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Clyde L. MacGowan

or a large scale urban planning expert could feel secure that his plans might not be easily set aside. To assure more certainty for planners in California, the doctrine of changing conditions as it involves this question of increased traffic must be more critically defined by the court in future cases .

*Herbert Barker**

* Member, Second Year class.

AIRPORT ZONING AS A HEIGHT RESTRICTION

Can airport zoning be upheld as a height restriction? Height restrictions in zoning have been recognized since about the turn of the century.[1] Safety was the early basis upon which this type of zoning was justified in the day of wooden construction, horse-drawn fire apparatus, gas lighting, and poor communications.[2] The early cases justified this exercise of the police power, as preventing conditions which were injurious to health and presented a real danger to property and persons.[3] Clearly, if height zoning is reasonably related to prevention of such undesirable conditions, it is a proper exercise of the police power.[4] Perhaps today, with improved construction techniques, the strongest reason for height zoning is aesthetics.

Airport zoning necessarily varies from the usual zoning in that because of the peculiar nature of the usage of an airport, the zoning is graduated uniformly at some ratio of height to distance from the airport boundaries out to some maximum distance. These zones, established by a state or political subdivision thereof, are normally based upon recommendations of the Federal Aviation Agency of the Department of Commerce, which sets up standards for airport approach zones based upon a practical glide angle for current aircraft.[5] This is an area at the end of the runway extending outward on an extension of the runway centerline to ten thousand feet, with an angle of height limitation of forty to one in height above the runway elevation, so that at the extreme, the limiting height would be two hundred-fifty feet. The width of this zone is five hundred feet at the runway threshold and widens to two thousand five hundred feet at the extremes of the zone. Less rigid, but graduated restrictions apply in a circular area around the airport to the sides of the runway. Where this type of zoning has been adopted, it is clear that property situated upon higher terrain in the vicinity of the airport may be drastically affected.

A Florida court was quite accurate in saying:[6]

> We can think of no situation which more clearly authorizes the exercise of this phase of the police power than that involved here. Such regulations promote the general welfare of the state and community served, contribute to the proper and orderly development of land areas in the vicinity of airports. Such regulations stabilize values and provide safety to those who use facilities in taking off

[1] Welch v. Swasey, 193 Mass. 364, 79 N.E. 745, *aff'd*, 214 U.S. 91 (1907).

[2] Cochran v. Preston, 108 Md. 220, 70 Atl. 113 (1908).

[3] Atkinson v. Piper, 181 Wis. 519, 195 N.W. 544 (1923).

[4] Brougher v. Board of Public Works, 205 Cal. 426, 271 Pac. 487 (1928).

[5] Department of Commerce, Federal Aviation Agency, TSO-N 18.

[6] Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority, 111 So. 2d 439 (Fla. Sup. Ct. 1959).

> and landing as well as those living in the vicinity thereof. Well settled principles with respect to zoning apply equally to airport zoning.

However, generally the law has been narrowly construed in this area in spite of the growing need. Today, it is clear that airports, at least publicly operated airports, are in the best interests of the public. While the courts readily recognize the right to air travel, they have been disinclined to uphold airport zoning. The old idea of property rights extending "ad coelum" was rejected early in the airport cases.[7] The courts have also generally refused to enjoin necessary flight through the airspace of the surface owner,[8] but instead grant an "aviation easement" or "clearance easement."[9] The early cases recognized the right to travel in the navigable airspace, defined as: above the minimum prescribed flight altitude[10] or generally five hundred feet above the surface.[11] Another criterion was: above the height to which a surface owner may reasonably expect to occupy for himself to the exclusion of others.[12]

While the courts in their efforts to protect the rights of individuals are exercising a conservative influence, the California legislature has been quite progressive in adoption of legislation favorable to aviation. California has a state-wide restriction against building structures over five hundred feet in height without first obtaining a permit to do so.[13]

Public airports may acquire land or air easements by eminent domain.[14] Airport hazards are defined and made public nuisances, and elimination thereof is to be accomplished to the extent possible by use of the police power.[15] The right of flight is defined and specifically includes flights within the zones of approach as defined by the Federal Aviation Agency standards for approaches.[16] The federal statutes do not go this far, although they give the Administrator of the Civil Aeronautics Board the right to obtain land or air easements by most methods, including condemnation as appropriate to carry out his duties.[17] In spite of the obvious legislative intent to use zoning in protecting the approaches of airports, it appears that easements will predominate as the means used. The courts have said that frequent low flights over property amounts to taking of an air easement for which the owner must be compensated.[18] A New Jersey statute enumerated the purposes of zoning, which corresponded to the police powers, but the court said airport zoning did not fall within any of these purposes.[19] Another case

[7] Hinmann v. Pacific Air Transp., 84 F.2d 755 (9th Cir. 1936).

[8] Gardner v. Allegheny County, 393 Pa. 120, 142 A.2d 187 (1958); Swetland v. Curtiss Airports Corp., 55 F.2d 201, 83 A.L.R. 319 (6th Cir. 1932).

[9] United States v. Brondum, 272 F.2d 642 (5th Cir. 1959).

[10] United States v. Causby, 328 U.S. 256 (1946).

[11] 14 C.F.R. 1, § 60.17 (c).

[12] Swetland v. Curtiss Airports Corp., 55 F.2d 201, 83 A.L.R. 319 (6th Cir. 1932).

[13] CAL. PUB. UTIL. CODE § 21641.

[14] CAL. CODE CIV. PROC. §§ 1239.2-4.

[15] CAL. GOV'T CODE § 50485.2.

[16] Dept. of Commerce, Federal Aviation Agency TSO-N 18; CAL. PUB. UTIL. CODE § 21403 (b).

[17] 49 U.S.C. § 1344 (c).

[18] Ackerman v. Port of Seattle, 551 Wash. 2d 400, 348 P.2d 664 (1960); Roberts & Bagewell v. The Queen, 1 D.L.R. 11 (1956); U.S. and Can Av. 252 (1952).

[19] Yara Engineering Co. v. City of Newark, 132 N.J.L. 370, 40 A.2d 559 (Sup. Ct. 1945); Rice v. City of Newark, 132 N.J.L. 387, 40 A.2d 561 (Sup. Ct. 1945).