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Pamela B. Stein

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THE PRICE OF SUCCESS: MITIGATION AND LITIGATION IN AIRPORT GROWTH

PAMELA B. STEIN

I. INTRODUCTION

TWENTY YEARS AGO one could travel the thirty-five miles between the cities of Dallas and Fort Worth and see large expanses of traditional Texas landscape: rolling fields, groves of mesquite trees, and, arching above, the state's famed big sky. Travelling the same route today reveals a snapshot of the new Texas, with offices, hotels, and shopping centers lining the roadway, and while the sky above remains vast, it too is brimming with shining symbols of sunbelt growth in the form of the hundreds of airplanes arriving at and departing from the Dallas/Fort Worth International Airport (DFW or the Airport).

This extensive ground-level development and the increasingly crowded skies illustrate DFW's success in generating tremendous economic growth for north Texas. Yet, this same success has brought about a classic confrontation. As the Airport seeks to expand, its neighbors fear the increased noise and other negative impacts which will inevitably accompany this growth.

What are the rights of homeowners and other citizens who are affected by aircraft noise? What parties are responsible for deciding how to minimize the noise problem? When does aircraft noise cross the line from being a minor inconvenience to begin such significant intrusion that compensation must be paid to those affected? This comment will explore the legal issues that arise when airport growth meets community or individual resistance
due to increased airport generated noise pollution. Because DFW's recently announced expansion plans are presently the focus of considerable debate regarding potential noise level increases, DFW's situation illustrates many aspects of this common controversy.

A. Expansion Plan

When DFW opened in 1974, it was the largest airport in the United States, covering more than 18,000 acres. It has since become the second busiest airport in the world in terms of both total passengers and total aircraft operations. Although the original Airport Master Plan (Master Plan) anticipated extensive growth, it was developed prior to airline deregulation and the hub-and-spoking pattern of major airline operations. As a result, the Master Plan did not anticipate the concentrated increases in air traffic that occurred in the past decade.

Reacting to these operational innovations and other changes over the twenty-year life of DFW, the Airport

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2 Memorandum from the DFW Action Center, Dallas/Fort Worth International Airport Fact Sheet 2 (1990). In 1989, DFW witnessed nearly 731,000 aircraft operations and handled more than 48,500,000 passengers. Letter from Dana Ryan, DFW Senior Planner (Nov. 7, 1991).

3 Questions & Answers, Airport Expansion Information, (DFW Airport Action Center, Dallas/Fort Worth International Airport) 1990, at 1. Under the hub-and-spoke system, airlines schedule large numbers of flights to arrive at and depart from their hub airports within a relatively short time span, facilitating passenger connections to a wide variety of destinations. DFW serves as American Airline's headquarters airport and also serves as a hub for Delta Air Lines. Id. at 1.

4 Donald V. Harper, Regulation of Aircraft Noise at Major Airports: Past, Present, & Future, 17 Transp. L.J. 117, 119 (1988). Federal deregulation led to rapid growth in the route systems of existing carriers and attracted new carriers into the market. Flight operations of scheduled U.S. airlines increased from approximately nine and one-half million take-offs and landings in 1976 to nearly 13 million operations in 1986. Id. at 119-20. Total air traffic at DFW increased by 123 percent between 1978 and 1988. Questions & Answers, supra note 3, at 1. Forecasts of aviation demand indicate that peak hour aircraft operations at DFW are projected to increase from 177 in 1990 to 307 in 2010, with total annual operations increasing from 700,000 to 1,217,000 over the same 20 year period. Federal Aviation Administration, supra note 1, at iii.
Board created a new Airport Development Plan (ADP). Although the ADP calls for major expansion and redesign of the present terminal, transit, and roadway systems, the elements of the ADP which draw the greatest public interest are two proposed new runways, referred to in the ADP as 16/34E and 16/34W.5

Runway 16/34E was included in earlier airport planning, but was expected to be only 5000 feet long, limiting its use to light corporate jets; runway 16/34W as not included in the previous Master Plan.6 Surrounding municipalities did not anticipate their potential to generate additional noise. Homes, schools, apartments and other sensitive uses have been allowed to develop in the areas now projected to experience significant noise increases should these runways become operational.

B. Intermunicipal Issues

The cities of Dallas and Fort Worth acted in conjunction to create DFW, and its governing board includes representatives from both cities.7 The Airport, however, is not principally located in either city. It straddles the Dallas/Tarrant county line and is largely located in four nearby municipalities: Irving, Coppell, Grapevine, and Euless.8 These cities have clearly reaped economic benefits from their proximity to the Airport. Many of DFW’s 30,000 employees live in these neighboring cities, and thousands of additional jobs and residents have been attracted to the area by its convenient transportation access.9

5 Questions & Answers, supra note 3, at 1. Runway 16/34E, proposed to be 8500 feet long, is intended to begin operating in 1992; the 9000 foot long runway 16/34W is proposed for use in 1997. The two runways will both be used for major air carrier operations and must be 5000 feet from other runways in order to accommodate simultaneous instrument-guided approaches. Federal Aviation Administration, supra note 1, at v.

6 Letter from Dana Ryan, supra note 2.

7 Memorandum from the DFW Action Center, supra note 2, at 1.

8 Only 1% of airport property is within Fort Worth city limits. Id.

9 Interview with Dana Ryan, DFW Senior Planner, at Dallas/Fort Worth International Airport (Oct. 9, 1990).
Yet, because these cities cannot directly control activities at DFW, their elected officials and residents remain wary of the Airport’s growth plans. Although acknowledging the economic boost provided by the airport, local officials are also sensitive to the environmental and quality of life concerns of their residents. In addition, each city has its own zoning ordinance and other development controls, further complicating the airport’s efforts to cooperate with its neighbors on land use controls.

The conflict between the police power regulations of these home rule cities and the airport’s authority to manage its own growth under the Texas Municipal Airports Act (TMAA) recently generated some litigation. In Dallas/Fort Worth Airport v. City of Irving, the court issued a summary judgment declaring that neither the TMAA nor the federal government preempted the cities from exercising their own land use controls. Although the ruling could be altered on appeal, for now, the cities have a strong bargaining position in seeking noise mitigation and other concessions to protect their residents.

II. Proposed Mitigation Program

Recognizing the need to reassure property owners that its current expansion program will not negatively affect their investments, the Airport has already proposed a two-tiered noise impact mitigation program. Under this proposal, the Airport will purchase those homes that are in-
side a line conforming to the 70 Ldn noise contour or are within the clear zones of the new runways. Persons whose homes are within the 65-69 Ldn noise contours are given the choice of either selling an avigation easement for 25% of the unimpacted fair market value of their home or participating in a sales guarantee program.

The seller in the guarantee program also attaches an avigation easement to the property at the time of the sale. This easement includes a covenant of non-suit by the property owner, designed to release and indemnify the Airport Board and the cities of Dallas and Fort Worth for liability resulting from noise, vibration, and other potential problems caused by aircraft overflights. Other aspects of the mitigation program include structural modifications to improve the sound-proofing of multi-family residences and public buildings, and operational measures such as runway preference systems and aircraft altitude recommendations to minimize aircraft noise near residential areas.

Funding for the expansion of DFW and the accompanying mitigation program comes from a variety of sources. Airline tenants at DFW bear the major portion of the cost of gate and terminal expansions. Landing fees paid by airlines utilizing the Airport will also partially finance new runway construction, transportation system improve-

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14 DALLAS/FORT WORTH INTERNATIONAL AIRPORT, RELOCATION/MITIGATION PROGRAM, ENVIRONMENTAL IMPACT STATEMENT 1 (Oct. 1989). Ldn represents a weighted average of the day/night decibel sound level measured over a twenty-four hour period. A ten decibel penalty is applied to noise events between 10 p.m. and 7 a.m. in computing this average. Id.


16 Id. at 3-4. Appraisals are based on similar homes in unimpacted areas. Id. Homeowners may list their homes with approved realtors at 90% of the appraised value for a specified time period. If unsold, the property's price is lowered an additional 5% for each of two additional periods. Id. If the property nevertheless remains unsold, the Airport sells the property by sealed bid. Id.

17 Id. at 5.

18 Id. at 3.

19 FEDERAL AVIATION ADMINISTRATION, supra note 1, at xvii.
ments, and mitigation techniques.\textsuperscript{20} The Aviation Trust Fund, financed by an 8% passenger tax, is a potential source of federal airport improvement grant funds, and Congress also recently adopted legislation authorizing airports to assess “passenger facility charges” on persons departing from or connecting through airports.\textsuperscript{21} Since DFW serves as a major hub for passenger connections as well as a destination airport, projected revenues from this new source run as high as $75,000,000 per year.\textsuperscript{22} If these estimates are correct, the Airport Board may be able to avoid issuing its own revenue bonds to pay for the remainder of the expansion program.\textsuperscript{23}

The preliminary cost estimate for the mitigation program alone is $250,000,000.\textsuperscript{24} Based on its assumption that half of the eligible property owners will select the sales guarantee program, the Airport Board expects to recoup a substantial portion of this outlay through resale of the properties it acquires. Thus, the Board estimates the net cost of mitigation at $150,000,000.\textsuperscript{25}

This estimate, however, includes only the airport’s planned expenditures under the mitigation program. While it appears to be an extensive program, it is entirely possible that persons not covered by the easement or guaranteed sales proposals will also claim they are adversely impacted by the expansion of DFW, and will seek compensation for their alleged reduced property values and other injuries. The next sections of this comment will describe the additional land use impact liabilities airports encounter as they grow, and will explore the current allocation of responsibilities for dealing with these costs.

\textsuperscript{20} Ryan interview, supra note 9.
\textsuperscript{21} David Nather, D/FW Could Use Tax for Runways, DALLAS MORNING NEWS, Oct. 31, 1990, at 25A.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Ryan interview, supra note 9.
\textsuperscript{25} Id.
III. THE PLAYERS AND THEIR ROLES IN CONTROL OF NOISE IMPACTS

A. Historical Basis for Federal Preemption

The practical demands of modern air travel long ago led American courts to reject the common law doctrine that one’s ownership of land extended to the periphery of the universe.26 But if individuals no longer have the sole right to determine what occurs in the airspace above their property, who possesses this authority?

To a large extent, the federal government has declared itself to be in control of the nation’s airspace. Air travel is considered to be a form of interstate commerce, subject to federal regulation under the Constitution’s Supremacy Clause.27 Pursuant to this authority, Congress has enacted a series of laws governing airport operations and aircraft noise generation.28 Numerous court challenges to

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26 U.S. v. Causby, 328 U.S. 256 (1945). “The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea.” Id. at 261.

27 The Constitution of the United States allocates to Congress the authority “To regulate commerce . . . among the several states”. U.S. CONST. art. I, § 8, cl. 3.

these laws, however, attest to the continuing desire of local governments and airport operators to retain some control over airport noise problems.29

The key issue underlying these cases is the extent to which federal legislation has preempted the regulatory authority of state or municipal governments under the Constitution's Supremacy Clause.30 Two cases arising from noise controversies at Kennedy Airport in New York were among the first decisions attempting to allocate government authority over noise generation.31 In 1956, the Village of Cedarhurst sought to enforce an ordinance prohibiting flights at altitudes lower than 1000 feet. The court found that the federal government's regulatory system applied to flights at these lower altitudes, and the municipal ordinance was therefore an invalid interference in an area preempted by federal legislation.32 Seeking to

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31 Cedarhurst, 238 F.2d at 812; Hempstead, 272 F. Supp. at 226.

32 Cedarhurst, 238 F.2d at 815. The village of Cedarhurst based its ordinance on a federal regulation which established 1000 feet as the minimum safe altitude for
avoid direct regulation of aircraft, and hence to avoid conflict with federal law, the town of Hempstead established noise limits rather than flight regulations in its municipal ordinance. But, the court held that Hempstead’s ordinance nevertheless conflicted with federal authority and declared, “the aircraft and its noise are indivisible. . . . The ordinance does not forbid noise except by forbidding flights . . . .”

The United States Supreme Court addressed the issue of federal preemption in the context of airport noise regulation in *City of Burbank v. Lockheed Air Terminal, Inc.* At issue was a Burbank city ordinance placing curfews on jet flights from the Hollywood-Burbank Airport between the hours of 11 p.m. and 7 a.m. The court noted that the FAA occasionally enforced curfews, but that such measures were generally opposed by the FAA unless the agency itself managed the curfews in its role as supervisor of navigable airspace. The court also acknowledged the lack of any express preemption in the 1972 Noise Control Act. This lack of express preemption was not considered decisive, however, for preemption can also occur if federal legislation is so pervasive that Congress leaves no room for state regulation, or if federal interests are so dominant that state regulation should be precluded.

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55 Hempstead, 272 F. Supp. at 230. The effect of Hempstead’s noise ordinance (establishing a ground-level decibel limit for aircraft) was to close the airspace over the town to aircraft operating at the low altitudes necessary for take-offs and landings. The court found that this was essentially equivalent to the invalid Cedarhurst ordinance. Thus, the Hempstead ordinance was also declared to be a violation of the federally granted right of travel through navigable airspace. *Id.*


55 Id. at 628.

56 Id. at 633. The 1972 Noise Control Act is codified at 49 U.S.C. § 1431.

57 Burbank, 411 U.S. at 633; see also Ronald D. Rotunda, *Sheathing the Sword of Federal Preemption*, 5 Const. Commentary 311 (1988). Rotunda discusses recent trends in preemption decisions and notes that the test for federal preemption can be concisely summarized as follows:
Relying on these two justifications for implied federal preemption, the majority in Burbank held for the FAA. The Court declared that "fractionalized" control of the timing of flights by a variety of municipalities would severely limit the FAA's ability to control air traffic, and that the powers given by Congress to federal agencies should not be diffused by allowing states or municipalities to participate in the planning. But rather than definitively ending the preemption debate, parts of the Burbank decision added fuel to the controversy.

B. The Proprietor Exemption

In footnote fourteen of the Burbank decision, the Court discussed a letter that the Secretary of Transportation submitted to Congress during the debate on the 1972 Noise Control Act. The letter expressed the Secretary's view that the proposed Act would not affect the right of state or local public agencies to issue regulations governing aircraft noise provided this was carried out in the agency's role as proprietor of an airport. Airport owners acting as proprietors could even deny access to their facilities on the basis of aircraft noise as long as this was not implemented in a discriminatory manner. The Supreme Court, therefore, emphasized that its holding in Burbank was limited to the instance of a city acting within its police power authority, and that it was not considering what lim-

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[S]tate law can be preempted in either of two general ways. [First,] If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. [Second,] If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Id. at 312 (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) (internal citations omitted)).

38 Burbank, 411 U.S. at 639-40.
39 Id. at 635-36. The Secretary of Transportation's letter is reprinted in S. REP. No. 1353, 90th Cong., 2d Session 6 (1968).
40 Burbank, 411 U.S. at 635.
41 Id. at 636.
its, if any, might apply to a municipal owner of an airport acting as the facility's proprietor.\textsuperscript{42}

The extent of this proprietor exemption has been the subject of several court cases, often with conflicting results.\textsuperscript{43} Some recent cases hold that proprietors still may not directly regulate frequency of take-offs, nor establish curfews, as such operational decisions are preempted by federal occupation of the field.\textsuperscript{44}

Yet other courts reject total federal preemption.\textsuperscript{45} The municipal operator of a California airport was allowed to establish a curfew on particularly loud aircraft in \textit{National Aviation v. City of Hayward}.\textsuperscript{46} In another California case, the court made a distinction between two noise standards. Although the Single Event Noise Exposure Level (SENEL) was preempted because it measured in-flight aircraft noise, a more general Community Noise Equivalent

\textsuperscript{42} Id.

\textsuperscript{43} Harrison v. Schwartz, 572 A.2d 528 (Md. Ct. App. 1990) (finding preemption based on congressional intent to occupy the field of aircraft navigation despite lack of direct conflict between municipal and federal regulations). \textit{But see Arrow Air v. Port Auth. of New York}, 602 F. Supp. 314 (S.D.N.Y. 1985) (allowing noise level restrictions imposed by municipal proprietor as the restrictions did not impede FAA purposes, were non-discriminatory, and thus did not violate Commerce Clause); \textit{National Aviation v. City of Hayward}, 418 F. Supp. 417, 421 (N.D. Cal. 1976) (holding that airport owners acting as proprietors can deny use of their airports to aircraft on the basis of nondiscriminatory noise considerations (citing \textit{Burbank}, 411 U.S. at 635-36 n.14)); \textit{Air Transport Ass'n v. Crotti}, 389 F. Supp. 58 (N.D. Cal. 1975) (holding that the proprietor's right to control the use of an airport is a necessary and well-established concomitant of the proprietor's responsibility for the consequences of the airport's operation).

\textsuperscript{44} Harrison, 319 Md. at 369, 572 A.2d at 532. The court explained its view of preemption as follows:

\begin{quote}
Once the field is occupied by the federal government, neither state nor local government may enter it. And occupation of the field does not mean every blade of grass within it must be subject to express federal control; it means only that congressional intent demonstrates that the area is subject to exclusive federal control, whether potential or actual.
\end{quote}

\textit{Id.}


\textsuperscript{46} 418 F. Supp. at 418 (upholding an 11 p.m. to 7 a.m. prohibition on take-offs and landings of aircraft exceeding 75 dBA as valid exercise of proprietor control, and rejecting attempts to substitute the judgment of the federal government for state and local determinations).
Level (CNEL) was permissible because it did not interfere in an area regulated by the FAA. In other states, county zoning restrictions limiting the use of a public airfield have been upheld, as have proprietor-established restrictions forbidding the use of noisier stage I aircraft.

The recent Texas state district court ruling in *Dallas/Fort Worth International Airport Board v. City of Irving* squarely addresses the issue of federal preemption of municipal authority. Although acknowledging substantial federal regulation of aircraft operations and existing airport facilities, the court distinguishes those issues from the physical expansion of the borders of an airport. While the former might be preempted from local regulation by the extent of federal involvement, the latter is considered to be a substantively different exercise of local power:

Federal preemption would clearly apply were this a case of a more "classic" nature, e.g., adjacent cities attempting to regulate noise, establish a curfew, limit landing weight, or otherwise regulate aircraft at an existing facility. The critical circumstance here, however, is not the day-to-day operation of an existing airport but a planned $3.5 billion expansion, including a territorial expansion.

The court granted summary judgment to the cities surrounding DFW airport who seek to control the airport's expansion through exercise of their police power zoning authority. Recognizing that Congress "has the power to

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47 *Crotti*, 389 F. Supp. at 64 (responsibility for determining the permissible noise level for aircraft using an airport remains with the proprietor of that airport).

48 *Faux-Burhans*, 674 F. Supp. at 1174 (no federal statute or regulation explicitly or implicitly preempts the regulation of the size, scope, and manner of operations at a private airport operating under a special use permit).

49 *Arrow Air*, 602 F. Supp. at 319 (federal noise standard exemption on Arrow's flights to San Juan did not preempt Port Authority from refusing to allow flights by Arrow to other destinations in Puerto Rico where the aircraft assigned to those routes failed to comply with the proprietor's noise standards).

50 No. 90-4298-I Dallas County Dist Ct., 162nd Judicial Dist. of Texas, Oct. 8, 1991).

51 *Id.* at 6-7.

52 *Id.* at 5.
pick up the club of federal preemption in this area," the
court nonetheless concluded that neither existing regula-
tions nor case law indicated that it had done so.

In fact, the attitude of the Supreme Court itself may
have undergone a change. Since the Burbank decision,
four of the five justices who formed the majority opinion
in that case have left the Court. The author of the dissent,
Justice Rehnquist, has become the Chief Justice, and Jus-
tice White, who joined the dissent, remains on the court.
In Burbank, Rehnquist noted that noise regulation has tra-
ditionally been an area of local rather than national con-
cern and that historic police powers should not be
superseded by federal regulation unless this is the "clear
and manifest" purpose of the Congress. Justice Rehn-
qu bist argued that the logical division of authority over
noise allowed the federal government to study and regu-
late the mechanical and structural aspects of aircraft,
while local regulation controlled other aspects of airport
noise. Although the majority of the Supreme Court did
not address the traditional Commerce Clause inquiry of
whether the restrictions were an unreasonable burden on
interstate commerce, Justice Rehnquist expressed his
opinion that the relatively few flights impacted by the Bur-
bank curfew did not constitute such a burden.

A number of recent Supreme Court decisions indicate
that other members of the Court are also increasingly
willing to accept local regulation in the commerce arena.

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55 Id.
54 Id. at 9.
55 Burbank, 411 U.S. at 653.
56 Id. at 643, 650.
57 Id. at 650, 653.
58 Justice Rehnquist's discussion of the appropriate roles of federal and local
governments in Burbank seems to foreshadow recent Court debates relating to
commerce. In a number of cases, the Court balanced the state interest being pro-
tected against the effect a regulation has on interstate commerce. See, e.g., Ray-
mond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978); Pike v. Bruce Church,
662 (1981), Rehnquist, again dissenting, argued that balancing should be aban-
doned. He maintained that the proper inquiry was whether a state legislature had
acted rationally, and whether the benefits sought by a regulation were more than
The current trend in Commerce Clause decisions appears to favor acceptance of concurrent regulation, provided state legislation does not preclude compliance with federal regulations. The Executive Branch has also demonstrated an increasing reluctance to allow its regulations to preempt state law. Pursuant to an Executive Order issued in 1987, executive departments and agencies must prepare preemption impact statements when promulgating new regulations. The Order emphasizes that federal regulations may preempt state laws only when the federal legislation contains an express preemption clause, when evidence compels the conclusion that Congress intended preemption, or when state regulation actually conflicts with a federal statute.

A key reason for federal reluctance to completely preempt airport noise regulation is the liability which accompanies such control. The taking of a noise easement, for example, requires compensation of the property owner. In Griggs v. Allegheny County, the Supreme Court reasoned that the proprietor, not the federal authorities, makes the decision about where to locate an airport, and, if so, the regulation should be valid despite some interference with interstate commerce. Id. at 698-99.

Rotunda, supra note 37, at 312. Rotunda notes that the Supreme Court recently upheld a state law regulating attempted corporate takeovers despite extensive federal regulation aimed at avoiding state protectionism in this field. See CTS Corp. v. Dynamics of Am., 481 U.S. 69 (1987). The Court stated, "[b]ecause it is entirely possible to comply with both the [federal] Williams Act and the Indiana Act, the state statute can only be preempted if it frustrates the purpose of the federal law." Id. at 79 (emphasis added); see also Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) (upholding California restrictions considerably more stringent than federal requirements on maturity of fruit even though the California regulations excluded certain Florida avocados from California markets).

Id. at 79 (emphasis added); see also Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) (upholding California restrictions considerably more stringent than federal requirements on maturity of fruit even though the California regulations excluded certain Florida avocados from California markets).

Id. (citing Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (1987)).

Id.


Causby, 328 U.S. at 261 (noting the United States conceded that if flights over Causby's property rendered it uninhabitable, this would constitute a compensable taking of private property under the fifth amendment of the Constitution).

369 U.S. 84 (1962).
hence, the proprietor should bear the costs of land and easement acquisition.\textsuperscript{66}

A municipal proprietor made an unsuccessful attempt to secure indemnification from an airline operator for the cost of an avigation easement in \textit{City of Los Angeles v. Japan Lines Co.}\textsuperscript{67} The California Court of Appeals accepted the \textit{Griggs}\textsuperscript{68} reasoning, holding the municipality responsible for the decision to build the airport in its present location. The court then found no language in the air carrier's lease requiring it to indemnify the city against a decision in which the city itself took part.\textsuperscript{69} The court also noted the lack of any California statutory authority for assessing such costs against the airline.\textsuperscript{70}

C. \textit{Summary of Noise Regulatory Authority}

The result of several decades of federal and municipal legislation and numerous court interpretations is a three-tiered system of airport noise regulation:

1. Federal authority: Federal departments and agencies

\textsuperscript{66} \textit{Id.} at 89-90. In response to an argument that the airline or a federal agency was the taker of the avigation easement, the Court stated:

\begin{quote}
[R]espondent, which was the promoter, owner, and lessor of the airport, is in these circumstances the one who took the easement in the constitutional sense . . . . The Federal Government takes nothing; it is the local authority which decides to build an airport \textit{vel non}, and where it is to be located. We see no difference between its responsibility for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built.
\end{quote}

\textit{Id.} at 89.

\textsuperscript{67} 116 Cal. Rptr. 69 (Ct. App. 1974).

\textsuperscript{68} 369 U.S. at 89-90.

\textsuperscript{69} \textit{Japan Air Lines}, 116 Cal. Rptr. at 74. The lease agreements of Japan Air Lines (JAL) and the thirty other airline lessees at the Los Angeles airport who were parties in this litigation did contain language indemnifying the City of Los Angeles for damages arising from the airlines' operations. But the court noted that the leases also contained pledges by the city that JAL and its fellow airlines would "peaceably have and enjoy the privileges of said Airport (LAX), its appurtenances and facilities . . . ." \textit{Id.} at 73. Further agreements and understandings between the city and the airlines indicated that the city would be responsible for such property rights as the city deemed necessary for operation of aircraft without unlawful interference with the rights of neighboring property owners. \textit{Id.} at 74.

\textsuperscript{70} \textit{Id.} at 76-79.
retain sole authority to regulate such technical areas as aircraft development and airspace navigation.

2. State and municipal authority: Police power regulation will be allowed provided it serves a valid public interest and does not unduly burden interstate commerce. The extent of the burden allowed has been determined on a case by case basis, but there appears to be a trend toward allowing greater local regulation.

3. Proprietor authority: The principal costs of airport growth must be borne by those who operate these facilities. Private or municipal owners of airports decide when and where to build airports, and must acquire the necessary land areas or easements. When the impact of an airport extends beyond its immediate boundaries, it is also the facility's proprietor who must deal with the costs of these extra-territorial impacts.\(^\text{71}\)

Sections IV and V of this comment will explore proprietor liability for the two most common impacts claimed, inverse condemnation and nuisance.

### IV. INVERSE CONDEMNATION

The fifth amendment of the United States Constitution declares that private property shall not be taken for public use without the payment of just compensation.\(^\text{72}\)

Although the Supreme Court has recognized the impracticability of extending private property rights to some infinite point in the skies,\(^\text{73}\) the Court has also declared that full enjoyment of one's property includes the right to be free of airborne intrusions that substantially interfere with

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\(^{71}\) See supra notes 31-70 and accompanying text for discussion of federal, municipal, and proprietor roles.

\(^{72}\) U.S. Const. amend. V.

\(^{73}\) Causby, 328 U.S. at 261. In an oft-quoted statement on the public right to air travel, the Supreme Court declared:

> The air is a public highway... Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.

Id.
the use and enjoyment of property.\textsuperscript{74}

A. \textit{What Impacts Are Compensable?}

The question that continually arises when property owners abutting airports seek compensation for alleged noise intrusions on their land is whether the damage suffered is sufficient to amount to a taking of property. It has long been accepted that individuals must bear minor costs or endure small inconveniences when necessary to secure a broad public benefit.\textsuperscript{75} Such a burden rises to the level of a compensable taking only when the cost which a small group is being asked to bear becomes disproportionate to the benefit being secured.\textsuperscript{76} Thus, property owners seeking compensation for the impact of airport noise on their property must show that they have suffered some harm which goes well beyond that experienced by the general public.

An analysis of the avigation easement cases reveals that

\textsuperscript{74} \textit{Id.} at 264-65. The Court qualified its earlier characterization of the air as a public highway, explaining that the property owner’s rights in the superadjacent airspace were to be treated similarly to rights in the land itself:

[I]t is obvious that if the landowner is to have full enjoyment of the land he must have exclusive control of the immediate reaches of the enveloping atmosphere. . . . The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. . . . [I]nvasions of it are in the same category as invasions of the surface.

\textit{Id.} at 266. ("The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment."); Scarlett \textit{v.} City of Atlanta, 306 F. Supp. 1049, 1052 (N.D. Ga. 1969) ("In our modern jet age, certain inconveniences must be borne, unhappily, as a price of progress. . . .") (citing Levell \textit{v.} United States, 234 F. Supp. 734 (E.D.S.C. 1964)). The inconvenience or damage suffered must become extensive or oppressive before a "taking" compensable under the Fifth Amendment will be found. \textit{Scarlett}, 306 F. Supp. at 1051 (citing United States \textit{v.} 3276.21 Acres of Land (Miramar), 222 F. Supp. 887, 891 (S.D. Cal. 1963)).

\textsuperscript{76} A complete discussion of the takings issue is beyond the scope of this comment. A classic case in this area, however, is Pennsylvania Coal \textit{v.} Mahon, 260 U.S. 393 (1922), in which the Supreme Court stated "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far, it will be considered a taking." \textit{Id.} at 417. In the aircraft context, the "regulation" which creates grounds for a taking could be the establishment of an airport’s general location or the more detailed decisions regarding flight paths and altitudes.
most courts apply either a physical invasion test, a diminution in value test, or a combination of the two. In the earliest of these cases, United States v. Causby,77 government military aircraft made direct overflights at altitudes barely above the treetops of respondents' farm. The aircraft noise was so great that the poultry on the farm would fly into the walls in fright, killing themselves. The Causbys were forced to give up the commercial chicken business, and suffered property losses estimated at $2,000.78

The Court noted that these damages were "the product of a direct invasion of the respondents' domain", and further stated that "so long as the damage [was] substantial," it was the "character of the invasion" that determined whether or not a taking had occurred.79 The "invasion" in Causby was repeated direct overflights, and this requirement of a physical overflight was frequently applied in the early avigation easement cases. It remains significant in the states whose constitutions, like the federal constitution, allow compensation only where there has been a taking of property.80

One of the earliest cases to allow a broader approach to the compensation issue was Thornburg v. Port of Portland.81 The plaintiffs sought compensation for inverse condemnation82 of their property, which was located directly

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77 328 U.S. at 256.
78 Id. at 259, 267.
79 Id.
80 See, e.g., Griggs v. County of Allegheny, 369 U.S. 84, 90 (1962) (direct overflights occurring "very, very close" to a residence held to be a compensable taking); Town of East Haven v. Eastern Airlines, 331 F. Supp. 16, 31-33 (D. Conn. 1971) (strictly interpreting Causby, 328 U.S. 256, and Griggs, 369 U.S. 84, as requiring the line of flight to be directly above a plaintiff's land in order to constitute a taking, and denying compensation to persons claiming damage from noise, soot and fumes by aircraft taxiing or idling nearby).
81 376 P.2d 100 (Or. 1962) (en banc).
82 Inverse condemnation describes the cause of action of a property owner seeking compensation from the government for a taking of his property when the government has not used eminent domain to acquire the property, but the land has been negatively impacted by a government activity. Id. at 105. The Port of Portland was owner and operator of the Portland International Airport. It was a governmental agency with power of eminent domain, which it used to acquire land in the airport vicinity. Id. at 101.
under the path of aircraft using a runway approximately six thousand feet from their land and roughly one thousand feet to one side of the glide path of aircraft using a runway just 1500 feet from their property. The plaintiffs claimed that the noise of aircraft using these two runways created a continuing nuisance, and as such amounted to a taking of their property. The Port based its defense on the lack of any trespass, claiming that the aircraft passing directly over the plaintiffs’ land were too high to cause compensable interference, and that no taking resulted from the planes passing at lower altitudes but to the side of the property.\(^{83}\)

The trial court followed a traditional approach, essentially creating an imaginary box of airspace extending five hundred feet above the plaintiff’s land. Since no planes passed directly through this box, the trial court found no taking had occurred.\(^{84}\)

The Oregon Supreme Court correctly assessed the significance of the issue before it, recognizing that it would be creating a new property interest if it determined that a government agency could be required to pay landowners for the inconvenience of noise coming from beyond the traditional boundaries of their property.\(^{85}\) After a careful review of the laws of nuisance and inverse condemnation, the court succinctly stated its conclusion that “[t]he real question was not one of perpendicular extension of surface boundaries into the airspace, but a question of reasonableness based on nuisance theories.”\(^{86}\) The court

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\(^{83}\) Id. at 101-02.

\(^{84}\) Id. at 102. The Civil Aviation Administration was authorized to establish minimum safe flight altitudes, with these establishing the lower limits of federally-regulated navigable airspace. In the case of the Thornburg property, this altitude was 500 feet. Id. at 111.

\(^{85}\) Id. at 102.

\(^{86}\) Id. at 107. The court explained its logic:

If we accept, as we must upon established principles of the law of servitude, the validity of the propositions that a noise can be a nuisance; that a nuisance can give rise to an easement; and that a noise coming straight down from one’s land can ripen into a taking if it is a persistent enough and aggravated enough, then logically the same kind and degree of interference with the use and enjoyment of one’s
recognized that to one ousted from enjoyment of his land, "it is to him an academic matter that the planes which have ousted him did not fly below 500 feet."^87

Having found that the plaintiffs did possess a possible cause of action, the court remanded the claim for jury trial. The jury was charged with determining if the activities of the government so unreasonably and substantially interfered with the use of plaintiffs' property that they were deprived of the practical enjoyment of their land. If the jury so found, it was to translate the loss in enjoyment into a reduction in the land's market value.^88

Thornburg thus became the first case to hold that a compensable trespassory taking could involve noise interference from beside a property rather than only directly above it. A number of state courts have since found the Thornburg decision persuasive.^89 In Martin v. Port of Seattle,^90 the Supreme Court of Washington rejected an attempt to classify plaintiff property owners on the basis of whether or not their property was subject to direct overflights.^91 The court declared its unwillingness to accept differing levels of compensation that depended upon "anything as

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^87 Thornburg, 376 P.2d at 109.
^88 Id. at 110.
^89 Martin v. Port of Seattle, 391 P.2d 540, 545 (Wash. 1964) (en banc) (declining to distinguish between a "taking" or "damaging" of property interests of nearly 200 plaintiffs all of whom alleged harm caused by noise and vibration rather than by physical invasion of property); see also City of Jacksonville v. Schumann, 167 So.2d 95, 97 (Fla. Dist. Ct. App. 1964), aff'd, 199 So.2d 727 (Fla. 1967), cert. denied, 390 U.S. 981 (1968) (allowing compensation of numerous property owners whose property was not subject to direct overflights but was subject to vibrations from acceleration of airplane engines on nearby taxiways and warm-up pad); Johnson v. City of Greenville, 435 S.W.2d 476, 479-80 (Tenn. 1968) (physical invasion of property was not required to justify compensation of the plaintiff whose house pre-dated construction of an airport runway located within 300 feet of the residence).
^90 391 P.2d at 540.
^91 Id. at 542, n.2. The property owners were divided into three groups, with category A referring to those subject to direct overflights, category B referring to those for whom overflights were disputed, and category C referring to those not experiencing direct overflights. Id.
irrelevant as whether the wing tip of the aircraft passes through some fraction of an inch of the airspace directly above the plaintiff's land".  

Also significant in *Martin* was the language of the Washington State Constitution. Unlike the federal Constitution, which refers to compensation only for a "taking" of property without compensation, the court emphasized that the Washington Constitution also provides compensation for a "damaging" of property.

The California Court of Appeals pointed to a similar provision in its state constitution when awarding compensation for persons whose property values were affected by aircraft noise. In *Aaron v. City of Los Angeles*, a group of residents living near Los Angeles International Airport presented evidence from professional appraisers that their property values had declined due to jet noise. The California court did not, however, rely solely on its state constitution provisions prohibiting "damaging" of property when it allowed compensation to plaintiffs not located within a direct flight path of the Los Angeles airport. Rather, the court emphasized the availability of technological means of measuring aircraft noise effects. Since the annoyance effect could be measured and maps could then be drawn to indicate the boundaries of areas subject to differing noise levels, the court concluded that

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92 Id. at 545.
93 U.S. CONST. amend. V.
94 *Martin*, 391 P.2d at 546. In justifying its holding, the court explained that the ninth amendment of the Washington State Constitution specifically provides for payment of compensation for a "damaging" as well as the more standard "taking". *Id.* at 543, 546. The court looked to the legislative intent behind this addition, noting:

>The specific purpose of the addition of language beyond that of the United States Constitution is to avoid the distinctions attached to the word "taking" appropriate to a bygone era. It is unnecessary to become embroiled in the technical differences between a taking and a damaging in order to accord the broader conceptual scope intended by the additional language.

*Id.* at 546.
95 115 Cal. Rptr. 162, 172 (Ct. App. 1974).
96 *Id.* at 165.
97 *Id.* at 171-72.
these contours provided a more accurate description of areas harmed than would the presence of a "wing tip" in a plaintiff's airspace. The court declared that interference in use and enjoyment of the property, coupled with a decline in its market value, were sufficient to justify compensation. No actual "trespass" into airspace was required.

Not all courts have recognized such a broad interpretation of compensable inverse condemnation. When a federal facility or activity is involved, courts have limited damages to persons harmed by actual overflights. Typically, such cases point to the fifth amendment of the Constitution and its limitation of compensation to instances where property is taken. In Batten v. United States, for example, residents subjected to clouds of black smoke and loud noise from a nearby Air Force aircraft warm-up area were denied compensation due to the absence of physical trespass by the airplanes. The court distinguished between a compensable taking and mere "consequential damages," noting that even when government action impairs use of property, absent a direct encroachment, the fifth amendment does not require compensation. Similarly, in Avery v. United States, the United States Court of Claims held that sound and shock waves

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98 Id. ("The plaintiffs are not seeking recovery for a technical trespass, but for a combination of circumstances engendered by the nearby flights which interfere with the use and enjoyment of their land." (quoting Martin, 391 P.2d at 545)). The California Court of Appeals also quoted with approval from the California trial court's opinion:

Since the noise from jet aircraft is capable of acceptable and recognized measurement in terms of its annoyance effect, no reasonable basis exists for making a legal difference between the effects caused by flyby aircraft and the same effects caused by flyover aircraft . . . . The development of the NEF [noise exposure forecast] contour areas provides a good means of drawing a reasonable line between those landowners who may establish a cause of action for inverse condemnation and those who may not.

Id. at 485, n.8, 115 Cal. Rptr. at 171.

99 Id. at 583.

Aaron, 115 Cal. Rptr. at 177.


101 Id.

102 Id. at 583.

103 Avery v. United States, 330 F.2d 640 (Ct. Cl. 1964) (denying that sound and
generated by government aircraft created injury which
was only "incidental" and "unavoidably attendant" to the
permissible use of the airways.\textsuperscript{104} Hence, the court found
no physical taking, and followed the \textit{Batten} rule in denying
compensation to plaintiff property owners.\textsuperscript{105}

Emphasizing that the compensable damage in \textit{Causby}\textsuperscript{106}
and \textit{Griggs}\textsuperscript{107} resulted from \textit{frequent, low}
overflights, the court in \textit{Bennett v. United States} denied compensation to a
group of Oklahoma City property owners.\textsuperscript{108} The federal
sonic boom test program, alleged to cause the harm com-
plained of in \textit{Bennett}, operated at relatively high altitudes.
The court therefore held the test program's effects were
not sufficiently direct, frequent or low to constitute a
physical taking, and the affected property owners thus
failed to qualify for federal government compensation.\textsuperscript{109}

Some states continue to follow these narrow federal
guidelines, pointing to state constitutions which limit
compensation to instances of takings, or relying on state
statutes protecting the public use of airspace.\textsuperscript{110} New
Hampshire, for example, relied on such a constitutional
provision to deny compensation to persons alleging harm
due to aircraft noise but not experiencing direct over-
flights in \textit{Ferguson v. Keene}.\textsuperscript{111} The state's highest court,
however, has since abandoned the physical invasion test.
In \textit{Sundell v. Town of New London},\textsuperscript{112} the Supreme Court of

\begin{footnotesize}
\begin{enumerate}
\item Id. at 643.
\item Id. at 645.
\item 369 U.S. at 84.
\item 328 U.S. at 256.
\item 266 F. Supp. 627 (W.D. Okla. 1965) (action brought by Oklahoma City area
residents seeking compensation for alleged harm caused by federally conducted
test of sonic booms under differing atmospheric conditions).
\item Id. at 629-30.
\item \textit{Ferguson v. Keene}, 238 A.2d 1 (N.H. 1968), \textit{overruled by} \textit{Sundell v. Town of
New London}, 409 A.2d. 1315 (1979) (state constitution limits compensation to
instances where property is taken); \textit{Cheyenne Airport Board v. Rogers}, 707 P.2d
717 (Wyo. 1985) (statute gives public right of passage through airspace).
\item 238 A.2d at 1.
\item 409 A.2d at 1319.
\end{enumerate}
\end{footnotesize}
New Hampshire declared that the right to recover for inverse condemnation "cannot be made to depend upon the means by which the property is taken."\textsuperscript{113}

The *Sundell* court explained that its traditional reliance on a physical invasion by tangible things now yielded to a new concern with the effects on rights of individuals.\textsuperscript{114} The foul odors resulting from fish kills and algae blooms caused by the town’s sewage treatment plant in *Sundell* “can surely interfere with an owner’s use of his land as much as an invasion by a more solid substance.”\textsuperscript{115} To the extent that this holding conflicted with *Ferguson*, the court declared *Ferguson* to be overruled.\textsuperscript{116}

Should other jurisdictions decide to follow the Oregon, Washington, and New Hampshire examples, the physical invasion test may become a thing of the past. In its place, courts may apply a more individualized test based on the noise levels and other negative effects of aircraft operations actually experienced on a property, regardless of its locations inside or outside a direct overflight path.

**B. Federal Statutory Attempts to Limit Liability**

The federal government attempted to clarify liability issues with passage of the Aviation Safety and Noise Abatement Control Act of 1979.\textsuperscript{117} Under this legislation, airport operators are encouraged to prepare and submit noise exposure maps to the Secretary of Transportation.\textsuperscript{118} After a map is printed in the local newspaper, all persons subsequently purchasing property in the area surrounding an airport are considered to have notice of the noise level, and are barred from recovering damages for

\textsuperscript{113} Id.
\textsuperscript{114} Id. at 1318.
\textsuperscript{115} Id. at 1319.
\textsuperscript{116} Id.
airport noise.\textsuperscript{119}

An important exception to the act, however, specifically states that this limitation will not apply if the property owner can show that the noise complained of results from a significant change in the type or frequency of aircraft operations or in the airport layout.\textsuperscript{120} Thus, when an airport such as DFW undertakes construction of new runways or other improvements which will increase its capacity, nearby property owners may bring actions against the airport for increased noise impacts.

The Airport Noise and Capacity Act of 1990\textsuperscript{121} includes the most recent federal attempt to walk the tightrope between retaining federal control over airport operations and avoiding federal liability for property takings resulting from airport noise. The act calls for the creation of a national noise policy to coordinate the independent actions of airport proprietors. Special emphasis is placed on regulations that differentiate between Stage II and Stage III aircraft.\textsuperscript{122} An airport proprietor or municipality seeking to restrict operations of Stage II aircraft must prepare and publicize a cost/benefit analysis of the impact of these new rules, including a description of any alternative

\textsuperscript{119} Id. § 2107.
\textsuperscript{120} Id. The statute provides, in pertinent part:

No person who acquires property . . . after February 18, 1980 in an area surrounding an airport with respect to which a noise exposure map has been submitted . . . shall be entitled to recover damages with respect to the noise attributable to such airport if such person had actual or constructive knowledge of the existence of such noise exposure map unless . . . such person can show that:

1. a significant change in the type or frequency of aircraft operations at the airport; or
2. a significant change in the airport layout; or
3. a significant change in the flight patterns; or
4. A significant increase in nighttime operations; occurred after the date of the acquisition of such property or interest therein and that the damages for which recovery is sought have resulted from any such change or increase.

Id. The statute further states that constructive knowledge shall be imputed if the noise exposure has been published in a local general circulation newspaper at least three times or a copy of the map was given to the purchaser. Id.

\textsuperscript{121} P.L. No. 101-508 § 9301, 104 Stat. 1388-378, 49 U.S.C. app. § 2151 (—).
\textsuperscript{122} Id. § 9304.
noise control techniques considered. New controls on Stage III aircraft operations must either be approved by proprietors and aircraft operators or by the Secretary of Transportation. Failure to obtain an approval may result in loss of eligibility to impose a passenger facility fee or to obtain federal airport improvement plan funds.\textsuperscript{123}

The 1990 act states that the federal government will be liable for noise-related damages “only to the extent that a taking has occurred as a direct result of such disapproval.”\textsuperscript{124} Stage III aircraft are the least-noisy class of planes presently in commercial operation. Shifting from Stage II to Stage III aircraft may allow more flights and longer hours of operation without increasing present cumulative noise levels. Federal disapproval of a Stage III limit may therefore prevent a hoped-for reduction in noise, but is not likely to cause an increase in noise generation sufficient to constitute a taking of property.

C. Application to DFW

The Texas Constitution follows the broader pattern of the Washington and California Constitutions. Adequate compensation is required in Texas if property is “taken, damaged, or destroyed for or applied to public use.”\textsuperscript{125} Texas case law does not require any appropriation or intrusion upon the land itself to find a damaging, but rather defines compensable damage as “an injury peculiar to certain property not suffered in common with other property in the community.”\textsuperscript{126} Thus, although the leading Texas case dealing with compensation for airplane noise in-

\textsuperscript{123} Id.
\textsuperscript{124} Id. § 9306.
\textsuperscript{125} Tex. Const. art. 1, § 17.
\textsuperscript{126} Fort Worth Improvement Dist. No. 1 v. City of Ft. Worth, 158 S.W. 164, 169 (Tex. 1913) (the Constitution’s use of the broad term “damaged” covers all instances of injury to rights or property caused by public works or purposes); Tarrant County Water Control & Improvement Dist. v. Reid, 203 S.W.2d 290 (Tex. Civ. App. 1947) (injury to land not occupied by the action creates a cause of action for damage to property); Nueces County Drainage & Conservation Dist. v. Bevly, 519 S.W.2d 938 (Tex. Civ. App. 1975) (homeowner successfully sued city for injury to land not physically invaded or appropriated).
volved a direct overflight, Texas courts apparently need not limit themselves to such trespassory grounds for awarding compensation.127

Rather than limiting compensation solely to those in the flight path, the DFW proposal will offer compensation to all homeowners within the 65 Ldn contour.128 This approach is apparently related to the federal noise contour map program and follows the logic, applied in Aaron, that the overflight distinction should be abandoned when "modern day noise measurement techniques provide more sophisticated means of drawing the dividing line between compensability and noncompensability."129 It also reflects the probability that Texas courts applying the state’s Constitution would follow the logic of Aaron, Martin, and Sundell, to the effect that no direct overflight is required for a compensable "damaging" of property.130

D. Defenses to Inverse Condemnation Claims

The use of noise contour boundaries in a mitigation program should help airports show that they are attempting to deal with all property owners on the basis of actual noise impacts. Will this contour-based distinction withstand challenges by those just outside its boundaries? The answer may depend on the ability of those not presently defined as eligible for compensation to prove an actual decline in the value of their property due to the operation of the new runways.

Courts have frequently required that those claiming inverse condemnation must demonstrate a significant loss in the value of their property in order to be awarded damages.131 In two New York cases, Kupster Realty Corp. v.
State,\textsuperscript{132} and 3775 Gennessee Street v. State,\textsuperscript{133} the plaintiffs were not compensated for projected future damages. Rather, the avigation easements already acquired by the airports were limited to allowing the amount of noise presently generated, and plaintiffs were advised that they would have to show a decline in the value of their property to collect damages for any future harm.\textsuperscript{134}

This emphasis on market value can lead to a costly and confusing battle of expert witnesses, as each side presents an array of real estate appraisals and market studies to demonstrate the impact of aircraft noise on property values.\textsuperscript{135} Florida courts have held that property owners must make a detailed showing of "substantial damage."\textsuperscript{136} In a rapidly growing area such as Florida, where land values are rising in response to population increases, this can be difficult test as property values may rise despite an unacceptable level of airport noise. Property owners claiming that they have suffered a more modest increase in value than they would have experienced in the absence of intrusive noise have been denied compensation for their (the interference with plaintiff's property "must be substantial, not merely consequential . . . . The inconvenience or damage suffered must become extensive or oppressive before a 'taking' compensable under the Fifth Amendment will be found.").

\textsuperscript{132} 404 N.Y.S.2d 225, 235 (Ct. Cl. 1978) (damages paid to acquire aviation easement must be "reasonably probable and reasonably ascertainable.").

\textsuperscript{133} 415 N.Y.S.2d 575 (Ct. Cl. 1979) (denying damages for projected future increases in noise because no correlation to decreased property value was shown).

\textsuperscript{134} Kupster, 404 N.Y.S.2d at 236; 3775 Genessee St., 415 N.Y.S.2d at 586.

\textsuperscript{135} See Alevizos v. Metropolitan Airports Com'n, 317 N.W.2d 352 (Minn. 1982). Seven different experts on property values testified in this trial, three for the petitioner property owners and four for the respondent Commission. Two of those testifying for respondent had used very sophisticated computer regression analysis and market research techniques on a data base of the 1,819 sales recorded in the city assessor's office over the past eight years. Although petitioner's experts found a property value reduction of 5-15%, the jury felt the larger studies by respondent were more convincing. These studies showed aircraft noise had little or no effect on market values in the affected neighborhood. Id. at 355-57.

\textsuperscript{136} See Fields v. Sarasota-Manatee Airport Auth., 512 So.2d 961, 965 (Fla. Dist. Ct. App. 1987) (denying compensation to property owner because Florida law requires showing of "substantial damage to be entitled to inverse condemnation in airport cases"); Adams v. County of Dade, 335 So.2d 594 (Fla. Dist. Ct. App. 1976), cert. denied, 344 So.2d 323 (Fla. 1977) (no diminution in property value because of rising values in area as a whole, so no inverse condemnation).
“decreased increase.”

The unstable real estate market in the vicinity of DFW during the past ten years will create a challenge to the appraisal industry and to the judges and juries asked to interpret their findings. Because of the job growth generated by DFW and related development in the early 1980’s, property values in the airport vicinity were high. The current real estate slow-down in Texas has caused housing values to drop significantly in most communities. Although home sales prices increased in the area in 1989 and early 1990, the national recession and local economic uncertainty caused home sales prices to drop during the last three quarterly reporting periods of 1990. Should prices rise, persons seeking to show a negative impact from airport noise may be in the “decreased increase” category, which is not compensable in Florida. If prices remain flat or decline, it may actually be easier for homeowners to show they are harmed by an “increased decrease” over the declines experienced by owners of similar, non-noise-impacted homes.

When neither a lack of direct overflight nor a failure to show a diminished property value are available as defenses, some airports have successfully fended off inverse condemnation claims because of the timing of the claims. Property owners may seek compensation for anticipated declines in property values due to widespread publicity about airport expansion plans and the resulting fear of increased noise in adjacent neighborhoods. But such claims have been disallowed as premature where the property owners have not yet been damaged but are attempting to obtain compensation for future airport development and the anticipated noise increases.

137 Fields, 512 So.2d at 965 (“decreased increase” of 1% of property value is neither a continuing invasion of property nor sufficient deprivation of beneficial use to constitute inverse condemnation).


139 3775 Tennessee Street, 415 N.Y.S. at 586 (denying compensation to property
Moreover, several courts have held for the airport proprietor when the claimant has waited too long to voice his complaint, and has violated the state's statute of limitations. Generally, the point at which the substantial decrease in property value occurs marks the date of a "taking" for purposes of applying the statute of limitations. Property owners and airport authorities need to carefully monitor area market values in the early months of operation of new airport facilities to determine if a demonstrable drop in property values can be linked to the increased noise. If such a decrease occurs, it will become the starting point for the running of the statute of limitations.

An additional time-related hurdle faced by property owners is the ability of an airport to acquire a prescriptive easement under the common law doctrine of adverse possession. An avigation easement is acquired by prescription if the noise, fumes, and other intrusions caused by aircraft occupy a property owner's airspace without objection for such time that, under state statutes, ownership of airspace is transferred to the airport. The owner of the property underneath the prescripted airspace is then unable to assert any claims based on a taking of this airspace.

E. Scope of the Easement Acquired

The exact extent of an avigation easement acquired either through an airport's voluntary purchase or as required by court action has not been widely addressed. In the model easement form provided by DFW, the property owner who failed to establish that a projected increase in air traffic would decline in property value).


141 Id. at 899.

owner grants a right of way for all aircraft together with the right to cause "such noise, vibration, fumes, dust, fuel, and lubricant particles, and all other effects that may be caused" by aircraft using DFW.\textsuperscript{143} The only exception to the easement is that owners or operators of aircraft may still be held liable for personal injuries or property damage caused by aircraft or objects from aircraft actually falling from the sky. This easement is to run with the land, binding all successors, until such time as Dallas/Fort Worth Regional Airport is abandoned and no longer used for public airport purposes.\textsuperscript{144}

Such broad language may not survive court scrutiny. In \textit{Avery v. United States},\textsuperscript{145} the court held that the use of an existing easement by new and heavier aircraft constituted an additional taking.\textsuperscript{146} Similarly, the New York courts in \textit{Kupster} and \textit{3775 Genessee Street} both limited the scope of the easements acquired.\textsuperscript{147} To do otherwise, the courts noted, would be to allow unlimited use of the easement by virtually any type of aircraft. This wide-open interpretation would essentially destroy the market value of the property. The taking would then have to be based on the value of the entire property, not just an avigation easement.\textsuperscript{148}

\textsuperscript{143} Model Avigation Easement Form, DFW Airport staff, October, 1990.

\textsuperscript{144} \textit{Id.}

\textsuperscript{145} 330 F.2d 640, (Ct. Cl. 1964) (limiting a "perpetual easement" already held by the federal government to the type of aircraft present when the easement was acquired, and holding that a new taking had occurred due to introduction of new aircraft, increased operations, and resulting decreased residential land values in the area subject to direct overflights.)

\textsuperscript{146} \textit{Id.} at 643.

\textsuperscript{147} \textit{Kupster}, 404 N.Y.S. 2d at 235; \textit{3775 Genessee Street}, 415 N.Y.S.2d at 587.

\textsuperscript{148} In \textit{Kupster}, the court limited the easement to damages which would be "reasonably probable and reasonably ascertainable." \textit{Kupster}, 404 N.Y.S.2d at 135. The court chose to use 1979 air traffic projections as the limit of aircraft operations that would be allowed under the easement acquired. \textit{Id.} In \textit{3775 Genessee Street}, the court echoed this reasoning and stated:

\begin{quote}
To the extent that future airport operations result in an appreciable increase in the frequency of overflights, or in the intensity of the noise produced, and to the further extent that there is a demonstrable effect on market value, additional servitude may be imposed . . . which will give rise to a new claim for the appropriation of a further avigation easement.
\end{quote}
V. NUISANCE

Nuisance actions are the second major category of claims available to persons alleging harm due to airport noise. A nuisance is an unprivileged interference with a personal or property right. Unlike the narrow interpretation of inverse condemnation used in some states, requiring a physical invasion of property rights, no actual trespass is required to find a nuisance. Since very loud noise can readily be considered an interference with one's enjoyment of property or with one's emotional peace and well-being, the doctrine of nuisance clearly applies in the airport noise context. Yet the complex nature of this cause of action presents numerous challenges to those seeking damages based on nuisance.

A. Background

Nuisance is a common law remedy, and thus is largely a creature of state court decisions. Accordingly, its utility will vary in different jurisdictions. A full review of these nuances is beyond the scope of this comment. Instead, this comment will focus on the major cases in which plaintiffs brought nuisance actions in pursuit of a remedy for airport noise.

Parties must overcome two initial hurdles in order to bring a nuisance claim against an airport. These hurdles are sovereign immunity and preemption. Since many airport proprietors are arms of municipal, federal or state governments, the proprietor may claim governmental immunity from such actions, or at least require that claims comply with the Federal Tort Claims Act or one of its state counterparts.

415 N.Y.S.2d at 587.


150 See supra notes 71-116 and accompanying text for discussion of inverse condemnation.

151 RESTATEMENT, supra note 149 § 821D.

152 Id. § 821A.

153 Vincent J. Rossi, Jr., Note, Inverse Condemnation and Nuisance: Alternative Reme-
Related to immunity is the concept of legitimized nuisance, which rests on the theory that no nuisance can be claimed if the act complained of is the result of a legislative directive. The defendant in Greater Westchester Homeowners Ass'n v. City of Los Angeles advanced this theory. Plaintiffs, owners and occupants of homes near the Los Angeles Airport (LAX), sued the city for inverse condemnation and nuisance created by the noise, fumes, and vibrations emanating from aircraft at LAX. In its defense, the city argued that the state's civil code created a legislative sanction for the airport's operation.

The Supreme Court of California rejected the city's legitimization argument. The court first pointed to the narrow construction it had previously given to the applicable code provision:

A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms... or by the plainest and most necessary...
implication from the powers expressly conferred, so that it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury.\textsuperscript{158}

The court declared its approval for the view that although an activity authorized by statute cannot be a nuisance, the way in which the activity is performed may create a nuisance.\textsuperscript{159} Accordingly, although state and federal legislation authorizes creation of airport authorities and regulates airports and flights, these governmental acts cannot create statutory immunity from nuisance claims.\textsuperscript{160}

As described previously, the preemption doctrine allocates decisions on aircraft design and flight patterns to the federal government.\textsuperscript{161} In the past, some courts have relied on this doctrine to bar state common law nuisance actions against governmental operated airports.\textsuperscript{162} A number of recent cases, however, have viewed preemption narrowly and allowed valid nuisance claims against airport proprietors.\textsuperscript{163} In Bieneman v. City of Chicago,\textsuperscript{164} for

\textsuperscript{158} Id. (quoting Hassell v. San Francisco, 78 P.2d 1021, 1022-23 (Cal. 1938)).

\textsuperscript{159} Id. (quoting Venuto v. Owens-Corning Fiberglass Corp., 99 Cal. Rptr. 350, 359 (1971)).

\textsuperscript{160} Greater Westchester, 603 P.2d at 1337 (Cal. 1979).

\textsuperscript{161} See supra notes 31-70 and accompanying text for a discussion of the preemption doctrine.

\textsuperscript{162} See, e.g., Burbank, 411 U.S. at 624 (holding that a city ordinance was preempted by the Federal Aviation Act and the Noise Control Act); Luedtke v. Milwaukee, 521 F.2d 387, 391 (7th Cir. 1975) (stating, in response to a nuisance claim based on low-altitude flights, "[s]ince the federal laws and regulations have preempted local control of aircraft flights . . . the defendants may not, to the extent they comply with the federal laws and regulations, be charged with negligence or creating a nuisance."); City of Irving v. FAA, 539 F. Supp. 17, 24 (N.D. Tex. 1981) (denying injunction against testing of diagonal runway because "Congress . . . has preempted the regulation of aircraft noise, so that there can be no state or local laws or nuisance suits concerning noise caused by airport operations.").

\textsuperscript{163} Baker v. Burbank-Glendale-Pasadena Airport Auth., 705 P.2d 866, 872 (Cal. 1985) ("Federal preemption of local regulation of airport noise is not absolute. . . . [S]tate law damage remedies remain available against an airport proprietor despite the fact that federal law precludes interference with commercial flight patterns and schedules."); Greater Westchester, 603 P.2d at 1336 (recognizing the state's traditional interest in compensating its citizens for damages and holding that claims for personal injuries founded upon nuisance have not been federally preempted).

\textsuperscript{164} 864 F.2d 463 (7th Cir.), cert. denied, 490 U.S. 1080 (1988). In this long-
example, the United States Court of Appeals for the Seventh Circuit overruled its prior determination of preemption seen in *Luedtke v. County of Milwaukee.* The court found that the Federal Aviation Act does not expressly preempt state damages remedies; in fact, the act expressly saves such remedies, providing that "nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute . . . ." Noting that extensive federal regulation in the nuclear power industry had not precluded the use of common law remedies in recent cases involving that industry, the court applied the same logic to air transportation, and found that federal law did not so extensively occupy the field as to preclude common law action. The Seventh Circuit also acknowledged that numerous jurisdictions considering this issue since *Luedtke* had concluded that nuisance and similar state law actions were not preempted by federal law.

The *Bieneman* court limited the use of these common law remedies to those aspects of airport operation not subject to federal control. These proprietor options, however, are exactly the issues likely to be contested when an airport undertakes new construction. Federal law does

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fought case on behalf of northern Illinois residents affected by noise from O'Hare airport, plaintiffs have been unsuccessful in their federal claims: requesting class certification, alleging deprivation of property without due process, and seeking to escape the statute of limitations. They have, however, received a favorable ruling that certain common law claims are not preempted by federal law.

165 521 F.2d 387, 390-91 (7th Cir. 1974).
166 *Bieneman*, 864 F.2d at 471 (quoting Federal Aviation Act of 1958, 49 U.S.C. § 1506 (1976)).
167 Id. at 472.
168 Id. at 470.
169 Id. at 472-73. The court stated:

A state court could not award damages against O'Hare [Airport] or its users for conduct required by these [federal] regulations, or for not engaging in noise-abatement procedures that the Federal Aviation Administration considered but rejected as unsafe . . . . There may be, on the other hand, aspects of O'Hare's operations that offend federal law, or that federal norms do not govern.

Id. The court uses as examples of the latter a lack of adequate perimeter noise baffles or building more runways than required by federal law. *Id.*
not require the addition of new runways; this is a choice made by DFW and other airports seeking to maintain their competitive position in the commercial aviation market. If this distinction between federally mandated actions and local options is persuasive to other courts, preemption will not bar nuisance claims based on harm caused by the decisions of local airport proprietors.

B. Private or Public Nuisance

Nuisance is a broad and complex doctrine, and one seeking to use it in the airport noise context has to face a series of decisions regarding the claim. One of the first such choices is whether a claim will be based on public or private nuisance. A public nuisance is one affecting a large community of persons, and in order to succeed in this sort of claim, an individual must show that he has suffered some greater harm than others have experienced. In addition, the extent of the harm will be balanced against the utility of the activity to the community.

One facet of public nuisance that is especially attractive to persons claiming harm from intrusive noise is its potential for use as a cause of action by persons who do not own

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171 RESTATEMENT (SECOND) OF TORTS § 821C, 821F (1977); see also Keeton et al, supra note 149, at 646 (stating uniform rule that “a private individual has no action for the invasion of the purely public right, unless his damage is in some way to be distinguished from that sustained by other members of the general public.”); Institoris, 258 Cal. Rptr. at 424 (plaintiff suing on public nuisance basis must show special injury in kind, not only in degree, from that experienced by the general public).
172 RESTATEMENT (SECOND) OF TORTS § 829A states that compensation will be made only for unreasonable interference in a property owner’s interest. See, e.g., Smithdeal v. American Airlines, Inc., 80 F. Supp. 233, 234 (N.D. Tex. 1948) (balancing of equities of $10,000,000 city and private investment in Love Field against individual alleging airport noise constituted nuisance); Greater Westchester, 603 P.2d at 1330 (resolution of airport liability in noise nuisance action requires careful weighing of public interest in commercial aviation against property owner’s right to peaceful enjoyment of his land); see also Rossi, supra note 153, at 793 (courts must consider possible financial burden on air commerce as well as need to protect landowners from airport noise damage).
property in the airport vicinity.\textsuperscript{173} Apartment dwellers or tenants of commercial space may use public nuisance to seek compensation for such harms as annoyance, inconvenience, discomfort, and mental or emotional distress.\textsuperscript{174} In addition, property owners who cannot show a decline in the market value of their land but who nevertheless do experience personal harm may also use public nuisance as their cause of action. A further advantage of this cause of action is that the defenses of prescription, laches, and expiration of the statute of limitations do not run against public nuisance.\textsuperscript{175}

In private nuisance, the relief sought must be based on harm to property.\textsuperscript{176} The party seeking a remedy for private nuisance must demonstrate some interference with the use and enjoyment of land.\textsuperscript{177} In the airport context, this interference may be due to noise, smoke, vibration, or other effects of aviation. In order to rise to the level of a nuisance, however, the alleged harm must be substantial and unreasonable, and of such a nature that it would be offensive or inconvenient to a normal person.\textsuperscript{178} The requirement for a substantial interference can be met by proof of a measurable decline in property value.\textsuperscript{179} In the absence of a sufficient showing of substantial harm, nuisance damages are likely to be denied. Thus, in Smithdeal v. American Airlines, Inc.,\textsuperscript{180} the federal district court dismissed the plaintiff's claim because he failed to show that aircraft flights in the vicinity of his home caused any harm greater than occasional interruptions in conversations and interference with radio reception. The court held that such complaints were "suffered or enjoyed by all of the people. They are the elements of progress."\textsuperscript{181} In gen-

\textsuperscript{173} Restatement (Second) of Torts § 821B.
\textsuperscript{174} Greater Westchester, 603 P.2d at 929.
\textsuperscript{175} Keeton et al, supra note 149, at 648.
\textsuperscript{176} Restatement (Second) of Torts § 821D.
\textsuperscript{177} Keeton et al, supra note 149, at 619.
\textsuperscript{178} Id. at 620.
\textsuperscript{179} Id. at 623.
\textsuperscript{180} 80 F. Supp. 233 (N.D. Tex. 1948).
\textsuperscript{181} Id. at 234.
eral, this sort of minor noise disturbance is considered a necessary fact of modern life, and is not considered sufficient to justify the imposition of tort liability.182

C. Permanent or Continuing Nuisance

Characterization of the alleged nuisance as either permanent or continuing will affect both the damages which may be awarded and the time within which an action may be brought. If the nuisance is defined as permanent, damages may be awarded for all past, present and future harm.183 Typically, a permanent nuisance refers to a building or other structure.184 Possibly an airport runway could be placed in this category, although it could also be argued that it is the aircraft themselves, rather than the airport or its facilities, that cause the alleged harm.

A continuing nuisance is an act which can be discontinued. Damages are allowed only for the harm suffered until the present. If the nuisance is not discontinued, a new action must be brought to seek compensation for the additional harm. Noise, vibration, and air pollution are usually considered to be continuing nuisances.185

Because only one action is required to recover damages for ongoing harm, the permanent nuisance action appears more favorable to those alleging an airport noise nuisance. However, state statutes of limitation or prescriptive rights statutes may alter this perception. In Institoris v. City of Los Angeles,186 the court held that the airport had acquired a prescriptive avigation easement over the subject property because flights had been operating in the vi-

182 RESTATEMENT (SECOND) OF TORTS § 822, cmt. j.
184 Baker, 705 P.2d at 866, 870 (1985) (“[T]he distinction to be drawn is between encroachments of a permanent nature erected upon one's lands, and a complaint made, not of the location of the offending structures, but of the continuing use of such structures.” (citing Tracy v. Ferrara, 301 P.2d. 904, 905 (1956)).
185 Baker, 705 P.2d. at 866.
186 258 Cal. Rptr. at 418 (plaintiff, lessor of hotel near Los Angeles International Airport, unsuccessfully sought damages for inverse condemnation and nuisance based on aircraft noise).
cinity for more than the number of years required to establish a taking by prescription. The starting date for this public acquisition also marked the start of the running of the statute of limitations. Thus, permanent nuisance claims were time-barred,\textsuperscript{187} while claims for continuing nuisance could be brought as long as the alleged nuisance continued to operate.\textsuperscript{188} The difficulty in using continuous nuisance was that the state's governmental tort claims act allowed recovery only for injury occurring within one hundred days immediately prior to the time of filing a claim. This statutory limit severely affected the potential amount of recoverable damages and also required filing for a new nuisance action for each one hundred days of on-going harm.\textsuperscript{189}

Because the dividing line between permanent and continuous nuisances is often a cloudy one, courts generally allow a plaintiff to make this election, choosing the claim best suited to the individual's complaint.\textsuperscript{190} One seeking permanent nuisance damages must bring this action within the applicable statute of limitations. This makes a permanent nuisance claim especially appropriate when new airport construction is the source of the alleged nuisance. In those instances where the noise problem has been ongoing or where no decline in property value is alleged and the harm is personal in nature, continuous nuisance is the appropriate cause of action.

D. Nature of Remedy

Historically, those claiming to be harmed by a nuisance sought to have the offending action enjoined.\textsuperscript{191} But

\textsuperscript{187} \textit{Id.} at 422-23; see also Christie v. Miller, 719 P.2d 68 (Or. Ct. App. 1986) (private airstrip acquired easement by prescription although planes did not continuously land or take off).

\textsuperscript{188} \textit{Institoris}, 258 Cal. Rptr. at 423; see also \textit{Baker}, 705 P.2d at 866: "[I]f a nuisance is a use which may be discontinued at any time, it is considered continuing in character and persons harmed by it may bring successive actions for damages until the nuisance is abated." \textit{Id.}

\textsuperscript{189} \textit{Institoris}, 258 Cal. Rptr. at 424.

\textsuperscript{190} Werlich and Krinsky, \textit{supra} note 183, at 870.

\textsuperscript{191} \textit{Restatement (Second) of Torts} § 821D, cmt. a (1977).
where the utility of the activity is high, as with an industry employing many persons or highway needed to accommodate transportation demands, courts are reluctant to order a cessation of such activities. This can sometimes be the case even when the plaintiff can clearly demonstrate substantial and unreasonable harm.\textsuperscript{192}

In such instances, some courts have crossed the line that distinguishes between permanent and continuous nuisance, awarding permanent damages (past, present, and future) for an on-going nuisance.\textsuperscript{193} This approach is particularly appropriate in airport noise cases. The utility of the airport is obviously high, both for the safety and convenience of the travelling public and the stimulus to the local economy. Yet persons in the immediate airport vicinity will inevitably experience noise levels much higher than those heard in the community as a whole,

\textsuperscript{192} The classic case in this area is Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970), in which the court departed from the traditional New York rule that injunctions must always issue against a continuous nuisance. \textit{Id.} at 315-16. The court was troubled by the extent of the disparity in economic consequences between the local economic benefit of the cement plant and the unquestionable but relatively minor harm to the neighboring landowners. The court resolved its dilemma by giving the cement plant a choice: accept an injunction or pay permanent damages to the plaintiffs, compensating them for past, present and future harm. \textit{Id.} at 875.

\textsuperscript{193} \textit{Baker}, 705 P.2d at 874 (Justice Mosk, concurring and dissenting) (test for classifying nuisances as either continuing or permanent is based on whether abatement of the nuisance is a reasonable remedy); \textit{see also}, Maloney v. Heftler Realty Co., 316 So.2d 594, 595 (Fla. Dist. Ct. App. 1975); City of Columbus v. Myszka, 272 S.E.2d 302, 305 (Ga. 1980); Goldstein v. Potomac Elec. Power Co., 404 A.2d 1064, 1068-69 (Md. 1979); \textit{Sundell}, 409 A.2d at 1320-21; Krueger v. Mitchell, 332 N.W.2d 733, 740-41 (Wis. 1983). Justice Traynor summarized the rationale for such decisions in Spaulding v. Cameron, 239 P.2d 625, 627-29 (Cal. 1952) (holding where defendant could prove corrective measures would prevent further mudslides onto plaintiff’s property, the award to plaintiff would be limited to past damages, but if future slides were likely, plaintiff could collect for permanent loss in property value). Justice Traynor stated:

\textit{Situations arose, however, where injunctive relief was not appropriate or where successive actions were undesirable either to the plaintiff or defendant or both. Accordingly, it was recognized that some types of nuisances should be considered permanent, and in such cases recovery of past and anticipated future damages were allowed in one action.}
placing on those close to the facility an unfair share of the cost of growth for which some compensation is due.

In addition to courts' reluctance to impose injunctions on airport activity because of the potentially severe economic impact of such actions, an injunction would also have to survive the charge that it interferes in areas reserved to federal control. Some of the earliest cases to define the federal role in noise abatement declared that locally imposed curfews violated the federal preemption of aircraft flight operations.\(^{194}\) Since injunctions limiting aircraft operations to certain runways or times of day would have an effect much like a curfew, similar judicial treatment can be expected. Thus, damages rather than injunctive relief are the more likely remedy in airport nuisance cases.

E. **Defenses to Nuisance**

A neighboring property owner or occupant bringing a nuisance action against a publicly owned airport faces two categories of opposition. The first group of defenses consists of claims that the airport proprietor simply cannot be sued for the harm caused by aircraft noise. Included in this category are claims of federal preemption or airport activities,\(^{195}\) governmental immunity for a state or municipally chartered airport authority, and the related concept of legitimized nuisance, sanctioned by legislative authority.\(^{196}\)

The second body of defenses available to airports are those common to all private nuisance actions, whether the offending activity is operated by a government, corporate, or individual owner. These include the running of the statute of limitations, laches, and acquisition of prescrip-

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\(^{194}\) *Burbank*, 411 U.S. at 628. "[T]he record shows that FAA has consistently opposed curfews, unless managed by it, in the interest of its management of the 'navigable airspace'." *Id.*

\(^{195}\) See *supra* notes 160-169 and accompanying text for discussion of federal preemption in airport nuisance cases.

\(^{196}\) See *supra* note 152-159 and accompanying text for discussion of sovereign immunity and legitimization of nuisance.
tive rights to the airways. The success or failure of these defenses depends on specific state laws, on facts relating to when the nuisance first came into being, and whether it has changed significantly in its effects, possibly creating a new nuisance.

An argument frequently made by airport supporters is that those complaining of aircraft noise knew of the airport’s location and operations prior to purchasing nearby property, and this awareness should bar any action against the airport. This concept, known as “coming to a nuisance,” may not be as complete a defense as it first appears. In fact, the majority rule is that a plaintiff is not barred from recovery of damages merely because the nuisance-generating activity preceded the plaintiff’s investment. This rule is based on the theory that an airport or other potential nuisance cannot limit the use or enjoyment of a neighbor’s property. As long as the land was bought in good faith and not purchased for the purpose of bringing a nuisance-based lawsuit, and no prescriptive easement had been acquired, one property owner should not have to endure negative effects of another’s intrusive use.

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197 Werlich and Krinsky, supra note 183, at 870. These defenses do not, however, run against a public nuisance. Id. See supra notes 170-174 and accompanying text for explanation of public nuisance.

198 Aaron, 115 Cal. Rptr. at 176. In discussing the time when the plaintiff property owners’ cause of action arose the court noted that this is a difficult question in aircraft for noise cases, stating:

There is, unfortunately, no simple litmus test for discovering in all cases when an avigation easement is first taken by overflights. Some annoyance must be borne without compensation. The point when that state is passed depends on a particularized judgment evaluating such factors as the frequency and level of flights; the type of planes; the accompanying effects, such as noise or falling objects; the uses of the property; the effect on values; the reasonable reactions of the humans below; and the impact upon animals and vegetable life.

Id. (quoting Jensen v. United States, 305 F.2d 444, 447 (Ct. Cl. 1962) (internal citations omitted)).

200 Werlich and Krinsky, supra note 183, at 871.

201 Keeton et al, supra note 149, at 635.

202 Id. In some instances, however, a plaintiff’s voluntary choice of a place to
VI. Conclusion

As the DFW Airport experience illustrates, airports and urban development are naturally attracted to each other. Even an airport initially located in a relatively undeveloped area will soon find itself surrounded by businesses and residents attracted by proximity to a convenient travel facility or to the jobs generated by the airport itself. Yet what appears initially to be a beneficial relationship contains the seeds of eventual conflict. The more successful the airport is at attracting growth, the greater the demand for more flights, larger aircraft, and longer or additional runways. These changes increase airport capacity, but also either increase the amount of noise generated or broaden the area exposed to aircraft noise.

Courts appear to be placing the airport proprietor squarely in the middle of this conflict. Through such actions as abandoning the overflight requirement, narrowing the scope of federal preemption, and awarding damages for nuisances having high public utility but unacceptably negative effects, courts have signaled that airport proprietors must pay for the environmental consequences of airport expansion.

The mitigation program currently proposed by the DFW Airport Board reflects this "effects" approach. The program differentiates treatment of property owners based on noise contours rather than direct overflights, ties payments to actual market value decreases in property, and includes payments for noise-reduction tech-

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203 See supra note 9 and accompanying text for discussion of the employment and residential growth generated by DFW Airport.

204 See Thornburg, 376 P.2d at 100; Martin, 391 P.2d at 540; Aaron, 115 Cal. Rptr. at 162.

205 See supra notes 45-70 and accompanying text for discussion of cases rejecting complete federal preemption of airport noise regulation.

206 See supra note 192 and accompanying text for explanation of cases awarding damages where enjoining a nuisance would have a severe economic impact or is impractical for other reasons.
niques such as soundproofing of sensitive uses.\textsuperscript{207} As the airport seeks public support and progresses through the required governmental approval processes, the scope of compensable effects may increase if litigation is to be avoided. While the resulting cost of the airport's expansion will be high, compensating those impacted by airport growth appears to be the inevitable price of success.

\textsuperscript{207} Federal Aviation Administration, \textit{supra} note 1, at 4-133, 4-146.
Current Literature