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The Aviation Hazard in Radio-Television Progress

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THE AVIATION HAZARD IN RADIO-TELEVISION PROGRESS

WITH frequency modulation and television developing as important branches of radio broadcasting, aviation's paramount need to keep the air free of serious hazards to air navigation is pointed up once more. The towering antennae which mark standard radio transmitting stations are inadequate, in terms of height, for either FM or television. Tower heights must increase if radio and television are to progress; but in the coming era of super-speed jets and mammoth planes air traffic already needs the space radio towers now occupy. While the AM radio antenna already presents a serious aviation hazard, if FM and television antennae begin puncturing the atmosphere at greater heights, the hazard to air navigation obviously will become more serious and could eventually hamper the advance of aviation.

The obstruction to aircraft flight has already received the attention of every branch of government—judicial, legislative, and administrative. Courts have petitioned to enjoin the erection and maintenance of such hazards as wooden poles with no apparent usefulness,[1] and of water towers [2] —useful in the extreme. No reported case involving radio antennae can be found indicating that the antennae hazard has been handled elsewhere. State legislatures have exercised their prerogative of authorizing municipalities to step in by zoning laws where the aviation hazard arises,[3] and the United States Congress has made such action mandatory as a requisite to getting federal benefits for local airport projects.[4] In the legislative area, as in the judicial, no special treatment is accorded radio towers; yet their inclusion in the general provision is obvious. Within the administrative framework of the Federal Communications Commission and the Civil Aeronautics Administration there is some doubt as to whether, with the variety of powers these agencies possess, either can actually prohibit the construction of abnormally high radio and television antennae.

Judicially, the evolution of the conflict has been an outgrowth of real property concepts. The development of the law of real property at a time when the uses to which the air above the land could be put were unforeseen gave rise to the *"ad coelum"* doctrine, whereby the landowner owned not only his soil, but also everything above and below.[5] In its practical application this idea merely safeguarded the proprietary rights of the landowner over the airspace immediately above his land, such as for building purposes and for protection against encroachments of fences and trees growing on adjoining lands. Theoretically, however, its operation was unlimited, and for a time in the early stages of the development of air law it threatened

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[1] United Airports Co. of Calif. v. Hinman, 1 Avi. 823 (S.D. Cal. 1939).

[2] Roosevelt Field v. Town of North Hempstead, 88 F. Supp. 177 (E.D.N.Y. 1950).

[3] Cal. Laws 1949, c. 588; Idaho Laws 1947, c. 130; Ill. Laws 1949, S.B. No. 591; Iowa Laws 1947, c. 182; Kas. Laws 1947, c. 13; Mont. Laws 1947, c. 287; Nev. Laws 1947, c. 205; Ore. Laws 1947, c. 205; Ore. Laws 1947, c. 542; Tex. Laws 1947, c. 391; Wis. Laws 1947, c. 516.

[4] Federal Airport Act, 60 Stat. 170 (1946), 49 U.S.C. §1102 (1948).

[5] For an excellent doctrinal analysis of the maxim, "cujus est solum ejus est usque ad coelum," see Sweeney, *Adjusting the Conflicting Interests of Landowner and Aviator in Anglo-American Law*, 3 J. AIR L. 329 (1932).

to thwart the growth of air navigation. Thanks to the liberal attitude of the courts the law has assumed a course in disregard of the literal application of the doctrine,[6] although its continuous prevalence, so far as necessary to protect the landowner's rights over the "usable column of air" above his land, remains unchallenged.

At the present time the right of an aviator to fly over the land of another, at an altitude not involving any interference with the potential proprietary or possessory rights of the landowner in his land, is of course unquestionable.[7] Both the landowner and the aviator, then, are protected; and the extent of that protection is illustrated in the recent case of *Roosevelt Field v. Town of North Hempstead.*[8] Plaintiff sought to enjoin the maintenance of a village water tower, upon the theory that it was an aeronautical hazard and a public and private nuisance. The need for the water tower was so great that the town council waived compliance with certain building ordinances in order to expedite its construction. Plaintiff claimed that there had been a "taking by defendants of property in the public domain through which plaintiffs had freedom of transit." [9] In a balancing of equities by the court, the defendant won easily. The town's need of a water supply was undisputed. The airfield was shown to be of little consequence due to the fact that it was equipped to handle only small private aircraft. Its runways were short and shabby, and the field itself was not a lucrative business.[10] Throughout similar judicial decisions it has been a combination of utility and necessity, as here, that has determined the outcome.[11] There is no reason to suspect that a radio tower would receive any different treatment should it ever become the subject of litigation.

Legislative action to restrict the aviation hazards is typically of recent date. Since 1947 a rash of zoning laws, including amendments to outdated ones, has spread on the statutory scene. Some, like those of California [12] and Idaho,[13] merely reconstructed the official state attitude toward arbitrary condemnation of property, providing for closer consideration of actual community needs and private interests. Others, like those of Illinois [14] and Arkansas,[15] actually prohibited or gave to municipalities the power to pro-

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[6] See note 11 *infra.*

[7] For a summary of cases, see Note, 69 A.L.R. 317 (1930).

[8] 88 F. Supp. 177 (E.D.N.Y. 1950).

[9] Plaintiff claimed that there would be no taking of defendant's property in the super-adjacent air space, because its use of the upper reaches thereof had already been taken by the exercise of such police powers under the zoning law. The court dismissed this contention on the ground that the zoning law did not automatically place all airspace in the vicinity of airfields in the public domain, but only those specifically provided for by ordinance.

[10] In spite of this fact, the CAA clearly regarded the tower as an aeronautical hazard, but in a letter to defendant admitted the absence of authority to prevent the construction, and pleaded for reconsideration of the proposed construction in the interest of safeguarding lives and property. The court itself, noting that plaintiff could have appealed the approval of the construction before it was actually begun, was in no mood to hear arguments after the fact of construction was already a reality.

[11] In United Airports Co. of Calif. v. Hinman, 1 Avi. 823 (S.D. Cal. 1939), the court had little difficulty awarding an injunction. Plaintiff airport owner had a thriving business, providing facilities of the highest type for commercial and government-owned planes. Defendant, on the other hand, had no actual interest at stake, having erected a derrick and numerous tall poles at the periphery of the airport for the sole purpose of hampering the airport's traffic. There was also evidence attesting to the fact that the construction of the hazards was in itself dangerous. The court did reserve the right to lift the injunction if defendant could prove that his use of the land in good faith necessitated the erection of such structures.

[12] Cal. Laws 1949, c. 588.

[13] Idaho Laws 1947, c. 130.

[14] Ill. Laws 1949, S.B. No. 591.

[15] Ark. Laws 1949, c. 285.

hibit certain types of construction above specified heights within airport vicinities.[16] Some concern was demonstrated with respect to the right of the state to so zone private property. In *United States v. Causby* [17] it was determined that the government took an easement when it used the airspace over a chicken farm in such a way as to destroy the use of the land for that particular purpose. The Supreme Court ruled that the government must compensate the landowner.[18] In the state zoning statutes compensation is not provided for, but one responsible state official insists that constitutional prohibitions against taking property without compensation are not flouted thereby. Granting that the state contemplates, through its zoning laws, the taking of an easement over the landowner's property, he reasons that the constitutional prohibition yields to the inherent police power vested in the state.[19]

The Federal Airport Act of 1946 [20] takes a somewhat different approach. It is not a zoning law; yet in order for localities to secure federal funds for expansion and improvement of airport facilities the Civil Aeronautics Administrator must have written assurance that "the aerial approaches to such airport will be adequately cleared and protected by removing, lowering, relocating, marking or lighting or otherwise mitigating existing airport hazards, and by preventing the establishment or creation of future airport hazards." [21] Here specific consideration of radio towers is present; the Administrator is authorized to seek the aid of the FCC in eliminating airport hazards caused by such towers.[22] The Act adds, however, that the Federal Government may share in the cost of "acquiring land or interests therein or easements through or other interests in airspace . . ." [23]

Administration of the Federal Communications Act and Civil Aeronautics Act has become, with respect to the existence of radio tower aviation hazards, a somewhat disjointed joint venture. Part of the FCC's power to license broadcasting stations is its power to pass on the sufficiency of the structure of the antenna, in terms of whether it is built for safety as to passersby on the ground.[24] In addition the agency's regulations provide two types of protection to the aviator. First is the prohibition against changes in existing antennae without specific authorization from the Commission, when the changes will make the antenna a certain height, or put it within a certain distance from a landing area.[25] Second is the power to require painting and/or illumination of radio towers which are or may become hazards to air navigation.[26] CAA regulations provide for notice to be given to the Administrator when either alteration or construction of structures of a certain height and near civil airways are proposed, or if they are within a certain distance from a landing area.[27] Hence neither agency has the flat power to *prohibit* construction or alteration of radio towers.

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[16] The Illinois statute, for example, allows restriction of the height of any structure "upon the relationship of one foot of height to each twenty feet of distance from the boundary line" of the airport.

[17] 328 U.S. 256 (1946).

[18] The case is fully considered in the note in 14 J. AIR L. 112 (1947).

[19] This is taken from an opinion rendered by the attorney-general of the State of West Virginia upon receipt of a request for information from interested parties. 1 Avi. Rep. 19, 151.

[20] 60 STAT. 170 (1946), 49 U.S.C. §1102 (1948).

[21] 60 STAT. 176 (1946), 49 U.S.C. §1110 (1948).

[22] 60 STAT. 171 (1946), 49 U.S.C. §1102 (1948).

[23] 60 STAT. 176 (1946), 49 U.S.C. §1109(d) (1948).

[24] This power is derived directly from the Communications Act of 1934, requiring the issuance of a construction permit before issuing a license to establish the broadcasting station. 48 STAT. 1089 (1934), 47 U.S.C. §319 (1948).

[25] 47 CODE FED. REGS. §9.110 (1949).

[26] Regulations under this heading are derived from the statute. 48 STAT. 1083 (1934), 47 U.S.C. §303(q) (1948).

[27] 14 CODE FED. REGS. §625.1 (1949).

A typical FCC proceeding illustrates how these agencies, in concert, manage to prohibit construction or alteration in spite of their supposed handicap. Earlier this year, radio station WOR in New York City sought permission to enlarge its broadcasting facilities by increasing the heights of its antennae, which apparently lie in and near certain designated airways and traffic approaches to several airports in the New York-New Jersey area. As in all FCC proceedings, the parties were met with the need of establishing the utility of the proposed construction.[28] In this particular case, however, the chief source of contention lay in the intervention of the CAA and other aviation interests,[29] all claiming that the new antennae would seriously hamper air traffic in the area, and would constitute a menace to life and property. The FCC made it clear that it was its policy to consult the CAA and other interested parties wherever a possible aviation hazard is involved.[30] WOR had several good arguments to sustain its position that the increased heights of the antennae would not present a serious hazard,[31] but eventually withdrew its application, indicating that the CAA's intervention was more than nominally successful. No official decision is available.[32]

The fact that the regulations of the two agencies present an overlapping of authority need not lead to the conclusion that a conflict exists. It is altogether logical that these two agencies work together, for the problem is common to both. Granted that once they combine their efforts the applicant for construction of an extremely high antenna has little chance of succeeding, it is equally true that adequate opportunity is provided for a hearing, and for appeal to the judicial process.[33] This latter remedy in all likelihood will be unavailing, it is admitted, for the courts today favor the landowner only under extreme conditions. Needless to say, organized legitimate aviation has highest priority in the use of airspace not previously occupied.

The city planners of today might derive great benefit from this realization. Forward-looking municipal authorities are seriously concerned with both radio and aviation, both of which can contribute substantially to the material progress of the city in the form of added employment and income. Under zoning laws, cities are relatively free to select the location of new public airports, and by intelligent cooperation with radio stations can leave ample space for the erection of antennae without hampering air traffic. However, in most cases the airport is an established fact. In such cases, if the broadcaster is forced to construct antennae in locations where aviation safety will not be endangered, his cost will be a fraction of the cost in lives and property that would otherwise be menaced. FM and television need not leave the scene of aviation progress; but in any event they will be forced to move over, whether by the courts, the legislatures or administrative agencies.

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[28] As to the utility of the new antennae, WOR claimed its proposed expansion was designed to increase the population served by 38%, and the area served by 212%. In addition it showed how it was performing a public service every day by presenting religious, educational, and patriotic programs, many of which were sustained by the broadcasting station, rather than by paid advertising.

[29] Namely, the Air Transport Association of America and the Port of New York Authority.

[30] 47 CODE FED. REGS. §1.377 (1949).

[31] The applicant contended, among other things, that the towers had always been considered an excellent checkpoint for pilots entering the area, and this was backed up with testimony from pilots; there was, of course, equally convincing testimony to the opposite effect.

[32] No reference to the proceeding is to be found in the trade journals, nor do the various law services provide a clue as to the actual reasons for the withdrawal of the application.

[33] 48 STAT. 1093 (1934), 47 U.S.C. §402(b)(1) (1948).

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