University of Michigan Journal of Law Reform

Volume 10

1977

The Legal and Institutional Framework for an Airport Noise-Compatibility Land Use Program

Mark Kantor
University of Michigan Law School

THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR AN AIRPORT NOISE-COMPATIBILITY LAND USE PROGRAM

The growth of aviation in recent years has led to widespread concern about the impact of airport noise upon surrounding communities.[1] The scope of the problem is affected by the number and type of aircraft using an airport, the manner in which they are operated, and the use made of adjacent land.[2] There is basic agreement on the necessity of a multipronged attack[3] which employs source noise reduction,[4] operational techniques,[5] and com-

---

[1] Aviation-generated noise affects not only the six to seven million Americans living near airports, FEDERAL AVIATION ADMINISTRATION, AVIATION NOISE ABATEMENT POLICY 1 (1976) [hereinafter cited as AVIATION NOISE ABATEMENT POLICY], but also the airport proprietors who bear legal responsibility for the adverse impact of noise, Griggs v. Allegheny County, 369 U.S. 84 (1962), *see* note 26 *infra*, the federal, state and local governments, AVIATION NOISE ABATEMENT POLICY, *supra* at 29-34, and the National Aviation System as envisioned by the FAA, FEDERAL AVIATION ADMINISTRATION, THE NATIONAL AVIATION SYSTEM: CHALLENGES OF THE DECADE AHEAD 1977-1986, at 7 (1976). *See generally* ENVIRONMENTAL PROTECTION AGENCY, LEGAL AND INSTITUTIONAL ANALYSIS OF AIRCRAFT AND AIRPORT NOISE AND APPORTIONMENT OF AUTHORITY BETWEEN FEDERAL, STATE AND LOCAL GOVERNMENT (1973) [hereinafter cited as LEGAL AND INSTITUTIONAL ANALYSIS].

[2] FEDERAL AVIATION ADMINISTRATION, THE FEDERAL AVIATION ADMINISTRATION FIVE-YEAR ENVIRONMENTAL PLAN 1976-1980, at 11 (1976) [hereinafter cited as FIVE-YEAR PLAN]; FEDERAL AVIATION ADMINISTRATION, THE NATIONAL AVIATION SYSTEM: CHALLENGES OF THE DECADE AHEAD 1977-1986, *supra* note 1, at 23; Comment, *Port Noise Complaint*, 6 HARV. C.R.-C.L.L. REV. 61, 76 (1970).

[3] Comment, *Port Noise Complaint, supra* note 2, at 74-83; FIVE-YEAR PLAN, *supra* note 2, at 13-15.

[4] Source noise reduction refers to alterations in aircraft engines which diminish the amount of noise generated by the engines. FIVE YEAR PLAN, *supra* note 2, at 15-16; Comment, *Port Noise Complaint, supra* note 2, at 76-77; AVIATION NOISE ABATEMENT POLICY, *supra* note 1, at 6-8; Dworkin, *Planning for Airports in Urban Environments: A Survey of the Problem and Its Possible Solutions*, 5 URB. LAW. 472, 479-80 (1973).

Public Law 90-411, 82 Stat. 395 (1968), amended § 611 of the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542 (1970 & Supp. V 1975), so as to require aircraft noise abatement regulations. In accordance with this legislation, Part 36 of the Federal Aviation Regulations, 14 C.F.R. 36 (1976), was promulgated to prescribe noise standards for new, subsonic transport aircraft and all subsonic turbojet aircraft. As part of the federal program outlined in AVIATION NOISE ABATEMENT POLICY, *supra* note 1, older aircraft will be required to meet Part 36 standards within 6 to 8 years. *Id.* at 35-42. The FAA is presently considering new, lower noise standards for future generation aircraft. *Id.* at 43.

[5] FEDERAL AVIATION ADMINISTRATION, ADVISORY CIRCULAR AC91-39 (Jan. 18, 1974).

Operational techniques for reducing noise impact include changes in takeoff procedures (including power reductions, turns during takeoff, and reduced rates of climb), approach procedures (including a two-segment glide path), preferential runways, and staggered operations. *See* U.S. DEP'T OF TRANSPORTATION, AIRPORTS AND THEIR ENVIRONMENT: A GUIDE TO ENVIRONMENTAL PLANNING 131-38 (1972) [hereinafter cited as AIRPORTS AND THEIR ENVIRONMENT].

prehensive land use management[6] to control noise impact. There is less consensus, however, with respect to the implementation of these strategies.[7]

Discussions of noise abatement proposals have concentrated upon source noise reduction and operational adjustments.[8] Land use management, however, is also necessary to achieve noise-compatible development around airports and removal or modification of existing incompatible uses.[9] Noise-compatibility land use planning involves five techniques for controlling development:[10] property acquisition,[11] property regulation,[12] building and housing codes,[13] tax policies,[14] and negotiation between public agencies over proposed developments.[15]

---

[6] AVIATION NOISE ABATEMENT POLICY, *supra* note 1, at 10; FIVE-YEAR PLAN, *supra* note 2, at 23-25; Dworkin, *supra* note 4, at 480-82; Comment, *Port Noise Complaint, supra* note 2, at 81-83.

The Airports and Airways Development Act of 1970, § 18(4), Pub. L. No. 91-258, 84 Stat. 219 (1970), conditions federal airport development assistance upon land use management to promote compatible development.

[7] Recently, both the FAA and the EPA have offered competing national programs designed to coordinate a single national airport noise policy. The FAA proposal required the retrofit (soundproofing) or replacement of existing subsonic jets that exceed specified noise levels. AVIATION NOISE ABATEMENT POLICY, *supra* note 1, at 5-11. In addition, airport proprietors will be *encouraged* to develop noise abatement programs, including land use measures, with federal assistance. In contrast, the EPA plan *requires* airport proprietors to develop a noise abatement program for the protection of the health and welfare of the surrounding community. EPA Airport Noise Regulatory Process, 41 Fed. Reg. 51, 522-33 (proposed regulations submitted to the FAA by the EPA, Nov. 22, 1976) [hereinafter cited as Airport Noise Regulatory Process].

[8] *See* Comment, *Port Noise Complaint, supra* note 2; Note, *The Constitutional Aspects of the Airport Noise Problem in Georgia*, 10 GA. L. REV. 218, 234-38 (1975). *See generally* City of Burbank v. Lockheed Air Terminal, Inc. 411 U.S. 624 (1973); Air Transport Ass'n of America v. Crotti, 389 F. Supp. 58 (N.D. Cal. 1975); National Aviation v. City of Hayward, No. C-75-2279 H.F.P. (N.D. Cal., July 13, 1976).

[9] Seago, *The Airport Noise Problem and Airport Zoning*, 28 MD. L. REV. 120 (1968).

[10] AIRPORTS AND THEIR ENVIRONMENT, *supra* note 5, at 168-80.

[11] Property acquisition may take the form of eminent domain proceedings, purchase of title in fee, purchase of noise easements, or land acquisition in anticipation of airport development. *Id.* at 169-74.

[12] Property regulation consists primarily of zoning, but may also include the requirement of a written statement to a prospective purchaser regarding the impact of noise on the property. *Id.* at 174-79.

[13] Building and housing codes may contain provisions for soundproofing and performance specifications. *Id.* at 179. For a full discussion of the constitutionality of mandatory soundproofing regulations, see Cleary, Gottleib, Steen & Hamilton, Legal Aspects of Required Soundproofing In High Noise Areas Near John F. Kennedy International Airport (unpublished report prepared for the Tri-State Transportation Commission, Feb. 2, 1970) (concluding that soundproofing regulations, as an exercise of the police power, will be more likely to withstand a constitutional challenge if limited to multiple-unit residential development).

[14] Preferential taxation to attract compatible development, to encourage soundproofing, or to provide compensation for noise impact are additional elements of an airport land use program. AIRPORTS AND THEIR ENVIRONMENT, *supra* note 5, at 180.

[15] Negotiation between public agencies as to proposed developments is necessary to coordinate the various levels of government involved in airport land use. *Id.* at 180-81. *See also* Gottleib, *Land Use Controls for Airport Planning*, 3 URB. LAW. 266 (1971); Blitch, *Airport Noise and Intergovernmental Conflict: A Case Study in Land Use Parochialism*, 5 ECOL. L.Q. 669 (1976).

This article will assess the constitutionality of zoning to promote noise-compatible development and the problems of establishing an institutional framework for such land use management.[16] Particular attention will be paid to the location of authority to administer a noise-compatibility program and to procedures for enforcing the program's goals.

I. THE CONSTITUTIONALITY OF AIRPORT NOISE-COMPATIBILITY ZONING

Zoning for noise-compatible development around airports should be a central feature of an airport land use program.[17] It primarily serves a preventive function, since it is difficult to eliminate nonconforming uses which exist at the time a zoning ordinance is enacted.[18] It may preserve existing compatible land uses and may prevent change to incompatible uses. Additionally, effective noise-compatibility zoning may lead to the development of compatible uses in areas where noncompatible uses have not yet been established.[19]

Public regulation of private property is limited by the fifth amendment, which provides that "private property shall not be taken for public use, without just compensation."[20] Through the

---

[16] The purpose of discussing the institutional framework is to assess alternative institutions for land use management, not their specific goals or criteria. For a similar approach, see LEGAL AND INSTITUTIONAL ANALYLSIS, *supra* note 1, at 3-1.

[17] AVIATION NOISE ABATEMENT POLICY, *supra* note 1, at 51. Gottleib, *supra* note 15, at 269.

[18] Retroactive zoning to eliminate nonconforming uses is not favored by the courts. A zoning ordinance which prohibits an existing use will be sustained where the consequent loss to the owner is "relatively slight and insubstantial," but otherwise the owner is entitled to compensation for a "taking." 1 R. ANDERSON, AMERICAN LAW OF ZONING § 6.06 (2d ed. 1976), citing People v. Miller, 304 N.Y. 105, 106 N.E.2d 34 (1952). *See also* Standard Oil Co. v. City of Bowling Green, 244 Ky. 362, 50 S.W.2d 960, 86 A.L.R. 648 (1932); State *ex rel.* Nealy v. Cole, 442 S.W.2d 128 (Mo. App. 1969); City of Omaha v. Glissmann, 151 Neb. 895, 39 N.W.2d 828 (1949), *appeal dismissed sub nom.*, Glissman v. City of Omaha, 339 U.S. 960 (1950), *reh. denied*, 340 U.S. 847 (1950); State v. Joyner, 23 N.C. App. 27, 208 S.E.2d 233 (1974), *aff'd*, 286 N.C. 366, 211 S.E.2d 320 (1975), *appeal dismissed*, 422 U.S. 1002 (1975); State *ex rel.* Fairmont Center Co. v. Arnold, 138 Ohio St. 259, 34 N.E.2d 777, 136 A.L.R. 840 (1941).

[19] U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, AIRCRAFT NOISE IMPACT: PLANNING GUIDELINES FOR LOCAL AGENCIES 109 (1972) [hereinafter cited as AIRCRAFT NOISE IMPACT].

[20] U.S. CONST. amend. V. About one-half of the state constitutions contain clauses identical to the "taking" clause of the fifth amendment. The remaining states prohibit the "taking *or damaging* of private property, without just compensation." Spater, *Noise and the Law*, 63 MICH. L. REV. 1373, 1399 (1965). *See, e.g.*, CALIF. CONST. art. I, § 14. A California court, applying the "taking or damaging" clause of the state constitution in an inverse condemnation case arising out of excessive noise generated by an airport, held that the additional language extended the scope of compensable injury beyond the limits of the

power of eminent domain, public authorities may take property for public use without the owner's consent,[21] if the owner is compensated.[22] When property has been appropriated for public use without compensation, the property owner may bring an inverse condemnation claim against the government for the value of the property "taken."[23] The point at which regulatory action becomes a "taking" is unclear.[24]

With few exceptions, major airports are owned by governmental entities.[25] In *Griggs v. Allegheny County*,[26] the Supreme Court held that a public airport proprietor is responsible for the "taking" of property resulting from the noise of direct[27] aircraft overflights of plaintiff's residence. The excessive noise caused a reduction in

---

United States Constitution. Aaron v. City of Los Angeles, 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (Cal. Sup. Ct. 1974). Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989 (1965), similarly interpreted an analogous provision in the Washington Constitution. However, Spater criticizes *Martin*, and impliedly *Aaron*, for reaching an overly broad conclusion:

> Did the court in *Martin* literally mean that "[w]hen the land of an individual is diminished in value for the public benefit, then justice, and the constitution require that the public pay?" If that is the intent, damages may be recovered in Washington for enacting building restrictions or zoning requirements, for converting a two-way street into a one-way street, for narrowing sidewalks, for constructing neighborhood fire or police stations, or even for erecting a new lamppost, as well as for the noise of highways, railways and airways.

Spater, *supra*, at 1405-06.

While the scope of compensation may be broader under such provisions, the meaning of "taking" is not clearer. *See* Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971) [hereinafter cited as *Sax II*]; Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165, 1171 (1967); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 14 (1971).

[21] 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 1.11 (rev. 3d ed. 1976).

[22] *See* note 20 *supra*.

[23] *See, e.g.*, Martin v. Port of Seattle, 64 Wash. 2d 309, 310, 391 P.2d 540, 542 (1964), *cert. denied*, 379 U.S. 989 (1965). *See generally* Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-called Inverse or Reverse Condemnation*, 1968 URB. L. ANN. 1; Van Alstyne, *supra* note 20.

[24] Van Alstyne, *supra* note 17, at 1-3. *See generally* Michelman, *supra* note 20; Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) [hereinafter cited as *Sax I*]; *Sax II*, *supra* note 20; F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973).

[25] Airport Noise Regulatory Process, *supra* note 7, at 51,523. Hollywood-Burbank Airport in California is one of only three or four important exceptions. LEGAL AND INSTITUTIONAL ANALYSIS, *supra* note 1, at 2-46.

[26] 369 U.S. 84 (1962). In *Griggs*, noise and vibration caused by extremely low overflights of planes leaving and arriving at defendant's airport interfered with the use and enjoyment of the plaintiff's residence. The court held that there was a taking of an air easement which must be compensated for and that the "promoter, owner, and lessor" of the airport was the "taker" who must pay the compensation. 369 U.S. at 89-90.

[27] The federal courts have continued to require direct physical overflight of plaintiff's property before awarding compensation, *see* Batten v. United States, 306 F.2d 580 (10th Cir. 1962), but the rule has eroded in states with similar property clauses. Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962). States in which the constitution provides for compensation where property is "taken or damaged," *see* note 20 *supra*, however, have granted compensation independent of the direct physical overflight requirement. Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964); Aaron v. City of Los Angeles, 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (Cal. Sup. Ct. 1974).

property value which, in the Court's view, required the exercise of the power of eminent domain. Land use controls, which restrict development around airports to uses that are compatible with high levels of noise, may eliminate the need to purchase the impacted land. Therefore, airport noise-compatibility zoning may be constitutionally suspect.[28]

A. Airport Hazard Zoning

While several tests of the "taking" issue have been suggested by commentators,[29] this note is concerned only with four.[30] The first test is whether the government, in the course of regulation, destroyed the property right under consideration. If, instead, the right was conferred upon the public for public use, compensation must be made to the injured property owner.[31] Thus, this test posits a qualitative difference between regulation and "taking."[32] A second test asks whether the owners of the regulated property received reciprocal benefits and were therefore compensated to some extent for their losses.[33] Another procedure for distinguishing the point at which regulation becomes a "taking" is to focus upon the role of the government. If the public agency is arbitrating

---

[28] *See* Part I B *infra*. Typical claimants for compensation in an inverse condemnation suit occasioned by airport noise-compatibility zoning are owners of property previously zoned "residential," who are prevented from developing the property. Owners of land that is already zoned and developed, who have suffered a market value loss due to the imposition of land use controls, may also be plaintiffs in an inverse condemnation proceeding. An additional injured party may be a local governmental authority, if land use controls cause a loss of tax revenue. U.S. DEP'T OF TRANSPORTATION, A COMPREHENSIVE POLICY TO AMELIORATE THE ADVERSE IMPACT OF TRANSPORTATION FACILITIES 52 (1975) [hereinafter cited as a A COMPREHENSIVE POLICY].

[29] *See* Kusler, *Open Space Zoning: Valid Regulation or Invalid Taking*, 57 MINN. L. REV. 1, 12 n.30 (1972).

[30] This note will not discuss the most widely used test; diminution of value. The classic formulation of this test was given by Mr. Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 415 (1922). Diminution of value, however, is not unique to airport zoning, but is a feature of all regulation. The special constitutional difficulties of airport hazard zoning, *see* Part I A *infra*, indicate that airport noise-compatibility zoning will be challenged as to its purposes and benefits, not its extent. Additionally, "denial of all reasonable use" is not an appropriate test of airport noise-compatibility zoning in general. Such zoning allows a variety of uses which, while less profitable than incompatible uses might be, are viable enterprises. *See generally* Kusler, *supra* note 29, at 35-41.

[31] *See* Ackerman v. Port of Seattle, 55 Wash. 2d 400, 348 P.2d 664 (1960).

[32] This conception of the "taking"issue finds expression in the opinions of the first Mr. Justice Harlan. *See* Mugler v. Kansas, 123 U.S. 623 (1887). *See also* Mr. Justice Brandeis' dissent in Pennsylvania Coal Co. v. Mahon, 260 U.S 393, 416-22 (1922). For thorough discussions of this test, see F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 24, at 118-23, and *Sax I*, *supra* note 24, at 38-40.

[33] *See* State v. Johnson, 265 A.2d 711, 716 (Me. 1970), where the court held that the landowners' "compensation by sharing in the benefits which this restriction [conservation measure to protect the ecology of coastal wetlands] is intended to secure is so disproportionate to their deprivation of reasonable use that such exercise of the State's police power is unreasonable."

between competing private claims, and not acquiring benefits for itself, the action is within the police power.[34] Conversely, if the regulatory action benefits the government in its role as proprietor of an economic enterprise, it is a "taking" which requires compensation.[35] A final test is whether the effects of the competing uses "spill over" onto each other. If so, then neither is entitled a priori to prevail on constitutional grounds, and the legislature is the appropriate decision-making body.[36]

The judicial experience with airport hazard zoning illustrates the constitutional questions which arise with noise-compatibility zoning. While courts have generally accepted comprehensive community zoning since the landmark decision of *Village of Euclid v. Ambler Realty*,[37] airport hazard zoning has often been invalidated on constitutional grounds.[38] Airport hazard zoning acts have normally been enacted for the purpose of protecting both aircraft users and the community from certain hazards of aircraft operations,

---

[34] *See Sax I, supra* note 24, at 63. "But losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a noncompensable exercise of the police power."

[35] *Id.* at 63. "The rule here proposed is that when economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required; it is that result which is to be characterized as a taking."

[36] *See Sax II, supra* note 20, at 155-72. This analysis is intended to

> . . . put competing resource-users in a position of equality when each of them seeks to make a use that involves some imposition (spillover) on his neighbors, and those demands are in conflict. In such cases, and such cases only, there is a conflict in which neither is a priori entitled to prevail, because neither claimant has any more right to impose on his neighbor than his neighbor does on him. Only in such situations may one use be curtailed by the government without triggering the taking clause.

Id. at 161.

[37] 272 U.S. 365 (1926).

[38] 2 R. ANDERSON, AMERICAN LAW OF ZONING § 9.36 (1968). Airport hazard zoning cases in which the court *invalidated* the zoning are Kissinger v. City of Los Angeles, 161 Cal. App. 2d 454, 327 P.2d 10 (1958); Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969); Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963); Dutton v. Mendocino County, 1949 U.S. Av. Rep. 1 (Sup. Ct., Mendocino Co., Cal. 1948); Roark v. Caldwell, 87 Idaho 557, 394 P.2d 641 (1964); Indiana Toll Road Comm'n v. Jankovich, 244 Ind. 574, 193 N.E.2d 237 (1963), *cert. denied*, 379 U.S. 487 (1965); Banks v. Fayette County Bd. of Airport Zoning Appeals, 313 S.W.2d 614 (Ky. Ct. App. 1958); Shipp v. Louisville & Jefferson County Air Bd., 431 S.W.2d 867 (Ky. Ct. App. 1968), *cert. denied*, 393 U.S.. 1088 (1969); Mutual Chem. Co. v. Mayor & City Council of Baltimore, 1 Av. Cas. 804 (Cir. Ct. Balt. City, Md. 1939); Jackson Mun. Airport Auth. v. Evans, 191 So. 2d 126 (Miss. 1966); Yara Engineering Corp. v. City of Newark, 132 N.J.L. 370, 40 A.2d 559 (1945); Hageman v. Wayne Twp. Bd. of Trustees, 20 Ohio App. 2d 12, 251 N.E.2d 507 (1969). *Contra*, Baggett v. City of Montgomery, 276 Ala. 166, 160 So. 2d 6 (1963); Morse v. County of San Luis Obispo, 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (1967); Smith v. County of Santa Barbara, 243 Cal. App. 2d 126, 52 Cal. Rptr. 292 (1966); Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Auth., 111 So. 2d 439 (Fla. 1959); Waring v. Peterson, 137 So. 2d 268 (Fla. Dist. Ct. App. 1962); LaSalle Nat'l Bank v. County of Cook, 34 Ill. App. 3d 264, 340 N.E.2d 79 (1975); Village of Willoughby Hills v. Corrigan, 29 Ohio St. 2d 39, 278 N.E.2d 658 (1972), *cert. denied, sub nom.*, Chrongris v. Corrigan, 409 U.S. 919 (1972); Township of Hickory v. Chadderton, 43 Pa. D. & C. 2d 319, 10 Av. Cas. 17, 410 (C.P., Mercer Co. 1967).

particularly low-flying aircraft.[39] In contrast to standard "Euclidean" zoning, airport hazard zoning moves the inoffensive uses (residences) away from the offensive uses (airports). Such acts establish height limits and specify permissible land uses based upon a consideration of runway configuration, approach and takeoff paths, the type of aircraft using the airport, and the type of aircraft navigation assistance.[40] For example, the Federal Aviation Regulations (FAR)[41] specify the allowable structure heights and the definition of use zones. While the Federal Aviation Administration (FAA) has no authority to enforce height regulations, it may curtail use of a runway if structure height violates the FAR standards. Consequently, height regulation almost uniformly follows FAA recommendations.[42]

Judicial hostility to airport hazard zoning may be traced to the fact that the benefits are conferred upon a public agency operating the airport, without compensation to the affected property owner. In this situation, the government is acquiring resources in its capacity as proprietor of an economic enterprise—the airport.[43] The implementation of such zoning eliminates the need to alter flight patterns in order to accommodate structures,[44] and prevents the obstruction of radar and other navigational aids.[45] Since height limitations and the removal of obstructions are necessary for airport operations, zoning ordinances with these objectives may substitute for the purchase of flight easements by the public agency operating the airport.[46] Accordingly, the majority of courts which have considered the constitutionality of airport hazard zoning have ruled that it is an impermissible taking of private property for public use without just compensation.[47]

In *Hageman v. Board of Trustees*,[48] for example, the owners of

---

[39] FEDERAL AVIATION ADMINISTRATION, MODEL AIRPORT HAZARD ZONING ORDINANCE, FEDERAL AVIATION ADVISORY CIRCULAR AC 150/5190-3A (1972). *See* Village of Willoughby Hills v. Corrigan, 29 Ohio St. 2d 39, 278 N.E.2d 658 (1972) for a discussion of chapter 4563, Revised Code of Ohio.

[40] AIRPORTS AND THEIR ENVIRONMENT, *supra* note 5, at 178-79.

[41] Federal Aviation Regulations F.A.R. Part 77, at 14 C.F.R. § 77 (1976).

[42] AIRPORTS AND THEIR ENVIRONMENT, *supra* note 5, at 178-79.

[43] *See Sax I*, *supra* note 24, at 62.

[44] *Id.* at 177-79.

[45] *Id.* Also, FAA regulations require that airports provide a clear approach path in order to receive funds under the Federal-aid Airport Program. Federal Aviation Regulations F.A.R. Parts 151.7(d), 151.9, 151.11, at 14 C.F.R. § 151 (1976). *See*, in particular, § 151.11(f). These restrictions apply to the vast majority of major American airports. Between 1971 and 1975, federal funding supported 2,434 projects at 1,225 airports. H.R. REP. NO. 94-594, 94th Cong., 2d Sess. 11 (1976).

[46] *See* Yara Engineering Corp. v. City of Newark, 132 N.J.L. 370, 373, 40 A.2d 559, 561 (1945): "The city may not under the guise of an ordinance acquire rights in private property which it may only acquire by purchase or by the exercise of its power of eminent domain."

[47] *See* cases cited in note 30 *supra*.

[48] 20 Ohio App. 2d 12, 251 N.E.2d 507 (1969).

property designated by the Wright-Patterson Air Force Base Joint Airport Zoning Board as part of an Air Hazard Corridor sought a declaration that the zoning regulations adopted by the Board were unconstitutional as a taking of private property for public use without just compensation.[49] The challenged regulations limited density of development to two residences per acre, and also restricted the height of structures.[50] Although the defendants argued that the regulations were a justified exercise of the police power,[51] the court held that the owners of the land could not be required to bear the costs of insuring the safety of the persons using the Air Force Base for public purposes. Therefore, the land use controls constituted a taking in violation of the Fifth Amendment.[52]

In *Jackson Municipal Airport Authority v. Evans,*[53] the Airport Authority filed suit to require the removal or topping of fifteen trees which had grown into the instrument approach zone.[54] In violation of an ordinance adopted under authority of the Airport Zoning Act,[55] the trees had reached a height of more than fifty feet. The court, relying upon the distinction between police power regulation and "taking or damaging" set forth in *Ackerman v. Port of Seattle,*[56] held that the ordinance so restricted the rights of the property owner as to constitute a taking for public use without just compensation.[57]

In *Ackerman,* the Washington Supreme Court distinguished between the two concepts, stating that police power rules are usually applied if "private property rights are actually destroyed through governmental action," but that eminent domain proceedings are required "when private property rights are taken from the individual and are conferred upon the public for public use."[58] The

---

[49] *Id.* at 20, 251 N.E.2d at 511.

[50] *Id.* at 15, 251 N.E.2d at 510.

[51] The defendants argued that "the regulations were enacted for the safety of the people who live there and who would be living there but for the regulations, and for the safety of the persons and property of those who land and takeoff at the base." *Id.* at 15, 251 N.E.2d at 510.

[52] *Id.* at 20, 251 N.E.2d at 512. *See also* Mutual Chem. Co. v. Mayor & City Council of Baltimore, 1 Av. Cas. 804, 807 (Cir. Ct. Balt. City, Md. 1939); LEGAL AND INSTITUTIONAL ANALYSIS, *supra* note 1, at 2-54.

[53] 191 So. 2d 126 (Miss. 1966).

[54] *Id.* at 127.

[55] *Id. See* MISS. CODE ANN. 1942 §§ 7544-01-17 (recompiled 1956).

[56] 55 Wash. 2d 400, 348 P.2d 664, 77 A.L.R.2d 1344 (1960).

[57] 191 So. 2d at 133.

[58] Wash. 2d at 408, 348 P.2d at 669. The underpinning for this distinction may be found in Mugler v. Kansas, 123 U.S. 623 (1887), where the first Mr. Justice Harlan noted "[t]he exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use . . . ." *Id.* at 699. As *Sax I, supra* note 24, at 39, observes, the Harlan theory distinguishes a qualitative difference between the police power and a "taking."

plaintiffs in *Ackerman* alleged that the Port of Seattle, as operator of the Seattle-Tacoma International Airport, used the airspace above their property as an airway for takeoffs and landings, substantially reducing the value of the land.[59] Since the Port had failed to acquire the property through eminent domain proceedings, the plaintiffs maintained that it was violating the provisions of the Washington Constitution prohibiting the taking of private property without compensation.[60] In holding that the frequent low flights amounted to the taking of a flight easement for which compensation was required, the court found that the rights of the property had been conferred upon the public for public use.[61] While *Ackerman* involved only an alleged "taking" due to repeated aircraft overflights of plaintiff's property, it has been cited with approval in a number of cases holding that airport hazard zoning amounts to a taking of private property.[62]

A leading case upholding the constitutionality of airport hazard zoning is *Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority*.[63] The Airport Authority filed suit to enjoin the erection of an ornamental roof on defendant's building in excess of the height limits established by the local airport zoning ordinance.[64] The defendants asserted that the enabling statute authorizing the local ordinance was unconstitutional because it authorized an unlawful taking of property without just compensation.[65] In sustaining the constitutionality of the enabling statute, the Florida Supreme Court held that the regulations were presumptively valid. In order to successfully attack the land use controls, the defendants had to "carry the extraordinary burden of both alleging and proving that it [the land use regulation] is unreasonable and bears no substantial relation to the public health, safety, mor-

[59] *Id.* at 403, 348 P.2d at 666.

[60] *Id.* at 403-04, 348 P.2d at 666.

[61] *Id.* at 408-12, 348 P.2d at 669-71.

[62] *See* Sneed v. County of Riverside, 218 Cal. App. 2d 205, 210-11, 32 Cal. Rptr. 318, 321-22 (1963); Roark v. City of Caldwell, 87 Idaho 557, 561-62, 394 P.2d 641, 643 (1964); Hageman v. Board of Trustees, 20 Ohio App. 2d 12, 16-17, 251 N.E.2d 507, 511 (1969); Jackson Mun. Airport Auth. v. Evans, 191 So. 2d 126, 131-32 (Miss. 1966).

Airport hazard zoning ordinances have also been invalidated on the ground that the particular application of zoning controls was arbitrary and unreasonable. *See* Kissinger v. City of Los Angeles, 161 Cal. App. 2d 454, 327 P.2d 10 (1958). In *Kissinger*, the evidence established that no change in the character of the property or surrounding neighborhood had occurred since the adoption of a comprehensive zoning plan that placed the property in a residential classification. Moreover, the city had not attempted to rezone any other property within the flight plan of the airport, and had permitted multiple residence dwellings and two public schools to be erected within the flight plan. *Id.* at 460-61, 327 P.2d at 15. The rezoning of plaintiff's property was invalidated as an arbitrary action. *Id.* at 462-63, 327 P.2d at 16-17. *See also* Banks v. Fayette County Bd., 313 S.W.2d 416, 418 (Ky. Ct. App. 1958).

[63] 111 So. 2d 439 (Fla. 1959).

[64] *Id.* at 440.

[65] *Id.* at 441.

als or general welfare."[66] Unlike the courts in *Hageman* and *Jackson,* the court did not discuss the public ownership of the airport as a factor affecting the constitutionality of the ordinance.

Similarly, in *LaSalle National Bank v. County of Cook,*[67] the court held that height limitations in the vicinity of airports adopted as part of a Cook County zoning ordinance did not work an unconstitutional taking of private property.[68] The disputed height limitations were more restrictve than those established by FAA regulations.[69] The court found that the ordinance was enacted for a valid police power purpose and that it did not have the effect of appropriating private property for public use.[70] Implicit in this finding was a determination that the restrictions were reasonably required to promote the public health, safety, and general welfare.[71] The effect of public ownership of the airport upon the question of "taking" by property regulation was not discussed.[72] In cases where the issue was involved, airport hazard zoning has been invalidated.[73]

B. Airport Zoning to Promote Noncompatible Development

Airport noise-compatibility zoning is designed to locate near airports those land uses which are not adversely affected by noise impact,[74] including light industrial uses which are inherently noisy, such as machine shops, and uses involving few people, such as reservoirs and sewage treatment plants.[75] Airport service activities, like warehouses and transportation facilities, are also noise-compatible uses. Finally, hotels, office buildings, and other indoor uses may be soundproofed in order to minimize noise im-

---

[66] *Id.* at 443. In discussing the *Harrell's* decision, the Environmental Protection Agency argues that the rationale for the holding derives from *Euclid;* zoning is a valid exercise of the police power of the State unless it is clearly arbitrary. LEGAL AND INSTITUTIONAL ANALYSIS, *supra* note 1, at 2-52. *Harrell's* was followed in a Florida case, Waring v. Peterson, 137 So. 2d 268 (Fla. Dist. Ct. App. 1962).

[67] 34 Ill. App. 3d 264, 340 N.E.2d 79 (1975).

[68] *Id.* at 277-78, 340 N.E.2d at 89.

[69] *Id.* at 272-74, 340 N.E.2d at 86-87.

[70] *Id.* at 278, 340 N.E.2d at 89.

[71] *Id.* at 277, 340 N.E.2d at 89.

[72] The court noted only that the operation of the airport by the federal government, which caused aircraft overflights of the plaintiff's property, was not at issue in the case. *Id.* at 277-78, 340 N.E.2d at 89.

[73] *See* text accompanying notes 39-53 *supra.*

[74] *See* AIRCRAFT NOISE IMPACT, *supra* note 19, at 109-10. *See generally* NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, A STUDY OF THE OPTIMUM USE OF LAND EXPOSED TO AIRCRAFT LANDING AND TAKE OFF NOISE 68-102 (1966) [hereinafter cited as NASA].

[75] NASA, *supra* note 74, at 103. *See generally* AIRCRAFT NOISE IMPACT, *supra* note 19.

pact.[76] If the noise reduction is sufficient, these uses may be compatible with airport noise.[77]

As in airport hazard zoning, the "taking" issue may arise because the airport is owned and operated by a governmental entity.[78] Two California cases have been cited for the proposition that airport noise zoning is constitutionally valid,[79] but this reliance appears to be misplaced. In *Smith v. County of Santa Barbara*,[80] the court upheld a rezoning of property near Santa Maria Airport from Residential to Design Industrial. The stated reason for the rezoning was that private citizens residing near the airport would be so annoyed by airport operations that they would suffer compensable damages. The court stated, in dictum, that such a reason justified the passage of the zoning ordinance.[81] In attacking the lower court dismissal of their inverse condemnation suit, the property owners argued that the rezoning was unreasonable, oppressive, and discriminatory. The Court of Appeals sustained the dismissal, noting that the plaintiffs failed to allege a diminution of value due to the rezoning.[82] The court neither considered the constitutionality of noise-compatibility zoning, nor confronted the problem of government ownership of Santa Maria Airport.

In *Morse v. County of San Luis Obispo*,[83] the plaintiffs alleged that they purchased their property near Paso Robles Airport in reliance upon a zoning ordinance which stated that the land would be rezoned for subdivision upon request. Instead, the County Board of Supervisors rezoned the land in order to decrease the allowable density of land use.[84] The court dismissed an argument that the property regulation resulted in a taking without compensation. It noted that the plaintiffs had not pleaded any activity from which a "taking" might be implied. In the absence of such a

---

[76] NASA, *supra* note 74, at 68-102. *See also* Figure 2-15, *Land Use Compatibility Guidelines for Aircraft Noise Environments*, in AIRCRAFT NOISE IMPACT, *supra* note 19, at 54.

[77] *See* NASA, *supra* note 65, at 68-71.

[78] *See* text accompanying note 25 *supra*.

[79] Blitch, *supra* note 15, at 698-99.

[80] 243 Cal. App. 2d 126, 52 Cal. Rptr. 292 (1966).

[81] *Id.* at 130, 52 Cal. Rptr. at 294.

[82] *Id.* at 130, 131-32, 52 Cal. Rptr. at 293, 295. The property owners

> conced[ed] the accepted principle that if the facts upon which a zoning ordinance is predicated are fairly debatable, courts will not disturb a legislative determination. *They contend, however, that such legislative determination may not be unreasonable, oppressive or discriminatory, and that the admitted facts at bench show that the zoning ordinance here involved all three.*

Id. at 130, 52 Cal. Rptr. at 293 (emphasis added). The plaintiffs, as appellants, relied upon Kissinger v. City of Los Angeles, 161 Cal. App. 2d 454, 327 P.2d 10 (1958), in support of this proposition. In distinguishing the two cases, the *Smith* court noted that *Kissinger* involved an instance of "spot zoning." 243 Cal. App. 2d at 129, 52 Cal. Rptr. at 294. *See* note 62 *supra*.

[83] 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (1967).

[84] *Id.* at 601-02, 55 Cal. Rptr. at 711.

showing, the court felt entitled to presume that the rezoning was a reasonable exercise of the police power designed to "forestall the development of residential zones in areas susceptible to excessive noise or above-average hazard."[85] The *Morse* court did, however, distinguish the challenged ordinance from an airport zoning ordinance limiting building height on the ground that the former did not appropriate the use of airspace above the plaintiff's property.[86] As in *Smith*, though, the problem of government ownership and operation of the airport was not addressed.

As with airport hazard zoning, noise-compatibility controls would benefit the users and proprietors of the airport by eliminating any need to purchase the impacted property,[87] and by removing the need for high-risk aircraft operational techniques to reduce noise impact.[88] Noise-compatibility zoning, however, may be distinguished from hazard zoning on the ground that it may benefit a larger class of people. High levels of noise may have a widespread impact upon property values in a community.[89] Aircraft noise adversely affects the use and enjoyment of property, thereby impairing its market value.[90] Since a difference in housing costs provides an economic incentive for persons to move into an area, the decrease in property values may even result in noise-induced ghettos in communities adjacent to airports which will be populated by residents who, for economic reasons, have a limited choice of housing.[91] Noise-compatibility zoning regulations de-

---

[85] *Id.* at 603, 55 Cal. Rptr. at 712.

[86] *Id.* at 604, 55 Cal. Rptr. at 713, distinguishing Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963).

In summary, the court held that "[s]o far as the pleadings disclose, the reclassification neither resulted in the use of plaintiffs' airspace for public purposes nor did it take away plaintiffs' right to continue the existing use of the property." 247 Cal. App. 2d at 604, 55 Cal. Rptr. 713.

[87] Since airport noise zoning would avoid the necessity of purchasing noise-impacted property, the costs of aviation activities would not reflect the costs of buying the land. Instead, the costs would be borne by the individual landowners. *See* Hageman v. Board of Trustees, 20 Ohio App. 2d 12, 251 N.E.2d 507 (1969), where the court explicitly held that the burden of insuring the safety of aviation consumers could not constitutionally be placed upon the landowner. *See generally* Berger, *To Regulate, or Not to Regulate—Is That the Question? Reflections On the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 LOY. L.A.L. REV. 253 (1975).

[88] Modification of operational techniques in order to reduce noise-impact often entails a higher risk factor than did the original technique. AVIATION NOISE ABATEMENT POLICY, *supra* note 1, at 45. *See also* AIRPORTS AND THEIR ENVIRONMENT, *supra* note 5, Table 18, at 135-38.

[89] Proximity to the airport is not the sole determinant of noise impact. The direction of flight paths, the type of aircraft using the facility, the flight profiles, the local weather conditions, and the type of community development are all important factors. *See* Alekshun, *Aircraft Noise Law: A Technical Perspective*, 55 A.B.A.J. 740 (1969).

[90] U.S. DEP'T OF TRANSPORTATION, THE EFFECTS OF MOBILE-SOURCE AIR AND NOISE POLLUTION ON RESIDENTIAL PROPERTY VALUES 8-12 to 8-16 (1975).

[91] FEDERAL AVIATION ADMINISTRATION, LAND USE CONTROL STRATEGIES FOR AIRPORT IMPACTED AREAS 11-12 (1972) [hereinafter cited as LAND USE CONTROL STRATEGIES].

signed to prevent the development of such noise ghettos benefit the present and future[92] residents and users of the community by stabilizing property values[93] and protecting public health and safety.[94] In sum, unlike airport hazard zoning which benefits only the users and proprietors of the airport, noise compatibility zoning benefits the residents and users of communities surrounding the airport, as well as the users and proprietors.[95] This conclusion is significant for two reasons. Both the "noise-generating" airport and the "silence-demanding" residences impose spillover effects on each other.[96] It may be argued that, where two uses spill over on each other, neither has a constitutional right to prevail.[97] The determination as to which use will prevail should be left to the legislature for resolution.[98] Rationally, this determination will be made by comparing the relative costs and benefits of each solution.[99] Alternatively, the additional benefits of noise-compatibility zoning may be conclusive in the judicial forum, as evidence of sufficient reciprocal benefits to validate the legislation.[100]

A second distinction between the two forms of zoning is that noise-compatibility zoning does not appropriate the regulated property to the benefit of the public agency operating the airport.[101]

---

[92] Benefits to future residents are a valid police power objective. Barkmann v. Town of Hempstead, 49 N.Y.S.2d 262, 268 App. Div. 785 (1944), *aff'd*, 294 N.Y. 805, 62 N.E.2d 238 (1945); H.F.H., Ltd. v. Superior Court, 15 Cal. 3d 508, 523, 542 P.2d 237, 248, 125 Cal. Rptr. 365, 376 (1975), *cert. denied*, 425 U.S. 904 (1976).

[93] *Cf.* Blades v. Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1952) (police power permits property restrictions which promote the general welfare by conserving the value of other properties); Schloss v. Jamison, 262 N.C. 108, 116, 136 S.E.2d 691, 697 (1964) (zoning ordinance sustained under enabling act which authorized regulation assuring "the greatest possible use and enjoyment of land . . ., balanced against the necessary protection of the values of buildings and land and the use and enjoyment of land on adjacent properties. . . .").

[94] Morse v. County of San Luis Obispo, 247 Cal. App. 2d 600, 603, 55 Cal. Rptr. 710, 712 (1967). *Cf.* 1 R. ANDERSON, AMERICAN LAW OF ZONING 2d § 3.10 (1968) (public health and safety as valid police power objectives). The extent of harm to property may also be offset by coupling partial compensation to the imposition of noise-compatibility zoning. *See* A COMPREHENSIVE POLICY, *supra* note 28, at 25-26, 32-33. For example, tax concessions for compatible development may be offered to owners of property regulated by the compatibility controls. *See* NASA, *supra* note 74, at 49-51, discussing tax abatement to attract airport-compatible development.

[95] Since FAA regulations require a clear approach path at all airports receiving federal funds, *see* note 45 *supra*, height limits and removal of obstructions are necessary for continued airport operations. There is no special benefit to residents and community users from the use of zoning to accomplish these ends, as opposed to the purchase of an aviation easement.

[96] *Sax II*, *supra* note 20, at 164. *See also* text accompanying note 36 *supra*.

[97] *Sax II*, *supra* note 20, at 161.

[98] *Id.* at 171.

[99] *Id.* at 171-72.

[100] *See* State v. Johnson, 265 A.2d 711, 716 (Me. 1970), and text accompanying note 33 *supra*.

[101] *Cf.* Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963) (discussing the difference between building height regulation and airport hazard zoning):

> We believe there is a distinction between the commonly accepted and traditional

In terms of the *Ackerman* distinction[102] the rights of property development are not conferred upon the public, but instead they are destroyed by the legislative imposition of noise compatibility regulations. In airport hazard zoning, the airspace into which a landowner is not permitted to build is used by low-flying aircraft or airport navigational aids. In airport noise-compatibility zoning, however, there is no flight through the affected property, nor is any other physical use made of the property by the airport. Therefore, the *Ackerman* rationale would permit airport noise-compatibility zoning as a legitimate exercise of the police power, because the development rights lost through zoning are not used by the public.

Property rights, however, include not only ownership and possession, but the right to use, enjoyment, and disposal as well.[103] Noise-compatibility zoning, by restricting development, transfers to the airport operator control of the right to determine whether the regulated property will be free from adverse noise impact. Therefore, it may be argued that the land use controls confer dominion over the property on the public, and that under *Ackerman* this transfer of control must be accompanied by compensation.[104] According to this analysis, the property right transferred is similar to a noise easement, the right to exclude particular unwanted interference with one's property.[105] The ability to exclude, however, is a necessary feature of all property rights.[106] Limiting the right to

---

height restriction zoning regulation of buildings and zoning of airport approaches in that the latter contemplates the actual use of the airspace zoned, by aircraft, whereas in the building cases there is no invasion or trespass to the area above the restricted zone.

Id. at 209, 32 Cal. Rptr. at 320. *See also* Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969); Indiana Toll Road Comm'n v. Jankovich, 244 Ind. 574, 193 N.E.2d 237 (1963), *cert. dismissed*, 379 U.S. 487 (1965).

[102] *See* text accompanying notes 56-62 *supra*.

[103] Spann v. City of Dallas, 111 Tex. 350, 355, 235 S.W. 513, 514 (1921).

[104] *Cf.* Leet v. Montgomery County, 264 Md. 606, 287 A.2d 491 (1972). In *Leet*, the Maryland Court of Appeals held that the County, in requiring a property owner to remove at his own expense automobiles abandoned on his property by trespassers, caused the property owner to spend his resources *pro bono publico*, and therefore effected a taking without just compensation. *Id.* at 613-16, 287 A.2d at 496-97 (citing *Ackerman* for the distinction between destruction of property rights and transference). The court explicitly noted that such action was not a direct taking of private property for the public good, *Id.* at 613, 287 A.2d at 496, but that it did "compel the private party to use its funds and resources to confer a benefit on the public." *Id.* at 616, 287 A.2d at 497.

[105] The owner may, of course, choose to sell or rent this right to exclude unwanted interference, and the government may acquire it for a public purpose through eminent domain proceedings.

[106] *See, e.g.*, R. MUSGRAVE & P. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 50 (2d ed. 1976). To illustrate, airport noise-compatibility zoning transfers to a public agency the decision whether or not a particular piece of property will be impacted by airport noise. On the one hand, the public agency has the right to reduce or eliminate the noise in return for compensation by the property owner. On the other hand, in the absence of noise-compatibility zoning, the public agency must purchase from the property owner the right to subject the land to the impact of noise; i.e., a noise easement. *See* Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964). Therefore, the existence of such zoning transfers to the public agency the property right represented by the noise easement.

exclude must necessarily restrict use, enjoyment, and disposal of the property. If compensation is called for in such cases, the *Ackerman* distinction between destruction and transfer of property rights is incorrect, and that basis for invalidating airport hazard zoning acts must be rejected.[107]

As distinguished from airport hazard zoning above, zoning for noise-compatible development near airports should not be considered a "taking." The institutional framework for implementing noise-compatibility programs may, however, strongly influence a court's disposition of the constitutional challenge. In particular, noise-compatibilty policies, such as partial compensation, in order to reduce inequitable results[108] will affect a court's review under the "spillover" test,[109] and under the "reciprocity of benefits" test.[110]

II. INSTITUTIONAL FRAMEWORK

Effective land use management must combine coordination of local planning with responsiveness to the needs of individual communities.[111] The primary objectives to be balanced in managing noise-compatible development are reducing jurisdictional fragmentation,[112] limiting program costs, and maintaining local support.[113]

---

[107] *Sax I, supra* note 24, at 39, identifies the reliance of the destruction-transfer theory on limited definitions of "taking" and "property." *See* note 58 *supra*. While a qualitative difference between destruction and transfer may have been observable during the late 1800's, when Mugler v. Kansas, 123 U.S. 623 (1887), *see* note 58 *supra*, was decided, the impact of the police power through zoning, business regulation, and conservation legislation on private ownership has eroded this distinction. *Sax I, supra* note 24, at 39-40.

[108] *See* note 95 *supra*, suggesting tax abatement as one procedure for cushioning the impact of noise-compatibility zoning.

[109] *See* text accompanying notes 96-99 *supra*.

[110] *See* text accompanying note 100 *supra*.

[111] Finney, *The Intergovernmental Context of Local Planning*, 29-32, in PRINCIPLES AND PRACTICE OF URBAN PLANNING (W. Goodman & E. Freund 4th ed. 1968).

[112] Jurisdictional fragmentation occurs when the authority to govern a region is apportioned among a number of political agencies with either divided or overlapping jurisdiction. *See generally* 4 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, SUBSTATE REGIONALISM AND THE FEDERAL SYSTEM 63-67 (1974) [series hereinafter cited as ACIR].

[113] For example, in assessing the institutional framework for a national approach to airport and aircraft noise abatement, including source, operational, and receiver components, the EPA concluded that the following factors should be fully considered: regulatory responsibility over various aspects of the problem should be clearly defined and continued, a clear definition of compensability should be developed, and the costs should ultimately be allocated to air transportation users and beneficiaries. To enforce such regulations the institutional framework should provide for coordination on a national level, yet allow flexibility to meet local and regional conditions. The regulations should provide guidance for land management, aircraft design, research and development for noise abatement technology and procedures, and for the establishment of incentives for all parties to maximize noise reduction. LEGAL AND INSTITUTIONAL ANALYSIS, *supra* note 1, at 3-13.

Accordingly, the decision as to which level of government will be given airport land use authority is crucial. There are three alternatives with respect to where the authority may be located: the municipal level, the county level, and the regional level.

A. The Municipal Level

A possible locus for noise-compatibility authority is the municipal level.[114] Implementation of noise-compatibility controls might occur under the authority of either a comprehensive community zoning act or an airport hazard zoning act.[115] State comprehensive community zoning enabling acts generally follow[116] the format of the Standard State Zoning Enabling Act.[117] Such acts empower municipalities to regulate use, density, and construction upon property for the public welfare.[118] Regulation is limited to actions which conform to a comprehensive plan, and which further traditional police power objectives.[119] Noise-compatibility zoning is directed toward the promotion of health and welfare goals that are within the ambit of the police power.[120] Therefore, assuming that airport noise-compatibility zoning is not a "taking,"[121] such land use controls may legally be implemented under the authority of comprehensive community zoning legislation.

Alternatively, it may be possible to zone for noise-compatible development under the authority of an airport hazard zoning act.[122] Authority granted to local governments under airport hazard zoning acts is limited to regulation for the purpose of preventing "the creation or establishment of airport hazards."[123] Zoning for the

---

[114] This operation is well suited to the use of preexisting comprehensive community zoning statutes as the legislative vehicle for noise-compatibility zoning. *See* text accompanying notes 129-30 *infra*.

[115] *See* Part I A *supra*. For example of an airport hazard zoning act, see the Airport Zoning Act in 3 E. YOKLEY, ZONING LAW AND PRACTICE § 26-7 (3d ed. 1967).

[116] *See generally* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.21 (2d ed. 1976).

[117] U.S. DEP'T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT (1926), *reprinted in* 4 R. ANDERSON, AMERICAN LAW OF ZONING § 26.01 (1968).

[118] *Id.* at § 1 of the Act.

[119] The Act states:

> Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewage, schools, parks, and other public requirements.

Id. at § 3.

[120] *See, e.g.*, Smith v. County of Santa Barbara, 52 Cal. Rptr. 292, 294-95, 243 Cal. App. 2d 126, 130 (1960); Morse v. County of San Luis Obispo, 55 Cal. Rptr. 710, 712, 247 Cal. App. 2d 600, 603 (1967).

[121] *See* Part I B *supra*.

[122] *See* note 40 and accompanying text *supra*.

[123] Airport Zoning Act, § 2(b), cited in 3 E. YOKLEY, *supra* note 100. at § 26-7.

purpose of promoting noise-compatible development may be within the mandate of the statute if incompatible development is considered an "airport hazard." The FAA[124] has defined "airport hazard" to include "any structure or object of natural growth located on or in the vicinity of a public airport" which is "hazardous to such landing or taking off of aircraft."[125] Many states have similar definitions.[126] To find that noise-compatibility controls are within the authority of an airport hazard zoning act requires proof that incompatible development is hazardous to aircraft landing or taking off at public airports. Since the operational procedures that are used to minimize noise impact result in a higher level of risk to aircraft,[127] noise-incompatible development may represent a hazard to aircraft. It is generally recognized, however, that the purpose of airport hazard zoning acts is prevention of physical hazards to aircraft, for example, building height.[128] While compatibility controls may be brought within the literal terms of the acts, they may not be within the puposes of such legislation.

Local governments will likely favor noise-compatibility authority at the municipal level, whether through the means of comprehensive community zoning or airport hazard zoning. Municipalities already exercise the power to regulate property,[129] and officials of these communities generally favor retaining this

---

[124] FEDERAL AVIATION ADMINISTRATION, MODEL AIRPORT HAZARD ZONING ORDINANCE, ADVISORY CIRCULAR AC: 150/5190-3A. Appeidix I (1972).

[125] *Id.* at Appendix I, § II(3).

[126] ALA. CODE tit. 4, § 63(3) (1958); ARIZ. REV. STAT. ANN. § 2-321(3) (West Supp. 1976); COLO. REV. STAT. § 41-3-103(3) (1973); DEL. CODE tit. 2, § 102(10) (1974); FLA. STAT. ANN. § 333.01(3) (Supp. 1976); HAW. REV. STAT. § 262-1(2) (1968); IDAHO CODE § 21-501(2) (Supp. 1976); ILL. REV. STAT. ch. 15-½, § 48.3 (1973); IOWA CODE § 329.1(2) (1975); KY. REV. STAT. ANN. § 183.011(8) (Supp. 1974); LA. REV. STAT. ANN. § 2.601(6) (1973); MD. ANN. CODE art. 1A, § 1-110 (1957); MASS. ANN. LAWS ch. 90, § 35(g) (1975); MINN. STAT. ANN. § 360.013(22) (1966); MISS. CODE ANN. § 61-7-3(2) (1973); MO. REV. STAT. § 305.505(2) (Supp. 1976); MONT. REV. CODES ANN. § 1-102(21) (Supp. 1975); NEB. REV. STAT. § 3-101(22) (1974); NEV. REV. STAT. § 497.020(2) (1973); N.H. REV. STAT. ANN. § 424:1(II) (1968); N.C. GEN. STAT. § 63-1(9) (1975); N.D. CENT. CODE § 2-04-01(2) (1975); OHIO REV. CODE ANN. § 4563.01(B) (Page 1973); OKLA. STAT. ANN. tit. 3, § 65.1(c) (1973); OR. REV. STAT. § 492.010(8) (1975); PA. STAT. ANN. tit. 2, § 1551(2) (1963); R.I. GEN. LAWS § 1-3-2(2) (1976); TENN. CODE ANN. § 42-401(2) (1964); UTAH CODE ANN. § 2-4-1(2) (1971); VT. STAT. ANN. tit. 5, § 552 (1972); WASH. REV. CODE § 14.12.010(2) (1974); W. VA. CODE § 29-2A-1(h) (1971); WIS. STAT. ANN. § 114.002(11) (1974).

[127] For example, a two-segment aircraft landing approach pattern will reduce noise impact across portions of the approach pattern. The procedure involves use of a steeper glide path during the early stages of approach (5 to 6°), followed by return to a normal glide slope (3°) for final approach and touchdown. An inherent safety problem in this procedure is the impact of aircraft wake vortices on aircraft flying a 3° approach behind aircraft using a two-segment approach. AVIATION NOISE ABATEMENT POLICY, *supra* note 1, at 45.

[128] *See, e.g.*, Roark v. City of Caldwell, 87 Idaho 557, 567, 394 P.2d 641, 646 (1964); Peacock v. City of Sacramento, 271 Cal. App. 2d 845, 857-58, 77 Cal. Rptr. 391, 402-03 (1969). *See* Part I A *supra*.

[129] 1 R. ANDERSON, AMERICAN LAW OF ZONING, § 2.29 (2d ed. 1976).

power.[130] Furthermore, locating airport land use power at the local level permits the use of existing land development and planning agencies, thereby minimizing the costs of a compatibility program.[131]

A fundamental cause of incompatible development around airports, however, has been the fragmentation of land use authority around airports.[132] This is exacerbated when the locus of regulatory power is the municipal level. The demand for residential development generated by the growth of the airport itself has induced neighboring cities to zone for incompatible residential uses.[133] An additional incentive for incompatible development is

---

[130] *See* note 147 *infra*. *See also* 4 ACIR, *supra* note 112, at 65.

[131] 4 ACIR, *supra* note 112, at 63.

[132] CALIFORNIA STATE SEN. COMM. ON LOCAL GOVERNMENT, BACKGROUND REPORT: A REVIEW OF AIRPORT LAND USE COMMISSIONS (Nov. 4, 1976) [hereinafter cited as BACKGROUND REPORT]: "One of the major barriers to an effective method for controlling incompatible uses around airports is the fragmented land use authority which often exists around airports. One jurisdiction owns the airport, several others may regulate land uses while still others may provide public improvements." *Id.* at 8. For example, Los Angeles International Airport is owned and operated by the City of Los Angeles. Land use around the airport is under the jurisdiction of the City of Los Angeles, the County of Los Angeles, the City of El Segundo, the City of Hawthorne, and the City of Inglewood. LAND USE CONTROL STRATEGIES, *supra* note 91, at 59. Coordination of an airport noise policy for the entire impact area has been difficult to achieve. *Id.* at 72.

[133] Total employment at a new airport could range as high as 39,300 people. Berger, *Nobody Loves An Airport*, 43 S. CAL. L. REV. 631, 676 (1970). In addition, three basic types of commercial and industrial activities contribute to employment opportunities in the area: airport-dependent activities whose level of business is directly related to airport passenger volume; airport-related activities whose business is a direct function of airport operations; and airport-attracted activities which prefer easy access to the airport. LAND USE CONTROL STRATEGIES, *supra* note 91, at 25-26. Accordingly, the very presence of an airport initially creates a demand for local housing. Berger, 43 S. CAL. L. REV., at 668. To this extent, neighboring cities have an economic incentive to zone for residential development. An additional incentive is that property tax revenues will increase. Blitch, *supra* note 15, at 701-02. The physical impacts of an airport, however, which are largely undesirable, almost exclusively affect nearby residences and activities. The economic benefits of the airport are distributed throughout the entire region served by the airport. LAND USE CONTROL STRATEGIES, *supra* note 91, at 8. In most cases continuing airport and aviation expansion increases the potential for severe noise impact. *Id.* at 9.

> Residents of neighborhoods adjacent to an airport fear that these impacts are translated into negative economic impacts that they must bear. Homeowners fear that airport noise pollution and safety hazards diminish the value of their homes. This argument is hard to document because any possible economic losses are masked by generally rising metropolitan real estate values and a variety of local real estate market factors. In fact, in some cases the presence of the airport may increase residential values, but most airport-area residents are convinced that their homes will sell for less and would be harder to sell than similar homes elsewhere. Airport neighbors who are anxious to move away from the inconveniences of the airport area believe that they are locked into their present homes because they may be unable to realize enough on the sale of their home to acquire acceptable housing elsewhere.

Id. at 9. A case study of Los Angeles has indicated that selling a residence near an airport is extremely difficult. *Id.* at 62. In most cases, the potential resale value for industrial and commercial use may not be sufficient to compensate for the cost of residential land when the value of the houses, which must be removed, is considered. *Id.* at 3. Additionally, persons feel a strong attachment to old neighborhoods and may be unwilling to move despite severe noise impact. Berger, 43 S. CAL. L. REV., at 669. Therefore, neighborhoods may be expected to deteriorate over time into noise-induced ghettos. *See* text accompanying note 78 *supra*.

the potential for an expanded municipal tax base.[134] Despite the local interest in controlling land use around airports and the lower administrative costs that may be realized by using local agencies to implement noise-compatibility regulation, the need to increase policy coordination requires that noise-compatibility regulation be vested at a higher level of government.[135]

B. The County Level

An alternative locus for noise-compatibility zoning authority is the county level. Involving multijurisdictional administrative units of the state,[136] regulation at this level would reduce the fragmentation of land use authority. Furthermore, since land use planning agencies may already exist at the county level,[137] use of existing agencies may also involve fiscal savings.[138] In California, for example, a system of county-level Airport Land Use Commissions (ALUC's) has been established to achieve compatible new development by zoning.[139] The ALUC's are authorized to formulate comprehensive land use plans for areas surrounding airports, and are empowered to disapprove the decisions of local agencies that are inconsistent with such plans.[140] The power to disapprove inconsistent development plans is qualified by a provision for an override by a four-fifths vote of the governing body of the local agency.[141] This approach has provided flexibility in adapting the broad noise-compatibility plan to local needs.[142] In California, counties have designated existing agencies to act as the ALUC or have authorized new organizations to handle ALUC responsibilities.[143] Four counties have designated the Sacramento Regional Area Planning Commission as their ALUC. The Planning Commission is trans-county in jurisdiction, and has been designated as the ALUC in four out of six counties.[144]

The California ALUC system has a number of drawbacks. Established agencies, already burdened with a variety of planning problems, have viewed airport noise compatibility planning as a

---

[134] Blitch, *supra* note 15, at 701-02.
[135] AIRPORTS AND THEIR ENVIRONMENT, *supra* note 5, at 161.
[136] 3 ACIR, *supra* note 112, at 54.
[137] *Id.* at 63-64, & Table IV-10.
[138] *See* text accompanying note 131 *supra*.
[139] CAL. PUB. UTIL. CODE § 21674(5) (Supp. 1975).
[140] *Id.* at §§ 21675, 21676.
[141] *Id.* at § 21676.
[142] *See* H. DUNNING, AN INVESTIGATIVE STUDY OF THE CALIFORNIA EXPERIENCE IN AIRPORT NOISE REGULATION 57-58 (final report to the EPA 1975).
[143] *Id.* at 57.
[144] *Id.* at 57-58.

low priority issue,[145] while new agencies have encountered problems of funding and political recognition.[146] For example, much of the conflict over development near metropolitan airports in California has been attributed to the question of local control versus ALUC control.[147] Such conflicts result from the division of jurisdiction over land development, the failure of municipalities to concern themselves with area-wide problems, and the limits placed upon ALUC power by the override provisions.[148] In evaluating the desirability of locating airport land use authority at the county level, however, the ability of a county-level agency to reduce jurisdictional fragmentation must be weighed against the conflicts engendered by intrusion into areas of traditionally local concerns.

C. The Regional Level

Finally, authority to administer noise-compatibility zoning may be vested in a regional agency. Because the environmental and economic impact of an airport is area-wide in scope, a comprehensive regional approach may be required.[149] An institutional structure based at the regional level may be able to coordinate airport development with other modes of transportation, as well as other uses and activities which compete for the same resources.[150] In Minneapolis-St. Paul, for example, airport development is re-

---

[145] *Id.* at 58.

[146] *Id. See* Blitch, *supra* note 15, at 678, for a discussion of the problems of Alameda County ALUC (a new organization) encountered in dealing with the City of Alameda.

[147] One such conflict is between the Port of Oakland, the City of Alameda, and the Alameda County ALUC over a proposed residential development near Metropolitan Oakland International Airport. *See generally* Blitch, *supra* note 15, and H. DUNNING, *supra* note 142, at 74-86. The Airport, under the jurisdiction of the Board of Port Commissioners of the City of Oakland, lies on Bay Farm Island, immediately adjacent to a portion of the island within the City of Alameda. H. DUNNING, *supra* note 142, at 75. In 1973, Alameda rezoned a portion of the island for single-family residences, which is the most difficult form of housing to insulate against sound. Blitch, *supra* note 15, at 674-75. Following this rezoning, the Alameda County ALUC conducted hearings upon the proposed development of the noise-impacted land, and disapproved the rezoning as inconsistent with the best interests of the area. H. DUNNING, *supra* note 142, at 86. The Alameda City Council unanimously overruled the ALUC determination and reinstituted single-family zoning for the site. *Id.* "[T]he key issue for the city council was local control. Faced with another government body taking significant action on land use matters the city regards as within its exclusive jurisdiction, the city council was unwilling to agree to any compromise." *Id.*

Four court actions have arisen out of this conflict. City of Oakland v. City of Alameda, Alameda County Sup. Ct. No. 453290-3 (memorandum opinion and announcement of intended decision filed Aug. 13, 1975); City of Oakland v. City of Alameda, Alameda County Sup. Ct. No. 450083-0 (judgment filed Mar. 11, 1975); City of Alameda v. City of Oakland, San Francisco County Sup. Ct. No. 687-726 (judgment entered Apr. 6, 1976); City of Alameda v. City of Oakland, San Francisco County Sup. Ct. No. 694-559 (filed Aug. 26, 1975).

[148] Blitch, *supra* note 15, at 704-05.

[149] AIRPORTS AND THEIR ENVIRONMENT, *supra* note 5, at 162.

[150] Such resources may include water supply, utility services, and air pollution control facilities. *Id.*

gionally based.[151] Policy direction is provided by the Metropolitan Council, while operational control is vested in the Metropolitan Airport Commission.[152] One consequence of this separation of planning and implementation was continuing conflict over the site of a new major airport in the area.[153]

The most significant problems with locating airport land use authority at either the county or regional level are that it will intrude into areas of previously local concern,[154] and that it may require the creation of a new agency, thereby proliferating the number of government bodies.[155] Additionally, specific state legislative authorization for an airport noise-compatibility program would be necessary. Such authorization permits the establishment of a program to meet the requirements of the immediate problem[156] and allows statewide concerns to be expressed through the legislative process. Accordingly, the impact of local interests will be reduced[157] and the prospects for a comprehensive approach to noise-compatible land use will be enhanced.[158] Since local objections to these developments would create practical problems in

---

[151] The Minnesota state legislature adopted the regional approach while restructuring the Minneapolis-St. Paul area local government. 1967 MINN. LAWS ch. 896, as amended, 1974 MINN. LAWS ch. 422 and 1975 MINN. LAWS ch. 13. *See also* 2 ACIR, *supra* note 112, at 116. A Metropolitan Council with policymaking duties was established. § 2, 1967 MINN. LAWS ch. 896. The Council is now provided with metropolitan planning authority. MINN. STAT. ANN. §§ 473.145-.151 (Supp. 1976), including airport planning. *Id.* at §§ 473.215-.219. The Council was not, however, granted operational control over the independent metropolitan commissions, including the Metropolitan Airport Commission. 2 ACIR, *supra* note 112, at 125-26.

[152] *See* note 151 *supra*. This arrangement for implementing policy, known as the "Sewer Board Model," involves a regional Commission legally separate, but subordinate to, the Council. The Commission owns the facilities and is charged with carrying out the program. 2 ACIR, *supra* note 112, at 125-26.

[153] During the period 1968-70, the Council vetoed a MAC proposal for a new airport site. 2 ACIR, *supra* note 112, at 121. Although the staffs of the two agencies jointly reexamined the proposal, which was then resubmitted by MAC, the Council again vetoed the suggested site. *Id.* In early 1973, the Council prepared an airport system plan and directed MAC to "search" a specified new site. *Id.* at 124. This stalemate resulted from the failure of the State legislature to direct that MAC follow Council guidelines, while providing the Council with power to suspend MAC development programs. *Id.* at 126.

[154] *Cf.* note 147 (discussing the problem of local control versus county-level authority; the same considerations are relevant to regional-level authority).

[155] *See* note 18 *supra*.

[156] *See* text accompanying notes 142-44 *supra*.

[157] *See* BACKGROUND REPORT, *supra* note 132, at 8-9.

[158] The U.S. Department of Transportation argues that a

> comprehensive and regional approach is essential for effective land use planning and control in the airport environs. . . . Multijurisdictional and local interests in the airport environs which have prevented, for example, zoning measures for guiding compatible development can be overridden. Zoning powers exercised by a higher government level (i.e., area-wide agency or county) are more effective in this regard than local municipal efforts to date.

AIRPORTS AND THEIR ENVIRONMENT, *supra* note 5, at 161. The U.S. Environmental Protection Agency described the California approach as "advanced and systematic," and the ALUC provisions as "a comprehensive procedure to obtain compatible land use." LEGAL AND INSTITUTIONAL ANALYSIS, *supra* note 1, at 2-41, 2-50.

administering a noise-compatibility program,[159] a possible solution to this problem is the separation of the planning, implementation, and enforcement functions of land use control as a means of satisfying local concerns. Proposed amendments to the California ALUC provisions[160] would remove zoning authority from ALUC's and would provide instead a coordination and oversight role.[161] ALUC's would retain the right to review and to veto community land use decisions, subject to an override power given to the local agency.[162] The local decisions, however, would have to conform to an airport noise and safety compatibility plan prepared by the ALUC.[163] While county and regional approaches would appear to be the more efficient means of meeting the goals of a noise-compatibility program, accommodations such as those contained in the California proposals may be necessary to avoid the opposition of local governments.[164]

III. ENFORCEMENT PROCEDURES

Enforcement procedures for noise-compatibility programs present two issues: first, whether there is a need for special enforcement; and second, assuming an enforcement mechanism is necessary, what form it should take.[165] The special problems of enforcing noise-compatibility zoning regulations stem from the interjurisdictional nature of airport land use planning. There are economic incentives, such as expansion of the tax base, for communities to allow the growth of incompatible development.[166] Additionally, real estate speculators may withhold property from the market in order to cause a change in zoning laws, thereby diminishing the supply of available land, and increasing the market value of remaining property.[167] The most efficient uses for expensive land

---

[159] *See* note 132 *supra*.

[160] California Senate Bill S. 1995 (Mar. 23, 1976), as amended in the Senate (May 4, 1976) (introduced by State Senator Anthony Beilenson) [hereinafter cited as S.B. 1995].

[161] *Id.* at § 4.

[162] *Id.* at § 6.

[163] *See id.*, at § 5.

[164] The conflict between the Minneapolis-St. Paul Metropolitan Council and MAC, where planning and implementation are separated, however, has led to a stalemate. *See* note 153 *supra*.

[165] The Environmental Protection Agency considers one of the basic criteria for an administrative framework for airport and aircraft noise regulation to be that "[t]he institutions assigned the responsibility of developing and adopting noise regulations must have both the legal and practical power, and adequate resources to enforce such regulations." LEGAL AND INSTITUTIONAL ANALYSIS, *supra* note 1, at 3-10.

[166] *See* note 133 *supra*. Even if land use authority is located at a regional or county level, coordination of building codes, tax policies, and public development is still necessary.

[167] LAND USE CONTROL STRATEGIES, *supra* note 91, at 29.

are high-density residential or commercial development, neither of which are noise-compatible.[168] Moreover, if some jurisdictions reduce the available land supply for noise-incompatible uses through zoning, property values in jurisdictions without noise-compatibility regulations will increase. As a result, noise-compatible development will not be uniform, and municipal competition for enlarged tax bases will be intensified.[169] Therefore, it is necessary to develop an enforcement system to ensure that the costs of a compatibility program are distributed equitably among all jurisdictions.

One means of enforcing policies is through "action-forcing devices," administrative requirements designed to ensure that decision-makers consider certain factors prior to a decision.[170] The National Environmental Policy Act of 1969 (NEPA),[171] the most prominent example of this form of enforcement,[172] requires federal agencies to prepare a detailed statement of the projected environmental impact for all "major federal actions significantly affecting the quality of the human environment."[173] During the process of preparing the Environmental Impact Statement (EIS), agencies must consider alternative actions and consult with other agencies having environmental expertise.[174]

The most fundamental impact of NEPA as an "action-forcing" device may be the information that it provides the public about agency decisions. The information contained in the EIS's has provided citizens and organizations with a basis for legal challenges to individual projects.[175] The threat of legal action has not only been felt in those cases, but has "forced" consideration of environmental issues in many other projects as well.[176]

---

[168] *Id.* at 20, 29.

[169] *See* note 133 *supra.*

[170] *Hearings on S. 1075, S. 237, S. 1752 Before the Senate Comm. on Interior and Insular Affairs,* 91st Cong., 1st Sess. 112-35 (1969) (testimony of Dr. Lynton K. Caldwell). *See also* Environmental Defense Fund, Inc. v. Corps of Engineers, 492 F.2d 1123, 1132 n. 13 (5th Cir. 1974).

[171] Pub. L. No. 91-190, 83 Stat. 852, (codified at 42 U.S.C. §§ 4321-4347 (1970 & Supp. V 1975)).

[172] Other examples include the Inflationary Impact Statements mandated by Exec. Order No. 11,821, 39 Fed. Reg. 41,502 (1974); State Environmental Policy, 1973 MINN. LAWS ch. 412, MINN. STAT. ANN. §§ 116D.01-.07 (Supp. 1977); Governmental Consideration of Environmental Impact, 1971 WIS. LAWS ch. 274, WIS. STAT. ANN. § 1.11 (Supp. 1976). As of April 1976, 26 states have adopted environmental action-forcing requirements of their own. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: THE SEVENTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 135 (1976) [series hereinafter cited as CEQ].

[173] National Environmental Policy Act of 1969, § 102(c), 42 U.S.C. § 4332(c) (1970 & Supp. V 1975).

[174] *Id.*

[175] 7 CEQ, *supra* note 172, at 122-32; Andrews, *Agency Responses to NEPA: A Comparison and Implications,* 16 NAT. RESOURCES J. 301, 315-17 (1976).

[176] 3 CEQ, *supra* note 172, at 226-27 (1962); 6 CEQ, *supra* note 172, at 628 (1975). *But see* Cortner, *A Case Analysis of Policy Implementation: The National Environmental Policy Act*

The use of "action-forcing" measures has also been proposed with respect to airport land use decisions. Proposed amendments to the California ALUC provisions,[177] for example, would require that a local agency overriding an ALUC decision to veto a development project "make specific findings demonstrating that the proposed action is consistent with the purposes" of the Act.[178] By compelling consideration of noise-compatibility in development plans and providing a basis for judicial review of land use decisions, these "findings" would function in a manner similar to an EIS. The courts would become the forum for requiring that the "findings" be consistent with an airport noise and safety compatibility plan prepared by the ALUC.[179]

By requiring a local agency to make "findings" only when overriding an ALUC veto of a local decision, the proposed California amendments place the "action-forcing" device at the end of the decision-making process. If the goal of such a mechanism is to force consideration of noise-compatibility concerns, this purpose may be served more effectively by requiring that the "findings of consistency" be made at the time of local government approval of the development plan. Forcing the original approval to be accompanied by a "finding of consistency" would provide incentives for developers, local land use agencies, and local legislative bodies to modify proposals sooner in order to accommodate noise impact concerns. Significantly, conditioning the initial approval of a development plan upon its conformity with noise-compatibility goals should bring such concerns to the attention of the developer at a stage where modification is still economically feasible.[180] Further-

---

of 1969, 16 NAT. RESOURCES J. 323, 323-24 (1974): "Federal agency implementation of NEPA and response to the requirement in Section 102(2)(c) for environmental impact statement (EIS), has been reluctant and incomplete."

[177] S.B. 1995, *supra* note 160.

[178] *Id.* at § 6(l)

[179] *See id.* at § 5. "Findings" by an administrative agency may be adjudged by a court as inadequate where they reveal a failure to make a full consideration of the problem as intended by the authorizing statute. *See* Lindberg v. Zoning Bd. of Appeals, 8 Ill. 2d 254,133 N.E.2d 266 (1956).

Citizen enforcement might take the form of mandamus proceedings, in which either the local government body, or the ALUC, would be compelled to measure the proposed development against the airport noise and safety compatibility plan. S.B. 195, § 5. Mandamus is available either to "compel performance of a ministerial act which the law specially enjoins . . . .," *see, e.g.*, CAL. CODE. CIV. PROC. § 1085 (1970), ". . . or to inquire into the validity of some kinds of quasi-judicial actions of administrative agencies. . . ." *See, e.g.*, CAL. CODE. CIV. PROC. § 1094.5 (1970). Gong v. City of Fremont, 250 Cal. App. 2d 568, 58 Cal. Rptr. 664, 667 (1967). A writ of mandamus is issued at the discretion of the court. Kartheiser v. Superior Court, 174 Cal. App. 2d 617, 622, 345 P.2d 135, 139 (1959). Alternatively, individual citizens might bring an action under the provisions of a "liberal standing-to-sue" statute. *See, e.g.*, CONN. GEN. STAT. ANN. § 22a-16 (1975); MICH. COMP. LAWS ANN. § 691.1202(1) (Supp. 1976).

[180] *Cf.* Calverts Cliff's Coord. Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), where the court invalidated the AEC's NEPA implementation regulations. The regulations delayed the

more, the "findings" prepared by the local body will provide detailed information to the public at an earlier time and allow citizen enforcement of the adequacy of the findings.[181]

There are several problems which have been raised in connection with "action forcing" procedures, and, in particular, NEPA. The content and scope of the material which must be included in the "findings" requires the issuance of administrative guidelines and criteria,[182] and compliance with these guidelines delays the project to some extent, with accompanying increases in costs.[183] Requiring "findings" may also lead to abuse of the process of judicial review. In order to thwart development plans, parties may file unfounded suits designed solely to delay or to increase the costs of the proposed development.[184]

An alternate approach to enforcing a noise-compatibility program would be to condition state financial assistance upon a showing of substantial action to promote compatible development.[185] While the imposition of zoning on a local level may not require outside funding, a noise-compatibility program encompassing property acquisition, property regulation, and enforcement of building and housing codes would require funding beyond the capacity of individual municipalities.[186] The Federal government, for example, has used this approach in providing grants for airport development pursuant to the terms of the Airport and Airways

---

writing of an EIS for nuclear power plants until application was made for an operating license. "By refusing to consider the requirement of alternatives until construction is completed, the Commission may effectively foreclose the environmental protection desired by Congress. . . . If 'irreversible and irretrievable commitment[s] of resources' have already been made, the license hearing (and any public intervention therein) may become a hollow exercise." *Id.* at 1128.

[181] *See* note 179 *supra*.

[182] *See generally* CEQ Guidelines: Preparation of Environmental Impact Statements, 40 C.F.R. Part 1500 (1975), and proposed FAA Order 1050.1B, Policies and Procedures for Considering Environmental Impacts, 41 Fed. Reg. 34222-34238 (Aug. 12, 1976). For a description of the CEQ guidelines, see Deutsch, *The National Environmental Policy Act's First Five Years*, 4 ENV. AFF. 3, 13-18 (1975). The guidelines consider the types of actions covered under the Act, 40 C.F.R. Part 1500.5, the content of EIS's, *id.* at Part 1500.8, procedures for review and comment, *id.* at Part 1500.9, and the effect of NEPA on existing agency mandates. *Id.* at Part 1500.4.

[183] Cortner, *supra* note 176, at 324-25 (1976). *See also* Calverts Cliff's Coord. Comm. v. AEC, 449 F.2d 1109, 1128 (D.C. Cir. 1971).

[184] Dreyfus & Ingram, *The National Environmental Policy Act: A View of Intent and Practice*, 16 NAT. RESOURCES J. 243, 258-59 (1976). *See also* Comment, *Four Years of Environmental Impact Statements: A Review of Agency Administration of NEPA*, 8 AKRON L. REV. 545, 565-66 (1973).

[185] A COMPREHENSIVE POLICY, *supra* note 28, at 25-26, 47-49.

[186] LEGAL AND INSTITUTIONAL ANALYSIS, *supra* note 1, at 4-12 to 4-13. For example, Los Angeles International Airport has spent $136 million acquiring noise-impacted land, and has paid an additional $20 million in damages to noise-impacted schools. BACKGROUND REPORT, *supra* note 132, at 3. The airport has spent an average of $200,000 per acre purchased, and redevelopment is not expected to cover the expenses. LAND USE STRATEGIES, *supra* note 91, at 51.

Development Act.[187] Prior to approving an airport development grant, the Secretary of Transportation must receive assurance that "appropriate action, including the passage of zoning laws," is taken "to the extent reasonable," to limit development of airport environs to airport-compatible uses.[188] The Airport and Airways Development Act is directed, however, at the airport proprietor and is only indirectly applicable to local land use agencies.[189] In addition, the indefinite language of the Act, "to the extent reasonable," undercuts strong enforcement efforts by either the Department of Transportation or citizen groups.[190] Conditioning noise-compatibility funding by state government to land use agencies upon a showing of substantial action may be a more effective means of promoting such a policy.

Conditional assistance legislation with clear restrictions, directed at the responsible actor, would have an immediate impact by providing a financial incentive for implementing noise-compatibility objectives.[191] Two major assumptions would be inherent in a conditional assistance program. The first is that airport noise-compatibility is an important goal of the land use agency. The second is that the fiscal and nonfiscal costs of conforming a program to state or federal dictates do not outweigh the benefits of outside funding. Local governments, however, may wish to maximize their tax revenue base by developing property to its highest economic potential.[192] The demand for residential development is a basic short-run factor operating against a noise-compatibility program.[193] Imposing the additional burden of compliance with state or federal direction may be an unacceptable interference in local affairs, causing the agency's refusal to accept the conditional funding.

Noise-compatibility policies may also be effectuated by means of a two-tiered implementation and enforcement procedure. Under this approach local land use agencies would have primary respon-

---

[187] Under the terms of the Airport and Airways Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 229, *as amended by* Airports and Airways Development Act Amendments of 1976, Pub. L. No. 94-353, 90 Stat. 871 (1976) (codified at 49 U.S.C. §§ 1701-1742 (1970 & Supp. V 1975)), the federal government is authorized to make planning and airport development grants. 49 U.S.C. §§ 1713, 1714 (1970 & Supp. V 1975). The 1976 Amendments authorize grants for the purchase of noise suppression equipment, the construction of physical barriers, landscaping to diminish the effect of aircraft noise, and the purchase of property rights to insure noise-compatible development. Pub. L. No. 94-353, at § 3(a)(1).

[188] 49 U.S.C. § 1718(4) (1970 & Supp. V 1975).

[189] *See* City of Inglewood v. City of Los Angeles, 451 F.2d 948, 956 (9th Cir. 1971), where the court refused to rule whether a neighboring community had the right to sue an airport proprietor for failure to meet the conditions of § 1718(4). *See also* text accompanying note 171 *supra*.

[190] 451 F.2d at 954-56.

[191] A COMPREHENSIVE POLICY, *supra* note 28, at 47.

[192] *See* note 133 *supra*.

[193] *Id.*

sibility for operating a noise-compatibility program. The state would establish standards for the program and would formulate individual compatibility plans if local agencies fail to meet the standards. The Clean Air Act Amendments of 1970[194] illustrate this approach. Under the 1970 Amendments, individual states are required to adopt and to submit to the Administrator of the Environmental Protection Agency implementation plans for national primary and secondary ambient air quality standards.[195] If the state fails to submit an implementation plan, submits an inadequate plan, or fails to make a required revision, the Administrator will promulgate an implementation plan for the recalcitrant state.[196]

The California ALUC system involves a two-tiered approach. Primary responsibility for noise-compatible development lies with local government, but it must conform with standards set by the county-level ALUC in a comprehensive land use plan.[197] Unlike the Clean Air Act Amendments, compliance with ALUC standards may be overridden by a four-fifths vote of the local agency.[198] Removing the override provision would provide a mechanism for state guidance of local airport land use policy decisions.[199]

A necessary feature of the two-tiered system is the existence of standards against which local efforts may be measured.[200] Ad hoc decisions as to the adequacy of local land use programs would have little deterrent effect upon incompatible development and would not provide guidance to individual communities regarding acceptable land use planning.[201] This difficulty would be met by the formulation of an "airport noise and safety plan" as suggested in the proposed California ALUC amendments.[202]

---

[194] Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified at 42 U.S.C. §§ 1857-1858a (1970 & Supp. V 1975)).

[195] *Id.* at § 110(a)(1), 42 U.S.C. § 1857c-5(a)(1) (1970 & Supp. V 1975).

[196] *Id.*at § 110(c)(1), 42 U.S.C. § 1857c-5(c)(1) (1970 & Supp. V 1975).

[197] CAL. PUB. UTIL. CODE § 21675 (Supp. 1975).

[198] Blitch, *supra* note 15, at 678-79. *See* Train v. Natural Resources Defense Council, 421 U.S. 60 (1975), for a history of the federal role in supervision of air pollution standards.

> The difference under the Amendments was that States were no longer given any choice as to whether they would meet this responsibility [to reduce air pollution]. For the first time they were required to attain air quality of specified standards, and to do so within a specified period of time.

Id. at 64-65.

[199] Blitch, *supra* note 15, at 679.

[200] *Cf.* National Primary and Secondary Ambient Air Quality Standards, 40 C.F.R. Part 50 (1976), and Requirements for Preparation, Adoption and Submittal of Implementation Plans, 40 C.F.R. Part 51 (1976) (guidelines for two-tiered implementation structure).

[201] An excellent basic document for airport noise-compatibility planning standards is AIRCRAFT NOISE IMPACT, *supra* note 19. EPA recommends, as part of its proposal to reduce airport noise, that the planning guidelines in AIRCRAFT NOISE IMPACT be used to judge noise-compatibility around airports. AIRPORT REGULATORY PROCESS, *supra* note 7, at 51,526.

[202] S.B. 1995, § 5, *supra* note 160. According to the BACKGROUND REPORT accompanying S.B. 1995, the "airport noise and safety plan" would define noise impact and crash hazard areas, and indicate compatible uses under state-established guidelines. BACKGROUND REPORT, *supra* note 132, at 8. *See generally* AIRCRAFT NOISE IMPACT, *supra* note 16, and the EPA endorsement of the planning guidelines contained therein, *supra* note 19.

The two-tiered enforcement model also appears to provide disincentives to local efforts to promote noise-compatible development. State government would be required to step in when local agencies fail to meet the standards. Therefore, local refusal to provide a noise-compatibility program would result in transferring the costs of administering the program to the state level.[203] Additionally, in order to maintain the capability for land use planning on the state level if the local agency defaults, a duplication of planning resources would be necessary. In order to remove the cost incentives for local government noncompliance, a device for assessing the defaulting local community for the costs of state formulation of a compatibility plan is essential to effective enforcement through a two-tiered model.[204]

IV. CONCLUSION

An essential element of an effective airport noise-compatibility development program is noise-compatibility zoning. While airport hazard zoning has often been successfully challenged on fifth amendment grounds as a "taking" of private property for public use without just compensation, airport noise-compatibility zoning is distinguishable upon two grounds. First, the size of the class benefitted by compatibility zoning is larger, encompassing the entire community. Second, the regulated land is not physically appropriated to the benefit of the public agency. On the basis of these distinctions, airport noise-compatibility zoning should be sustained in the face of a constitutional challenge.

In devising the institutional framework for a noise-compatibility program, specific state legislative authorization provides the ability to tailor a program to meet the needs of the problem at hand, and allows statewide concerns to be expressed. The adverse effects of parochialism will be reduced correspondingly. Jurisdictional cooperation is further assisted by locating the institutional authority at either the county or regional level of government. In addition, the combination of a specific legislative act and a county or regionally based location provides greater flexibility in dealing with individual noise-impact problems.

---

[203] The problems with New York City enforcement of air pollution controls are discussed in Schachter, *Some Criteria for Evaluating State and Local Air Pollution Control Laws*, 14 B.C. IND. & COM. L. REV. 583, 628-30 (1973).

[204] *See id.* at 628: New York City will seek civil penalties along withinjunctive relief, where air pollution violations are both serious and continuous. "The reason for seeking penalties in addition to an injunction is to decrease the likelihood of delays in compliance."

The proposed California ALUC amendments seek to establish an effective method of enforcing noise-compatibility policies. A possible improvement would be to modify the suggested "action-forcing device" so that the "findings of consistency" are reached at the same time as initial local government approval of the development project. Requiring that "findings" be made earlier in the decision-making process will provide a method of internalizing noise-compatibility goals at an early stage, lower administrative costs, and promote effective enforcement of compatibility goals as expressed in the ALUC "noise and safety" compatibility plans. The viability of conditional assistance as an enforcement procedure for a noise-compatible development program depends upon the force of the conditions. Furthermore, the requirements expressed in the conditions should be met directly by the local land use agencies, not indirectly through the airport proprietor. Finally, separating implementation and enforcement into a two-tiered framework may be an effective system for enforcing noise-compatibility policy. There must, however, be objective standards included in a "noise and safety plan" against which local efforts may be measured, and the costs of state formulation of a compatibility plan must be assessed upon a defaulting local community. Whatever the means chosen, however, thoughtful planning is essential to alleviate the airport noise problem.

—Mark Kantor