

1941

Airport Legal Developments of Interest to Municipalities - 1940

John M. Hunter Jr.

Follow this and additional works at: <http://scholar.smu.edu/jalc>

Recommended Citation

John M. Hunter Jr., *Airport Legal Developments of Interest to Municipalities - 1940*, 12 J. Air L. & Com. 148 (1941)
<http://scholar.smu.edu/jalc/vol12/iss2/2>

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

AIRPORT LEGAL DEVELOPMENTS OF INTEREST TO MUNICIPALITIES—1940†

BY JOHN M. HUNTER, JR.*

Most civil airports in the United States are municipally owned¹ while many of those that are not are located within the territorial limits of cities. Consequently, airport legal problems are naturally of concern to municipal law officers, a fact that is evidenced by the attention given these problems by the National Institute of Municipal Law Officers during the last two years.²

This concern with airport legal problems seems likely to become greater in the near future as the problems themselves become more numerous and more pressing. Civil aviation is growing at a tremendous rate, this being true both of scheduled air carrier operations³ and private flying.⁴ At the same time, the Army and Navy air forces are expanding even more rapidly to meet the existing national defense emergency. As a result, the Nation's civil airport facilities, previously far from adequate,⁵ are becoming even less so.⁶ Many public airports are being taken over by the military services,⁷ while the remainder are already seriously overcrowded due to the greatly increased operations of the Army and Navy air forces, the air carriers,

† Substantially as prepared by the author for the Committee on Airports of the National Institute of Municipal Law Officers and used by that Committee in making its report at the annual meeting of the Institute in Washington, December 5-7, 1940, to be published in the Institute's "Municipalities and the Law in Action for 1940."

* Attorney for Airport Division, Civil Aeronautics Administration, U. S. Department of Commerce; Member of the District of Columbia Bar.

1. As of January 1, 1941, there were 791 municipal, 503 commercial, 288 CAA intermediate, 21 Navy, 70 Army, 492 marked auxiliary, 136 private, and 31 miscellaneous Government airports, making a total of 2332. 2 Civil Aeronautics Journal 58 (Feb. 15, 1941).

2. See the following publications of the National Institute of Municipal Law Officers: (1) McIntire and Rhyne, "Airports and Airplanes and the Legal Problems They Create for Cities," Report No. 42 (April, 1939); (2) "Airport Approach Protection Materials—Model Statute and Ordinance" Report No. 59 (Feb., 1940); (3) the Municipal Law Journal, recent issues of which have contained many references to airport legal questions; and (4) "Municipalities and the Law in Action for 1939," which contains several papers on airport legal problems.

3. See testimony of Robert H. Hinckley, Assistant Secretary of Commerce, and Donald H. Connolly, Administrator of Civil Aeronautics, at hearing Sept. 20, 1940 before subcommittee of House Appropriations Committee, on proposed appropriation to Administrator for development of landing areas. Supplemental Hearing, First Supplemental Civil Functions Appropriation Bill for 1941 (H.R. 10539), Subcommittee of the Committee on Appropriations, House of Representatives, 76th Congress, 3rd Session, pp. 27-35, 54-63, and 69. See also CAA domestic air carrier statistics, 2 Civil Aeronautics Journal 63 (Feb. 15, 1941).

4. See Supplemental Hearing, *ibid.*; also address of Robert H. Hinckley, Assistant Secretary of Commerce, 1 Civil Aeronautics Journal 421 (Sept. 15, 1940).

5. See Civil Aeronautics Authority report to Congress, "Airport Survey" (March 23, 1939), House Document No. 245, 76th Congress, 1st Session.

6. See Supplemental Hearing, *supra* note 3.

7. *Ibid.*

and civilian flying schools.⁸ Consequently, it may be expected both that civil airports will experience a much greater flying activity than has ever been known and that many existing civil airports will be expanded and improved and many new non-military airports established. In this latter connection, it should be noted that the present WPA airport program is considerably larger than those of recent years,⁹ and that the Civil Aeronautics Administration is now carrying on a program of construction or improvement of public airports necessary for national defense, involving an expenditure of approximately \$40,000,000 in Federal funds.¹⁰

In these circumstances, it seems particularly important that municipalities consider the legal problems involved in the municipal development, operation, protection and regulation of airports. These problems are illustrated by the legislation, litigation and other legal developments with respect to airports from December, 1939 to November, 1940, of which the more important will be briefly reviewed under four main headings, as follows: (1) Municipal Development of Airports; (2) Municipal Operation of Airports; (3) Municipal Protection of Airports; and (4) Municipal Regulation of Airports.

(1) *Municipal Development of Airports.*

While political subdivisions have been acquiring, establishing, and developing airports for years, it appears that there are still many legal problems arising in this field, a fact evidenced by the legal opinions and legislation of the last year. These developments, while relatively few in number, illustrate several of the principal legal problems with which a municipality may find itself confronted in establishing or further developing an airport.

For one thing, one of these developments indicates that there are still, at this late date in the development of publicly-owned airports, many political subdivisions lacking the basic power to establish such airports. This was the issuance of an opinion by the Attorney General of Illinois,¹¹ holding that the counties of Illinois have no power to acquire and maintain airports, such powers not having been expressly granted by the legislature. This opinion should be

8. *Ibid.* See also Civil Aeronautics Administration press release, October 7, 1940, concerning action of Administrator of Civil Aeronautics in restricting instruction flying under CAA Civilian Pilot Training Program at 46 airports.

9. The current relief appropriation act, Public Resolution No. 88, 76th Congress, contains provisions, Sec. 1(c) and (d), earmarking \$25,000,000 to supplement the amounts otherwise authorized for non-labor costs in connection with WPA airport and other projects certified by the Secretary of War or the Secretary of the Navy as important for military or naval purposes.

10. Pub. No. 312, 76th Congress, Appropriation to Administrator of Civil Aeronautics, Department of Commerce, for the development of landing areas.

11. Ill. Att. Gen. Op. to Chairman, Ill. Aeronautics Commission, Aug. 1, 1940, 235 CCH 1880.

of particular interest to municipalities not only for its restatement of the well settled rule that political subdivisions have the power to establish airports only if expressly granted by statute but because it also holds that, in the absence of such a grant of power to counties, a county can neither sponsor a governmental project for the development of an airport on county-owned land nor lease such land to a city or other public corporation for use as an airport even though such public corporation does have the power to establish airports.

A variation of this fundamental problem is illustrated by a decision recently handed down by the Supreme Court of New York in the case of *Albany v. Bol*.¹² In that case, defendants claimed that, while New York law authorized municipalities to establish, construct, equip, and maintain airports, and for such purposes to exercise the power of eminent domain, it did not authorize municipalities to condemn property to enlarge already established municipal airports. It goes without saying that the Court refused to accept this very narrow interpretation of the statute.

Although the property in question in the Albany case was located outside the territorial limits of the City, there was no question raised as to whether the City had the power to establish an airport so located. However, this question was in issue in the recent case of *Howard v. City of Atlanta*.¹³ The appellants there were owners of certain land within the City of College Park and were seeking an injunction to restrain the City of Atlanta from acquiring their property by condemnation for enlargement of the Atlanta Municipal Airport. It was admitted by the appellants that the City of Atlanta had statutory authority to acquire and maintain an airport and for this purpose to acquire land without its corporate limits. However, they contended that this authorization did not go so far as to permit exercise of the power of eminent domain outside the City limits. The majority of the court refused to accept this contention, interpreting the legislative grant to acquire property to mean that the property needed could be acquired in the most expedient manner.

Closely related to these questions is the question whether express statutory authority is necessary to permit a municipality to accept Federal aid in the development of its municipal airport. This question is of particular importance at this time, in view of the fact that, under the recently authorized CAA airport program,¹⁴ Federal aid in the development of public airports will be extended to political

12. *City of Albany v. Leonard Bol, et al.* Misc. (N.Y.) 1047, 19 N.Y. Supp. (2d) 522 (N.Y. Sup. Ct., May 2, 1940).

13. *Howard et al v. City of Atlanta*, 10 S.E. (2d) 190 (Ala. Sup. Ct., July 16, 1940).

14. *Supra* note 10.

subdivisions primarily and directly for this purpose, for the first time. In the past, all Federal airport aid has been primarily for the relief of unemployment, the development of airports being only a secondary purpose. The writer does not attempt at this time to say whether such enabling legislation is or will be necessary to permit political subdivisions to participate in the CAA airport program. However, it is noteworthy in this connection that numerous laws have been passed by the State legislatures, authorizing, validating, or regulating the acceptance of Federal aid for other than airport purposes,¹⁵ and that at least fourteen of the States have enacted legislation expressly authorizing State agencies or political subdivisions to accept Federal aid for airport development, or recognizing the existence of such power,¹⁶ of which four were adopted during the last year,¹⁷ an off-year for State legislatures.

Another interesting airport legal question that has received attention during the last year is that whether electoral approval of municipal appropriations and tax levies for airport purposes is necessary. This question was the subject of an opinion given by the Attorney General of Minnesota,¹⁸ in which it was held that municipalities may acquire and maintain airports either within or without their corporate limits without the necessity of receiving a favorable vote of the electors unless bonds are to be issued for such purpose, in which case a favorable vote is a prerequisite. This opinion would be of little general interest if it were not for the fact that the three most recent Court decisions on this question have failed to recognize that the establishment of an airport is a necessary public purpose, justifying either an appropriation of public funds without first obtaining electoral approval or a bond issue based on such approval. In North Carolina there have been two cases holding that cities of that State are without legal authority under the State Constitution to expend money obtained from taxes for the purpose of a municipal airport unless authorized to do so by a vote of the people,¹⁹ these opinions being based on the view that the construction, equipment, operation, and maintenance of a municipal airport are not "necessary municipal expenses" under the State Constitution. Going even further, the Supreme Court of South Carolina has held²⁰ that a county

15. For example, California alone has adopted at least twenty such enabling acts.

16. Alabama, Colorado, Florida, Kentucky, Illinois, Indiana, Maine, Mississippi, New Hampshire, Pennsylvania, South Carolina, Tennessee, Texas and Wyoming.

17. Kentucky Laws 1940, c. 1; Maine Laws 1940, c. 303; Mississippi Laws 1940, S.B. 511; and South Carolina Laws 1940, S.B. 1850.

18. Minnesota Attorney General's Opinion to City Attorney, Pipestone, Minnesota, May 24, 1940, 235 CCH 1867.

19. *Goswick v. City of Durham*, 211 N.C. 687, 191 S.E. 728 (1937); and *Sing v. City of Charlotte*, 213 N.C. 60, 195 S.E. 271, (1938)

20. *Gentry v. Taylor*, 192, S.C. 145, 5 SE (2d), 857 (1939)

bond issue for the establishment of an airport was unconstitutional, even though made with the approval of the voters and in accordance with a State statute expressly authorizing counties to borrow funds for this purpose. This opinion was based on a belief similar to that expressed in the North Carolina cases, that establishment of an airport by a county is not "an ordinary county purpose." These three cases are directly contra to the majority rule as expressed in many previous cases,²¹ but being the last three authoritative expressions of opinion on the question prior to that of the Attorney General of Minnesota, it is good to have in this latest opinion a return to the view that expenditures of public funds for airport purposes are for a necessary public purpose.

Finally, the last year has witnessed a case on the question of the compensation necessary upon condemnation of a private airport by a municipality.²² In that case, the principal question was whether the value of the land should be that as an airport, its use at the time, or that as a potato farm, its original use. The City contended that it was not proper to consider the value of the land for the purpose to which it would be put after condemnation, despite the fact that it was already used for such purpose. While the court failed to decide this question, sending the case back to the lower court on a procedural point, it is believed that the briefs of counsel on the evaluation questions involved would be valuable to any city attorneys concerned with the acquisition of existing privately-owned airports.

(2) *Municipal Operation of Airports.*

As might be expected, there have been fewer legal questions to arise in connection with the operation of airports by cities than there have in the field of municipal airport development. However, it might also be expected that there would have been more legislation enacted and legal opinions given in this field during the last year than has been the case. Strangely enough, there were no reported cases of suits against municipalities for damages arising from operation of municipal airports, the general principles of law governing the tort liability of cities in this connection having apparently been so firmly established by prior cases as to limit the litigation in this field to the lower courts.²³ As a matter of fact, the only legal developments in this field of any great significance, other than those discussed *infra*, were the adoption by several municipalities of rules and regulations

21. See Charles S. Rhyne, "The Legal Experience of Airports," (1940) 11 JOURNAL OF AIR LAW 298.

22. *Pugh v. Topeka*, 151 Kan. 862, 99 P. (2d) 862 (1940). See discussion of the evaluation problems involved, by City Attorney of Topeka in "Municipalities and the Law in Action for 1939," *supra* note 2, pp. 281-287.

23. See Rhyne, *supra* note 21, pp. 303-308; also Report No. 42, *supra* note 2.

governing use of their municipal airports²⁴ and the intervention of certain cities in cases of application by an air carrier to the Civil Aeronautics Authority for issuance or amendment of a Certificate of Convenience and Necessity authorizing such air carrier to serve those cities.²⁵

The principal legal developments of interest in the field of airport operation during the last year were with regard to the leasing of municipal airports or airport facilities to private persons and the grant by cities of airport operating privileges. These developments included the adoption of several city resolutions authorizing airport leases and grants of privileges and concessions,²⁶ together with one case in which the court ordered renewal of the lessee's option to renew its lease of a portion of a municipal airport.²⁷

In addition to these developments, there have been three cases in which informal complaint has been made to the Civil Aeronautics Authority of violation of the exclusive right provision of Section 303 of the Civil Aeronautics Act of 1938, which reads: "There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended." In all of these cases the complaint was that the city in question had granted a private operator an exclusive right to conduct commercial flying activities at the municipal airport, including operation of a flying school and a charter flying service.

It is believed that municipalities will be particularly interested in these cases in view of the fact that, if the exclusive rights in question are illegal, many of them may find themselves ineligible, on this ground, for Federal aid in the expansion and improvement of their airports. That this is the case is seen in the fact that in the operation of many municipal airports improved with Federal aid, exclusive rights have been granted to private operators for the conduct of flying schools and charter flying services. However, the

24. The cities known to have recently adopted such rules, either by resolution or otherwise, are Norfolk, Va., Oakland, Cal., San Francisco, Cal., and Topeka, Kan.

25. These cities included Atlantic City, N. J., Fayetteville, Ark., Lexington, Ky., Lufkin, Tex., Memphis, Tenn., and Winston-Salem, N. C.

26. The cities known to have recently adopted such resolutions are Buffalo, N. Y., Chicago, Ill., Denver, Colo., Duluth, Minn., Indianapolis, Ind., Miami, Fla., San Francisco, Cal., and Philadelphia, Pa.

27. *Standard Oil Co. of N. J. v. City of Newark*, 127 N.J. Eq. 106, 11 a. (2d) 119 (1940). In this case, the City had leased a portion of its airport to the Company with an option to renew, and the Company had constructed a hangar on the leased land. The City and Company later entered into a contract for sale of this hangar to the former for \$25,000, and the latter thereupon, in reliance upon this agreement, allowed its option to renew the lease to expire. It was then found that the City ordinance authorizing such contract did not make provision, as required by State statute, for the funds necessary to carry it out. The lower court held the contract void and also left the Company without remedy as to expiration of the option. But the court, in the case cited, affirmed only that portion of the decree holding the contract void and ordered that the Company be allowed to exercise the option.

Civil Aeronautics Administration has not yet announced its interpretation of the provision in question, two of the cases being still pending and the third having been settled by the voluntary action of the city in revising the airport lease complained of, to eliminate provision for such exclusive rights.

Finally, in this connection, it should be noted that the operation of municipal airports may be affected by the fact that the recently authorized CAA airport program is expressly restricted by the appropriation act²⁸ to the development of "public airports and other public landing areas." This language has recently been construed to mean that an airport to be eligible for aid under this program must be not only publicly-owned but publicly-controlled, meaning that there must be adequate assurance that it will be operated for the use and benefit of the public, on reasonable terms and without discrimination. Consequently, where a municipally owned airport is or would be operated by a private individual or company under lease or contract from the city, it is necessary, to satisfy this requirement, either that ultimate control of operation of the airport rest with the city or that safeguards against operating policies and practices not in the public interest be provided in the contract with or lease to the private operator.

(3) *Municipal Protection of Airports.*

Once an airport is established, it is highly desirable, if not necessary, that it be protected against two threats to its utility as an airport, and even to its existence as such. These are, first, the danger that its aerial approaches may be obstructed, and second, the danger that it may be abated as a nuisance. Both of these problems are becoming, and will continue to be, as civil aviation expands, more and more serious. And both are or should be of particular interest to municipalities, it being an increasingly well-recognized fact that the responsibility for their solution rests with the Nation's cities and counties. This responsibility would seem to extend not only to the airports owned by such political subdivisions but to all publicly-used airports within their territorial limits.

A. *Airport Approach Protection*

Of these two problems, by far the more common, and more difficult as well, is that of protecting the aerial approaches of airports against obstruction, preventing the erection of buildings, transmission lines, and other man-made structures, and the growth of trees and

28. *Supra* note 10.

other objects of natural growth, in the vicinity of airports, to heights making them obstructions or hazards to the landing and taking-off of aircraft. Such obstruction of an airport's approaches not only endangers the lives and property of flyers and their passengers, and of occupants of land in its vicinity as well, but in effect reduces the area useable for landing and taking-off, thus tending to destroy or impair the utility of the airport and the public investment it represents.²⁹

While some progress has been made toward solution of this problem during the last year, it is still true that there are very few airports the approaches of which are adequately protected and still fewer whose approaches are protected at all. Whether because public bodies have been unable or unwilling to make the large expenditures necessary to acquire title to or easements or air rights in the property surrounding airports, or because such acquisition of property rights is slow and difficult, this method has proved wholly inadequate, even in the States that have enacted statutes authorizing its use. With few exceptions, what progress has been made has come through use of the so-called "airport zoning" method,³⁰ this being the adoption of regulations under the State police power, limiting the height of structures and other objects near airports, without compensation. It is believed that municipal law officers will be interested in the legal developments of the last year in this regard.

These developments include the action of several municipalities³¹ in adopting the usual type of airport zoning ordinance, restricted to protecting an airport's approaches by limiting the height of structures in its vicinity,³² together with the enactment of one State statute,³³ authorizing an agency of the State Government "to make and adopt and enforce such rules and regulations as may be necessary to remove or prevent hazards which may affect the proper use of airports within the State."

29. The Administrator of Civil Aeronautics of the U. S. Department of Commerce has advised the chief executive officers of many political subdivisions that "it will become increasingly difficult, if not impossible, to justify expenditures of Federal funds for the development of airports the approaches of which are not adequately protected." Moreover, it is required that each political subdivision or other public agency sponsoring a CAA airport project undertake that the aerial approaches of its airport will be protected against obstruction "insofar as is reasonably possible and within its legal ability."

30. For a survey of airport zoning statutes and ordinances through the year 1938 see Report No. 42, *supra* note 2, or John M. Hunter, "Survey of State Airport Zoning Legislation," Report No. 6 of CAA Technical Development Division, June, 1939.

31. Baton Rouge, La.; Moline, Ill.; Peoria, Ill.; San Jose, Cal.; and Seattle, Wash.

32. As distinguished from airport zoning such as that discussed *infra*.

33. Miss. Laws 1940, S.B. 511. This statute brings the total number of State acts providing, to some extent, for prevention of airport approach obstruction by the police power airport zoning method, to thirteen, these including, in addition to the 1940 Mississippi Act, the nine Statutes discussed in Report 42, *supra* note 2, and Report 6, *supra* note 30, together with three enacted in 1939, as follows: Mass. Laws 1939, c. 412; Mont. Laws 1939, c. 12, p. 13; and Tex. Laws 1939, c. 4 p. 95.

But these developments are unimportant in comparison with certain others indicating a growing realization of the importance of the problem on the part of both the Federal Government and local governments and promising an early solution.

So far as Federal action is concerned, the Civil Aeronautics Administration of the United States Department of Commerce has recently prepared, and distributed to the many persons requesting such assistance, a draft of a model airport zoning act representing the cooperative effort and considered views of many legal and aeronautical experts, including the members of the Committee on Uniform Aeronautical Code of the National Conference of Commissioners on Uniform State Laws and the General Counsel for the National Association of Real Estate Boards. In this undertaking, the Civil Aeronautics Administration had invaluable assistance from municipal law officers, its draft of a model airport zoning act being based in large measure upon a similar act suggested by the National Institute of Municipal Law Officers in April, 1939.³⁴ However, it should be noted in this connection that the Institute is opposed to the CAA draft insofar as it would require political subdivisions to adopt airport zoning regulations in accordance with plans adopted by a State Commission, and has therefore prepared still another draft which, while otherwise identical to the CAA draft, would merely authorize political subdivisions to adopt such airport zoning regulations as they considered necessary. The Civil Aeronautics Administration has expressed itself as of the opinion that either of these proposed model acts would accomplish the desired results.

With respect to action by local governments, the year's airport zoning developments of particular significance were the action of Cook County, Illinois³⁵ and King County, Washington³⁶, in making provision for airports in their master or comprehensive county zoning ordinances, and that of Los Angeles County, California, in formulating, as a basis for such zoning, a master county airport plan.³⁷

The Cook County and King County ordinances are the first instances of incorporation of airport zoning regulations in a com-

34. See Report No. 42, *supra* note 2, and, for a revision of this suggested model act, Report No. 59, *supra* note 2.

35. Ordinance adopted by the Cook County Board of Commissioners, Aug. 20, 1940.

36. Resolution adopted by King County Board of Commissioners, Sept. 23, 1940, amending the general county zoning ordinance of June 2, 1937.

37. This plan was prepared by the Regional Planning Commission of Los Angeles County and submitted by that Commission to the County Board of Supervisors under date of January 30, 1940, and was adopted by the Board on January 14, 1941. The Commission's report on this plan, containing many extremely interesting recommendations, has been published under the auspices of the Aviation Committee of the Los Angeles Chamber of Commerce. One of these recommendations is that the plan be effectuated by county and city zoning regulations.

munity zoning ordinance, several cities having previously adopted, as part of their general zoning regulations, height limits designed to some extent to protect airport approaches.³⁸ However, to the writer's knowledge, none of these cities has formulated, as part of its comprehensive city plan for land uses, location of transportation facilities, and future development of the community in its physical aspects, a master plan for airports, indicating exactly where airports should be located within the city, and none, in adopting its city zoning ordinance, has: (1) designated certain areas or districts as suitable for the establishment of airports; (2) attempted to regulate land uses in the vicinity of airports with a view to protecting their aerial approaches and also ensuring attractive surroundings; (3) made an effort, by means of height limit and land use requirements, to ensure safe and attractive ground approaches to the airports within its territorial limits; or (4) prescribed minimum requirements for future airports, governing their location, size, and facilities. These things it has apparently remained for the Counties of Cook, King, and Los Angeles to do for the first time, the Los Angeles County airport plan specifying exactly where existing and future airports should be located within the County, the King County and Cook County zoning ordinances not only regulating the height of structures within airport approaches but establishing airport districts and regulating the establishment of future airports as to location, and in the case of Cook County, as to size and facilities as well. In addition, it is probable, though not entirely clear, both that the land use requirements of these ordinances for areas in the vicinity of airports, are designed to protect the airports' aerial approaches and surroundings, and that an effort has been made to protect airport ground approaches.

While the writer of this paper does not agree with certain community planners and zoners that provision for airports in community planning and zoning is essential to the validity of airport zoning,³⁹ there are believed to be several advantages, insofar as airport zoning is concerned, in thus integrating airport planning and zoning with community planning and zoning.⁴⁰ Several of these would accrue if the plan and ordinance were so designed as to prevent

38. Including: Atlantic City, N. J.; Chicago, Ill.; Cleveland, Ohio; Fresno, Calif.; New York, N. Y.; Omaha, Neb.; Pueblo, Colo.; and Seattle, Wash.

39. For the planners' contention see Edward M. Bassett, "Can the Circle of Land Surrounding an Airport be Zoned under the Police Power to Regulate Height of Buildings?", 6 *Planning and Civic Comment* 9 (March, 1940); for the opposite view see: Report No. 42, *supra* note 2; Charles S. Rhyne, *supra* note 21, pp. 315-317; and John M. Hunter, "The Relation of Airport Zoning to Community Planning and Zoning," paper presented at Southwestern Airport Planning Conference, April 8, 1940, copies of which may be obtained from the Civil Aeronautics Administration, Washington, D. C.

40. For a more complete discussion of the advantages seen in such community planning and zoning, see Hunter, *supra* note 39.

use of the area surrounding the airport for industrial purposes, the advantages seen in this being that the airport zoning height regulations would so limit the value of the land affected, and so largely prevent increase in its value, as to permit greater reliance upon police power airport zoning than would otherwise be possible, prevent future invalidation of airport zoning regulations valid when adopted, and keep down the cost of such air rights as it might be necessary to acquire. In addition, provision for airports in a community master plan and zoning ordinance would make much clearer to the courts the constitutional basis upon which it is the writer's opinion that airport zoning regulations may be and are rested, this being the benefit to the community and the general public of adequate protection of the airport's approaches. Finally, such provision for airports would make it more certain than would otherwise be the case that such airports would not be moved or located elsewhere, thus providing, with respect to airports, the assurance required by the courts of the permanency of land uses protected by police power regulations.

But such better and more effective protection of airport aerial approaches is by no means the only highly desirable result, insofar as protection of the public interest in airports and civil aeronautics is concerned, of integrating airport landing and zoning with community planning and zoning, there being at least four others possible. Two of these have already been indicated, namely, protection of the ground approaches of airports against developments that would make them unsafe or unattractive and prevention of the establishment of improperly located and inadequate airports.⁴¹ But, more than this, proper community planning and zoning would go far to ensure the availability of land needed at some future date for the development of new airports and the expansion or improvement of existing airports and also lessen if not entirely remove any danger that might otherwise exist that airports might be abated or closed by injunction as private or public nuisances.⁴²

B. *Airport Abatement Prevention*

This problem, while referred to as simply one of preventing abatement of airports as nuisances, is actually considerably more than this, abatement of an existing airport being only one of the possibilities arising from the fact that the low-flying, dust, noise, lights, crowds, and other incidents of operation of an airport may annoy, inconvenience, or otherwise injure the owners of property

41. For further discussion of use of the community planning and zoning device to regulate airport development, see part (4) of this paper, *infra*.

42. For further discussion of use of the community planning and zoning device to prevent abatement of airports, see part (3)B of this paper, *infra*.

in its vicinity. Listing all of these possibilities, action taken by nearby property owners may result in preventing establishment of an airport, by action of a public body or court decree, in a court award of damages against the owner of an existing airport, even though a municipality, and, most serious, in limiting or even preventing operation of an airport, by administrative action or injunction.

As a general rule, it is believed that, where there is a considerable public use of and benefit from an airport *and* such airport is operated with as much regard for the interests of neighboring property holders as is consistent with safety and efficiency, such persons are not entitled to either injunctive relief or damages for any inconvenience, annoyance, or other injury to them resulting from operation of the airport.⁴³ However, the fact remains that there had been, up until this year, six reported airport nuisance cases, beginning with the famous Smith and Swetland cases ten years ago,⁴⁴ in several of which the airport in question was abated.⁴⁵ Moreover, it appears that this problem is fast assuming serious proportions in California, where more flying is done than in any other State,⁴⁶ and where more airports are located.⁴⁷ In that State, one airport has already been abated as a nuisance⁴⁸ while injunction proceedings were commenced during the year 1940 with respect to at least one other.⁴⁹

This being the case, it should be of particular interest to municipalities, now that aviation is growing so rapidly and the system of civil airports is being considerably expanded, that the past year has witnessed a seventh airport nuisance case,⁵⁰ in which the court denied the contention of owners of property in the vicinity of land proposed to be used by the University of Virginia for establishment of a public airport, that such an airport would be a nuisance.

43. For the reasoning upon which this belief is based, see the writer's brief on "Airports as Nuisances," Oct. 18, 1939, copies of which may be obtained from the Civil Aeronautics Administration, Washington, D. C.

44. *Smith v. New England Aircraft Co., Inc.*, 170 N. E. 385 (Mass., 1930); *Swetland v. Curtiss Airports Corp.*, 55 F. (2d) 201 (C.C.A. 1931); *Gay and Rush Hospital v. Taylor*, 19 Delaware and Chester Co. Reports 31 (Ct. of Common Pleas, Chester Co., Pa., 1932); *Meloy v. City of Santa Monica*, 124 Cal. App. 622, 12 P. (2d) 1072 (1932); *Thresher v. City of Atlanta*, 173 S.E. 817 (Ga., 1934); and *California v. Dycer Flying Service, Inc.*, 235 CCH 1834 (Cal. Superior Ct., Los Angeles Co., March 31, 1939).

45. See the Swetland, Hospital, and Dycer Cases, *supra* note 44.

46. As of July 1, 1940, California had 5,826 of the 41,006 pilots in the United States (over $\frac{1}{3}$) and 1,442 of the 14,359 airplanes in the Country (over $\frac{1}{10}$). 1 Civil Aeronautics Journal 391 (Aug. 1, 1940).

47. As of Jan. 1, 1941, California had 174 of the 2,332 airports then in the United States (over $\frac{1}{13}$), as against 146 located in Texas, its closest rival in this respect. *Id.*, p. 31 (Jan. 15, 1941).

48. See Dycer Case, *supra*, note 44.

49. According to a newspaper report dated August 21, 1940, a taxpayers' association and the Board of Education of Alhambra, Cal. were then starting legal proceedings to abate flying at the Alhambra Airport. On January 27, 1941, an injunction was granted prohibiting further use of the airport for pilot training and limiting its use to the business needs of two aircraft manufacturing companies and to emergency landings.

50. *Batcheller et al v. Commonwealth of Virginia*, 10 S.E. (2d) 529 (Va. Sup. Ct., Sept. 5, 1940).

In its opinion, it is noteworthy that the Court repeats with approval the following statement made in 2 C.J.S. 909: "An airport, landing field or flying school is not a nuisance *per se*, although it may become a nuisance from the manner of its construction or operation; in other words, it can be regarded as a nuisance only if located in an unsuitable place or if operated so as to interfere unreasonably with the comfort of adjoining owners."

But even more interesting to municipalities in this connection should be the action of Los Angeles County in formulating an airport plan, as discussed *supra*, it being the writer's belief that such community planning would provide an excellent safeguard against abatement of airports as nuisances. For one thing, the airport locations provided for in such a plan would be determined, as they were in preparing the Los Angeles County plan,⁵¹ with a view to injuring private landowners as little as possible and with due regard for their property rights. And more important, provision for airports in city or county planning would go far to indicate to the courts the necessary community and public interest in their establishment and continuance in the locations specified. As is stated in the Regional Planning Commission's report on the Los Angeles County airport plan,⁵² "An immediate and direct effect of the adoption of a valid plan for an airport system will be a partial clarification of some of these problems (the legal problems arising from 'the conflict of interests in the airport and those in surrounding properties'); the legal status of the individual airport will be more clearly recognized and the airport interests can be said to rest upon a substantial basis of community need."

(4) *Municipal Regulation of Airports*

In view of the fact that activity in civil aviation is increasing rapidly and expansion of the civil airport system is in prospect, there is believed to be a real need for regulatory action by public authorities, preventing the establishment of airports which would increase the hazards of flying, whether because inadequate in size or facilities or because improperly located, as where located too near other airports.

At the present time there is almost no regulation of this nature, other than the control exercised by political subdivisions over the development of their own airports. The Civil Aeronautics Authority

51. According to a newspaper report dated Aug. 8, 1940, the interests seeking abatement of the Alhambra Airport, *supra* note 49, were given an opportunity to protest to the Los Angeles County Regional Planning Commission, against the inclusion of this airport in the Commission's County airport plan, *supra* note 37.

52. *Supra* note 37, p. 54.

is believed to be without power to regulate the development of airports except indirectly through its power to control Federal expenditures for airport purposes,⁵³ its power to limit or prevent use of an airport by an air carrier,⁵⁴ and its power to specify what airports may be used in connection with the Civilian Pilot Training Program.⁵⁵ Moreover, while nineteen of the States have legislation authorizing a State agency to exercise licensing or approval control over the establishment of airports generally,⁵⁶ and while three political subdivisions, as will be seen, have recently taken matters into their own hands, two of them adopting regulations on the subject, the States and their political subdivisions on the whole exercise very little regulatory authority in this field.

In these circumstances, it seems particularly noteworthy that, as what are believed to be the first instances of action by a political subdivision to regulate airports, steps were taken this last year by three counties and one city to regulate airport development within their limits. This local action consisted of formulation of the Los Angeles County airport plan,⁵⁷ adoption of the Cook County and King County zoning ordinance,⁵⁸ and promulgation of an airport licensing ordinance regulating the establishment of airports within the City of New York.⁵⁹

Of these developments, the Cook County zoning ordinance is the most complete of the four in coverage of this regulatory field, this ordinance providing not only that all future airports shall meet certain minimum requirements as to size and facilities, but that they shall be located within a certain area and at least three miles from any existing airport meeting certain specifications. As against this, the King County airport regulations are concerned only with airport location, the New York City airport licensing ordinance is confined to regulation of size and facilities to the exclusion of location, and the Los Angeles County airport plan has not yet been effectuated by regulations. However, these latter two developments should also be of interest and value, the Los Angeles County plan for the fact that it is the only one attempting to specify exactly where future airports should be located, and the New York City ordinance for the fact

53. Civil Aeronautics Act of 1938 (52 Stat. 973), Sec. 303.

54. *Id.*, Sec. 401.

55. By implication from power to prescribe regulations governing conduct of this program, Civilian Pilot Training Act of 1939 (53 Stat. 855), Sec. 2.

56. Connecticut, Illinois, Kentucky, Louisiana, Maryland, Mississippi, Michigan, Nebraska, New Hampshire, New Jersey, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and Utah.

57. *Supra* note 37.

58. *Supra* notes 35 and 36.

59. As promulgated by the Commissioner of Docks, New York City, May 22, 1940 (New Regulation No. 31).

that it is the first and only instance of airport licensing by a political subdivision to come to the writer's attention.

CONCLUSION

On the basis of this review of the year's airport legislation, litigation, and other legal developments of interest to municipalities, it is submitted that the most noteworthy and significant of these are the action taken by Cook County, Illinois and King County, Washington, in making provision for airports in their comprehensive county zoning ordinances,⁶⁰ and that of Los Angeles County, California, in preparing a master county plan for airports.⁶¹ Not only do these developments indicate that airports have become an integral feature of the community, they reflect the need for county and municipal action to solve the problems involved in the establishment, operation, and presence of airports in the community, and at the same time show that political subdivisions may be counted upon to rise to their responsibilities in this regard. And in indicating these things, it is believed that these developments show the way to cities and other counties to solve, at one time and most efficaciously, several of the most serious airport problems confronting civil aeronautics today, including those of protecting airport approaches **against obstruction**, guarding against abatement of airports as nuisances, and preventing airport development not in the best interests of civil aviation and the flying public. It is hoped and believed the year 1941 will see a continued and widespread utilization of this community planning and zoning device to solve these problems.

60. *Supra* notes 35 and 36.

61. *Supra* note 37.