case to issue general obligation bonds for airport purposes without additional legislation. To remedy this situation, it is of interest that three States during the year 1941 adopted acts authorizing particular cities or counties to borrow for airport purposes in excess of their statutory debt limits⁵⁵ and that two States authorized the levy of airport taxes in certain cases, in excess of their maximum tax limits.⁵⁶ Also, one act was adopted enabling cities and counties to appropriate funds for airport purposes in excess of their annual budgets.⁵⁷

In addition to these devices, three of the year's airport enabling acts, as previously noted,⁵⁸ authorize the issuance of airport bonds secured by a pledge of airport revenues or a lien on the airport property. As is usual in this type of legislation, it is provided in these acts that the bonds shall not be considered a debt of the political subdivision, the result being that the State's constitutional or statutory debt limit does not apply. However, the absence of any general obligation may make the sale of such bonds impossible, and in addition, where the bond holder acquires a lien or mortgage on the land, the title held by the political subdivision would seem to be so encumbered as to disqualify that public agency for a CAA airport project under the project eligibility rules of that Federal agency.

As a variation of this means of avoiding the State debt restrictions, *two* acts were adopted providing for the creation of "airport authorities" to act on behalf of one or more political subdivisions in airport matters.⁵⁹ Such authorities are usually public bodies of the Government corporation type, having the power to acquire property, borrow money, and sue and be sued. Lacking the power to tax, it might be necessary for such an authority, in order to sell its bonds, to secure them by a lien on the airport property, which as

54. Calif. L. 1941, c. 265; Kans. L. 1941, H. B. 177; Vt. L. 1941, c. 54.

55. Ariz. L. 1941, c. 28; N. J. L. 1941, c. 8; Md. L. 1941, c. 651.

56. Kans. L. 1941, S. B. 37 and H. B. 177; N. D. L. 1941, H. B. 176 and H. B. 186.

57. Idaho L. 1941, c. 103.

58. *Supra*, n. 53.

59. N. H. L. 1941, c. 272; N. C. L. 1941, S. B. 138.

previously indicated, would make the airport ineligible for development under the CAA airport program. On the other hand, however, it is sometimes possible for such an authority to borrow on its general credit or on some security other than the land, as by pledging future airport revenues.

Before leaving this subject, mention should be made of three recent legal opinions on the airport financing powers of political subdivisions. One of these was an opinion given by the Attorney General of Alabama to a County,⁶⁰ advising that the County could enter into a fifteen year airport lease in conjunction with other political subdivisions, at a \$5,000 yearly rental, in spite of a restriction in the Alabama Code that no obligation may be incurred by a County that cannot be satisfied out of the current year's revenues. The theory was that since the lease was to be terminable by the lessees at the end of any year the credit of the County would not be obligated for a period beyond a year.

In the same vein is the case of *Miles v. Lee*,⁶¹ which while decided in 1940, was not reported in our review for 1941. In that case, the members of the Fiscal Court and the members of the Louisville and Jefferson County Air Board, owners of the airport, as individuals, had entered into agreements with a group of banks whereby the banks were to advance the Board the amount needed to pay an award for land condemned for expansion of the Louisville Municipal Airport, taking a lien on the land condemned as security. The members of the Fiscal Court agreed to vote to levy a tax sufficient to enable the Board to discharge the lien and to authorize the Board to borrow in anticipation of the tax if necessary, and further agreed to see to it that the loan was repaid, while the members of the Board agreed to vote both to request the County to levy a tax and to borrow, if necessary, and also agreed to repay the loan. Among other objections, it was claimed that the Board had exceeded its borrowing power in that it obligated itself beyond the current fiscal year in violation of a provision of the Kentucky Constitution. But the Court held that this financing plan did not create a present indebtedness on the part of the Air Board to be paid out of future revenues. It ruled that the Board would be under no legal obligation to repay the banks and that since the banks would have title under the lien, the Air Board would not actually acquire the land and become liable for its purchase price unless and until it elected to discharge the

60. Ala. Att. Gen. Op. to Chairman, Morgan County Board of Revenue and Control, July 10, 1941, 235 CCH 1911.

61. 143 S. W. (2d) 843 (Ky., Oct. 15, 1940).

lien at the beginning of the new fiscal year when the banks would be paid with the proceeds from sale of that year's tax anticipation notes.

A further example of liberal interpretation of an airport finance measure is seen in a decision of the Attorney General of Texas.⁶² It was his ruling that a State statute authorizing counties to issue negotiable bonds for airport purposes, conditioned upon a favorable vote of the electorate, did not negative the implied power to sell non-negotiable, interest-bearing time warrants without a vote of the people. This opinion is of particular interest in connection with the discussion of the necessity for electoral approval of municipal appropriations for airport purposes contained in our 1940 review.⁶³

Joint Airports

Closely related to this subject of airport financing is that of joint airports, one of the principal reasons for joint action in the development and operation of an airport by two or more political subdivisions being that this spreads the financial burden of development, operation, maintenance, protection, and regulation of an airport over the residents of a larger portion of the area to be served by it than is the case where an airport is supported by one municipality, or even one county.⁶⁴ To permit such collaboration, a number of the States last year adopted enabling legislation on the subject. Of these acts, six authorize joint action by two or more cities,⁶⁵ ten provide for such cooperation between political subdivisions of different classes, such as counties and cities or cities and towns,⁶⁶ and three empower political subdivisions of the State to join with those of an adjoining State.⁶⁷ In most of these cases, the procedural details are left to local determination; however, two of these acts authorize political subdivisions wishing to join in the development and operation of an airport to create an airport authority to represent them as their agent.⁶⁸

62. Tex. Att. Gen. Op. to Kaufman County Att., May 1, 1941, 235 CCH 1904.

63. *Supra*, n. 1, at p. 151.

64. For an excellent discussion of this subject, see Emil F. Jarz, "Intermunicipal Cooperation in Establishing, Maintaining, and Operating Airports," *Journal of Air Law and Commerce*, Vol. 2, No. 4, P. 301 (October, 1941).

65. Idaho L. 1941, c. 103; Ill. L. 1941, S. B. 372; Kans. L. 1941, S. B. 38 and H. B. 366; Oreg. L. 1941, c. 189; Wash. L. 1941, c. 21.

66. Calif. Stat. 1941, c. 265; Del. L. 1941, S. B. 207 (Special Act); Fla. L. 1941, c. 20861; Idaho L. 1941, c. 103; Minn. L. 1941, c. 264; Mont. L. 1941, c. 54; N. Y. L. 1941, c. 606; Ore. L. 1941, c. 189; S. D. L. 1941, H. B. 250; Wash. L. 1941, c. 21.

67. Del. L. 1941, S. B. 207; Ga. L. 1941, S. B. 214; N. H. L. 1941, c. 199.

68. N. H. L. 1941, c. 272; N. C. L. 1941, S. B. 138.

Airport Districts

But perhaps the most noteworthy development of the year with respect to airport financing was the enactment of State legislation providing for airport development and operation by a functional type of political subdivision, usually known as an "airport district," with boundaries coextensive with the area to be served by the airport and powers independent of the municipalities and counties within such area. If given the power to tax, such airport districts are believed to offer in many respects the best solution of the airport financing problem.

Up until 1941, this type of airport legislation was in effect in only two States⁶⁹ and in those States had never been invoked. But last year the State of California, although one of the two States already having such a general act, adopted a special act creating the Monterey Peninsula Airport District, specifically providing that such District should have the power to tax.⁷⁰

In addition, it should be noted that Illinois has recently enacted legislation⁷¹ which, while it authorizes incorporation of any two or more contiguous counties or contiguous portions thereof as an aviation district, by vote of the legal voters residing therein, and authorizes such districts to establish airports, does not authorize such districts to levy taxes and in fact stipulates that airport bonds issued by an aviation district shall not constitute an indebtedness of the district but shall be payable solely from airport revenues and secured by a mortgage lien on the airport and its facilities. In view of these limitations on their powers, it would seem that, so far as financing is concerned, such aviation districts not only are subject to the same disadvantages as are airport authorities⁷² but are even less advantageous in that there is no provision for contribution of funds to them by the cities served by the airports they establish.

(2) AIRPORT OPERATION AND REGULATION

Report of Nichols Committee

Considering first the year's legal developments in this field resulting from action by the Federal Government, an excellent introduction is furnished by the preliminary report issued July 10, 1941,⁷³

69. Calif. L. 1929, p. 1857; Mass. L. 1939, c. 393.

70. Calif. L. 1941, c. 52.

71. Ill. L. 1941, S. B. 372.

72. See discussion *supra* regarding the acts cited in n. 59.

73. House Report No. 933, 77th Congress.

by the Select Committee to Investigate Air Accidents of the House of Representatives,⁷⁴ headed by Representative Nichols of Oklahoma. In this report several recommendations were made which, if enacted into law, would have a far-reaching effect on civil aviation and municipal airports. The most important of these from the view point of the municipal law officer were: (1) that the Federal Government assume jurisdiction over all navigable air space; (2) that Federal legislation be enacted establishing minimum requirements for airport lighting; (3) that the Federal Government train airport control tower operators; and (4) that at least one man in each airport control tower shift be under the supervision of the CAA.⁷⁵

With respect to the first two of these recommendations, it should be noted that the Civil Aeronautics Board has adopted an amendment to the Civil Air Regulations requiring all pilots and aircraft to have Federal certifications,⁷⁶ while a bill was pending in Congress at the end of the last session which would have effectuated the second recommendation.⁷⁷

As regards the Committee's recommendations as to airport traffic control, it is of interest that Congress last year appropriated \$500,000 to the Civil Aeronautics Administration for the maintenance and operation of airport traffic control towers at 39 public airports.⁷⁸ However, it should be borne in mind that, by the terms of this legislation, the funds appropriated for this purpose are to be used only where the Secretary of War or Secretary of the Navy certifies that "the accomplishment of such work is essential to the national defense," and that such certification has been restricted to cases of airports jointly occupied by military and civil aviation.

"True Lights"

Also of interest in this field is Federal regulation of "true lights," meaning airport and other beacons operated as aids to air navigation. Ever since 1926, it has been unlawful to operate such a light without obtaining "lawful authority"⁷⁹ or to exhibit with intent to interfere with air navigation any light likely to be mistaken for such a "true light".⁸⁰ However, it was not until last year that regulations were

74. As created by House Res. 125, 77th Congress.

75. *Supra*, n. 73, at p. 7.

76. CAB Regulations No. 193, Oct. 10, 1941 adopting Amendment No. 135 of Civil Air Regulations amending sections 60.30 and 60.31, effective Dec. 1, 1941.

77. S. 1717, 77th Congress, 1st session: introduced by Senator McCarran July 3, 1941; referred to Committee on Commerce.

78. Public 247, 77th Congress.

79. Air Commerce Act of 1926, as amended, §11(e).

80. *Ibid* and Civil Aero. Act of 1938, as amended, §902(c).

promulgated by a Government agency to implement the statutes on this subject. These regulations, as issued by the Administrator of Civil Aeronautics,⁸¹ prescribe certain requirements as to location, characteristics and performance to be met by six types of "true lights," including a requirement that they be operated from sunset to sunrise, and require that each such light not operated by a Federal agency have an air navigation facility certificate and rating, and that none be extinguished without permission.

Notice of Hazards

Also issued by the Administrator during 1941 was a regulation requiring notice of the construction or alteration of structures along or within 20 miles of a civil airway, to a height in excess of 150 feet above ground level, 100 feet above navigable water, or 1/100 its distance from a recognized landing area.⁸² This regulation does not in any way attempt to control the manner in which any structure is constructed or altered, nor does it attempt to prevent such construction, or alteration. Its sole purpose is to obtain information needed to warn aircraft pilots of construction constituting a potential hazard to air commerce. In this respect, this regulation is like Regulation 76 of the former Civil Aeronautics Authority,⁸³ which it supersedes.

Exclusive Rights

As a final development in the field of Federal regulation of airports during the year 1941, municipal law officers will be interested in an Opinion of the Attorney General of the United States⁸⁴ on a question which was discussed at some length in our 1940 article,⁸⁵ namely, whether an exclusive right to operate a charter flying service, a flying school, or other commercial flying service at an airport improved with Federal funds is in conflict with the exclusive right provision of the Civil Aeronautics Act of 1938. The ruling was that in the usual case, "the grant of an exclusive right to use (such) an airport for a particular aeronautical activity" constitutes a violation of the Act. However, the opinion went on to state that this "does not mean that in administering the provisions of Section 303 it is necessary to permit such competition as would endanger the safety

81. See "Obstruction Marking Manual," Part I, U. S. Department of Commerce, CAA, June 1, 1941.

82. Regulations of the Adm. of Civil Aeronautics, Part 525, effective Nov. 1, 1941. The regulation is set out in full in 13 Journal of Air Law and Commerce 72.

83. Civil Aeronautics Regulations Serial No. 76, effective July 16, 1940.

84. 40 Att. Gen. Op. No. 15 (June 4, 1941).

85. *Supra*, n. 1, at p. 153.

of the public and of persons engaged in air commerce." In other words, it appears that an exclusive right to use an airport upon which Federal funds have been spent, for any particular commercial activity involving the landing and taking-off of aircraft, is in conflict with the statute unless required in the interests of safety.

State Regulation

Turning to State and local developments in the field of airport operation and regulation, it should be noted that all four of the State aeronautical regulatory acts passed during 1941⁸⁶ make provision for the licensing of airports by the State aeronautics commission. As pointed out in last year's article,⁸⁷ the previous statutes of this type have not always provided for airport licensing.

Of particular interest to city attorneys in this connection is a recent opinion of the Attorney General of Illinois⁸⁸ in a matter involving conflicting airport regulations of a State agency and a county. These were regulations of the State Aeronautics Commission as to length of runways and regulations on the same subject contained in the Cook County airport zoning ordinance of which so much was said in our article last year.⁸⁹ The question, of course, was which should prevail and the Attorney General's ruling was that the State regulations were paramount. The ground for this opinion was apparently that the statute authorizing county zoning did not expressly permit such regulation, though it did provide for county regulation of the location of airports, whereas the act creating the State Aeronautics Commission did expressly authorize that Commission to regulate the size of airports.

Another interesting example of recent State airport regulation is furnished by an order of the Minnesota Aeronautics Commission granting an application of the University of Minnesota for a license for the airport it had just established and denying that of a private corporation for a license for a previously established airport located about one mile from that of the University.⁹⁰ In this order, the Commission found that it would be unsafe and not "in the public interest or convenience" to grant both licenses and considered at some length the qualifications of the two applicants, the nature of the two air-

86. *Supra*, n. 10.

87. *Supra*, n. 1, at p. 161.

88. Ill. Att. Gen. Op. to Ill. Aeronautics Commission, April 1, 1941, 235 CCH 1901.

89. *Supra*, n. 1, at pp. 156, 161.

90. Order of Minn. Aeronautics Commission in the matter of the applications of the University of Minn. and the Hannaford Aircraft Company for licenses for airports near New Brighton, Minn., Oct. 16, 1941.

ports, and other factors determining which airport should be permitted to continue to exist.

Municipal Regulation

In this connection, it is noteworthy that, while there was no legislation during 1941 expressly authorizing political subdivisions to regulate the establishment, development, operation, and maintenance of all airports within their territorial limits,⁹¹ eight States did adopt legislation authorizing municipalities to regulate their own airports.⁹² Although this power is now expressly vested in political subdivisions in some thirty-two States, many of these also have legislation providing for State regulation of all airports, including those that are publicly-owned, the result being a possibility of conflicting airport regulations as in the Illinois case mentioned above.⁹³

In addition to this legislation, there has been one opinion of a State Attorney General on the related question whether or not a statute authorizing cities to establish an airport beyond their city limits carried with it, by implication, the power to regulate such airports. In this opinion, which was given by the Attorney General of Minnesota, it was held that such extraterritorial regulation was authorized even though the City's home-rule charter was silent on the matter.⁹⁴

Municipal Airport Operation

While it would seem that the power to operate and maintain airports is also inferred from the power to establish and develop them, the State airport enabling acts usually contain express provisions granting this power to the political subdivisions to which they apply. This is true of all of the 1941 airport enabling acts extending the power to establish airports to additional classes of political subdivisions.⁹⁵

However, while many of these statutes, as previously indicated,⁹⁶ authorize political subdivisions to issue bonds for acquisition of land needed for airport purposes or for airport construction and develop-

91. See discussion of such regulation in last year's article, *supra*, n. 1, at p. 160.

92. Fla. L. 1941, c. 20861; Ill. L. 1941, S. B. 61 and S. B. 372; Kans. L. 1941, S. B. 37; Mont. L. 1941, c. 54; Oreg. L. 1941, c. 189; S. D. L. 1941, H. B. 250; Tex. L. 1941, S. B. 129.

93. *Supra*, n. 88.

94. Minn. Att. Gen. Op. to International Falls City Attorney, April 9, 1941, 235 CCH 1900.

95. *Supra*, n. 31.

96. *Supra*, n. 50.

ment, only five expressly permit borrowing to defray the costs of airport operation, maintenance, or repair.⁹⁷

Airport Leases

It has generally been held that, in the absence of statutory authority, municipalities cannot lease their airports to private operators.⁹⁸ In this connection, however, it is interesting to note that the Attorney General of Alabama last year ruled that the County of Houston, acting in concert with the City of Dothan in acquiring lands to be developed as a joint airport with Federal funds, could lease the completed facility to the Federal Government, despite the fact that there was no specific statutory authorization for the execution of such a lease.⁹⁹ It was his opinion that a code provision stating that the County governing body shall "have control of all property belonging to the County" was sufficiently broad to authorize the proposed lease to the Federal Government.

On the other hand, in the case of the *City of Daytona Beach v. Dygert*¹⁰⁰ the City desired to have a two year lease of its airport to the defendant declared void. In that case, the court held the lease invalid even though there was a special act permitting the City to lease or otherwise dispose of land acquired for airport purposes to private individuals. While this decision may have been correct, it has been criticized¹⁰¹ for the ground upon which it purported to be based, which was that the act did not constitute the express authorization necessary for lease of land impressed with a public trust.

Perhaps the true reason for this decision is indicated by a recent opinion of the Attorney General of California,¹⁰² holding that a County could not legally lease a portion of a hangar for a mere nominal consideration. This ruling was based on a limitation in the California Constitution that political subdivisions have no inherent power to make gifts of public property.

Tort Liability

Another legal question in this general field is that whether political subdivisions are liable for personal injuries or damages

97. Del. L. 1941, S. B. 207 (Spec. Act) ; Idaho L. 1941, c. 172 (1st class cities) ; Mont. L. 1941, c. 54 ; Texas L. 1941, S. B. 129 (cities over 40,000) ; Vt. L. 1941, c. 54.

98. See collected cases in Report No. 42, National Institute of Municipal Law Officers (April, 1939) at p. 3.

99. Ala. Att. Gen. Op. to Judge of Probate, Houston County, May 1, 1941, 235 CCH 1903.

100. 1 S. (2d) 170 (Fla., March 11, 1941).

101. See 12 Air Law Review 334 (July, 1941).

102. Calif. Att. Gen. Op. to Kern County Att., March 13, 1941, 235 CCH 1894.

resulting from negligence of their employees or agents in operation of their airports.¹⁰³ This question was the subject of several interesting developments during the year 1941.

In *Peavey v. City of Miami*¹⁰⁴ instructions to the jury to the effect that the same degree of care should be exercised by the city to be free from such liability as would be required of a private airport proprietor were held correct; however, the jury found that the defendant city was not negligent¹⁰⁵ and rendered a verdict against the plaintiff. Opposed to this ruling is an opinion by the Attorney General of Kentucky¹⁰⁶ advising that operation of an airport by a city is just as much a municipal, governmental function as maintenance of a public park and that therefore a City so operating an airport would be exempt from tort liability.

In addition, the year 1941 witnessed the passage of at least one act, the sole purpose of which was to declare the operation of airports to be a governmental function,¹⁰⁷ and also the decision of a case construing a similar statute in another State, *Abbott v. City of Des Moines*.¹⁰⁸ This case was one of a suit brought against the City by the owner of a plane which was damaged in a hangar explosion caused by sparks from a City employee's welding torch. The court held that there was no need to determine whether or not there was negligence because a State statute places municipal airports in the same category as public parks, operation of which is a governmental function, thus making cities immune from suit for injuries resulting from negligence in their operation.

(3) AIRPORT PROTECTION

As was pointed out in our article covering airport legal developments during 1940,¹⁰⁹ once an airport is established, it is highly desirable, if not necessary, that it be protected against two threats to its continued utility as an airport, and even to its existence as such, these being the danger that its aerial approaches may be obstructed and the danger that it may be abated as a nuisance.

103. See discussion in Report 42, *supra*, n. 98, at p. 5.

104. 1 S. (2d) 614 (Fla., April 15, 1941).

105. The case holds that posting notice of runway repairs in CAA "Notices to Airmen" and outlining the dangerous areas with red lanterns at night was due care and that the plaintiff's action in landing at the airport while known to be under repair without first maneuvering for better orientation constituted contributory negligence.

106. Ky. Att. Gen. Op. to Member of Danville Board of Council, Feb. 5, 1941, 235 CCH 1890.

107. Me. L. 1941, c. 243

108. 298 N. W. 649 (Iowa, June 17, 1941).

109. *Supra*, n. 1, at p. 154.

Airport Zoning

Much was accomplished during 1941 to guard against this first danger, considerable progress having been made toward protection of airport approaches by the airport zoning method. This progress is largely attributable to the efforts of the Civil Aeronautics Administration and National Institute of Municipal Law Officers and other organizations interested in the welfare of civil aviation, in encouraging the adoption of State and local legislation necessary to permit effective and widespread utilization of this means.

Early in the year two sample airport zoning acts were released. While in many respects similar to the two earlier drafts prepared by the Institute, with the assistance of the CAA,¹¹⁰ these two model acts contain certain new features not included in the original drafts, which experience had shown to be necessary or otherwise desirable in this type of legislation. One of these drafts contemplates placing a measure of control in a State aviation body; the other, which was prepared by the National Institute of Municipal Law Officers, differs from the first in that it places full control of airport zoning in the local political subdivisions. In all other respects the two drafts are identical.

That there is a rapidly growing appreciation of the need for airport zoning is seen in the fact that no less than 11 acts were adopted in 1941 either prescribing airport zoning regulations or authorizing an agency of the State Government or certain classes of political subdivisions to adopt such regulations for the protection of certain airports or types of airports.¹¹¹ In addition, it is noteworthy that in two other States, airport zoning bills were passed by the Legislature only to be vetoed by the Governor.¹¹² When added to the airport zoning acts already in existence,¹¹³ the 11 adopted last year raises the total of States now having legislation on the subject to 23.

Of these 11 acts, two empower a State agency to adopt the regulations,¹¹⁴ five authorize political subdivisions to zone in accordance with approach plans adopted or approved by a State agency,¹¹⁵

110. Report 42, *supra*, n. 98, and Report 59, National Institute of Municipal Law Officers (Feb. 1940).

111. Ark. L. 1941, c. 116; Ill. L. 1941, S. B. 493; Me. L. 1941, c. 142; Mass. L. 1941, c. 537; Nebr. L. 1941, L. B. 495; N. H. L. 1941, c. 145; N. M. L. 1941, c. 171; N. C. L. 1941, c. 240; Okla. L. 1941, S. B. 153; Oreg. L. 1941, H. B. 362; Wyo. L. 1941, c. 110.

112. Mich. L. 1941, H. B. 551 and Pa. L. 1941, S. B. 913.

113. See Report of Airports Committee, *supra*, n. 1, at p. 155.

114. Okla. L. 1941, S. B. 153 and Oreg. L. 1941, H. B. 362.

115. Ill. L. 1941, S. B. 493; Mass. L. 1941, c. 537; Nebr. L. 1941, L. B. 495; N. H. L. 1941, c. 145; N. M. L. 1941, c. 171.

and four merely authorize municipalities or other political subdivisions to zone.¹¹⁶ Altogether, it appears that all but four of these statutes¹¹⁷ were patterned after one or another of the zoning acts referred to above.

It is not possible at this time to state how many airports have been or will be protected under the authority of these measures; however, the volume of requests for information in this field received by the CAA and the Institute indicates a growing realization on the part of city officials that the aerial approaches of their airports must be protected against obstruction by the airport zoning method.

Moreover, it appears that Congress is awakening to this need. This is indicated by the following statements contained in the recent report of the Nichols Committee discussed above:¹¹⁸

"The third cause of accidents is on a parity with the second, but is subject only indirectly to remedial action by the Congress, and that is, the inherent defects in, obstructions upon, and hazards about, the existing airports. Your committee believe that the only direct action the Congress can take on these matters is to authorize the licensing and grading (*sic*) of airports by the Civil Aeronautics Administrator, and thereby limit the use of many airports to daylight and good weather operations until such time as the cities and States in which they are situated shall take the necessary steps to insure the safety of interstate commerce. This will require the enactment by many State legislatures of enabling acts empowering cities and other subdivisions of government to zone all approaches to their airports."

In this connection, it should be noted that in 1941 twelve States adopted legislation authorizing acquisition, by grant, purchase, or condemnation, of air rights or easements where such action is necessary in order to secure the removal or lowering of an existing obstruction or the property is so close to the airport boundary that regulation of the height of structures thereon would constitute an unlawful taking of property without compensation. This legislation includes one of the airport zoning acts which are not patterned after one of the model acts,¹¹⁹ all of those which are,¹²⁰ and in addition four acts not authorizing airport zoning.¹²¹

116. Ark. L. 1941, c. 116; Me. L. 1941, c. 142; N. C. L. 1941, c. 240; Wyo. L. 1941, c. 110.

117. Nebr. L. 1941, L. B. 495; Okla. L. 1941, S. B. 153; Oreg. L. 1941, H. B. 362; Wyo. L. 1941, c. 110.

118. *Supra*, n. 73.

119. Okla. L. 1941, S. B. 153.

120. Ill. L. 1941, S. B. 493; Me. L. 1941, c. 142; Mass. L. 1941, c. 537; N. H. L. 1941, c. 145; N. M. L. 1941, c. 171; N. C. L. 1941, c. 240.

121. Fla. L. 1941, c. 20861; Kans. L. 1941, S. B. 37, S. B. 38; Oreg. L. 1941, c. 189.

Airports as Nuisances

As is stated in 2 C. J. S. 909, "An airport, landing field, or flying school is not a nuisance per se, although it may become a nuisance from the manner of its construction or operation; in other words, it can be regarded as a nuisance only if located in an unsuitable place or if operated so as to interfere unreasonably with the comfort of adjoining owners."¹²²

In the past year under the impetus of the Federal airport program, there was a marked trend toward locating airports so that they would not constitute an abatable nuisance. Under the extra-territorial authority granted by the State statutes, municipalities are establishing their airports at sites farther away from built up areas where future expansion will be possible at a lower cost, where approach obstructions are fewer, and where there is less danger that the airports will become nuisances. Moreover, increased attention is being given to planning and regulating the location of airports with reference to other physical features of the community in such a way as to hold conflicts of land uses to a minimum.¹²³ As a result, it is believed that the day is not far distant when airport abatement suits will be a thing of the past.

It is interesting to note in this connection that in the case of *Miles v. Lee*,¹²⁴ the plaintiffs raised the point that the expansion of the Louisville Municipal Airport would be extremely objectionable to the residents of the surrounding vicinity which was an entirely residential district, and would "seriously interfere with the peace of the many thousands of people living within this area and seriously and materially destroy the values of their properties and homes." While it was not affirmatively pled that this airport constituted a nuisance, the court observed, in passing, that on the basis of the above circumstances, the plaintiffs could not charge the maintenance or creation of a nuisance or seek an injunction to abate or prohibit it.

On the other hand, it has been reported that on January 27, 1941, final action was taken on a petition filed by certain taxpayers and the Board of Education of Alhambra, California, to abate flying at the Alhambra Airport.¹²⁵ A decree was issued on that date enjoining further use of the airport for pilot training, and limiting future use to emergency landings and to the actual business needs of two aircraft manufacturing companies having plants adjacent to the airport.

122. See article cited *supra*, n. 1, at p. 160.

123. See the discussion of such planning and regulation in the article cited *supra*, n. 1, at pp. 156-162.

124. *Supra*, n. 61.

125. See Report of Committee on Airports, *supra*, n. 1, at p. 159.

Conclusions

It can be said by way of summary that the year 1941 was the renaissance for municipal airports. The Federal Government for the first time, by direct appropriation recognized the integral part which the municipal airport plays in our civil and military life. The State legislatures were quick to provide needed airport enabling legislation. And the municipalities, counties, and other political subdivisions continued their contribution to civil aeronautics and the national defense, often at considerable sacrifice, by providing civil and military aviation with adequate airport facilities.