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THE REGULATION OF AIRPORTS

ROWLAND W. FIXEL*

1. REGULATION OF AIRPORTS

An airport has been defined as any locality, either of water or land which is adapted for the landing and taking off of aircraft and which provides facilities for shelter, supply and repair of aircraft; or a place used regularly for receiving or discharging passengers or cargo by air.¹

Airports are comparatively recent additions to the facilities of transportation. They became necessary in connection with and as an aid to aerial navigation. Due to the mechanical requirements of aircraft, airports and landing fields have developed along special lines, with special features, and consequently have become subject to laws and principles of regulation peculiar to themselves in many respects.

While airports are to some extent similar to wharves and docks, the similarity ends with the one use to which they are put, namely, the housing of the instrument of transportation. The difference between an airport and a wharf is that while a wharf is local in its nature,² an airport is more extensive in its usability.

It is true that strictly speaking, an airport is merely a local facility used in connection with air navigation and therefore legislation with reference to it will deal first with local matters such as master and servant, hours of service, liability for death or injury, traffic rules, rates and charges. Yet because it is an instrument of and an aid to interstate and foreign commerce, it subjects itself to other and different regulations than those purely local.

Again because the airport is a point of arrival and departure for the airplane, and the use of an airport involves rights of property owners near or adjacent to the airport, very serious questions have arisen, at this state of the mechanical perfection of the airplane, concerning the regulation of airports and their use, looking toward a preservation of such outside property interests as well as maintaining for airport owners sufficient freedom of action to enable them to successfully carry out their functions and purposes.

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1. Sec. 9 (g), Act 254, 69th Cong. S. 41.

2. *Parkersburg v. Parkersburg*, 107 U. S. 691, 27 L. Ed. 584.

Airports have been classified as private and public. A private airport is such as is owned, maintained and used either by an individual, firm or agency solely for its own purposes and not for hire or reward. It does not hold itself out to the public, nor does it propose to offer any facilities, services, or supplies to the public. It receives no support or revenue from any external source, but is established and used by its owner or owners in their capacity as private owners thereof. Such airports are generally adjacent to the estate of an individual or are developed in connection with a commercial operation.

The extent of regulation of such private airport as a result is limited as compared to that of a public airport. The principal regulations imposed on a private airport now are and in the future necessarily will be such as to bring the airport under the control and supervision of some proper state or municipal agency so that it may be ascertained whether the private airport is suitable for the use intended; whether it is used for any purposes in conflict with law; and so that uniform authority may be exercised over it to prohibit injustice, damage or law violation. Unless such supervision is exercised, there would be great possibility of danger to adjacent property, danger of smuggling, illegal operations of all kinds including breaches of the Federal Air Act.

Private airports then are and will be regulated in general to the extent that they are

- (a) duly licensed
- (b) properly situated and equipped
- (c) not used as a base for illegal operation of any kind.

Public airports are such as are open to the public; where services and supplies are furnished, and where the public generally is invited to use all facilities available for hire and reward.

Such airports are owned either by private capital or are established and maintained by municipalities, boards designated by local laws or state statutes, or by the states themselves.

Public airports when acquired or established by the municipality or state, are acquired and established by virtue of legislative enactment or authority. The powers usually granted are, (a) the right of eminent domain, it being assumed that the establishment of an airport is for a public necessity;³ (b) the right to equip such air fields. Under this right the government agency may establish, construct, own, control, lease, equip, improve, and maintain such

3. Minnesota Session Laws 1929, Chap. 217, S. F. No. 5, Sec. 3.

airport and air field; (c) the right to operate and regulate the airport and to establish such fees or charges for the use of the airport and its facilities as are reasonable, subject to the approval of the governing body.

Public airports therefore being creatures of state law are subject to regulation by the law which brought them into being. Even though they may be privately owned, they are a facility necessary to the successful transportation of persons and property in air, a medium free in its nature and interstate in its character, and hence they are quasi public in their nature.

2. AUTHORITY TO REGULATE

An airport being an aid to navigation, cannot be considered apart or detached from the instruments which navigate the air. Aircraft must take off from and land at airports. Whether such airports are fields in or adjacent to cities, or are on buildings specially constructed for that purpose, does not change the character of the port as an airport. It remains at all times an aid to navigation, and as such must be under the supervision and control of some power or authority. This is necessary so as to preserve for aircraft a safe, satisfactory and permanent medium in which to land and take off.

On the other hand, the airport, while an aid to navigation, is in general an immovable territory, usually on the ground or water and within the territorial limits of a municipality or a state. It is in this regard, a local institution and becomes subject to local regulations. That Congress intended to relinquish its control over airports and terminal landing fields, with the exception of Army and Navy fields, and transfer such control to local authority, is clearly determined by reference to the Federal Air Act, Sec. 5(a), where certain airways and navigation facilities were directed to be turned over to the control of the Secretary of Commerce with the exception, Congress said, that the established airports and terminal landing fields may be transferred to the jurisdiction and control of the municipalities concerned under arrangements subject to approval by the President. And in Sec. 5(b) where the Secretary of Commerce was given authority to establish, operate and maintain along such airways, all necessary air navigation facilities except airports.

By this act, Congress clearly intended to pass the control of commercial airports to local authorities.

The reason for this was that airports are local in their nature, and can be more successfully operated through local ownership and supervision than under Federal authority.

Intermediate landing fields, however, are solely under the jurisdiction and authority of the Department of Commerce. Establishment, regulation, and control thereof are vested in the Government and "no exclusive rights, preferential privileges, or commercialization of any emergency field will be permitted," nor may such landing field be used in any manner inconsistent with the air commerce act. Aircraft pilots and the aeronautical public must comply with the air commerce regulations promulgated by the Department of Commerce in using intermediate landing fields.

"No fixed-base operation will be permitted to establish at or operate from an intermediate landing field." And the regular use of such field for embarkation or landing of passengers, exchange of mails, or loading and discharging of cargo, or any other commercial operation is prohibited. Other uses such as grazing of stock, parking of cars or airplanes, storage of any equipment or material, or leaving any debris on the field in any manner that may cause an accident is likewise prohibited.⁴

The purpose of these requirements is to provide for the safety of the aeronautical public in cases of emergencies.

Likewise, the Federal Government retains control over its army and naval air fields. The Secretary of the Treasury is authorized to establish, equip and maintain not exceeding ten aviation stations at points on the Atlantic and Pacific coasts, the Gulf of Mexico and the Great Lakes. These stations when established are completely under the control of the branch of the service to which they are assigned, and cannot be used as a base for commercial operations or in any manner whatsoever without the consent of the military authority having jurisdiction thereof. Some of the leading airports in the country have been developed under this authority, namely, Selfridge Field, Kelly Field, and Mitchell Field.⁵

The Federal Government having relinquished to the municipalities its rights and claims to establish, maintain and operate airports and landing fields, except intermediate landing fields, and its Army and Navy airports, the question who has authority to regulate airports has become largely an academic one.

4. Air Commerce Bulletin, Vol. 2, No. 1, pp. 24-6.

5. Act of August 29, 1916, 39 Stat. 601.

3. BASIC AUTHORITY

The power to regulate airports is given either directly by state statute, or is implied in the power granted to establish and operate airports.

Legislation has been enacted by many states authorizing the establishment and operation of airports, either by the states through some state agency, or by its municipalities. In many instances the statutes confer no power to regulate the airports, when established. However, where power is conferred by statute authorizing the establishment and operation of an airport, that power includes the right to regulate the airport in question, at least to the extent necessary to execute the power.⁶

State legislation embraces various phases of control and regulation.

First, there is found the basic legislation necessary to enable a sub-division of a state to acquire, construct and operate airports and landing fields. This right is generally accompanied by express provision for the acquisition of the necessary land by purchase, lease or condemnation.

Some states have authorized their municipalities to acquire and operate airports outside of their corporate limits.⁷ South Carolina⁸ gives individual authority, as the need arises, to acquire and operate an airport. It has no general law.

Two states have passed acts validating the previous acquisition of airports by counties, cities, and towns, thus legalizing an otherwise unlawful act.⁹

Michigan,¹⁰ New Jersey,¹¹ Wyoming,¹² New Hampshire,¹³ West Virginia,¹⁴ and North Carolina,¹⁵ have authorized municipalities and counties either singly or jointly to acquire, erect and maintain airports and landing fields.

6. *Brown v. Clark*, 102 Tex. 323, 116 S. W. 360, reversing 108 S. W. 421 (Cir. App. 1908).

7. Missouri S. B. 476 Acts of 1929; W. Virginia, Chapt. 61, Act of 1929; N. Hampshire, Ch. 90, P. A. 1929; N. Dakota, S. B. No. 83, 21st Leg. Ass.; Kansas, S. B. 159 of 1929; Idaho, Chap. 108, H. B. 10, Approved 3/4/29; Iowa, Ch. 138, 43rd G. A.; Ohio, Gen. Code, Sec. 3677; Illinois, Sec. of Act of Ill. App. July 11, 1927.

8. Acts 440, 461, 538 and 562 of 1929.

9. Minnesota, Chap. 217, Session Laws of 1927; Montana, H. B. 196 of 1929.

10. P. A. 182 of 1927.

11. Chap. 350, Laws of 1929; Chap. 181, Laws of 1928.

12. Sec. 5, Chap. 72, Session Laws 1927.

13. Chap. 90, P. A. and Joint Res. of Leg. of 1929.

14. Chap. 61, Acts of 1929.

15. Chap. 87, Act of 1929.

In different states various agencies are given control of airports. In Illinois, Park Districts;¹⁶ in Minnesota, City Councils;¹⁷ in Pennsylvania the State Aeronautical Commission. In Michigan¹⁸ the State Board of Aeronautics has control of airports. In Indiana¹⁹ there is a Board of Aviation Commissioners. In Montana²⁰ the authority in control is the Board of County Commissioners.

Regulations of airports vary in the several jurisdictions but as a general rule they embrace such matters as schedules of flight, personnel, aircraft, flight restrictions, night operations, landing, bulletins, lighting, communications and structures.

Indiana²¹ has taken the most forward step in regulating property adjacent to airports by adopting the principle of zoning. Through its Board of Aviation Commissioners, it controls and regulates property adjacent to airports by fixing a restricted zone for a distance of not more than 1500 feet in any direction from the boundaries of the airport, within which zone no building may be erected high enough to interfere with the ascent or descent of aircraft at a gliding angle of one foot in height to every seven feet of horizontal distance to the nearest point of such airport or field; and said board also is authorized to require the removal of all buildings, towers, poles, wires, cables and other structures, and all trees within such zone.

Connecticut²² likewise authorizes the Commissioner of Aeronautics to establish zoning regulations over areas adjacent to any airport.

Alabama, Maine, Delaware, and New Mexico have no general laws governing the establishment and maintenance of airports. There will have to be legislation in these states with reference to airports, or else serious questions concerning regulation, and authority to operate may eventually be encountered.

In conclusion, on the subject of authority to regulate, we find these outstanding facts. Authority to regulate airports and landing fields is in the several states. This authority is usually delegated to the various counties, municipalities, or subdivisions thereof so as to provide adequate control, supervision and regulation. Without such authority, the establishment and operation of airports is

16. Sec. 1 of Act of Ill. Approved July 11, 1927.

17. Chap. 125 S. F. 705 Session of Minn., Laws of 1929.

18. P. A. 177 of 1929.

19. H. 24, Act 1929, P. 141 of Mar. 9, 1929.

20. Montana, H. B. 196 of 1929.

21. H. 24, Acts of 1929, P. 141, Approved Mar. 9, 1929.

22. Chap. 236 of Acts.

the usurpation of a quasi public or governmental activity, and illegal. No local regulations, however, can prevail if they are in conflict with those prescribed by the Federal government.

4. DIFFERENT PHASES OF REGULATION

Regulation of airports comprehends (a) Public convenience, rates, and services; (b) Adequate Police Regulations and Safety Factors.

In taking up these phases of regulation, the police regulations and safety factors will be first considered. Police power is the power inherent in a government to enact laws, within constitutional limits, to promote the order, safety, health, morals, and general welfare of society.²³ It is used to regulate the use and enjoyment of property by the owner. This includes the power to forbid the use of property in a manner hurtful to the health and comfort of the community.²⁴ It is an essential element in governments because the life, health and comfort of existence and beneficial use of property is dependent thereon.²⁵ A statute or ordinance regulating or restraining private rights of persons and property is constitutional even though loss results to the individuals from its enforcement.²⁶

For instance, regulations would be legal requiring reasonable conveniences at airports such as waiting rooms, heat, drinking water, telephones, telegraph, notices of time of arrival and departure of aircraft operating on a fixed schedule, adequate personnel to handle freight, express and mail arriving and being forwarded, and the service of conflicting interests without preference.²⁷

Also the regulation of all activities relating to the health, morals, and safety of persons who come in contact with the airport either as visitors, operators or passengers, as well as those who are indirectly affected by the activity of the airport because their personal or property rights are concerned due to their proximity to the airport.

The state or political subdivision thereof legally responsible for the establishment and operation of the airport is charged with a duty to regulate such airport so that it is a safe place upon which

23. 12 C. J. 904.

24. *Chicago v. Gunning System*, 214 Ill. 628, 73 N. E. 1035; *Chicago v. Rogers Park Water Co.*, 214 Ill. 212, 73 N. E. 375.

25. *Slaughter House Cases*, 16 Wall (U. S.) 36, 21 L. Ed. 394.

26. *Crowley v. Christenson*, 137 U. S. 86, 34 L. Ed. 620.

27. *State v. St. Louis R. Co.*, 83 Ark. 249, 103 S. W. 623 as to railroads.

to enter and use. It must be properly situated, drained, equipped and free from nuisances liable to endanger persons and/or property. For instance, water from an airport may not be drained on to adjacent private property.²⁸ Likewise there must be adequate surfacing for airports so as to prevent accidents to planes in landing and taking off.²⁹

In addition, the equipment such as beacon and signal lights should be capable of performing the work for which they are intended.

The control of persons on or about to enter an airport is a matter strictly under the regulation of local authorities. Breaches of the peace, disturbances of all kinds and nuisances are also under local authority as well as concessions on airport space to persons under contract or lease, with privileges, duties and services to perform. In fact, every kind of regulation except those hereinafter named, dealing with personal conduct, safety, and use of an airport as it is related to the health, morals or safety of society, will be found to be vested in local government exercising jurisdiction over the airport under the law.

There are exceptions to the foregoing.

1. The Federal Government exercises authority under the Federal Air Act to punish persons for interference with air navigation, exhibiting a false light or signal so that it is likely to be mistaken for a true light in connection with an airport, or who remove, extinguish or interfere with any true light or signal.
2. The Treasury Department retains jurisdiction to collect customs and duties and also at airports designated Ports of Entry, to control entry at such ports. It also retains jurisdiction to apprehend and take into custody violators of the Prohibition Law.

But apart from these instances where Federal Offenses and restrictions come into play, the jurisdiction to control and the exercise of that authority as to all police powers will be in the local government.

(b) Public Convenience and Uniform Rates and Services.

As airports are public utilities,³⁰ they are impressed with the responsibilities which are co-ordinate with the privileges conferred

28. *City of Mobile v. Lartigue*, Alabama Ct. of Appeals: 127 So. 257.

29. *Air Commerce Bulletin*, Vol. 2, No. 1, page 14.

30. *State ex rel. City of Lincoln v. Johnson*, *State Auditor*, Neb., 1928, 220 N. W. 273.

upon them. These responsibilities are to the public and concern convenience, services and tariffs. Public airports or those established and maintained by the public, are subject to unlimited control by the state or municipality establishing them. But private airport corporations, even though quasi public in their nature, can only be regulated by the governing authority to the extent of the public interest except insofar as this right may be restricted by the terms of the charter granted by the state.³¹

As the main activities of airports are use for air mail, transports, schools, sightseeing, short hops, service to privately owned planes and testing, it is apparent that airports should be selected with a view to public convenience, whereby all of the enumerated functions may be exploited and satisfied.

The airport should conform to accepted engineering requirements and be of sufficient size so that there is minimum danger of damage to surrounding property.

This of course is but a statement of what is best for public convenience. If it were possible to put into practice the suggestions offered, there would be little danger of a decision such as was recently made in the case of *Swetland v. Ohio Air Terminals, Inc.*, in the U. S. District Court in Cleveland, in which it was held that planes must not fly over property adjacent to airports at a height less than 500 feet. In that case, an adjacent property owner claimed aircraft taking off and landing on the airport flew over his property at a height of less than five hundred feet, and as a result trespassed on his property.

Although there was a finding by the trial judge that the aircraft in so flying did not cause any unreasonable interference with the adjacent property owner's beneficial use of his property, yet the court, apparently unwillingly and hesitatingly, concluded that flight at five hundred feet or less was an unreasonable interference with the adjacent property owner's property.

This case demonstrates the need for uniform regulation of airports so that a similar situation will not arise in the future, because, as in the *Swetland* case, the Curtiss interests had expended hundreds of thousands of dollars in the belief that a pilot could take off and land on the airport and traverse the navigable air space at less height than five hundred feet. It was the belief, up to the time this decision came down, that as to taking off and landing on airports the low flying restriction did not apply.

31. *Georgia R. Etc. Co. v. Smith*, 128 U. S. 174, 32 L. Ed. 377; *Illinois Central R. Co. v. Illinois*, 108 U. S. 541, 27 L. Ed. 818.

Of course, the case is a District Court decision and it is possible it may be appealed, but it is a very important case, especially in view of the fact that large capital has been put into every phase of aviation activities, and if, after the capital is put into the industry, whether in the development of airports or flying schools or what not, by one turn the investment can become obliterated and made useless, it confronts the whole industry with a very serious situation.

Public convenience undoubtedly has in the past and will more so in the future, be considered in the establishment of airports. This will take into consideration proximity to the source of passengers, utility and suitability of the port with reference to surrounding property, and contact with other mediums of transportation.

On the subject of rates and services there is one general remark which covers briefly the whole field. That is that airports must charge reasonable and uniform rates for supplies and services.

As an airport is in a sense a terminal such as a railroad yard, it must be open to all and not subject to control by one of the carriers using it. Being a recipient of patronage from various air lines, services and carriers, it must not, through stock ownership, control or other contrivance, offer special privileges or services to one rather than another. Nor can it, through any expedient, offer lower rates to one than another. Its rates and charges must be uniform so that no advantage may be secured by one air carrier over another. If otherwise, competition would be rendered ineffective and illegal combinations and monopoly with their attendant evils would result.

With air traffic assuming so great a part in our national life today, the airport takes on added significance and power. For here is the one great aid to air navigation, without which air transportation would be rendered impotent. The airport must be kept free from dominance by any company or individual. Its rates and charges must be kept reasonable, and it must serve one the same as another.

Those who regulate airports should insist on establishing and maintaining adequate service to meet the public convenience, and uniform rates as well as uniform services to all. Furthermore, there should be no more regulation than is necessary to protect the public interest as well as the owners' property right. (Applause.)

CHAIRMAN NICHOLS: Again we have been very fortunate in having a very well prepared paper, and passing from Major Fixel's paper to the next speaker, I am not going to make any comments on Mr. Vorys until I have heard his paper. It seems these are all old friends of mine. In Milwaukee we had Mr. Logan, who spoke this morning, Professor Fagg, Major Fixel and Mr. Vory's, and knowing so much of each of the gentlemen, I am withholding my remarks.

I came down here prepared to pound the gavel heavily, with the thought that we would have heated discussions, and the first paper I have seen which is probably going to start something in the way of discussions is this forthcoming paper, and if you will prepare the notes and comments so we can get through the discussion quickly and intelligently I think we will be better satisfied. I take great pleasure in introducing the Honorable John W. Vorys, Director of Aeronautics, State of Ohio. (Applause.)