NOTES, COMMENTS AND DIGESTS

ZONING—CONSTITUTIONALITY OF ZONING LAWS ENACTED TO PROTECT AIRPORT APPROACHES.

The great strides made by commercial aviation during the last generation, the huge expansion of the country's capacity to manufacture aircraft which has been necessitated by the war effort, and the growing interest in private flying, all have combined recently to press home the problems created by the increased use of aircraft. One of the most important problems has been that of protecting approaches to landing fields in order to insure the safe arrival and departure of aircraft. The laws of physics decree that a certain minimum gliding angle be maintained while an airplane approaches the ground for a landing. The hope expressed in the early part of the last decade that the use of helicopter airplanes would permit the use of very small landing fields has, as yet, not been realized; and instead, the use of larger aircraft has considerably increased the space needed for safe landing and departure. Authorities now recommend that a gliding angle of 40:1 (forty feet in horizontal distance for every foot of height) be available at Class A airports.

It would be possible to protect the approaches to an airport by purchasing all of the land surrounding the airport, or by purchasing an easement over such lands. Although the right of eminent domain has been extended to airport companies in California, the use of this method would not be practicable in many instances because of the great expense that would necessarily be involved. The solution to the problem that has presented itself in the most favorable light to the aviation industry has been the adoption of zoning laws which would restrict the height of structures in the vicinity of airports, and it is this solution that will be here discussed.

The validity of zoning laws enacted under the police power of the State has now been generally recognized. The question presented by the enactment of all zoning laws, however, is whether they are a valid exercise of the police power. It is generally urged by those adversely affected by zoning laws that

1. Cal. Code Civ. Proc. (1941), §1238: "Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses: ... (20) Airports for the landing and taking off of aircraft, and for the construction and maintenance of hangars, mooring masts, flying fields, signal lights and radio equipment." This section is to be construed in connection with Cal. Civ. Code (1941), §1001, which provides: "Any person may, without further legislative action, acquire private property for any use specified in section twelve hundred and thirty-eight of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such title is 'an agent of the state,' or a 'person in charge of such use,' within the meaning of those terms as used in such title ..." "The right to condemn may be exercised by the state through its immediate officers or it may be delegated through legislative acts to corporate bodies or individuals upon compliance with the terms on which the right is given." 10 Cal. Jur., Eminent Domain (1923), 289, §9, and cases there cited.

the restrictions placed upon the use of property constitute an unreasonable interference with rights of property, or that such laws deprive property owners of "due process of law" or the "equal protection of the laws". On the other hand, it is recognized that the States, under the police power, may enact statutes which have a reasonable tendency to promote the public health, safety or morals, or to promote the general welfare. Can it properly be said, therefore, that a zoning law which would restrict the use of property surrounding airports so that such property could not be utilized in a manner which would make hazardous the use of the airports and endanger the lives and property or people in the vicinity of airports, is a valid exercise of the police power? The answer to this question must depend upon the degree of foresight exercised by the courts in construing such zoning laws, and the drafting of the laws themselves in a manner which will adequately protect the owners of property which would be affected by such laws.

The objection that a zoning act limiting the height of structures erected upon property surrounding airports deprives the surrounding property owners of equal protection of the laws is an objection that has been urged as to many zoning laws. Every zoning act must, by necessity, operate arbitrarily to a certain extent; but, in those jurisdictions which have upheld the validity of zoning laws, the courts have pointed out that the fixing of zones is a matter within the discretion of the public authorities. In the absence of proof of a clear abuse of the discretion vested in the public authorities, the courts will not substitute their judgment for that of the proper administrative officials. A zoning law enacted to protect airport approaches should be made, preferably, a part of a master zoning plan whereby definite areas would be set aside in which the operation of airports would be permitted. The adoption of such a master plan would still further remove the force of arguments that the restriction of the height of structures surrounding airports is arbitrary.

A still more serious problem, however, is presented by the claim that a zoning law protecting airport approaches would deprive surrounding property owners of their property in violation of the "due process" clauses of the state and federal constitutions. Insofar as any zoning law depreciates the value of property by restricting the use to which it may be put, every such law results in the taking of private property without compensation. It has been held, however, that the rights of property ownership are held subject to a valid exercise of the police power by the State, and incidental damage to property resulting from proper governmental activities is not a deprivation of property without due process of law. Both the California and United States Supreme Court have held that such zoning laws do not deprive the owners of property of "due process of law" or the "equal protection of the laws". 3

7. For cases holding that there was an abuse of discretion, see: Skalko v. City of Sunnyvale, 14 Cal. (2d) 212, 93 Pac. (2d) 93 (1939); Arverne Bay Construction Co. v. Thatcher, 278 N. Y. 222, 15 N. E. (2d) 687, 117 A. L. R. 1110 (1938).
8. This doctrine was well stated in State ex rel. Carter v. Harper, 182 Wis. 148, 154, 196 N. W. 451, 453, 33 A. L. R. 209, 273 (1923), where it was said:
Courts have upheld zoning laws even though such laws resulted in great financial loss to individual property owners. It would seem, therefore, that the validity of a zoning act calculated to protect airport approaches must depend, in its final analysis, upon whether the law is a valid exercise of the policy power and not upon its effect in reducing the value of the property affected.

Limitations upon the height of buildings are not uncommon, and these laws generally have been upheld as a valid exercise of the police power to reduce the fire hazard in centers of population. Even where it has been quite evident that the law was enacted to accomplish some purposes not strictly within the police power, the courts have upheld the validity of such laws if they actually did serve some legitimate police purpose. It would seem, therefore, that if a zoning law such as that under consideration here served an end recognized as a proper object of protection under the police power, the courts would not inquire as to whether any other purpose was being accomplished which could not form the sole subject of such a statute. At least one zoning statute enacted to protect airport approaches has attempted to show that the law was enacted as a proper exercise of the police power in that it was calculated to protect the public safety.

A statute enacted under the police power must operate for the benefit of the general public. It has been held that a zoning law restricting the height

"It is thoroughly established in this country that the rights preserved to the individual by these constitutional provisions are held in subordination to the rights of society. Although one owns property, he may not do with it as he pleases, any more than he may act in accordance with his personal desires. As the interest of society justifies restraints upon the individual conduct, so also does it justify restraints upon the use to which property may be devoted. It was not intended by these constitutional provisions to so far protect the individual in the use of his property as to enable him to use it to the detriment of society. By thus protecting individual rights, society did not part with the power to protect itself or to promote its general well-being. Where the interest of the individual conflicts with the interests of society, such individual interest is subordinated to the general welfare. If in the prosecution of governmental functions it becomes necessary to take private property, compensation must be made. But incidental damages to property resulting from governmental activities, or laws passed in the promotion of the public welfare, are not considered a taking of the property for which compensation must be made." Accord: Chicago, Burlington & Quincy R. R. v. Chicago, 166 U. S. 220, 17 Sup. Ct. 581, 41 L. Ed. 752; Chicago & Alton R. R. v. Transbarger, 258 U. S. 67, 35 Sup. Ct. 678, 59 L. Ed. 1201 (1919).

9. In Hadacheck v. Sebastian, 239 U. S. 394, 36 Sup. Ct. 142, 60 L. Ed. 348, Ann. Cas. 1917B 927 (1915), affg. 165 Cal. 416, 132 Pac. 584, L.R.A. 1916B 1248 (1915), the property owner had established a brick kiln in a certain district within the city of Los Angeles prior to the enactment of a zoning ordinance prohibiting the operation of brick kilns in such district. The ordinance was upheld although it served to reduce the value of the property from $800,000 to $60,000.


11. Welch v. Swasey, 214 U. S. 91, 29 Sup. Ct. 567, 53 L. Ed. 923 (1909); Cochran v. Preston, 108 Md. 113, 49 L. Ed. 1163, 129 Am. St. Rep. 452, 15 Ann. Cas. 1048 (1908); Atkinson v. Piper, 181 Wis. 619, 156 N. W. 544 (1923). In connection with the last cited case, reference should be made to Piper v. Ekern, 190 Wis. 586, 194 N. W. 155, 34 A.L.R. 32 (1923), in which a statute limiting the height of structures which was passed ostensibly for the purpose of reducing the fire hazard to the state capitol building was held unconstitutional.

12. Mo. Laws (1941), c. 142 (1941) U. S. Av. R. 451. It is there stated, in §2: "It is hereby found and declared that an airport hazard endangers the lives and property of users of the airport and of occupants in its vicinity . . . ." and see the discussion of this statute in Municipalities and the Law in Action in 1941, p. 759.

of structures surrounding airports is for the benefit of those desiring to use aerial transportation and for those who use airports rather than for the general public. On the other hand, it has been contended that the general public is benefited by the presence of facilities which enable the community to utilize a most important form of transportation. The importance to the general public of airport facilities is shown by a number of decisions holding an airport to be a public utility and the operation of an airport to be a public purpose, so that municipalities could acquire and maintain airports. The importance of airport facilities to the progressive community was judicially recognized as far back as 1928 by Mr. Justice Cardozo when he said:

“A city acts for municipal purposes when it builds a dock or bridge or a street or a subway. Its purpose is not different when it builds an airport. Aviation today is an established means of transportation. The future, even the near future, will make it still more general. The city that is without the foresight to build the ports for the new traffic may soon be left far behind in the race of competition. Chalcedon was called the city of the blind, because its founders rejected the nobler site of Byzantium lying at their feet. The need for vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness.”

Predictions are now being freely made that the airplane will supplant the automobile to a considerable extent after the end of the present conflict, because of the great expansion of the country’s aircraft manufacturing capacity and the development of small aircraft which are safe to fly and inexpensive to produce and operate. That these predictions have been partially realized is shown by the constant increase in the number of persons licensed to fly airplanes and the accompanying increase in the number of privately owned aircraft. It would seem, therefore, that the protection of aerial terminal facilities, if not yet a matter affecting the general public, is speedily approaching the point where it will be a matter of general public interest, and that to insure the uninterrupted progress of aerial transportation, effective steps should be taken now to protect airport approaches.


16. Krenwinkle v. City of Los Angeles, 4 Cal. (2d) 611, 51 Pac. (2d) 1098 (1935); State ex rel. City of Lincoln v. Johnson, 117 Neb. 301, 220 N. W. 273 (1928); State ex rel. Chandler v. Jackson, 121 Ohio St. 186, 167 N. E. 396 (1929).


18. Eddie Rickenbacker Looks Ahead, 23 Fortune (1941), 118.

19. The number of certificated pilots in the United States on January 1, 1942, was 100,787, an increase of 59.7% over the number of certificated pilots on January 1, 1941, and an increase of 338.5% over the 22,983 certificated pilots on January 1, 1939. During the year ending January 1, 1942, the number of certificated aircraft increased 45% to 24,836. The importance of aerial transportation in California is emphasized by the fact that this State, on January 1, 1942, led in the number of certificated pilots, with 12,655 as compared to New York's 7,326 which was next in line. California also led in the number of certificated aircraft, with 2,404, as compared with Pennsylvania's 2,357 which was the second largest number among the States. 3 Civil Aeronautics Jour. 45, 48 (1942).

20. During the year ending January 1, 1942, there was an increase in the number of airports and landing fields throughout the United States of 328, to bring the total number up to 2,484. Texas led all the States in the number of airports and landing fields with a total of 297, while California was next with 194. 3 Civil Aeronautics Jour. 22 (1942).
Legislation to protect airport approaches extends back at least to 1928, and in the past two years there has been enacted a rapidly increasing volume of such legislation with new laws being constantly proposed. The statutes that have been enacted do not attempt, in many cases, to set out a comprehensive solution of the airport approach problem, and in all of the statutes the efforts of the draftsmen to meet anticipated constitutional objections is evident. Many of the statutes are made applicable only to publicly owned airports, but it is submitted that the problem as to what airports should be protected is best covered by the Arkansas statute. The Arkansas zoning law applies to airports of the "public utility class," and airports are placed within that class if they are available to the general public for private flying, or as a point of arrival or departure by air.

Practically all of the zoning statutes deal in the same general way with the problem of nonconforming uses. Nonconforming uses may be abated by compensating the owner for the injury to his property that would be caused by altering any structure to make it conform to the provisions of the statute. To provide for the gradual elimination of all nonconforming uses, it is generally provided that no nonconforming structure may be altered in any way to make the structure any greater hazard to aerial navigation than it already is. If the structure has deteriorated to a substantial extent—generally between 50% to 80%—it is provided that such structure may not be rebuilt and that the owner may be required to tear it down. This provision applies whether the deterioration occurs because of gradual decay or because of some unforeseen event such as an act of God. It has been pointed out that the courts have generally upheld such provisions in zoning laws.

The advisability of protecting airport approaches would not be disputed by many, but the methods by which this should be done will doubtlessly provoke serious dispute. The only methods proposed whereby airport approaches could be effectively protected are condemnation of the land surrounding the airport or condemnation of an easement over such lands, and the enactment of comprehensive zoning laws which would restrict the use of property around airports without providing for compensation to landowners except in those cases where it is

21. The County of Alameda, California, on December 3, 1928, adopted an ordinance which declared it to be unlawful to erect any structure whatever in excess of 50 feet in height within 1000 feet of any boundary of a public air navigation facility. The Board of Port Commissioners of the City of Oakland, California, adopted a similar measure on January 7, 1929. 2 Air Com. Bull. 333, 334 (1939).

22. Eleven acts were adopted during 1941 to provide for airport zoning. This brought to 23 the number of States having legislation on this subject. 2 Civil Aeronautics Jour. 313, 332 (1941).

23. See, for example, the Model Airport Zoning Act drafted by the Civil Aeronautics Administration, and the Model Airport Zoning Act drafted by the National Institute of Municipal Law Officers. 12 Jour. Air L. & Com. 176, 192 (1941).


26. Maine and North Carolina have adopted airport zoning laws which are applicable to any airport. Such a provision would seem to include airports which are not open to the general public, and, as a result, it seems doubtful as to whether a zoning law as applied to such airports could be upheld as a proper exercise of the police power. Me. Laws (1941), c. 142, [1941] U. S. Av. R. 451; N. C. Laws (1941), c. 250, [1941] U. S. Av. R. 554.

sought to abate a nonconforming use. The adoption of the condemnation method
would protect the interests of property owners to the greatest possible extent,
but the financial burden upon both municipal and private operators of airports
would probably be so great in certain cases that the proper protection could
not be realized. The enactment of zoning laws would transfer the burden from
the operators of airports to the owners of the property surrounding the airports.
Whether or not this could properly be done without violating the constitutional
guarantees pertaining to the rights of property ownership depends upon whether
such laws could be properly brought within the exercise of the police power
as a means of protecting the public safety or promoting the general welfare
because the rights of property owners are subject to the interests of the general
public. If the narrow view is taken that the protection of airport approaches is
for the benefit only of those who use the airport and the owners of such airports,
then the constitutional objections must prevail. If, on the other hand, it is
recognized that the unhindered development of aerial transportation will operate
to the benefit of all members of the community, and that the proper development
of air terminals today is as important as was the development of railway
terminals during the last century, it is submitted that the enactment of zoning
laws for the protection of airport approaches is a proper exercise of the police
power, and the constitutional objections must fail.—Irvin Grant.