

THE CONFLICTING INTERESTS OF AIRPORT OWNER AND NEARBY PROPERTY OWNER

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In the field of airport law the most important questions confronting the lawyer today—and probably the most difficult—are those arising out of the conflict which almost inevitably exists between the interests of the owner or occupant of land in the immediate vicinity of an airport and those of the airport owner. These questions are: (1) Does the landowner to whom the operation of an airport or the low-flying of aircraft in landing or taking-off is obnoxious or damaging, have a cause of action for damages or injunctive relief against the owner of the airport or the flyer? (2) Can the airport owner, by court action or the adoption of airport zoning regulations, prevent the landowner from erecting a structure which would be an obstruction to the landing and taking-off of aircraft at the airport, or from using his property in a manner hazardous to such aircraft operations?

From the standpoint of the landowner, the airport is often a nuisance due to the noise of airplanes either on the ground or in the air, the dust resulting from aircraft operations, the glare of airport lights, the crowds attracted to the airport, the apprehension occasioned by the low-flying of planes in landing and taking-off, or a combination of two or more of these incidents of airport operation. Unless the owner of an airport site or existing airport can be enjoined from establishing an airport, from continuing to operate it, or from permitting the operations complained of, or can be discouraged from doing so by successful suits for damages, the landowner's property may be depreciated in value, his health and that of his family and friends affected, his business injured, his property physically damaged, or his property rights infringed. On the other hand, if the landowner can collect damages or obtain injunctive relief, the person or public agency desiring to construct or operate the airport may find it difficult if not impossible to do so, depending upon the nature of the relief granted.

Similarly, the use made of property in the vicinity of an airport may be equally damaging to the airport owner. For one thing, such property may often be used in a way creating a hazard to the safe operation of aircraft at the airport, thereby diminishing its utility and value. Such hazards may take the form of glare in the eyes of pilots, dust or smoke resulting in a lessening of visibility, electrical interfer-

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ence with radio communication between airport and flyer or with radio aids to air navigation, or a building or other structure which is so located, and of such a height above the elevation of the airport, as to obstruct one of the aerial approaches of the airport.

Of these possible hazards, the physical obstruction is by far the most dangerous to the users of aircraft and therefore the most serious to the airport owner. But more than this, the physical obstruction in effect reduces the length of the runway or landing strip and therefore may destroy the utility of the airport and the large investment it usually represents.

According to the airport approach standards of the Civil Aeronautics Administration,¹ an airport other than one which is so small as to be suitable only for light personal aircraft,² if it is to accommodate modern planes with safety, must have aerial approaches or airspace channels extending at least two miles from the ends of its runways or landing strips, within which an airplane can descend or climb at a rate of 30 feet horizontally to one foot vertically, or, in the case of an approach to be used for instrument-landings, descend at a rate of 40 to 1.³ This means that in the case of most airports, there must be no structure, tree, or other object anywhere within two miles of the airport, in line with one of its runways, which is higher above the elevation of the airport than $1/30$ or $1/40$ its distance from the end of the runway. As an example, a 50 foot structure constructed on land having the same elevation as the airport, would be an obstruction if located within 1,500 feet of the end of a runway, reducing the effective length of the runway by the number of feet it was within such 1,500 foot limit. Thus, if located 500 feet from the end of the runway, such a structure would make 1,000 feet unusable for landings and take-offs over it, reducing the effective length of the runway by a third.

It will thus be seen that many of the landowners near an airport may have it in their power to seriously injure its owner merely by making a normal and reasonable use of their property. This makes it important to the airport owner that ways be found and steps taken to limit the height of future structures and objects of natural growth in the vicinity of the airport, without undue expense. But this again is of course directly contrary to the interests of the landowner, particularly if the limitations are to be imposed without compensation.

This conflict of interests between the airport owner and the nearby landowner is necessarily of great concern to the public, and this only partially because of the public interest in protecting and preserving private property rights. Of far greater concern to the public is the fact that many airports⁴ are owned and operated by municipalities, counties, states, and other public agencies as public facilities,⁵ while

¹ CAA Office of Airports Drawing No. 152-C, as revised November 19, 1941.

² The CAA recommends that such airports have approached permitting landings and take-offs at a 20 to 1 rate of descent or climb. CAA Drawing No. 152-C, *supra* note 1.

³ The CAA also recommends the obstruction marking and lighting of any structures near an airport which, although conforming to these standards, are materially higher than other objects in the vicinity.

⁴ 1,067 as of December 31, 1944. CAA, CIVIL AVIATION AND THE NATIONAL ECONOMY (September, 1945), Table C-18, p. 117.

most of those which are privately owned are public utilities, serving a public need. If such an airport is abated, or the establishment of such an airport prevented, the consequences may well be not only a serious injury to the owner of the airport property but the loss of an essential and valuable asset to the entire community, to civil aviation, and to the national defense. And if an airport hazard is established in the vicinity of such an airport, not only is the utility of the airport as a public facility impaired but the lives and property of the public are endangered. As is stated in many state airport zoning acts, "the creation or establishment of an airport hazard is a public nuisance and an injury to the community served by the airport in question," making it "necessary in the interest of the public health, public safety, and general welfare" that the creation or establishment of airport hazards be prevented.⁶

Actually then, the problem with which the bar, the legislatures, and the courts are confronted is not only how to resolve the conflicting property rights of the airport owner and the neighboring landowner but how far to protect the public interest in the development and availability of airports at the cost of interfering with private property rights.

This problem is coming more and more to the fore as aviation activity increases. Complaints about low-flying and airport noises are heard more frequently. City councils, county boards, zoning commissions, and state aeronautics commissions are being petitioned more often to prevent the establishment of airports in residential areas. More and more suits are being brought by landowners to enjoin airport operations and to recover for damages resulting from such operations. And the number of state airport zoning acts and municipal and county airport zoning ordinances is increasing rapidly.

Aviation itself is becoming alarmed. As evidence of this, an official of the Civil Aeronautics Administration recently took occasion to warn pilots that unnecessary low-flying is building up a prejudice against airports which may cost aviation the support of the public for needed airport development, stating that "we are facing a serious problem in many localities in obtaining satisfactory airport locations because

⁶ It is well established by court decisions that the establishment and operation of an airport is a public purpose for which a political subdivision may issue general obligation bonds, levy taxes, and condemn land. See Ulman, *The Public Nature of Airports* (1941) 13 GEO. L. J. 198, and RHYNE, AIRPORTS AND THE COURTS (1944) 17-31.

⁷ Substantially similar language is to be found in those airport zoning laws which are patterned upon one or another of the several model airport zoning acts recommended by the National Institute of Municipal Law Officers and the Civil Aeronautics Administration since April, 1939. These airport zoning laws include acts of Alaska, Hawaii, and 24 states, as follows: Alaska L. 1943, c. 23; Hawaii L. 1945, No. 181; Ariz. L. 1945, c. 15; Ark. L. 1941, c. 116; Fla. L. 1945, c. 23,79; Ill. L. 1945, S. B. 445; Ind. L. 1945, c. 190, sec. 9; Iowa L. 1945, H. F. 366; La. L. 1944, No. 118; Me. L. 1941, c. 142; Md. L. 1944, c. 13; Mass. L. 1941, c. 537; Minn. L. 1945, c. 303, sec. 24-36; Neb. L. 1945, L. B. 209; N. H. L. 1941, c. 145; N. M. L. 1941, c. 171; N. Y. L. 1945, c. 901; N. C. L. 1941, c. 250; N. D. L. 1945, S. 56; Okla. L. 1945, c. 359; Pa. L. 1945, c. 107; S. D. L. 1943, c. 2; Tenn. L. 1945, c. 74; Utah L. 1945, c. 315; Vt. L. 1945, H. B. 170; Wash. L. 1945, c. 174.

of the objections of neighboring residents."⁷ Moreover, both that agency and the Civil Aeronautics Board, departing for the first time from their established policy of not participating in such cases, intervened last year in the *Dlugos* case⁸ in opposition to continuance of a temporary injunction which the court had issued at the request of a farmer adjacent to the Allentown-Bethlehem Airport, enjoining United Air Lines from operating aircraft above his property at a height of less than 100 feet. And, as further evidence of this concern, the Committee on Interstate and Foreign Commerce of the House of Representatives has warned that the tremendous investment in airports will become valueless and the airports death traps unless there is adequate airport zoning.⁹ In the words of the Committee, "unless zoning is accomplished now, before airport approaches are further obstructed, the task will some day reach staggering proportions. Few steps are of such urgency. Few steps are so essential to promote safety."

But as serious as this problem is today, it will undoubtedly increase greatly in importance as aviation progresses. Aviation experts are predicting an increase in the number of aircraft in this country within the next ten years from 30,000 to over 400,000.¹⁰ And it is expected that Congress will soon authorize a program of Federal grants for airport development designed to double the number of civil airports in the continental United States within five to ten years, as recently recommended by the Civil Aeronautics Administration.¹¹ It seems evident that any such expansion

¹¹ CAA, NATIONAL AIRPORT PLAN (November 28, 1941) H. R. Doc. No. 807, 78th Cong., 2d Sess. sion of aviation must bring with it many additional instances of conflicts between the interests of airport owners and nearby landowners.¹²

In view of these considerations, it is apparent that the legal questions posed in the opening paragraph of this paper constitute a real challenge to the law. In the following paragraphs, an attempt will be made to show how these questions have been answered by the courts and to suggest the legal principles which are involved and should be applied if this challenge is to be met.

⁷ CAA press release dated September 2, 1945, reporting statement of John H. Geisse, Assistant to the CAA Administrator for Personal Flying.

⁸ *Dlugos v. United Air Lines*, 1944 U. S. Av. Rep.—(Ct. Comm. Pl. Pa., Lehigh Co., May 27, 1944).

⁹ H. R. REP. No. 784, 78th Cong., 1st Sess. (October 20, 1943).

¹⁰ CIVIL AVIATION AND THE NATIONAL ECONOMY, *supra* note 4, at 62.

¹² Such conflicts can sometimes be avoided by action of the airport owner in locating the airport in an unpopulated or rural area, in so laying out the runways that aircraft approaches and take-offs will not be made over residence or built-up areas, in acquiring the lands which otherwise would be affected, or avigation easements therein, or in establishing airport rules and air traffic patterns designed to minimize annoyance to neighboring landowners. And science may well help to solve the problem by reducing the noise of airplane engines and propellers (see CIVIL AVIATION AND THE NATIONAL ECONOMY, *supra* note 4, at 47) or by improving the performance of aircraft through application or use of such scientific discoveries as the helicopter, jet-assisted take-offs, reversible propellers, radar, or even atomic power. However, any such assistance from science is largely speculative and in the future while the possibility of finding a solution to the problem in the manner in which the airport is developed is considerably limited by the fact that airports, if they are to be as useful as they should be, must be located in close proximity to the communities they are to serve where land is usually expensive, aeronautically adequate airport sites are often scarce, and neighboring lands may well be used for residential or industrial purposes. Moreover, there is of course very little that can be done to avoid conflicts with the interests of neighboring property owners where the airport is already established.

IS THE AIRPORT A NUISANCE?

While it is well established that an airport is not a nuisance per se,¹³ it appears from the cases on this subject which have been decided to date that an airport may be, or create, a private or public nuisance in fact. In two of those cases the airport itself was completely abated,¹⁴ and in another the normal airport activities and operations were so circumscribed by injunction as to amount to complete abatement.¹⁵ In seven cases, injunctive relief was granted against operation of the airport in a certain manner or against low-flying in connection with use of the airport.¹⁶ In still another case, it was held that low-flying incident to the operation of a municipal airport was a nuisance to an adjoining landowner which entitled the latter to damages if not to injunctive relief.¹⁷ And in a still more recent case, the court warned the defendant city that its operation of a proposed new airport would probably be a nuisance by reason of its nearness to three schools, a church, and several homes, and if so would be enjoined.¹⁸

¹³ *Swetland v. Curtiss Airports Corp.*, 41 F. (2d) 929, 932 (N. D. Ohio, 1930); *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S. E. 817 (1934); *Batcheller v. Commonwealth of Virginia*, 176 Va. 109, 10 S. E. (2d) 529 (1940); *Delta Air Corp. v. Kersey*, 193 Ga. 862, 20 S. E. (2d) 245 (1942); *Warren Township School District No. 7 v. City of Detroit*, 308 Mich. 460, 14 N. W. (2d) 134 (1944).

¹⁴ *Swetland v. Curtiss Airports Corp.*, 55 F. (2d) 201 (C. C. A. 6th, 1931) modifying decision cited *supra* note 13 (construction and operation of privately-owned airport enjoined at request of owners of residential property located across road from airport site); *Gay v. Taylor*, 19 Pa. Dist. & Co. Rep. 31 (Ct. of Comm. Pl. Pa., Chester Co., 1932) (operation of privately-owned airport enjoined at request of owners of adjoining country residences and hospital).

¹⁵ *People v. Dycer Flying Service, Inc.*, 1939 U. S. Av. Rep. 21, 235 CCH 1834 (Cal. Super. Ct. L. A. Co., 1939) (injunction issued at request of city enjoining operation of privately-owned airport in manner causing disturbance to landowners in adjacent residential area, as a public nuisance).

¹⁶ *Thrasher v. City of Atlanta*, *supra* note 13 (judgment reversed with direction to issue injunction against continued spreading of dust in excessive or unreasonable quantities over residential property in vicinity of Atlanta Municipal Airport); *Burnham v. Beverly Airways, Inc.*, 311 Mass. 628, 42 N. E. (2d) 575 (1942) (decree affirmed upholding injunction against flying below height of 500 ft. over residence 2,800 ft. from city-controlled but privately-operated airport); *Mohican & Reena, Inc. v. Tobiasz*, 1938 U. S. Av. Rep. 1, 235 CCH 2205 (master's report filed in Super Ct., Hampden, Mass., 1938) (corporate owner of summer camp for children one-half mile from defendants' privately-owned airport found entitled to injunction against flying below altitude of 1,000 ft. within 500 ft. of camp property); *Vanderslice v. Shawn*, 27 A. (2d) 87 (Del. Ct. Chan., 1942) (residential owners held entitled to injunction enjoining owners of private airport from permitting flights at less than 100 ft. over adjacent dwellings); *Alhambra Airport case*, 13 J. OF AIR L. & COMM. 138 (1941) (decree issued on petition of certain taxpayers and Alhambra Board of Education, enjoining further use of private airport for pilot training and limiting future use to emergency landings and actual business needs of two aircraft manufacturing plants located at airport); *Dlugos v. United Air Lines*, *supra* note 8 (airline enjoined from operating planes at altitude below 100 ft. over plaintiff's fields adjacent to municipal airport, on days when plaintiff engaged in farming such fields, not to exceed 10 days during following year, provided 5 hours' written notice given airline at its airport office); *Glatt v. Page*, unreported (Dist. Ct. Neb., 1928) (injunction granted against flights below 100 ft. over poultry farm).

¹⁷ *Kersey case*, *supra* note 13 (owner of house at end of runway of Atlanta Municipal Airport held to have stated cause of action for damages and perhaps injunction in alleging damages resulting from low-flying). But cf. *Rochester Gas & Electric Corp. v. Dunlop*, 148 Misc. 849, 266 N. Y. Supp. 469 (Monroe Co. Ct. N. Y., 1933) (damages given on theory of trespass); *Causby v. U. S.*, 235 CCH 2216 (U. S. Ct. Cl., 1945) (damages given on theory of a taking under the Tucker Act); *Neiswonger v. Goodyear Tire and Rubber Co.*, 35 F. (2d) 761 (N. D. Ohio, 1929) (damages given on theory that civil suit is authorized for violation of minimum height of flight regulations); cf. *Johnson v. Curtiss Northwest Airplane Co.*, 1928 U. S. Av. Rep. 44 (Dist. Ct. Ramsey Co. Minn., 1923) (defendant enjoined from further violations of state minimum height of flight statute).

¹⁸ *Detroit case*, *supra* note 13.

However, there are also airport nuisance cases in which the court refused to enjoin the establishment or operation of an airport¹⁹ or set aside an airport license issued by the State Corporation Commission,²⁰ a case in which injunctive relief against the operation of air-meets was denied,²¹ and cases in which even damages were refused for injuries resulting from the operation of an airport.²² And in some of the cases in which some measure of relief was granted, notably the *Kersey* case,²³ that relief was considerably less than that asked by the petitioner.

Granting then that an airport may or may not be or create a nuisance for which relief will be given by the courts, the question is when or in what circumstances is this the case.

While it is always difficult to resolve conflicts between the interests of neighboring property owners, it is submitted that the problem is considerably simplified, as well as more accurately stated, if considered as one of adjusting two public interests, i.e., that in preventing interference with the landowner's use and enjoyment of his property and that in preventing interference with the establishment or continued operation and use of the airport.²⁴ The former of course depends upon the value to society of the uses to which the land is put or adaptable and the extent to which the airport has interfered, and will interfere, with that use and enjoyment; the latter upon the value to the public of the proposed or existing airport and the effect upon such value which the granting of the relief requested would have. Using this test in a particular case, if the former public interest outweighs the latter, the airport operation complained of is a nuisance and relief should be granted; if the opposite is true, the interference with the landowner's property rights is justified and no nuisance has been created.

For example, the landowner would be entitled to relief where the airport was privately-owned and privately-used and its proper operation seriously interfered with his use or enjoyment of the land, where the airport owner had not acquired enough land to prevent undue interference with the then-existing land uses in the neighborhood, or where the injury was not reasonably necessary or could feasibly

¹⁹ *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N. E. 385 (1930); *Meloy v. City of Santa Monica*, 124 Cal. App. 622, 12 P. (2d) 1072 (1932); *Detroit* case, *supra* note 13; *Nicholas v. Mason City*, unreported (Iowa, 1941); *Littlefield v. City of Tulsa*, unreported (Com. Pl. Ct., Tulsa, Okla., 1939); *Miles v. Louisville & Jefferson County Air Board*, 235 CCH 1881 (Ky. Ct. of App., 1940).

²⁰ *Batcheller* case, *supra* note 13.

²¹ *Lehmaier v. Wadsworth*, 122 Conn. 626, 191 Atl. 521 (1937).

²² *Smith* and *Meloy* cases, *supra* note 19; cf. *Sysak v. DeLisser Air Service Corp.*, 235 CCH 2005 (N. Y. Sup. Ct., Nassau Co., 1931).

²³ *Supra* note 13.

²⁴ It is suggested that authority for applying this balancing of public interests test in the airport nuisance cases may be found not only in the many cases which have been decided on the question whether the interference with private property rights resulting from the use made of adjoining property by a private person or public agency is justified but in the numerous cases raising the question whether the adoption or administration of a state, municipal, or county police regulation (such as regulations dealing with public nuisances, city zoning, and slum clearance) is, in its effect upon private property rights, a valid exercise of the police power or an unconstitutional taking or confiscation. For a valuable case involving the analogous conflict of interests between railroads and neighboring landowners, see *Richards v. Washington Terminal Co.*, 233 U. S. 546 (1914).

be avoided or mitigated. In any of these events, the relief granted should include both damages and an injunction but with the difference that, in the first two cases, the injunction should go as far as necessary to give adequate relief, even if this means complete abatement of the airport, while in the third case, it should go only as far as to enjoin such of the activities complained of as might be unnecessary and, where possible without seriously interfering with operations at the airport, require conduct of other activities in such a way as to avoid or lessen further injury.²⁵

Conversely, it appears that all relief should be denied where the injury to the landowner is the unavoidable result of necessary airport operations and the airport is properly constructed and either publicly-owned or used extensively by the public.²⁶ As a general proposition, it would seem that neighboring property owners are not entitled to either injunctive relief or damages for any inconvenience, annoyance, or other injury to them resulting from low-flying, noise, dust, crowds, or other incidents of operations at a properly located and constructed airport, where there is a considerable public use of and benefit from such airport and it is operated with as much regard for their interests as is consistent with safety and efficiency.

While these suggested principles have not been expressly stated or approved by the courts, it is submitted that they find support in the results reached in the airport nuisance cases cited *supra* and to some extent in the reasoning of the opinions, and that they explain those results. In other words, it is suggested that the courts have been influenced by the public interest factor, whether consciously or not,²⁷ and that this is the real explanation of their decisions even though many of them were rested on other grounds.

Thus, in each of the three cases in which airports were abated as nuisances, the *Swetland*,²⁸ *Gay*,²⁹ and *Dycer*³⁰ cases, the airport was privately owned and operated while the plaintiff's property had been put to valuable use, in the *Swetland* and *Dycer* cases for residence purposes and in the *Gay* case for the establishment of a hospital. Similarly, in the *Burnham*, *Mohican*, *Vanderslice*, and *Alhambra* cases,³¹ in which certain airport operations were enjoined, the airport involved in each case was small and privately operated while the plaintiff either had his home nearby or, in the *Mohican* case, was operating a large well-established camp for children. As for the two cases in which injunctive relief was granted despite the fact that the

²⁵ For recognition elsewhere of this distinction between necessary and unnecessary injuries, see HUBBARD, McCLINTOCK AND WILLIAMS, AIRPORTS—THEIR LOCATION, ADMINISTRATION AND LEGAL BASIS (Harvard City Planning Studies, Vol. 1, 1930) 125-131.

²⁶ For excellent appraisals of the community and national interest in airports, see: RHYNE, *supra* note 5, at 17-31; Ulman, *supra* note 5; SEN. REP. No. 224, 79th Cong., 1st Sess. (April 30, 1945) 9-14; H. R. REP. No. 844, 79th Cong., 1st Sess. (June 30, 1945) 2.

²⁷ This consideration has had some attention in the opinions of the Federal district and circuit courts in the *Swetland* case, *supra* notes 13 and 14, and in those of the highest Massachusetts and Georgia courts in the *Burnham*, *Thrasher*, and *Kersey* cases, *supra* notes 16 and 13. Of these opinions, that in the *Kersey* case is particularly recommended for its treatment of this subject.

²⁸ *Supra* notes 13 and 14.

³⁰ *Ibid.*

²⁹ *Supra* note 14.

³¹ *Supra* note 16.

airport involved was publicly owned and operated, the *Thrasher* and *Dlugos* cases,³² the court was careful in each case to limit the injunction issued in such a way as not to interfere materially with operation and use of the airport—a feature also of the relief granted in the *Burnham* and *Mohican* cases.³³ And in another case involving a municipal airport, the *Kersey* case,³⁴ while the court in finding that the lower court had erred in sustaining the city's demurrer, held that the city had so constructed and maintained the airport "as to require such low flying over the home of the petitioner as to constitute an unreasonable interference with the health of petitioner and his family," it was stated that "if on the trial it should appear that it is indispensable to the public interest that the airport should continue to be operated in its present condition, it may be that the petitioner should be denied injunctive relief."

The same principle is apparent in the airport and low-flying nuisance cases in which relief was denied. For example, while the airport in the famous *Smith* case³⁵ was privately owned, it was used by the public for charter flights and the low-flying complained of was over unimproved land and therefore caused no actual damage to its owner.³⁶ In the *Nicholas* case,³⁷ the public interest in protecting the landowner was greater, he being the owner of a turkey farm, but so was the public interest in preventing interference with the airport, which was municipally-owned. And in the *Batcheller* case,³⁸ although the plaintiffs' lands were used for expensive residences, they were located some distance from the site of the proposed airport, which was to be established and operated by the University of Virginia, a tax-supported agency.

IS HARMLESS LOW-FLYING A TRESPASS?

This problem of determining whether the landowner should have a cause of action for damages or injunctive relief against the owner of the airport or the flyer using the airport is comparatively simple where the operation of the airport or the low-flying results in actual damage to him. However, the problem is considerably more complicated where the landowner owns the airspace above his land to a height below which aircraft can fly without interfering with his use and enjoyment of his property or otherwise occasioning him actual damage. Where such property rights in airspace exist, it would appear at first glance that each harmless flight through privately-owned airspace is a technical trespass for which the landowner may recover nominal damages and that continued flights of this nature might result in the granting of injunctive relief against the flyer responsible or even against the owner of the airport.

Prior to the development of aviation, the prevailing concept of rights in airspace was expressed by the ancient maxim of the common law "*cujus est solum ejus est usque ad coelum*," which may be freely translated as "he who owns the land owns

³² *Ibid.*

³⁵ *Supra* note 19.

³⁸ *Supra* note 13.

³³ *Ibid.*

³⁶ See discussion *infra*, p. 548.

³⁴ *Supra* note 17.

³⁷ *Supra* note 19.

up to the sky."³⁹ However, in the aviation cases involving the flight of aircraft over private property, this rule has been consistently and completely rejected. In lieu of this concept, there appear to be, in general, three possible theories of airspace ownership, each of which has had its advocates in the courts and the many scholars and legal committees that have expressed their views on the subject.⁴⁰

Of these theories, one regards ownership as extending "ad coelum" subject to a public easement for aerial transit at heights not interfering with the reasonable enjoyment of the surface. Another, which is almost the exact opposite of the "ad coelum" theory, is that there is *no* ownership of the unenclosed or unused air space. And the third, the zone theory, simply divides the airspace into two horizontal zones, the landowner owning that contained in the lower zone but not that of the upper. This limit is usually determined either by the height of "possible effective possession" or "effective user," meaning the height to which the owner of the land may erect a structure or otherwise use his property, or by the altitude below which repeated flights of aircraft would constitute a nuisance to the use then being made of the surface.

During the years 1920 through 1926, when the question of the lawfulness of flight was receiving its first serious attention, the prevailing view appears to have been the compromise easement theory. This view was advocated by many scholars and in 1922 was adopted by the American Bar Association and the Conference of Commissioners on Uniform State Laws in drafting the original Uniform State Law for Aeronautics sponsored by those bodies. In that model act, it is expressly provided, as Section 3, that "the ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in Section 4." This right is stated in the following language:

"Flight in aircraft over the lands and waters of this state is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space above the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath."

These provisions were included in many of the state aviation laws enacted in the years following the drafting of this model act,⁴¹ and in 1934, this theory was accepted by the American Law Institute in its Restatement of the Law of Torts.⁴² However, the easement theory has had few advocates and many critics since 1936 and, with three possible exceptions in recent years,⁴³ has been rejected by all courts consider-

³⁹ Sweeney, *Adjusting the Conflicting Interests of Landowner and Aviator in Anglo-American Law*, 3 J. OF AIR L. 329-373, 531-625, at p. 347; RHYNE, *supra* note 5, at 94.

⁴⁰ The classification of theories used in this paper corresponds to that advanced in Sweeney, *ibid.*, differing somewhat from that followed in RHYNE, *supra* note 5, at 154.

⁴¹ There are still 22 states which have such legislation: Ariz., Ark., Colo., Del., Ga., Idaho, Ind., Md., Mich., Minn., Mo., Nev., N. J., N. C., N. D., Pa., S. C., S. D., Tenn., Vt., Wis., Wyo.

⁴² RESTATEMENT, TORTS (1934) §194.

⁴³ *Capitol Airways, Inc. v. Indianapolis Power & Light Co.*, 215 Ind. 462, 18 N. E. (2d) 776 (1939); *Guith v. Consumers Power Co.*, 36 F. (2d) 21 (E. D. Mich., 1940); *Vanderslice case*, *supra* note 16; cf. the *Dlugos case*, *supra* note 8.

ing the question, include the Supreme Judicial Court of Massachusetts and the Circuit Court of Appeals for the Sixth Circuit, in the famous *Smith* and *Swetland* cases, decided in 1930 and 1931.⁴⁴ And shortly after this latter decision, in 1935, both the Conference of Commissioners and the American Bar Association expressly and officially repudiated the easement concept in approving a new Uniform Aeronautical Code.⁴⁵

It was at this stage in the evolution of the law that the no-ownership theory received its greatest support. This came from several legal writers⁴⁶ and even from the Aviation Committee of the Conference and the Committee on Aeronautical Law of the American Bar Association in recommending, in 1932, the adoption of the new uniform aeronautical code referred to *supra*.⁴⁷ However, neither the Committee in submitting this draft nor the Association in adopting it committed itself to the no-ownership concept, the new code simply omitting Section 3 of the original model act while substantially restating the old Section 4. While this provision is equally consistent with the zone theory, being silent on the question of ownership of airspace, it is clear from the report filed by the two Committees that the no-ownership concept was the one intended.

This theory has received judicial approval in one case, referred to herein as the *First Hinman* case, which was decided by the Circuit Court of Appeals for the Ninth Circuit in 1936.⁴⁸ With this one exception, however, this theory has found no support in the courts, and even when adopted by the two Committees, was severely criticized by many writers on the subject. Instead, those writers advocated the theory which is apparently the basis upon which all earlier American cases, including the *Smith* and *Swetland* cases, had been decided—the zone theory. And these cases, with the three possible exceptions noted *supra*,⁴⁹ appear to have been followed by all subsequent cases involving the question, including the recent *Burnham* and *Kersey* cases.⁵⁰ It therefore appears that the zone theory now represents the law of airspace ownership in most jurisdictions in this country.

But this is not to say that the zone theory is uniformly understood or applied. Rather, the fact is that ever since the *Smith* and *Swetland* cases there have been two opposing schools of thought as to whether the landowner should have any remedy for low-flying which does him no harm. The one advocates the so-called "technical trespass" doctrine, which was first propounded by the Massachusetts court in the *Smith* case,⁵¹ the other, the "nuisance" doctrine, which first found expression in the opinion of the Circuit Court in the *Swetland* case.⁵² This difference of opinion has existed ever since, some of the cases apparently supporting the former view

⁴⁴ *Smith* case, *supra* note 19; *Swetland* case, *supra* note 14.

⁴⁵ 60 A.B.A.R. (1935) 119.

⁴⁶ For a recent endorsement of this theory, see RHYNE, *supra* note 5, at 161.

⁴⁷ Logan, *Proposed Uniform Aeronautical Code* (1932) 3 J. OF AIR L. 285, 286.

⁴⁸ *Hinman v. Pacific Air Transport Corp.*, 88 F. (2d) 755 (C. C. A. 9th, 1936), *cert. den.* 300 U. S. 654 (1937).

⁴⁹ *Supra* note 43.

⁵⁰ *Burnham* case, *supra* note 16; *Kersey* case, *supra* note 17.

⁵¹ *Supra* note 19.

⁵² *Supra* note 14.

and the remainder the other. As recently as 1942, in the year's two appellate court decisions on the subject, the Supreme Judicial Court of Massachusetts expressly reaffirmed the "technical trespass" doctrine,⁵³ though with qualifications,⁵⁴ while the Supreme Court of Georgia for the second time adopted the "nuisance" concept.⁵⁵

Briefly, this difference of opinion is as to whether the action of trespass *quare clausum fregit* should lie for a flight through the landowner's airspace (within the lower zone) which does not result in any substantial damage to him. Both schools of thought agree that in the absence of police regulations or legislation limiting his rights in such matters, he may maintain either an action of trespass or an action of nuisance for any such flight which *does* interfere with the then-existing reasonable use of the land or is dangerous to persons or property on the land, and should have injunctive relief against further nuisances of this character if proper upon application of the "balance of convenience" test of equity.⁵⁶ However, while the "nuisance" school takes the position that there should be no remedy whatever unless there is actual interference with the landowner's use and enjoyment of this property, the "trespass" school presumably would allow a trespass action for nominal damages for an isolated flight within a landowner's zone of "possible effective possession" which resulted in no actual damage,⁵⁷ and might even enjoin continued flights of this nature.⁵⁸ Whether the cause or the effect of adoption of these views, those holding to the "technical trespass" rule place the limit of ownership of airspace at the height to which the landowner may reasonably occupy and use the airspace above his land,⁵⁹ while the proponents of the "nuisance" concept fix this limit at the height below which the flight of aircraft would be annoying or otherwise injurious to the landowner.

While it would therefore appear that harmless low-flying might conceivably be actionable and even restrainable in some jurisdictions, at least in theory, there is reason to believe that few if any courts will grant relief where the flying does not result in or threaten actual damage to the landowner. For one thing, many of the states have legislation and regulations which should have the effect of narrowing the zone of "effective possession." To the extent that the height of structures may be limited by regulation,⁶⁰ it would seem that the height of "effective possession" can be no higher than the limit prescribed by any applicable state, municipal, or

⁵³ *Burnham* case, *supra* note 16. ⁵⁴ See discussion *infra*, p. 550. ⁵⁵ *Kersey* case, *supra* note 17.

⁵⁶ This is well brought out in the *Kersey* case, *supra* note 17 and the *Burnham* case, *supra* note 16.

⁵⁷ Such a result was actually reached in the *Burnham* case, *supra* note 16.

⁵⁸ While the court in the *Burnham* case, *supra* note 16, refused to enjoin low-flying over unimproved lands of the petitioner, it did restrain flying below 500 ft. over the petitioner's home and improved lands despite the fact that no actual damage had been proved.

⁵⁹ In both the *Smith* and *Burnham* cases, *supra* notes 19 and 16, the Massachusetts court set this limit at 500 ft., doing so on the theory that the 500 ft. limit of the Federal and state minimum altitude of flight regulations had the effect of determining the property rights of landowners in airspace. But cf. the *Swelland* case, *supra* note 14. This theory of the Massachusetts court has been severely criticized on the ground that it confuses a criminal liability of flyers with a civil right of property owners. See RHYNE, *supra* note 5, 118, 157-159.

⁶⁰ See discussion *infra*, p. 550, *et seq.*

county airport zoning regulation or other height regulation.⁶¹ Moreover, several of the states have enacted the provision of the 1922 Uniform State Law for Aeronautics declaring the flight of aircraft to be lawful so long as there is no actual damage to the landowner beneath,⁶² which likewise might preclude suits for nominal damages.⁶³ And as a third and a more certain means of insuring such a result, the Council of State Governments, upon the recommendation of the Civil Aeronautics Administration,⁶⁴ is now urging state legislation expressly forbidding the maintenance of a cause of action for harmless flight.⁶⁵

In this connection, however, it is noteworthy that the Massachusetts Court so qualified its "technical trespass" doctrine in the *Burnham* case as to permit it to reach the same result in future cases as would be reached by a court following the "nuisance" rule. This it did in stating that it may be that flight in the vicinity of an airport beneath the lower level of the "navigable air space" would not be a trespass if "substantially harmless and . . . justified upon striking a reasonable balance between the landowner's right to exclusive possession free from intrusion and the public interest in necessary and convenient travel by air."⁶⁶ It thus appears that the Massachusetts Court by its insistence upon the "technical trespass" doctrine, finds itself in the strange position of determining whether a flight is a technical trespass by application of the balancing test suggested *supra* for use in airport nuisance cases.⁶⁷

IS THE AIRPORT HAZARD PREVENTABLE BY INJUNCTION OR REGULATION?

Regardless of which of these theories of airspace rights is applied, however, there is still the problem of preventing the establishment of approach obstructions and other airport hazards.⁶⁸

In establishing a new airport or enlarging an existing one, the owner should be able to acquire such property rights as are necessary to permit the removal or elim-

⁶¹ While the police power, as a general rule, cannot be exercised to acquire a public right to use the property regulated, and while the imposition of a height limit by zoning regulation certainly would not deprive the landowner of his remedies for low-flying amounting to a nuisance, it appears that in a jurisdiction applying the "effective possession" zone theory, such a regulation would have the effect of lowering the ceiling of the zone within which a flight would be a trespass. This is borne out by the dictum of the *Burnham* opinion quoted *infra* at note 98.

⁶² These are the 22 states listed in note 41 *supra*, plus Massachusetts which has enacted the lawfulness of flight provision of the 1935 Uniform Aeronautical Code (*supra* note 45).

⁶³ Although the existence of such a statutory provision (see note 62 *supra*) did not have this effect in the *Burnham* case, *supra* note 16.

⁶⁴ Occasioned apparently by the result reached in the *Burnham* case, *supra* note 16.

⁶⁵ The legislation proposed is a so-called "Harmless Flight of Aircraft Act," reading as follows: "No cause of action at law or in equity based upon flight in aircraft over lands or waters of this state shall be maintained unless other than nominal damage results therefrom or unless irreparable damage will probably result therefrom." COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE POSTWAR LEGISLATION, FEDERAL-STATE PROGRAM FOR 1946-1947 (Dec. 1, 1943) A-1.

⁶⁶ In applying this test to the facts of the *Burnham* case, the court pointed out that the airport in question was a "private airport."

⁶⁷ *Supra* at note 24.

⁶⁸ Even in a jurisdiction subscribing to the no-ownership theory, it appears that the landowner's right to use the airspace above his land is paramount to the right of anyone else to do so (with the qualifications noted *infra*). *First Hinman* case, *supra* note 48.

ination of the then existing hazards. In fact, it appears that in the usual case this would be the only way in which such hazards could be eliminated legally.⁶⁹

On the other hand, however, it would not be feasible, due largely to the cost involved, for the airport owner to acquire all the property interests which would be necessary (if this were the only method to be employed) in order to prevent the further creation of additional hazards or compel the removal of such hazards when established.⁷⁰ Nor is this legally necessary.

For one thing, it is clear that the courts will enjoin both the erection and maintenance of airport obstructions established with the intent of preventing or interfering with necessary low-flying. In all three of the cases which have been decided in which such intent was proved, the court granted an injunction compelling removal of the offending structures and forbidding the further erection of such structures.⁷¹ In one of these cases,⁷² the landowners' purpose was to force the airport owner to purchase their property on their own terms, and in the others, to prevent the continuance of low-flying which they considered a nuisance.⁷³ In one of them,⁷⁴ the court pointed out that the erection or maintenance of structures and trees with intent to make it dangerous to use the airport "would not constitute a proper use and enjoyment of the defendant's premises and would not be necessary for its enjoyment." And in all three cases, the court expressly declared that any such spite obstruction would be a public nuisance.

Conversely, however, if spite or other improper motive is not shown and there is no valid regulation forbidding the erection of the obstruction, it appears that both injunctive relief and damages will be denied. Such a result has been reached in three additional cases involving an action to enjoin, or recover damages for, the erection of an airport hazard.⁷⁵

But this does not mean that there are no circumstances in which a landowner

⁶⁹ This proposition finds support in the statement of the Circuit Court in the *Sweetland* case, *supra* note 14, that a private person cannot lawfully establish an airport where its normal operation would deprive nearby landowners of the use and enjoyment of their property unless the site is "indispensable to the public interest" and in the holding of the Georgia Supreme Court in the *Kersey* case, *supra* note 17, that a city in establishing an airport must acquire enough land, and so construct the airport, that its operation will not impose unnecessary burdens upon adjoining landowners. Concerning the validity of retroactive airport zoning regulations, see RHYNE, *supra* note 5, at p. 188, and authorities there cited.

⁷⁰ This is well brought out in an "interpretative statement" issued by the Council of State Governments in support of the CAA-NIMLO model airport zoning act, in which it is pointed out that this method of protecting airport approaches would require the acquisition of acreage as much as fourteen times that necessary for the airport proper. COUNCIL OF STATE GOVERNMENTS, *supra* note 65, at B-75.

⁷¹ *City of Iowa City v. Tucker*, 1936 U. S. Av. Rep. 10 (Dist. Ct. Johnson Co., Iowa, 1935); *Commonwealth v. Von Bestecki*, 43 Dauphin Co. Rep. 446, 1938 U. S. Av. Rep. 1 (Ct. Com. Pl. Dauphin Co., Pa., 1937); *United Airports Co. of Cal., Ltd. v. Hinman*, 1940, U. S. Av. Rep. 1, 235 CCH 1858 (U. S. Dist. Ct., S. Dist. Cal., 1939), referred to herein as the *Second Hinman* case.

⁷² The *Second Hinman* case, *supra* note 71.

⁷³ In the *Von Bestecki* case, *supra* note 71, the court pointed out that the landowner had a remedy at law or in equity if the low-flying constituted a trespass or nuisance, and refused to allow self-abatement of a nuisance as a defense.

⁷⁴ The *Tucker* case, *supra* note 71.

⁷⁵ *Air Terminal Properties v. City of New York*, 16 N. Y. Supp. (2d) 629 (N. Y. Sup. Ct. 1939); *Capitol Airways* case, *supra* note 43; *Guith* case, *supra* note 43.

may be prevented, without compensation, from using his property in a normal manner, without improper motive, where such use would be an airport hazard. Rather, it is submitted that under certain conditions and with certain limitations, the state police power may be exercised to prevent the establishment of such airport hazards whether this is accomplished by comprehensive city or county zoning regulations or by airport zoning regulations having as their sole purpose the prevention of airport hazards.⁷⁶

This method of protecting the aerial approaches of airports has been recommended by the Civil Aeronautics Administration for many years. More specifically, that agency since April, 1939, has urged the enactment in each state of a model airport zoning enabling act drafted jointly by it and the National Institute of Municipal Law Offices, the most recent draft of which is dated November 7, 1944,⁷⁷ and the adoption by cities and counties of a companion model airport zoning ordinance. With the active endorsement and support of many persons and organizations,⁷⁸ including the Council of State Governments,⁷⁹ this model act or substantially similar legislation has now been enacted by the Legislatures of 24 States and the Territories of Alaska and Hawaii,⁸⁰ and by the governing bodies of many political subdivisions.

The CAA-NIMLO model airport zoning act is carefully drafted to ensure the constitutionality of acts patterned thereon. This is evidenced by many of its provisions, including its legislative declarations of policy and findings of fact,⁸¹ its provision expressly requiring that all regulations be reasonable,⁸² its many provisions concerned with notice, hearings, and other procedural matters, non-conforming uses⁸³ and permits and variances,⁸⁴ and its detailed provisions concerning appeals and judicial review.⁸⁵ It is apparent from these provisions that the drafters of this model act have profited by the experience of the proponents of comprehensive zoning in meeting the requirements of "due process."

In addition, it is worthy of note that neither the Civil Aeronautics Administration nor any of the other advocates of airport zoning considers such zoning a complete answer to the problem.⁸⁶ Rather, those organizations recognize that an airport zoning regulation, like any other exercise of the state police power, must be reasonable in its effect upon private property rights.

If an airport zoning ordinance were to prescribe too low a height limit or attempt to compel the removal or lowering of an existing obstruction or otherwise interfere with a non-conforming structure or use, it undoubtedly would be held to be an un-

⁷⁶ For excellent analyses of the law of airport zoning, see: RHYNE, *supra* note 5, 164-190; Lord, *Validity of Prospective Airport Zoning* (1942) 31 GEO. L. J. 105; Note, *Constitutionality of Zoning Laws Enacted to Protect Airport Approaches* (1942) 13 J. OF AIR L. & COMM., 272.

⁷⁷ MODEL STATE AIRPORT ZONING ACT (Nov. 7, 1944), Civil Aeronautics Administration and National Institute of Municipal Law Offices, footnote 1.

⁷⁸ *Ibid.*

⁷⁹ COUNCIL OF STATE GOVERNMENTS, *supra* note 65, at B-75.

⁸⁰ *Supra* note 6.

⁸¹ Sec. 2 of Model Act cited *supra* note 77.

⁸² *Id.* Section 6(1).

⁸³ *Id.* Section 6(2) and footnote 9.

⁸⁴ *Id.* Section 7.

⁸⁵ *Id.* Sections 8, 10, 11.

⁸⁶ COUNCIL OF STATE GOV'TS, *supra* note 65, at B-75.

constitutional taking of private property without just compensation.⁸⁷ And since CAA standards call for unobstructed airspace above a 30 or 40 to 1 flight path beginning at the end of the runway at ground level,⁸⁸ it seems clear that a height limit as low as that necessary could not legally be imposed by the zoning method for some distance from the end of the runway, this distance depending upon many factors such as the use made of property in the neighborhood.⁸⁹ It is therefore recognized by the proponents of the model airport zoning act that the airport zoning method must be used in conjunction with, and supplemented by, the acquisition of property or avigation easements, in order to achieve complete protection for an airport's approaches.⁹⁰

As another limitation of airport zoning, it appears that there is very little that can be done by this method to protect the approaches of privately-owned airports which are not available for use by the general public.⁹¹ This also is recognized by the CAA-NIMLO model act, it being drafted to authorize the adoption of airport zoning regulations for the protection of only those airports which are "utilized in the interest of the public."⁹²

Whether and to what extent such airport zoning is a proper exercise of the police power are questions which have not yet been settled by the courts, despite the fact that there are many airport zoning acts and ordinances which have been in effect for years, some of them since 1928.⁹³ However, there have been two reported cases on the constitutionality of airport zoning regulations, the *Newark* case⁹⁴ and the *Baltimore* case,⁹⁵ one case in which the existence of such regulations influenced the outcome,⁹⁶ and one, the *Burnham* case,⁹⁷ in which the Supreme Judicial Court of Massachusetts expressed the opinion, by way of dictum, that the Massachusetts airport zoning act "contains adequate provisions for securing and regulating the approach to public airports."⁹⁸

In the *Newark* case, the Supreme Court of New Jersey held unconstitutional an airport zoning ordinance of the City of Newark. However, that decision was on

⁸⁷ See discussion *infra*, p. 554.

⁸⁸ See discussion *supra*, p. 540.

⁸⁹ See discussion *infra*, p. 554.

⁹⁰ See Model Act, *supra* note 77, footnote 17 and COUNCIL OF STATE GOV'TS, *supra* note 65, at B-75. That the model act was clearly drafted in this thought is indicated by its inclusion of a section (Section 13) authorizing the acquisition of air rights, avigation easements, and other property interest where "it is desired to remove, lower, or otherwise terminate a non-conforming structure or use" or when "the approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations under this Act." See also Section 11(6) of the Model Act.

⁹¹ U. S. DEPT. OF COM., REPORT OF COMMITTEE ON AIRPORT ZONING AND EMINENT DOMAIN (Dec. 18, 1930) 6, 7.

⁹² Model act, *supra* note 77, Section 1(1).

⁹³ See RHYNE, *supra* note 5, at 169-176.

⁹⁴ *Yara Engineering Corp. v. City of Newark*, 235 CCH 1989 (N. J. Sup. Ct., Jan. 8, 1945).

⁹⁵ *Mutual Chemical Co. v. Mayor and City Council of Baltimore*, 235 CCH 1821 (Cir. Ct. No. 2, Balt., Jan. 25, 1939).

⁹⁶ *United States v. 357.25 Acres of Land*, 235 CCH 1972 (U. S. D. C. W. D. La., 1944). In this condemnation case, the court upheld a jury award of "no dollars" as damages for the taking of a 25-40 ft. avigation easement in lands adjacent to an airport used by the Army, stating that since a Parish airport zoning ordinance had already limited the height of buildings on those lands to 25 ft., the taking did not result in any appreciable diminution in the value of the claimant's property.

⁹⁷ *Supra* note 16.

⁹⁸ *Id.* at 42 N. E. (2d) 579.

the ground that the city lacked the power to adopt such an ordinance in the absence of state enabling legislation.

In the *Baltimore* case, a Maryland airport zoning act was held unconstitutional in its application to property adjacent to the Baltimore Municipal Airport. This holding was in part on the ground that the height limits of the statute were a taking of the landowner's property, as in fact they undoubtedly were, being as low as five feet as to portions of the property zoned. However, the court also held that airport zoning was not for a public purpose, stating that ". . . the zoning of the area surrounding an airport is rather for the benefit of those who desire to use aerial transportation and for those who own airplanes than for the general public." It is submitted that this flies directly in the face of the many court decisions on the public nature of airports,⁹⁹ disregards the numerous cases supporting closely analogous police regulations,¹⁰⁰ and overlooks completely the great public interest in aviation and airports and the injury to that interest that results from the creation of an airport hazard.

The correct view, it is submitted, is that a reasonable airport zoning regulation may be sustained both as a regulation for the public health and safety and as a regulation for the general welfare. Once it is realized that most if not all people have a large stake in aviation, including those who do not fly as well as those who do, there should be no difficulty in arriving at this conclusion.¹⁰¹

The really difficult question, however, is how restrictive can an airport zoning regulation be in its effect upon the use of private property without being unreasonable and therefore invalid.

Space does not permit an analysis of the legal principles governing the determination whether a police regulation is reasonable. Suffice it to say that here again the problem, in its last analysis, appears to be one of balancing two conflicting public interests in each particular application of an airport zoning regulation. The one of course is the public interest in accomplishing the desired result, requiring that there be taken into account such considerations as the value of the airport to the community and the general public, its adequacy for safe aircraft operations, and the effect upon its safety and utility of a use of the property in question in a manner prohibited by the regulation. The other is the public interest in protecting and preserving the landowner's property rights requiring consideration of the nature of the uses to which his property is put and adaptable, the extent to which those uses are limited

⁹⁹ See Ulman, RHYNE, *supra* note 5.

¹⁰⁰ See note 24 *supra*.

¹⁰¹ While it has been contended that airport zoning does not satisfy the community benefit or reciprocal advantage requirement which the courts have applied in the comprehensive zoning cases, it appears that this may be answered on two lines of reasoning: (1) the law does not require that the losses and burdens resulting from zoning regulations be equal as to all landowners affected or that there be a compensating benefit to each such landowner offsetting the limitation placed upon his rights, a regulation being for the general welfare if it results in overall benefit to the entire community (which is certainly true of airport zoning); and (2) a showing of community benefit is unnecessary in the case of a regulation which is primarily and directly necessary for the public health and safety (as is airport zoning), as distinguished from a regulation which is primarily for the general welfare and only incidentally for the public health and safety (such as comprehensive zoning).

by the regulation, and the injury suffered by the landowner as a result. In other words, it is submitted that a conflict of the interests of airport owner and nearby property owner which arises out of an attempt of the former to prevent some use of the latter's property that would result in an airport hazard must be adjusted or settled by application of fundamentally the same test as that used in determining whether the airport or some airport operation is a nuisance to the landowner.

Since this balancing test is only a very general guide rather than a formula or yardstick and since a court, in applying it in a particular case, would still have to determine and weigh the facts and considerations involved, in the light of its own concepts of the best interests of society, it is dangerous to generalize as to the extent to which the approaches of airports may be protected by the airport zoning method. However, it seems safe to say that in the case of a properly enacted airport zoning regulation for the protection of a large terminal airport owned and operated by a municipality and used extensively by the public, it would be reasonable to impose a height limit as low as 35 feet above grade if the property so zoned was used for a residence of the story and a half type and this was the usual type of building in the neighborhood. If such land was used only for agricultural purposes, this height limit might be even lower; if for commercial or manufacturing purposes, it would have to be considerably higher.

If height limitations as exacting as those suggested may be imposed, it is apparent that police power airport zoning offers an effective means of solving the problem of protecting airport approaches.