

#65.40

5/12/70

Memorandum 70-56

Subject: Study 65.40 - Inverse Condemnation (Aircraft Noise Damage)

The Commission has devoted considerable time at previous meetings to aircraft noise damage. This memorandum summarizes previous action and suggests what action should be taken in the future on this topic.

Our consultant, Professor Arvo Van Alstyne, discussed aircraft noise damage in a portion of his study published in the UCLA Law Review. See 16 UCLA L. Rev. 491, 523-544 (1969). The major portion of the study is devoted to suggestions as to standards that might be enacted to make clear when a cause of action for aircraft noise damage arises. The Commission devoted substantially all of its attention to this problem.

The consultant recommended enactment of a presumptive standard based on a combination of noise level and distance. The Commission considered the possibility of enacting a presumptive standard based on noise level but rejected this approach primarily because of the cost of proof under present technology and the difficulty of establishing such standards. The Commission considered the possibility of enacting a presumptive standard based on distance from runways but rejected this approach because it has no relationship to the number or type of aircraft operated, use of the affected property, and the like. Accordingly, such a standard fails to provide a meaningful measure of the scope of aircraft operations or their impact on surrounding property.

The Commission considered the opinion of Judge Jefferson (attached to the First Supplement to Memorandum 70-19) and in substance adopted the standard of that opinion--that a cause of action for aircraft noise

damage arises when "the market value of real property has been reduced by jet noise to an extent which is reasonably measurable." Damage in the amount of \$400 was considered sufficient in the view of Judge Jefferson. No other actions have been taken by the Commission.

We now have a second opinion by Judge Jefferson in Greater Westchester Homeowners' Association v. City of Los Angeles. We attach a copy of this opinion which considers liability of the airport operator, aircraft operator, and aircraft manufacturer for damages to property and for personal injury caused by aircraft noise.

The staff believes that an examination of the two opinions by Judge Jefferson will reveal that the opinions provide the person whose property or person is injured by aircraft noise with a maximum amount of protection. We do not believe that it would be a profitable expenditure of the Commission's time to draft legislation in this area at this time. The appellate courts will no doubt be considering the problems involved in aircraft noise damage cases in the near future. Accordingly, the staff suggests that we merely keep abreast of the developments in this area of law so that we will be alert to the need to devise legislative solutions to problems if such need arises. Dr. Garbell, who already has been of substantial assistance to the Commission, has indicated a willingness to keep abreast of developments and from time to time to report them to the Commission.

For your information, attached as Exhibit I is an article from the May 11 issue of the Los Angeles Daily Journal.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

California Plans Curb on Jet Noise

By Paul Corcoran

Airplane noise, particularly the roar of jetliners, is somewhat like sin. No one has anything good to say about either one.

Everyone agrees all that can be done should be done to curb this major environmental nuisance, short of closing down airports.

But there are airport operators in California who believe that is just what will happen—that they will have to stop business—if new noise standards set forth by the State Aeronautics Board go into effect as scheduled next Jan. 1.

Airport officials and advisers, who decline to be quoted by name, say the plans are unworkable, conflict with federal regulations, and that such airports as Los Angeles International, San Francisco and San Diego "cannot live with them."

The little-publicized entry of California into the fight to reduce aviation noise pollution may have historic ramifications as to the role the states have in a field where the federal government, specifically the Federal Aviation Administration (FAA), is dominant.

Legal authorities both in California and in Washington say there is serious doubt about the constitutionality of all or part of the regulations.

No other state currently is attempting a comparable control program.

Spurred on by voter concern over airport noise, the California Legislature passed a bill by Assemblyman John Foren of San Francisco authorizing the Department of Aeronautics to "adopt noise standards governing the operation of aircraft and aircraft engines for airports operating under a valid permit issued by the department to an extent not prohibited by federal law."

"That's the real hooker," said John Powers, acting director of the FAA's Office of Noise Abatement in Washington. He referred to the word "aircraft" and the fact that the regulation would apply to planes in flight.

"It is my understanding that no state can pass laws which restrict or inhibit aircraft in flight," Powers said. The FAA legal staff confirmed this. The law does not prohibit the airport operators, as proprietors, from determining the permissible noise level at the airports.

After a slow start, and as complaints mounted against jet noise, the FAA made a thorough study of the problem and issued new antinnoise standards the first of which went into effect Dec. 1, 1969.

Transportation Secretary John A. Volpe said the regulations are sufficiently rigid to result in "an approximate halving of the noise around airports."

Thus far, however, this has not satisfied either those who are subject to the regulations—the airlines—or the people who complain that noise is so bad it causes jangled nerves and psyches them so much they become physically sick.

"It is the nature of this office that I don't satisfy anyone," said Powers with resignation. "We feel we have been fair when everyone complains."

There are certain factors that must be taken into consideration in adopting standards.

"The law requires that standards be technologically feasible, economically reasonable and appropriate to the aircraft," Powers said.

The economic factor influenced federal officials in exempting first-generation jets from some of the regulations governing noise of aircraft engines.

Cost of "retrofitting"—replacing noisy engines with those sufficiently quiet to meet new restrictions—would have been prohibitive if all the first-generation airliners were overhauled at once, FAA and industry spokesmen indicated. However, the FAA has stated it plans to issue a separate set of antinnoise rules to cover noise from the first generation of jetliners—the 707s, 727s, 737s, DC-8s and DC-9s.

This, likely, will mean the retrofitting will be required by the end of 1972.

A primary goal of the California Aeronautics Department plan is to give residents in the vicinity of airports "a specific legal means of determining actual violations of the law," explained Gov. Ronald Reagan in announcing criteria had been proposed. This redress is not possible at this time nor has it been, the governor said.

The fact that so little has been done to meet the airport noise problem prompted the state to act on its own.

Joseph R. Crotti, state aeronautics director, said the acceptable level would be 65 community-decibels over a specific period of time, depending on a variety of factors, including geography, climate and air traffic. A complicated formula—differing somewhat from the FAA's "Effective Perceived Noise Decibels"—was developed by the California Aeronautics Board.

The standards, according to provisions of the law, are "based upon the level of noise acceptable to a reasonable person residing in the vicinity of the airport." Airports are to be classified according to the type and volume of air traffic. Not only the airport, but areas around airports in arbitrarily determined noise impact territory, would be covered by the California standards, which are subject to amendment by the Legislature.

In theory, networks of complex monitoring devices would record sound above the maximum allowable level. The counties would be responsible for reporting violations.

Violators would be subject to fines of up to \$1,000. In addition, they would have to put improved mufflers on their jet engines.

While the California plan is an honest attempt to achieve some relief for her citizens, it has an Alice-in-Wonderland quality that bemuses airport operators. They are concerned about the impact such standards would have on aviation, yet few have stated opposition publicly because of the current tide of public support for all things of an environmental nature.

"How are you going to determine the noise impact area, and how far it extends?" one official asked. "The standards are impractical, unenforceable and the whole thing may be illegal."

Powers and others on the federal level stressed that proprietors already have the right to tighten noise standards at airports, and that some already are doing so. The Port of New York, operator of Kennedy and LaGuardia, is just one jurisdiction with more rigid standards than required by federal law. Los Angeles is another.

But admittedly, many airports do not exercise such a prerogative.

For better or worse, California is setting out on its own to attack a problem that is little understood but very real.

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES
10

11 GREATER WESTCHESTER HOMEOWNERS'
12 ASSOCIATION, etc., et al.,

13 Plaintiffs,

14 -vs-

15 CITY OF LOS ANGELES, etc., et al.,

16 Defendants.

NO. 931,989

17 CITY OF LOS ANGELES, a municipal
18 corporation,

19 Cross-Complainant,

20 -vs-

21 AERONAVES DE MEXICO, S.A., a corpora-
22 tion, et al.,

23 Cross-Defendants.

MEMORANDUM OPINION

24 This is an action brought by several thousand plaintiffs
25 seeking damages against the City of Los Angeles. Plaintiffs
26 allege that they are homeowners, residents and their families
27 living in the vicinity of the north runway of the Los Angeles
28 International Airport, which is owned and operated by the defendant
29 City. Plaintiffs allege that beginning in June of 1967 the defend-
30 ant City opened the north runway for use by jet aircraft, and that
31 plaintiffs' residential properties have been damaged and plaintiffs
32 have suffered personal injuries as a result of noise, fumes and

1 vibrations emanating from jet aircraft using the north runway.
 2 Defendant City has filed a cross-complaint against various Air-
 3 lines, including all of the major Airlines, and also against four
 4 Manufacturers of jet aircraft and jet engines. In its cross-
 5 complaint, defendant City seeks to hold the Airlines and the Air-
 6 craft Manufacturers responsible for any damages plaintiffs may
 7 recover against the defendant City. All of the Aircraft Manu-
 8 facturers and one of the Airlines have demurred to the City's
 9 cross-complaint. The remaining Airlines have filed motions for
 10 summary judgment in their favor. This memorandum opinion deals
 11 with the demurrers to the cross-complaint and the motions for
 12 summary judgment which the moving Airlines seek.

13 Plaintiffs allege in their first amended complaint that
 14 on June 24, 1967 defendant City of Los Angeles, sometimes herein-
 15 after referred to as the City, authorized jet aircraft to take off
 16 from, and land on, the north runway of the Los Angeles International
 17 Airport, sometimes hereinafter referred to as the Airport. Plain-
 18 tiffs allege that the use of the north runway since June 24, 1967
 19 has, through noise, vibrations and fumes coming from jet aircraft,
 20 damaged the properties of plaintiffs in a variety of ways, includ-
 21 ing (1) ouster of plaintiffs from their properties; (2) taking away
 22 the use of these properties; (3) physical damage to the properties;
 23 (4) impairing the utility of the properties; (5) impairing the
 24 ability of owners to sell their properties; (6) impairing the
 25 ability of owners to borrow on security of their properties;
 26 (7) making the homes hazardous to live in; (8) making the homes
 27 uninhabitable and (9) making living in their homes a health hazard.
 28 Plaintiffs assert that these various effects upon their properties
 29 create the legal consequence that the City has taken and damaged
 30 their properties for a public use, namely, the maintenance and
 31 operation of an airport. These allegations are contained in one
 32 count.

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In a separate count, plaintiffs allege that the same acts which constitute a taking and damaging of their residential properties have also proximately caused plaintiffs to suffer personal injuries, such as a hearing loss and damage to the nervous system.

In another count, plaintiffs allege that the noise, fumes and vibrations from jet aircraft using the north runway have caused injury to the health of plaintiffs, are offensive to the senses, obstruct and interfere with the enjoyment of plaintiffs' properties and hence constitute a public and private nuisance.

In another count, plaintiffs allege that as a result of the acts of defendant which constitute a taking and damaging of their properties and the creation and maintenance of a nuisance, plaintiffs have suffered bodily injury, injury to their nervous systems, emotional upset, loss of hearing, physical and mental pain and an impaired ability to work.

In a separate count, plaintiffs allege that they have been damaged as a result of the defendant City's negligent operation and management of the Airport and jet aircraft use of the Airport. In this count, plaintiffs list the following twenty-two alleged negligent acts of the City:

(1) Failure to acquire sufficient property to create a clear zone around the Airport to prevent damage to persons and property;

(2) Expansion of the Airport without regard to people and land uses in proximity thereto;

(3) Expansion of the Airport without taking available precautions to prevent damage to people and land uses in proximity thereto;

(4) Exposure of people to noise in excess of the limits proscribed by the State of California Industrial Safety Orders;

(5) Failure to erect baffles around the Airport to reduce noise exposure;

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- (6) Failing to require jet aircraft to use available noise-suppression devices;
- (7) Failure to impose noise limits on jet aircraft;
- (8) Failure to warn those in proximity to the Airport of damage from noise, vibrations and fumes of jet aircraft;
- (9) The establishment of a noise limitation level which permits damage to persons and property;
- (10) The dissemination of misleading information about the damaging effects on people and land uses of noise, vibrations and fumes from jet aircraft;
- (11) The use of Airport property in violation of statutes and ordinances;
- (12) The failure to require landing and takeoff patterns which minimize noise, vibrations and fumes around plaintiffs' homes;
- (13) Failure to limit the hours of use of the runways;
- (14) Failure to limit movements of jet aircraft;
- (15) Failure to limit the use of the runways;
- (16) The requirement that jet aircraft use runways in proximity to plaintiffs' homes;
- (17) Failure to prevent runups in areas in proximity to plaintiffs' homes;
- (18) Failure to create adequate runup areas;
- (19) Failure to condemn plaintiffs' properties before taking or damaging the same;
- (20) Operation of the Airport with knowledge that the operation was a dangerous condition, hazardous to the health of people and destructive to property in proximity to the Airport;
- (21) Prevention of plaintiffs from changing noncompatible land use to compatible land use;
- (22) Deliberate blighting of the area in proximity to the Airport.

1 In a separate count, plaintiffs allege that before June
 2 24, 1967 defendant City knew that shock waves and vibrations caused
 3 by the present use of the Airport would invade the plaintiffs'
 4 properties.

5 In another count, plaintiffs allege that the north runway
 6 is on land zoned by defendant City for residential use; that the
 7 runway is not a permitted use in a residential zone, and that
 8 defendant City is subject to, and is violating, its own laws.

9 In another count, plaintiffs allege that defendant City
 10 has, on numerous occasions, entered into a written contract with
 11 the Federal Aviation Administration, which provides (1) that defend-
 12 ant City will extinguish any claims against the Airport which will
 13 affect the operation of the Airport, and (2) that defendant City
 14 will acquire any property rights with respect to properties of
 15 plaintiffs which are being used for the operation of the Airport;
 16 that plaintiffs have property rights being used by the defendant
 17 City for Airport purposes, and that defendant City has not acquired
 18 these property rights.

19 In a separate count, plaintiffs allege the making of the
 20 contract between the City and the Federal Aviation Administration,
 21 and then allege that the plaintiffs have claims against the Airport
 22 which affect its operation, and that defendant City has not ex-
 23 tinguished these claims.

24 In another count, plaintiffs allege that the City entered
 25 into a covenant which provided that the north runway, as well as
 26 the airspace in proximity to plaintiffs' properties, would be used
 27 only for emergency landings; that this covenant was evidenced by a
 28 written memorandum signed by duly authorized representatives of
 29 defendant City; that plaintiffs have performed all duties and con-
 30 ditions under the covenant which they were to perform, and that on
 31 June 24, 1967 the defendant City breached this covenant by author-
 32 izing jet aircraft to regularly use the north runway, as well as

1 the airspace in proximity to the plaintiffs' properties, for take-
2 offs and landings that were not emergencies.

3 In a separate count, plaintiffs allege that the north
4 runway is constructed on land subject to a deed restriction; that
5 the deed restriction is to the effect that property shall not be
6 used for any business, commercial or other nonresidential purpose;
7 that plaintiffs' properties are subject to and benefit from this
8 deed restriction; that the Airport's land and the plaintiffs' lands
9 are subject to the deed restriction which was derived through
10 predecessors in interest from a common grantor, who owned all the
11 land now subject to the deed restriction as a single parcel; that
12 all deeds to the land from the common grantor uniformly contained
13 the deed restriction; that the City is using land subject to the
14 deed restriction as an Airport, which is a business, commercial
15 and nonresidential use; that all of the Airport's uses subject to
16 the deed restriction are in violation of the deed restriction.

17 In an amendment to the first amended complaint, plain-
18 tiffs allege that through the sixteen counts of their first amended
19 complaint they are seeking compensation for damages to their prop-
20 erties and to their persons caused by noise, vibrations and fumes
21 from jet aircraft using the Airport; that eight of the sixteen
22 counts seek damages to the properties and the other eight counts
23 seek damages for personal injury; that no duplicate relief is
24 sought; that all of the counts of the first amended complaint are
25 based on essentially the same facts; that the difference in the
26 various counts simply state different legal theories by which com-
27 pensation is sought.

28 Defendant City of Los Angeles has filed a first amended
29 cross-complaint for declaratory relief and indemnity, wherein the
30 City, as cross-complainant, seeks a judgment declaring that the
31 Airlines and Aircraft Manufacturers named as cross-defendants in
32 the cross-complaint should be responsible for, and hold the City

11 free and harmless from, and indemnify the City for, any judgment
 20 which the plaintiffs may obtain against the City. The cross-
 30 defendant Airlines from which the City seeks indemnity are the
 40 following: Aeronaves de Mexico, Air Canada, Air France, Air New
 50 Zealand, Ltd., Air West, Inc., American Airlines, Inc., Continental
 60 Air Lines, Inc., Delta Air Lines, Inc., Flying Tiger Line, Inc.,
 70 Japan Air Lines Co., Ltd., Mexicana de Aviacion, National Airlines,
 80 Inc., Pacific Southwest Airlines, Pan American World Airways, Inc.,
 90 Peruvian Airlines, Inc., Scandinavian Airlines System, Inc., Trans
 100 World Airlines, Inc., Union de Transport Aeriens, United Air Lines,
 110 Inc., Varig Airlines and Western Air Lines, Inc.

120 Defendant City by its cross-complaint also seeks indemnity
 130 from the following corporations alleged to be designers and manu-
 140 facturers of commercial jet aircraft and jet-powered engines: The
 150 Boeing Company, General Electric Company, McDonnell Douglas Corpora-
 160 tion and United Aircraft Corporation.

170 In its cross-complaint against the Airlines, the City
 180 alleges that these Airlines operate with a Certificate of Public
 190 Convenience and Necessity from the Federal Aviation Administration,
 200 and that the City has no control over the right of the Airlines to
 210 operate in and out of the Los Angeles International Airport; that
 220 the City has no control over the schedules for mail transportation;
 230 that the City does not select or control the jet aircraft used by
 240 the Airlines, and that the City has no control over the landings
 250 and takeoffs made by the Airlines. The City alleges that if, under
 260 the allegations of the complaint of plaintiffs, there has been
 270 damage and injury to plaintiffs' residential properties on any
 280 theory of taking or damaging, or the commission of a nuisance, or
 290 any negligent use of jet aircraft, or any trespass from jet air-
 300 craft, or any violation of zoning laws, or any breach of contract,
 310 or any violation of a deed restriction, or any breach of covenant,
 320 that the cross-defendant Airlines are the true parties who have

1 committed such taking, damaging or injury to plaintiffs' residen-
2 tial properties by the means specified, and that such cross-
3 defendants are jointly responsible for any such damage suffered by
4 plaintiffs.

5 The City also alleges that the cross-defendant Airlines
6 are liable for any judgment which may be rendered in favor of
7 plaintiffs and against the defendant City by reason of an express
8 contractual agreement of indemnity, included as provisions in the
9 leases of Airport space which have been entered into between the
10 City as lessor and these cross-defendant Airlines as lessees.

11 In the cross-complaint against the cross-defendant Air-
12 lines, the City also alleges that for the same reasons alleged with
13 respect to the property damage claimed by plaintiffs, the cross-
14 defendant Airlines are responsible for any personal injuries suf-
15 fered by plaintiffs from noise, fumes and vibrations of jet aircraft
16 using the Airport north runway on any theory of liability predi-
17 cated on nuisance, negligence, trespass, violation of zoning laws,
18 breach of contract, violation of deed restriction or violation of
19 covenant.

20 In its cross-complaint against the Aircraft Manufacturers,
21 the City alleges that the cross-defendant Aircraft Manufacturers
22 have negligently designed and manufactured jet aircraft and en-
23 gines which use the Los Angeles International Airport, so that
24 noise, fumes and vibrations from such jet aircraft may cause damage
25 and injury to persons and property, and that these cross-defendants
26 are jointly liable for any damage done by the jet aircraft used by
27 the Airlines and negligently designed and manufactured by these
28 cross-defendants. The theory of the City's cross-complaint against
29 the Aircraft Manufacturers is basically that any injury or damage
30 to plaintiffs' properties or persons resulting from jet aircraft
31 noise, fumes and vibrations is caused by the negligent design and
32 manufacture of jet aircraft and jet engines by the manufacturers,

1 irrespctive of whether plaintiffs' claim against the City is
2 predicated on an inverse condemnation theory, negligence theory,
3 trespass theory, nuisance or any other theory.

4 The City in its cross-complaint also asserts that there
5 is an actual controversy between the City and all cross-defendants
6 relative to the legal rights, duties and responsibility for the
7 alleged damage to plaintiffs and, for that reason, plaintiffs seek
8 a declaration of rights.

9 In its cross-complaint against the cross-defendant Air-
10 lines, the City is relying upon two legal theories of a right of
11 indemnity. One is the doctrine of implied indemnity, predicated on
12 the City's relationship with the Airlines, by virtue of which the
13 Airlines operate jet aircraft into and out of the Los Angeles
14 International Airport. The second legal theory is that of contrac-
15 tual indemnity, arising from the written provisions for indemnity
16 contained in the Airport leases executed by and between the City
17 as lessor and the Airlines as lessees.

18 The four cross-defendant Aircraft Manufacturers have all
19 filed a general demurrer to the City's cross-complaint. One of the
20 Airlines, namely, Flying Tiger Line, Inc., has also filed a general
21 and special demurrer to the City's cross-complaint. All of the
22 cross-defendant Airlines other than Flying Tiger Line, Inc., have
23 filed motions for summary judgment against the City with respect to
24 the cross-complaint. The parties have filed with the court exten-
25 sive memoranda of points and authorities in support of, and in oppo-
26 sition to, the motions for summary judgment and the demurrers. In
27 addition, the court entertained extensive oral argument on the
28 motions and demurrers.

29 The motions for summary judgment have been submitted on a
30 stipulation of facts entered into between the cross-complainant City
31 and the moving cross-defendants, together with affidavits submitted
32 by the respective parties. The stipulation of facts was entered

1 into solely for the limited purpose of the motions for summary
2 judgment. The facts stipulated to are, in essence, the following:

3 That the Los Angeles International Airport is a public
4 airport which is and has been owned by the City of Los Angeles for
5 more than thirty years; that it is operated by the City's Depart-
6 ment of Airports under the direction of a Board of Airport
7 Commissioners; that over the years the City has improved and en-
8 larged the Airport to its present condition and size; that in the
9 course of the City's enlargement and improvement of the Airport the
10 runway north of the terminal complex was constructed during the
11 year 1959; that this north runway is known as Runway 24L/6R; that
12 in constructing this runway the City was implementing a master plan
13 which had been publicly disclosed as early as 1945; that the con-
14 struction of this north runway was financed (1) with revenue col-
15 lected from Airport users and concessionaires, (2) with proceeds
16 obtained from the public sale of bonds and (3) with grants received
17 from the federal government.

18 That on or about June 12, 1967, Clifton A. Moore, then
19 First Deputy General Manager of the Los Angeles Department of Air-
20 ports, wrote a letter to Mr. A. B. Bush of the Federal Aviation
21 Administration, then Chief of the Los Angeles Tower, a copy of which
22 is attached as an exhibit to the stipulation of facts. In this
23 letter it was stated that effective June 24, 1967 clearance was
24 granted for the unlimited use of Runway 24 for takeoffs and Runway 6
25 for landings of all types of aircraft. (The one north runway is
26 given the designation 24L at its easterly terminus and 6R at its
27 westerly terminus.)

28 That on or about December 14, 1967, the same Mr. Moore,
29 on behalf of Francis T. Fox, then General Manager of the Los
30 Angeles Department of Airports, sent a letter to Merle H. Nichols
31 of the Federal Aviation Administration, then Assistant Chief of the
32 Los Angeles Tower, a copy of which letter is attached as an exhibit

1 to the stipulation of facts. The letter of December 14, 1967
 2 stated that it was confirming the verbal clearance given by Mr. Fox
 3 for the use of Runway 6 for takeoff of four-engine jet aircraft;
 4 that whenever there were traffic or departure delays during east
 5 wind conditions, this runway was to be available for use between
 6 the hours of 7:00 a.m. and 9:00 p.m., and that between those hours
 7 in periods of slack traffic, the Number 7 runways would receive
 8 primary usage. (The Number 7 runways are the two south runways
 9 designated 25L/7R and 25R/7L, respectively.)

10 As a part of the stipulation of facts, there was attached
 11 a copy of Resolution No. 2059, adopted by the Board of Airport
 12 Commissioners on September 25, 1963. Resolution No. 2059 was to
 13 the effect that the Board of Airport Commissioners urged and re-
 14 quested all those in positions of authority to make policy decisions
 15 on the development of a supersonic aircraft, to direct their efforts
 16 so that supersonic aircraft would produce sound levels under the
 17 approach and departure flight paths of the aircraft which would be
 18 less than the levels produced by the current jet subsonic aircraft.
 19 This Resolution No. 2059 also stated that the Board would place
 20 operating restrictions on supersonic aircraft operations at the
 21 Airport to control the noise levels from such aircraft unless cer-
 22 tain operating sound levels were achieved in the aircraft design.
 23 The stipulation of facts sets forth that at no time to date have
 24 any of the cross-defendant Airlines operated any supersonic trans-
 25 port aircraft at the Airport.

26 Attached as an exhibit and made a part of the stipulation
 27 of facts is a copy of the minutes of a meeting of the Board of Air-
 28 port Commissioners of the City, held on October 22, 1969, which re-
 29 lates to the adoption of Resolution No. 5456. The minutes state
 30 that this resolution would reconfirm and restate that any aircraft
 31 then in service or that would be placed in service in the future
 32 would be denied the use of airport facilities at the Los Angeles

1 International Airport in the event such aircraft imposed noise
2 levels upon adjacent communities which would exceed those currently
3 in existence. The stipulation of facts sets forth that at no time
4 to date have any of the moving airlines operated any scheduled air-
5 craft at the Airport which have imposed noise levels upon adjacent
6 communities greater than the noise levels imposed on those com-
7 munities by the aircraft which were operating at the Airport on
8 October 22, 1969.

9 Attached to and made a part of the stipulation of facts
10 is a copy of a lease and operating agreement between the City and
11 Western Air Lines, Inc., and a copy of an amendment thereto. It
12 is stated in the stipulation that this agreement between the City
13 and Western Air Lines has been in full force and effect since
14 November 10, 1967. The stipulation sets forth that other cross-
15 defendant Airlines are lessee parties to leases and operating
16 agreements with the City which are legally identical with the lease
17 and operating agreement between the City and Western Air Lines, as
18 modified by the amendment to the Western Air Lines lease made in
19 the fall of 1967. It was further stipulated that other cross-
20 defendant Airlines are lessee parties to leases and operating agree-
21 ments with the City which were legally identical with the lease and
22 operating agreement and amendment thereto between the City and
23 Western Air Lines, with the lone variation occurring in Article 22
24 of the Western Air Lines lease and operating agreement pertaining
25 to the matter of indemnity. The variation in Article 22 occurring
26 in some of the leases and operating agreements is set forth in the
27 stipulation of facts. The stipulation of facts also makes clear
28 that the City's claim against the cross-defendant Airlines for con-
29 tractual indemnity is based entirely on the leases and operating
30 agreements previously referred to in the stipulation.

31 In support of the motions for summary judgment, the moving
32 Airlines submitted affidavits by Arvin O. Basnight, the Director of

1 the Western Region of the Federal Aviation Administration, which is
2 composed of nine western states, including California; Donald J.
3 Haugen, Chief of the Los Angeles Tower-Terminal Radar Control of
4 the Federal Aviation Administration, and Floyd E. Wescott, Vice-
5 President of Operations of Pacific Southwest Airlines. In opposi-
6 tion to the motions for summary judgment, the City submitted affi-
7 davits by Clifton A. Moore, General Manager of the Los Angeles
8 Department of Airports since October 1968; Bert J. Lockwood,
9 Assistant to the General Manager of the Los Angeles Department of
10 Airports and an employee at Los Angeles International Airport since
11 1947, and Milton N. Sherman, Assistant City Attorney of the City of
12 Los Angeles assigned to the Department of Airports.

13 Mr. Basnight in his affidavit states that the Federal
14 Aviation Administration has promulgated extensive regulations
15 governing the Airlines, which include rules governing the certifica-
16 tion of aircraft types, the licensing of operating personnel, the
17 air worthiness certification of individual aircraft and the opera-
18 tion of a system of air traffic control, including rules for the
19 operation of aircraft approaching, landing and taking off from air-
20 ports. He states that each of the cross-defendant Airlines holds
21 a Certificate of Public Convenience and Necessity issued by the
22 Civil Aeronautics Board, which specifies that each Airline is
23 authorized to conduct commercial operations over certain specified
24 routes into and out of the Los Angeles International Airport, with
25 the exception that Pacific Southwest Airlines operates only in
26 intrastate commerce within the State of California under a Certifi-
27 cate of Public Convenience and Necessity from the California Public
28 Utilities Commission.

29 Mr. Basnight further states that pursuant to Federal
30 Aviation Regulations, the Federal Aviation Administration has issued
31 to each of the cross-defendant Airlines operations specifications
32 and an operating certificate; that these certificates require that

1 each airline conduct its operations in accordance with its opera-
2 tions specifications; that the operations specifications specify,
3 among other things, the kinds of operations authorized, the types
4 of airplanes authorized for use and the various airports at which
5 operations are authorized.

6 Mr. Basnight further states that pursuant to the Federal
7 Aviation Act and the regulations issued thereunder, the Federal
8 Aviation Administrator has prescribed certification procedures for
9 transport aircraft; that these regulations are designed to assure
10 that each type of transport aircraft proposed for use in the car-
11 riage of persons and property meets applicable air worthiness re-
12 quirements and contains no feature or characteristic which makes it
13 unsafe for such use; that each type of aircraft operated at the Los
14 Angeles International Airport by each of the cross-defendant Air-
15 lines, including all types of jet aircraft, has been type certifi-
16 cated by the Administrator of the Federal Aviation Administration.

17 Mr. Basnight further states that the Federal Aviation Act
18 authorizes the Administrator to issue an air worthiness certificate
19 for any aircraft if he finds, after inspection, that such aircraft
20 is in a condition for safe operation and conforms to the type cer-
21 tificate therefor; that each and every aircraft, including jet air-
22 craft, operated by the domestic cross-defendant Airlines, namely,
23 American, Continental, Delta, Flying Tiger, Pacific Southwest, Pan
24 American, Trans World, United and Western, is required to have an
25 air worthiness certificate issued by the Administrator approving
26 the use of said aircraft on certificated operations.

27 He further states that prior to the initial use of the
28 three existing runways at Los Angeles International Airport for jet
29 aircraft landings and takeoffs, a determination was made by the
30 Federal Aviation Administration that such use of each runway would
31 not be unsafe either to persons or property on the ground or to
32 persons or property in the air.

1 Mr. Basnight also states that under the Federal Airport
2 Act, the Los Angeles International Airport has been developed as
3 part of a national plan for the establishment of a nationwide
4 system of public airports, adequate to meet the present and future
5 needs of civil aeronautics, in accordance with the standards estab-
6 lished by the Administrator; that in order to bring about the estab-
7 lishment of a nationwide system of public airports adequate to meet
8 the present and future needs of civil aeronautics, the Administrator
9 is authorized "to make grants of funds to sponsors of airport
10 development." (See U.S. Code, section 1103.) Mr. Basnight further
11 tells us that the Los Angeles International Airport has, and is
12 being, developed and improved under federal government project
13 grants totalling more than twenty million dollars; that included in
14 the total are eleven grants relating specifically to the north run-
15 ways, beginning in 1949 and extending to 1968. (The total of the
16 eleven grants set forth by Mr. Basnight amounts to \$14,299,216.)
17 Mr. Basnight also tells us that each project grant has involved a
18 Grant Agreement containing certain assurances by the sponsor of the
19 Airport, which, in this case, is the City of Los Angeles, and under
20 such grant agreements the City has agreed to "keep the airport open
21 to all types, kinds, and classes of aeronautical use, without dis-
22 crimination between such types, kinds, and classes; provided, that
23 the sponsor may establish such fair, equal, and not unjustly dis-
24 criminatory provisions to be met by all users of the airport as may
25 be necessary for the safe and efficient operation of the airport;
26 and provided further, that the sponsor may prohibit or limit any
27 given type, kind or class of aeronautical use of the airport, if
28 such action is necessary for the safe operation of the airport or
29 necessary to serve the civil aviation needs of the public."

30 The Basnight affidavit states that the Los Angeles
31 International Airport is a vital and integral part of the nation-
32 wide system of public airports; that it is a major air terminal for

1 scheduled foreign and domestic flights located on the west coast of
2 the United States, and that any restrictions on its use or opera-
3 tion would directly affect the overall national airport system.

4 The Basnight affidavit also states that the Federal
5 Aviation Administration is vitally interested in the alleviation of
6 noise disturbances to the residents of communities adjoining air-
7 ports; that extensive research programs have been undertaken by
8 Congress, the National Aeronautics and Space Administration, the
9 Department of Housing and Urban Development and the Department of
10 Health, Education and Welfare to seek technical advances in the
11 area of aviation noise control; that to date approximately forty-
12 three million dollars have been allocated under these noise-related
13 programs; that under the Federal Aviation Act, section 611, 49
14 United States Code, section 1431 (1968), the Administrator is
15 directed to prescribe rules and regulations as he finds necessary
16 to provide for the control and abatement of aircraft noise; that
17 in prescribing such rules, he must consider whether any such rule
18 or regulation is, among other things, "consistent with the highest
19 degree of safety in air commerce," and whether it is "economically
20 reasonable, technologically practical and appropriate for the par-
21 ticular aircraft, aircraft engine, appliance or certificate to
22 which it will apply."

23 Mr. Basnight adds that pursuant to the authority of
24 section 1431, the Administrator on December 1, 1969 adopted regula-
25 tions prescribing noise standards which must be met as a condition
26 to type certification for all new, subsonic turbojet-powered air-
27 craft, and that, in addition, the Federal Aviation Administration
28 is currently studying the question as to whether there is a need
29 for the promulgation of retrofit noise standards for jet aircraft
30 types already certified. He states that in promulgating noise
31 standards for new aircraft, and in determining the need for stan-
32 dards as to existing aircraft, the Federal Aviation Administration

1 is seeking to obtain maximum noise control which is technically
2 practical and economically reasonable under the current state of
3 noise abatement technology.

4 Mr. Basnight concludes by asserting that in prescribing
5 these noise standards the Federal Aviation Administration does not
6 intend to impose them on the airport proprietor, and that subject
7 to contractual limitations contained in the grant agreements exe-
8 cuted between the airport proprietor and the Federal Aviation
9 Administration, the proprietor is free to impose such limitations
10 on the use of an airport as he determines will best serve both the
11 local desire for quiet and the local need for the benefits of air
12 commerce.

13 Mr. Donald J. Haugen, Chief of the Los Angeles Tower-
14 Terminal Radar Control of the Federal Aviation Administration,
15 states in his affidavit that the current level of traffic requires
16 the use of all three runways under the circumstances in which those
17 runways are presently being assigned. He states that if one or
18 more of these runways were unavailable, congestion and substantial
19 delays would inevitably result.

20 The affidavit of Floyd E. Wescott, Vice-President of
21 Operations of Pacific Southwest Airlines, states that Pacific
22 Southwest Airlines operates intrastate in California under a Certi-
23 ficate of Public Convenience and Necessity issued by the California
24 Public Utilities Commission; that this certificate authorizes
25 routes, the minimum number of flights and types of aircraft, and
26 specifically restricts Pacific Southwest Airlines to using the
27 Lockheed electra-jet, the Boeing 727, the Boeing 737 and the Douglas
28 DC 9 jet aircraft; that Pacific Southwest Airlines is the holder of
29 a Commercial Operator Certificate issued by the Administrator of the
30 Federal Aviation Administration. Attached to Mr. Wescott's affi-
31 davit and made a part thereof is a copy of the Certificate of Public
32 Convenience and Necessity issued to Pacific Southwest Airlines by

1 the California Public Utilities Commission, a copy of the Commer-
2 cial Operator Certificate issued by the Federal Aviation Administra-
3 tion, and a copy of the Standard Air Worthiness Certificate issued
4 by the Federal Aviation Administration for each aircraft being
5 used, certifying that the particular aircraft is in condition for
6 safe operation.

7 Mr. Clifton A. Moore, the General Manager of the Los
8 Angeles International Airport, states in his affidavit that the
9 City of Los Angeles does not establish the specifications for the
10 design of any aircraft and does not manufacture, own, operate or
11 control any aircraft or the flight of any aircraft which operates
12 to and from the Los Angeles International Airport; that all air-
13 craft is approved and certified by the Federal Aviation Administra-
14 tion, and that upon such certification the Los Angeles International
15 Airport must accommodate any airlines which are awarded routes to
16 the Los Angeles International Airport; that such routes are awarded
17 by the Civil Aeronautics Board and by a treaty agreement by the
18 United States Government for international carriers.

19 Mr. Moore further states that the north Runway 24L/6R was
20 completed in 1959, but that for many years the use of this runway
21 was restricted by mutual agreement between the City of Los Angeles,
22 the Airlines and the Federal Aviation Administration, and that no
23 restrictions on the use of this runway were the result of unilateral
24 action on the part of the City.

25 Mr. Moore further states that the letters dated June 12,
26 1967 and December 14, 1967, and attached as Exhibits A and B, re-
27 spectively, to the stipulation of facts, were sent after coordina-
28 tion with, and approval by, the Federal Aviation Administration and
29 were not the result of unilateral action on the part of the City.
30 Mr. Moore also asserts that increased air traffic for the Los
31 Angeles International Airport, brought about by the federal govern-
32 ment's awarding routes to Los Angeles to additional airlines, and

1 the desire by the general public for increased flight services,
2 were the factors which required the opening of the north Runway
3 24L/6R.

4 In his affidavit, Mr. Bert J. Lockwood, Assistant to the
5 General Manager of the Los Angeles International Airport, states
6 that the aircraft certified by the Federal Aviation Administration
7 and operating at the Los Angeles International Airport are certi-
8 fied with safety as the main criterion for approval; that noise
9 produced by aircraft is a secondary consideration by the Federal
10 Aviation Administration in certifying aircraft for flight. Mr.
11 Lockwood also states that the Los Angeles International Airport
12 was planned as a four-runway complex since 1946; that this plan be-
13 came a part of the national airport plan; that the City has received
14 federal monetary grants since 1949 to aid in completing the runways
15 and related facilities of the Airport, including the north Runway
16 24L/6R. Mr. Lockwood points out that in 1959 there were six com-
17 mercial airlines that operated jet aircraft at the Los Angeles
18 International Airport; that in 1967, twenty-two commercial airlines
19 were operating jet aircraft at the Los Angeles International Airport,
20 and that since then four additional major airlines have been awarded
21 routes to this Airport by the Civil Aeronautics Board.

22 Mr. Lockwood further states that in approximately the
23 year 1960 the Department of Airports for the City prepared an opera-
24 tional regulation, the purpose of which was to reduce noise volumes
25 for east takeoffs from the Los Angeles International Airport; that
26 this was to be accomplished by requiring all takeoffs to be made to
27 the west until the tail-wind component of surface wind exceeded ten
28 knots; that the Department of Airports attempted to implement this
29 operational procedure which was considered safe by the Boeing
30 Company, which was the manufacturer of most of the jet aircraft
31 operating at this time at the Airport. Mr. Lockwood states that
32 Chief Pilots groups made objections to the Department of Airports

1 and the Federal Aviation Administration, stating that company
2 regulations limited down-wind component to five knots; that there-
3 after the Department of Airports was notified by the Federal
4 Aviation Administration that such a regulation was considered as
5 entering an area of flight regulations that had been preempted by
6 the Federal Aviation Administration, and that the Department of
7 Airports, therefore, could not implement the proposed regulation;
8 that as a result the proposed regulation was never implemented.

9 The Lockwood affidavit also states that depending on
10 Airline company policy, Airlines taking off from the Los Angeles
11 International Airport utilize different climb speeds or climb
12 techniques; that these different procedures create different sound
13 levels into the Airport environment; that one technique used by
14 some Airlines creates a greater sound level into the surrounding
15 community than another technique used by other Airlines.

16 Milton N. Sherman, Assistant City Attorney assigned to
17 the Department of Airports, states in his affidavit that he parti-
18 cipated in the negotiation and preparation of the exhibit attached
19 to the stipulation of facts pertaining to a change in the landing
20 fees paid by the Airlines; that the priority of expansion projects
21 to be completed under this agreement between the City and the Air-
22 lines was established by negotiation with the Airlines operating
23 at the Los Angeles International Airport, with the requirements of
24 the Airlines being given utmost consideration; that the Airlines
25 desiring additional facilities for expanded operations contracted
26 to pay additional landing fees as might be required to service the
27 Airport bonds to insure completion of the projects covered by this
28 exhibit for Airport expansion.

29 Mr. Sherman further states that he is familiar with the
30 contractual requirements imposed upon the City of Los Angeles
31 through the grants from the United States Government; that the City
32 of Los Angeles has been under contractual obligation to allow the

1 use of north Runway 24L/6R since the year 1959. He further states
2 that pursuant to the contractual agreement, the City of Los Angeles
3 must allow commercial jet aircraft to operate on all of the runways
4 at Los Angeles International Airport, including the north Runway
5 24L/6R. He also states that the Board of Airport Commissioners'
6 Resolution No. 5456, adopted on October 22, 1969, referred to in an
7 exhibit to the stipulation of facts, was adopted following coordina-
8 tion with the Airlines operating at the Los Angeles International
9 Airport; that the formal resolution, with appropriate recitals and
10 text, has not yet been prepared, due to the required continual
11 coordination with the Airlines and the Federal Aviation Administra-
12 tion; that the Airlines operating at the Los Angeles International
13 Airport have contracted for operating rights and leasehold facili-
14 ties with the City of Los Angeles, for which they pay an appropriate
15 fee, and that the City, for such fees, has in part contracted to
16 maintain and operate and keep the Airport in good repair.

17 The stipulation of facts and affidavits summarized
18 herein constitute the factual premise upon which must be based the
19 Court's ruling either granting or denying the motions for summary
20 judgment.

21 The principles applicable to motions for summary judgment
22 are so well settled that citation of authorities is unnecessary.
23 The question to be decided by the trial court on this motion is
24 whether facts have been presented which give rise to triable issues.
25 It is not the function of the Court to pass on or determine the
26 issues themselves - that is, the true facts in the case. Issue
27 finding, rather than issue determination, is the pivot on which the
28 summary judgment law turns. Summary judgment becomes appropriate
29 only if the affidavits in support of the moving party or an agreed
30 statement of facts would be sufficient to sustain a judgment in
31 favor of the moving party, and the opponent does not by counter-
32 affidavit show facts sufficient to present a triable issue of fact.

1 Further, the affidavits of the moving party must be strictly con-
 2 strued, while those of the party opposing the motion for summary
 3 judgment are to be liberally construed. Any doubts as to the pro-
 4 priety of a summary judgment should be resolved in favor of deny-
 5 ing the motion.

6 The summary judgment procedure is a drastic procedure, and
 7 should, therefore, be exercised with caution. The summary judgment
 8 procedure cannot be considered a substitute for the open trial
 9 method of eliciting and determining factual disputes. See
 10 Stationers Corp. v. Dunn and Bradstreet, Inc., 62 Cal.2d 412 (1965).

11 Another salient principle of summary judgment procedure is that if
 12 only questions of law are involved, these may be determined and
 13 applied on a motion for summary judgment. See Simson v. Russell,
 14 194 Cal.App.2d 592 (1961).

15 It is the contention of the cross-defendant Airlines that
 16 under the stipulation of facts and the affidavits submitted by them
 17 that there are no triable issues between the cross-complainant City
 18 and the cross-defendant Airlines; that there are only questions of
 19 law involved, with the consequence that these cross-defendants are
 20 entitled to a summary judgment in their favor.

21 Two basic contentions of both the demurring cross-defend-
 22 ants and those making motions for summary judgment are as follows:

23 (1) That plaintiffs cannot, on any recognized legal
 24 basis, recover a judgment against the City for any alleged property
 25 damage or personal injuries on any of the theories set forth in
 26 their complaint, and hence the City can state no basis for indemnity
 27 recovery against cross-defendants;

28 (2) That the only possible theory of recovery by plain-
 29 tiffs against the City would be a recovery for property damage only
 30 in inverse condemnation, and that on such a theory the City alone is
 31 responsible for the taking or damaging of plaintiffs' residential
 32 properties, and there is no legal basis upon which the City may

1 shift its liability in inverse condemnation over to the Airlines
2 which use the Airport or to the Manufacturers of the jet aircraft
3 and jet engines used by the Airlines.

4 Cross-defendants place their chief reliance upon Lombardy
5 v. Peter Kiewit Sons' Co., 266 Cal.App.2d 599 (1968), where it was
6 held that a complaint against the State and a contractor did not
7 state a cause of action in either inverse condemnation or nuisance.
8 There the complaint alleged that plaintiffs were property owners
9 next to a freeway, and that the building and operation of the free-
10 way by the defendants resulted in fumes, noise, dust, shocks and
11 vibrations, causing mental, physical and emotional distress to the
12 plaintiffs and damage to their real property. The court held that
13 this complaint did not state a cause of action in inverse condemna-
14 tion because there was no allegation of substantial damage to the
15 property itself. The court likewise held that plaintiffs' complaint
16 stated no cause of action on a theory of nuisance because state
17 highways are constructed and maintained under the authority of the
18 state constitution and state legislation, and section 3482 of the
19 Civil Code provides that there can be no nuisance for a governmental
20 activity maintained under express authority of law.

21 Lombardy does seem to hold that substantial damage to real
22 property, which is a requisite for an action in inverse condemna-
23 tion, requires a physical damage to the property itself. In the
24 case at bench, plaintiffs' complaint does allege actual physical
25 damage resulting from jet aircraft pollution in the form of noise,
26 fumes and vibrations. Lombardy cites as authority for its holding
27 Albers v. County of Los Angeles, 62 Cal.2d 250 (1960), and Frustuck
28 v. City of Fairfax, 212 Cal.App.2d 345 (1963). In Albers, the
29 crucial issue revolved around an interpretation by the Supreme Court
30 of the "or damaged" provision of Article I, section 14 of the
31 California Constitution. There the court held that the construction
32 of a public project according to the plans and specifications and

1 which construction caused physical damage to private property and
2 which was not the result of foreseeability or negligence, neverthe-
3 less gave private property owners a right of action against the
4 County for damages, even though had such injury been inflicted at
5 common law by a private person no cause of action would have been
6 stated. This right of action under these circumstances is one
7 granted by the Constitution itself and is not dependent either upon
8 common law or statutory provision. In Albers, the court distin-
9 guished the physical property damage case presented there from the
10 market value diminution without physical damage case presented in
11 People v. Symons, 54 Cal.2d 855 (1960), and which is also presented
12 in Lombardy.

13 Symons and Lombardy certainly indicate that there can be
14 no recovery for a decrease in property values to neighboring land-
15 owners caused by the construction and operation of a freeway, with
16 its traffic noises from automobiles and trucks, the screech of
17 brakes and the exhaust contaminants emitted by trucks and automo-
18 biles. But Albers cannot be accepted as authority for holding that
19 recovery in inverse condemnation in California may take place only
20 in the event of actual physical damage to real property from a
21 governmental project. There is every reason to hold that Albers,
22 Symons and Lombardy are not intended to stand in the face of chang-
23 ing conditions created by the advent of jet aircraft. The Albers,
24 Symons and Lombardy principles must be restricted in their applica-
25 tion to the narrow, factual situations presented.

26 That the doctrines of Albers, Symons and Lombardy are to
27 be limited to the factual situations presented in these cases is
28 clearly set forth by the Supreme Court in Loma Portal Civic Club
29 v. American Airlines, Inc., 61 Cal.2d 582 (1964), decided after
30 Symons and Albers. In the Loma Portal Civic Club case, property
31 owners sought an injunction against a number of commercial airlines
32 to enjoin jet flights over their homes near an airport in San Diego

1 on the theory that such flights constituted a nuisance. The trial
 2 court granted the defendant commercial airlines a summary judgment
 3 denying injunctive relief. The Supreme Court sustained the trial
 4 court. This case was decided on the factual setting, as set forth
 5 by the pleadings and affidavits, that the plaintiffs did not claim
 6 that a significant portion of the defendants' overflights was in
 7 violation of federal law, nor that flights were so conducted as to
 8 be imminently dangerous to the plaintiffs, nor that such flights
 9 were inconsistent with, rather than in furtherance of, the public
 10 interest. It was conceded that the defendant airlines were oper-
 11 ating under an obligation to provide safe and adequate service in
 12 the public interest; that their activities were conducted under
 13 extensive governmental supervision, enforceable by effective
 14 sanctions, and that their operations, as a general matter, had
 15 been determined to be in the public interest. The Supreme Court
 16 accepted the view that for the City of San Diego, the national
 17 interest in commerce, transportation and defense was furthered
 18 and advanced by the operation of scheduled passenger, freight
 19 and postal jet carriage into and out of the city; that the people
 20 of the City of San Diego and of the State of California were
 21 benefiting from these flight operations, and that no contention
 22 could fairly be made that the airlines' operations were not in
 23 furtherance of the public interest. The court, therefore, placed
 24 the justification for the denial of injunctive relief against the
 25 airlines operating jet flights over the lands of the plaintiffs
 26 upon the basis of an overriding public interest.

27 Thus, the court in Loma Portal Civic Club points out that
 28 it is established law that public policy denies an injunction and
 29 permits only the recovery of damages where private property has
 30 been put to a public use by a public service corporation and the
 31 public interest has intervened, citing cases such as People v.
 32 Ocean Shore Railroad, 32 Cal.2d 406, 421 (1948), and Hillside Water

1 Co. v. City of Los Angeles, 10 Cal.2d 677, 688 (1938).. This prin-
 2 ciple is based upon the policy of protecting the public interest
 3 in the continuation of the use to which the property has been put;
 4 that the airlines' aircraft jet service is in the public interest,
 5 and that the public has come to rely on and has a substantial stake
 6 in the continuation of that service.

7 In ascertaining this public policy in maintaining jet
 8 aircraft service for passenger, freight, mail and military trans-
 9 portation, the Supreme Court points out that numerous statutory
 10 provisions provide guidance; that the federal legislation is found
 11 in the Federal Aviation Act, which declares "to exist in behalf of
 12 any citizen of the United States a public right of freedom of
 13 transit through the navigable airspace of the United States" (49
 14 U.S.C. § 1304), and which defines navigable airspace to include
 15 "airspace needed to insure safety in take-off and landing of air-
 16 craft" (49 U.S.C. § 1301[24]); that the California public policy in
 17 this area is found in section 21403 of the Public Utilities Code,
 18 which provides in subparagraph (a) that "flight in aircraft over
 19 the land and water of this State is lawful, unless at altitudes
 20 below those prescribed by federal authority, or unless so conducted
 21 as to be imminently dangerous to persons or property lawfully on
 22 the land or water beneath" and which provides in subpara-
 23 graph (b) that "the right of flight in aircraft includes the right
 24 of safe access to public airports, which includes the right of
 25 flight within the zone of approach of any public airport without
 26 restriction or hazard"

27 The Supreme Court further points out that the provisions
 28 as set forth in Public Utilities Code section 21403(b) indicate a
 29 policy against interference with such operations by the injunctive
 30 process; that another indication of California policy in this area
 31 is found in section 731a of the Code of Civil Procedure which re-
 32 stricts the use of the injunctive process for specified zones uses,

1 including airport uses, and that this indicates an intent that such
2 uses are favored in the state and are not to be enjoined unless it
3 is clearly established that such uses are being carried out in both
4 an unnecessary and an injurious manner.

5 The court in Loma Portal Civic Club makes clear that its
6 holding that an injunction is not available against jet aircraft
7 flight operations in the vicinity of a public airport, conducted by
8 regularly scheduled airlines and not alleged to be conducted in
9 violation of federal orders or regulations or in an imminently
10 dangerous manner, is solely because there is an overriding public
11 interest and public policy in the operation of jet aircraft under
12 the conditions set forth for the safe, regular air transportation
13 of goods and passengers.

14 The Loma Portal Civic Club case is especially significant
15 because the court makes a special point of stating what the case
16 does not hold or determine. Thus, the court makes this highly sig-
17 nificant observation: "Nothing herein is intended to be a determina-
18 tion of the rights of landowners who suffer from airplane annoy-
19 ances to seek damages from the owners or operators of aircraft or
20 to seek compensation from the owner or operator of an airport."
21 (Loma Portal Civic Club, supra, at p. 591.) (Emphasis added.)

22 Also, the court specifically considers and rejects the
23 contention of the airlines that the refusal of an injunction can be
24 supported on the ground of federal preemption. The acceptance of
25 federal preemption, said the court, would preclude the state from
26 taking any action in the field. In reaching the conclusion that
27 the federal preemption theory was untenable, the court points out
28 that noise abatement is a federal as well as a state aim, "and when
29 not inconsistent with safety, enforcement of a damage remedy under a
30 nuisance theory, for example, would not necessarily present a con-
31 flict with federal law but might well reinforce it." (Loma Portal
32 Civic Club, supra, at p. 592.) The Supreme Court thus concludes

1 that Congress did not intend by the Federal Aviation Act to nullify
2 state-created liability and rights in the areas of definition and
3 adjustment of property rights and the protection of health and wel-
4 fare.

5 The claim of state preemption as a defense must be re-
6 jected for the same reasons that the claim of federal preemption as
7 a defense cannot stand. Section 21401(a) of the Public Utilities
8 Code provides that flight of aircraft over land and waters of the
9 state is lawful unless at altitudes proscribed by federal authority,
10 or "unless so conducted as to be imminently dangerous to persons or
11 property lawfully on the land or water beneath." Although in the
12 case at bench the plaintiffs' complaint does not allege in specific
13 language that jet aircraft are flown in such a way as to be immi-
14 nently dangerous to persons and property of the plaintiffs, a fair
15 construction of their complaint indicates that the specific allega-
16 tions constitute allegations that jet aircraft are operated in such
17 numbers, at such times and at such a height that, because of the
18 noise, fumes and vibrations emanating therefrom, such aircraft have
19 damaged and ousted plaintiffs from the possession of their proper-
20 ties and caused personal injury to residents and, therefore, such
21 jet aircraft flights have been so conducted as to be imminently
22 dangerous to persons and property lawfully on the land beneath.

23 In Anderson v. Souza, 38 Cal.2d 825 (1952), a case deal-
24 ing with a private airport, the Supreme Court held that the passage
25 of the 1947 State Aeronautics Commission Act was not intended to
26 take away common law and long-established statutory law declaring
27 that nuisances may be abated at the suit of those injured thereby.
28 This is a rejection of a claim of state preemption. Anderson,
29 therefore, is authority for holding that state preemption is not a
30 valid defense to plaintiffs' claims for recovery against the defend-
31 ant City. The Loma Portal Civic Club case, dealing with the current
32 state statutory law regulating aircraft, indicates no change in view

1 by the Supreme Court with respect to the question of state pre-
2 emption, decided adversely to the preemption defense advanced in
3 Anderson.

4 Although Loma Portal Civic Club does not indicate what
5 type of "airplane annoyances" suffered by landowners will give rise
6 to a damage action against an airport operator or aircraft opera-
7 tors, the result seems inescapable that substantial damage in terms
8 of decreased property values or personal injury suffered from jet
9 aircraft noise, fumes or vibrations would come within the nuisance
10 concept there enunciated by the court.

11 The quoted statement in Loma Portal Civic Club indicates
12 a recognition by the California Supreme Court that there is a sig-
13 nificant difference between noise, fumes and vibrations emanating
14 from jet aircraft and those coming from automobiles and trucks on
15 a street or freeway. This difference is so pronounced that the
16 legal consequences of jet noise should not be the same as the legal
17 consequences of street and freeway noise of cars and trucks, as
18 enunciated by cases such as Lombardy and Symons. The sounds
19 emanating from cars and trucks on streets and freeways are simply
20 minor contrasted with the irritating and offensive sounds emanating
21 from current jet aircraft. If this were not so, we would not have
22 Mr. Basnight, Director of the Western Region of the Federal Aviation
23 Administration, stating in his affidavit in this case that "The
24 F.A.A. is vitally interested in the alleviation of unnecessary noise
25 disturbances to the residents of communities adjoining airports.
26 Congress, the National Aeronautics and Space Administration, the
27 Department of Health, Education and Welfare and the F.A.A. have
28 embarked on an extensive research program whereunder they are seek-
29 ing technological advances in the art of aviation noise control.
30 To date approximately forty-three million dollars has been allo-
31 cated under these and noise related programs." Nor would Congress
32 in 1968 have added section 611 to the Federal Aviation Act.

1 directing the Administrator of the Federal Aviation Administration
 2 to prescribe and amend such rules and regulations as he may find
 3 necessary to provide for the control and abatement of aircraft
 4 noise, as set forth in Mr. Basnight's affidavit.

5 In the quoted statement from Loma Portal Civic Club, it
 6 is to be noted that the court spoke in terms of landowners seeking
 7 "compensation" from the airport owner or operator and "damages"
 8 from the aircraft owners or operators. But the Albers case indi-
 9 cates that there is no magic involved in whether plaintiff is seek-
 10 ing "compensation" or "damages" in inverse condemnation or whether
 11 plaintiff is relying on a "taking" as contrasted with a "damaging"
 12 of his property. The words "compensation," "damages," "taking"
 13 and "damaging" are not words of art, nor can any strict or narrow
 14 interpretation of such words stand in the way of a plaintiff's re-
 15 covery if the facts alleged or proved entitle him to a recovery.
 16 Thus, in the concluding paragraph of the opinion in Albers, an
 17 inverse condemnation case, we find that the Supreme Court ordered
 18 the trial court to enter a new judgment awarding to two plaintiffs
 19 "additional damages in the amount of with interest thereon
 20 and additional damages in the amount of with
 21 interest thereon" (Albers, supra, at p. 274.) (Emphasis
 22 added.) It is to be noted in Albers that the Supreme Court did not
 23 order the trial court to enter a new judgment awarding the two
 24 plaintiffs "additional compensation." Albers indicates, therefore,
 25 that the use of the two terms "compensation" and "damages" in the
 26 Loma Portal Civic Club case is of no special significance.

27 In discussing Albers, Lombardy, Symons and Loma Portal
 28 Civic Club, we are dealing with the California constitutional,
 29 statutory and common law. Irrespective of plaintiffs' rights under
 30 California law, plaintiffs' complaint alleges a cause of action in
 31 inverse condemnation under federal law. If plaintiffs are able to
 32 prove a substantial diminution in the market value of their

1 residential properties, without physical damage, resulting from jet
2 aircraft noise, fumes and vibrations, they may recover judgment
3 against the City under the due process clause of the Fourteenth
4 Amendment to the United States Constitution. This is the result of
5 the United States Supreme Court case of Griggs v. Allegheny County,
6 369 U.S. 84 (1962), which holds that flight of aircraft over an
7 owner's property creating a substantial reduction in value from the
8 jet aircraft noise constitutes a taking of the owner's property by
9 the governmental entity operating the airport within the federal
10 constitutional sense requiring compensation.

11 If the United States Supreme Court considers jet aircraft
12 noise to be of such offensive character and magnitude to create a
13 cause of action in inverse condemnation, it is highly unlikely that
14 the California appellate courts will consider the cases of Albers,
15 Symons and Lombardy as authority preventing the court creation of
16 rules of law similar to Griggs under our state Constitution,
17 statutes and common law. The jet noise in Griggs which the Supreme
18 Court recognized as creating a cause of action in the landowner
19 affected was described in the Griggs opinion as the following
20 "accurately summarized uncontroverted facts": "Regular and almost
21 continuous daily flights, often several minutes apart, have been
22 made by a number of airlines directly over and very, very close to
23 the plaintiff's residence. During these flights it was often im-
24 possible for people in the house to converse or to talk on the tele-
25 phone. The plaintiff and the members of his household (depending on
26 the flight which in turn sometimes depended on the wind) were fre-
27 quently unable to sleep even with ear plugs and sleeping pills;
28 they would frequently be awakened by the flight and the noise of
29 the planes; the windows of their home would frequently rattle and
30 at times plaster fell down from the walls and ceilings; their health
31 was affected and impaired, and they sometimes were compelled to
32 sleep elsewhere. Moreover, their house was so close to the runways

1 or path of glide that as the spokesman for the members of the Air-
2 lines Pilot Association admitted, "If we had engine failure we would
3 have no course but to plow into your house." (Griggs, supra, at
4 p. 588.)

5 It therefore seems to this Court that the plaintiffs'
6 complaint alleges a good cause of action in inverse condemnation
7 which, under Article I, section 14 of the California Constitution
8 provides for compensation both in the case of a taking or damaging
9 of real property for public use. Are plaintiffs, however, limited
10 to a recovery, insofar as property damage is concerned, to the
11 theory of inverse condemnation, even if plaintiffs prove all of the
12 allegations set forth in their complaint? Plaintiffs have alleged
13 in their complaint that they are entitled to recover on theories of
14 nuisance, negligence and others in addition to that of inverse con-
15 demnation. It is the contention of cross-defendants that the law
16 does not allow recovery on such additional theories.

17 Cross-defendants point to plaintiffs' first amended com-
18 plaint, as amended, which states that all of the counts of their
19 complaint are based on essentially the same facts, and differ from
20 each other only in that they set forth different legal theories
21 upon which the court may award compensation. The cross-defendants
22 also point out that in prior rulings in this case at bench it was
23 held that "the substance of the cause of action of any plaintiff is
24 either for inverse condemnation of their property or personal in-
25 juries," and that this ruling is the law of the case and must be
26 applied in passing on the present motions for summary judgment.
27 But prior rulings in this case at bench do not constitute a holding
28 that plaintiffs' right of recovery for a taking or damaging of their
29 residential properties is limited to a theory of inverse condemna-
30 tion. And even if the prior rulings constituted such a holding,
31 the theory of the law of the case has no application. The theory of
32 the law of the case does not preclude a subsequent trial judge from

1 making a ruling contrary to that made previously in the same case
2 by a different trial judge. It is only when the appellate court
3 has made a ruling in a case that the law of the case doctrine be-
4 comes applicable to require all subsequent proceedings to be in
5 consonance with the law of the case determined by the appellate
6 court.

7 Cross-defendants request the Court to take judicial notice
8 of prior rulings in other cases in the Superior Court. Reference
9 is made to holdings by trial judges in other cases to the effect
10 that section 3482 of the Civil Code precludes plaintiffs from being
11 able to allege a cause of action against a governmental operator-
12 owner of an airport on the theory of nuisance. Section 3482 pro-
13 vides that "Nothing which is done or maintained under the express
14 authority of a statute can be deemed a nuisance." Although such
15 rulings of other judges of the Superior Court are entitled to all
16 due deference and consideration, they are not binding upon this
17 Court. We must look to the appellate courts for such binding
18 authority. Thus, the Lombardy, Symons and Albers cases are binding
19 upon this trial court but only on the factual situations involved
20 there, namely, the law relating to freeway noise, fumes and vibra-
21 tions and actual physical damage to real property.

22 The cross-defendants cite a number of appellate cases as
23 supporting their legal position that plaintiffs' claim against the
24 City for property damage is, of necessity, limited to the theory of
25 inverse condemnation. One case cited is that of Frustuck v. City of
26 Fairfax, 212 Cal.App.2d 345 (1963). This case is cited as holding
27 that a landowner whose property is taken or damaged for a public
28 purpose has only the one remedy of an inverse condemnation action.
29 However, a careful reading of Frustuck indicates that this case
30 simply holds that a damaged landowner is not entitled to damages
31 and an injunction which would prevent the public entity from exer-
32 cising the right of eminent domain.

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Cases such as Cothran v. San Jose Water Works, 58 Cal.2d 608 (1962), which speak in terms of a remedy in inverse condemnation for a landowner whose property has been taken for a public purpose, are not addressing themselves to the question of whether such a damaged landowner may recover a judgment for damages against a governmental entity on theories other than that of inverse condemnation. We are not limited, however, to a consideration of this question on principle only. Prior decided cases have held that a landowner may recover from a public entity for damage to his property on more than one theory, even though the facts are the same.

Other decided cases indicate and establish quite clearly that damaged landowners may recover from a public entity on theories of nuisance and negligence in addition to that of inverse condemnation. One such case is Granone v. County of Los Angeles, 231 Cal.App.2d 629 (1965). There plaintiffs sued the defendant county and county flood control district for damages arising out of a flooding of their lands and the destruction of crops thereon. The plaintiffs claimed that the defendants in a flood control project had installed defectively designed culverts at a street intersection and had negligently maintained such culverts, with the result that the culverts caused flooding of plaintiffs' lands. The plaintiffs' complaint set forth four causes of action, three of which were the theories of inverse condemnation, common law negligence and the maintenance of a nuisance, respectively. A judgment for damages was rendered in favor of plaintiffs, and on appeal the court held that the plaintiffs were entitled to recover on each of these three legal theories. In Granone, the Supreme Court denied a hearing requested by defendants.

Another pertinent case is Ambrosini v. Alisal Sanitary Dist., 154 Cal.App.2d 720 (1957). In this case, a landowner brought an action against a sanitary district for damages to a celery crop due to the overflow of a sewer outfall line at a manhole owned and

1 operated by defendant public entity. The plaintiff's complaint
 2 alleged two causes of action, one in inverse condemnation and one
 3 for the maintenance of a nuisance. Judgment was rendered by the
 4 trial court in favor of plaintiff on both causes of action. On
 5 appeal, the court held that the plaintiff was entitled to recovery
 6 on both grounds alleged. Here, also, the Supreme Court denied the
 7 defendant's petition for a hearing.

8 Another case in point is Behr v. County of Santa Cruz,
 9 172 Cal.App.2d 697 (1959), in which the plaintiff alleged that the
 10 defendant county maintained a rubbish dump from which fire spread
 11 and damaged plaintiff's property. Plaintiff alleged that this dump
 12 constituted a nuisance because the county maintained it in such a
 13 fashion that it was injurious to and caused an obstruction to the
 14 free use of plaintiff's property so as to interfere with the com-
 15 fortable enjoyment of life and property. Plaintiff secured a money
 16 judgment for the damage to his property on a nuisance theory.
 17 Defendant appealed on the basis that the county was authorized to
 18 maintain and operate a dump by section 2582 of the Government Code
 19 and had an immunity from liability on any nuisance theory by virtue
 20 of Civil Code section 3482. The court rejected defendant's posi-
 21 tion and stated, "The rule in California is that a public agency or
 22 municipality may be liable for the maintenance of a nuisance even
 23 though it is exercising a governmental function in the activity at
 24 issue, and any person whose property is affected or whose personal
 25 enjoyment is lessened by a nuisance may maintain an action for
 26 damages." (Behr, supra, at p. 711.)

27 Granone, Ambrosini and Behr would appear to be good
 28 authority for holding that plaintiffs have stated a cause of action
 29 for recovery on the ground of a nuisance in the case at bench.
 30 Lombardy v. Peter Kiewit Sons' Co., supra, certainly takes an oppo-
 31 site view - that section 3482 of the Civil Code precludes freeways
 32 and streets with motor vehicle noise and fumes from being considered

1 a nuisance. This holding of Lombardy, however, cannot be considered
2 binding nor too persuasive in the case of airport jet aircraft
3 noise, fumes and vibrations in light of the contrary ideas enunciated
4 by the Granone, Ambrosini and Behr cases.

5 In the case at bench, plaintiffs have alleged that the
6 defendant City has maintained the Los Angeles International Airport
7 in such a fashion that jet aircraft use of the Airport, with the
8 emission of noise, fumes and vibrations, constitutes a nuisance,
9 causing damage to plaintiffs' residential properties and their persons.
10 Such allegations by plaintiffs, if proved, would seem to
11 bring the case within the principle that, although the City has
12 authority, expressly by statute, to maintain an airport from which
13 jet aircraft arrive and depart, this authority cannot be construed
14 to permit the City to maintain the Los Angeles International Airport
15 in such a manner as to create a nuisance. If the jet aircraft
16 operating at the Los Angeles International Airport are doing so in
17 such manner, at such times and in such numerous flights that they
18 have become "injurious to health" or "offensive to the senses" or
19 "an obstruction to the free use of property, so as to interfere with
20 the comfortable enjoyment of life or property," then the operation
21 of the Airport can be considered a nuisance within the definition
22 of this term in section 3479 of the Civil Code. In the face of such
23 proof, Civil Code section 3482 cannot be used as a defense to liability.
24

25 In like fashion, Granone is authority for holding that if
26 plaintiffs are able to prove their allegations regarding the negligent
27 maintenance and operation of the Airport by defendant City,
28 with damage to plaintiffs resulting therefrom, then plaintiffs are
29 entitled to recover under a common law negligence theory.

30 Although it might appear that nuisance and negligence are
31 synonymous, this is not true. In Sturges v. Charles L. Harney,
32 Inc., 165 Cal.App.2d 306, 318 (1958), the question was considered

1 whether there can be a nuisance without negligence. Although the
2 court recognized that the torts of negligence and nuisance may be,
3 and frequently are, coexisting and practically inseparable, yet
4 "a nuisance need not grow out of acts of negligence but may be the
5 result of skillfully directed efforts - efforts which may be skill-
6 fully directed toward accomplishing the desired end, but may not
7 have due regard for the rights of others."

8 In the case at bench, do the plaintiffs' allegations that
9 they suffered personal injuries as a result of jet aircraft noise,
10 fumes and vibrations state a good cause of action for recovery
11 from the City? If the freeway noise cases represented by Symons
12 and Lombardy, cited supra, were to govern the airport jet aircraft
13 noise problem, there could be no recovery by plaintiffs for any
14 personal injuries suffered. If plaintiffs have alleged a good cause
15 of action for property damage on nuisance and negligence theories,
16 it would seem to follow that these same two theories would support
17 a recovery for personal injuries resulting from the same set of
18 facts. Authority for this view is found in the dicta set forth in
19 the Loma Portal Civic Club case and in the holding of Bright v.
20 East Side Mosquito Abatement Dist., 168 Cal.App.2d 7 (1959). Here
21 the plaintiff's complaint alleged personal injuries sustained as a
22 result of the defendant public entity's creating a nuisance by the
23 creation of a blanket of chemical fog to kill mosquitoes. It was
24 alleged that the fog covered a highway and prevented plaintiff from
25 being able to perceive the road traffic, with the result that plain-
26 tiff had an automobile accident and received personal injuries.
27 The trial court sustained a demurrer to the complaint without leave
28 to amend and a judgment of dismissal followed. On appeal, the
29 court held that the complaint stated a good cause of action on a
30 nuisance theory. The defendant relied upon section 3482 of the
31 Civil Code legalizing a nuisance for a governmental entity.
32 Reliance upon section 3482 of the Civil Code as a defense was

1 predicated upon the view that the defendant governmental entity was
2 engaged in the very activity for which it was created, to wit,
3 spraying for mosquitoes. The court, however, rejected this immunity
4 argument based upon Civil Code section 3482 by holding that while
5 the defendant governmental entity was authorized by statute to abate
6 mosquitoes, such power cannot be construed to permit the govern-
7 mental entity to abate mosquitoes in such a manner as to create a
8 nuisance.

9 It is urged by cross-defendants that the plaintiffs in
10 this action have stated no cause of action against the City be-
11 cause there is no allegation of a breach of duty by the defendant
12 City to any individual plaintiff, and, therefore, the City states
13 no cause of action for indemnity against the cross-defendants.
14 This point is without merit. There is little doubt, of course,
15 that in dealing with questions of liability for damage to real
16 property and to the persons of residents living in the vicinity of
17 airports resulting from jet aircraft noise, fumes and vibrations,
18 we are dealing with essentially new conditions and new concepts
19 which remain to be finally determined by our appellate courts. We
20 do, however, have indications from other decided cases of the way
21 in which the law is being directed. The growth of a mobile popula-
22 tion and crowded cities and the development of ever increasing
23 mechanical means of living inevitably bring changes in the law which
24 must govern this type of society. Under the changing conditions of
25 modern living, our Supreme Court has indicated that where compensa-
26 tion is sought for injury and damage, the inquiry is being shifted
27 from the nature of the wrong committed, which undergirds the con-
28 cept of "duty," to the nature of the harm done.

29 The test of liability is coming to be the reasonable ex-
30 pectation of the person injured by the act of another to be free
31 from such injury. The status and relationship of the parties have
32 become important considerations in determining liability. This

1 changing concept is seen in such cases as Dillon v. Legg, 68 Cal.2d
2 728 (1968), in which a negligent automobile driver who struck a
3 child was held liable to the mother for physical injury resulting
4 from the emotional shock of having witnessed the accident. Before
5 Dillon, it would have been said that the automobile driver owed no
6 duty to the mother who was not struck by the automobile. In
7 Elmore v. American Motors Corp., 70 Cal.2d 578 (1969), a bystander
8 was permitted to recover for injuries resulting from a defectively
9 designed automobile part. Before Elmore, it would have been said
10 that the automobile manufacturer owed no duty to the bystander. In
11 Rowland v. Christian, 69 Cal.2d 108 (1968), it was held that a
12 landowner may become liable to a trespasser who gets hurt on the
13 premises. Before Rowland, it would have been said that the land-
14 owner owed no duty to a trespasser.

15 These cases, even without the extension of the law of
16 inverse condemnation as seen in Albers, and even without the in-
17 timation from Loma Portal Civic Club, lead to the conclusion that
18 in the case at bench plaintiffs have alleged a cause of action
19 against the City even though there is no allegation of a duty owed
20 by the City in the common law sense of that term. Certainly, it
21 would be a reasonable expectation on the part of property owners
22 and residents living near an airport to be free from personal in-
23 jury or substantial diminution of property values caused by noise,
24 fumes and vibrations from jet aircraft flights in the vicinity of
25 their properties.

26 The cross-defendant Airlines and Aircraft Manufacturers
27 assert that in the event plaintiffs are able to recover from the
28 defendant City on an inverse condemnation theory, no legal basis
29 exists for the City to shift its liability over to the Airlines or
30 the Aircraft Manufacturers. For this position, cross-defendants
31 rely principally upon the decision of the United States Supreme
32 Court in Griggs v. Allegheny County, 369 U.S. 84 (1962). The

1 Airlines and Aircraft Manufacturers assert that Griggs is a holding
2 that only the airport operator is liable in inverse condemnation
3 for damage to private property resulting from jet aircraft use of
4 a public airport and not the Airlines operating the aircraft or the
5 Manufacturers who build such aircraft and jet engines. Griggs did
6 hold that Allegheny County, which owned and operated the Greater
7 Pittsburgh Airport, was bound under the Fourteenth Amendment to the
8 United States Constitution to compensate a property owner who was
9 damaged as a result of aircraft flights over his land. The point
10 was made in Griggs, which is accepted here under the pleadings,
11 stipulation of facts and affidavits, that the jet aircraft which
12 caused the damage were operating within the navigable airspace de-
13 clared by Congress, and operating within all rules and regulations
14 prescribed by the Federal Aviation Administration. In Griggs, the
15 court held that the fact that the approach patterns were within the
16 navigable airspace declared by Congress did not preclude a holding
17 that there had been a "taking" of private property for public use
18 by the governmental owner and operator of the airport.

19 The case of Griggs reached the United States Supreme
20 Court because the Supreme Court of Pennsylvania had determined that
21 if the jet aircraft flights over the property owner's land consti-
22 tuted a "taking" in the constitutional sense, it was not the County
23 of Allegheny which had committed the "taking." The United States
24 Supreme Court held that it was the governmental entity of the County
25 of Allegheny which had taken a flight easement over the owner's
26 private property for a public use, and that the defendant county
27 was required to pay just compensation to the owner by virtue of the
28 Fourteenth Amendment to the United States Constitution. In so
29 holding, the Supreme Court said, "It is argued that though there
30 was a 'taking,' someone other than respondent was the taker - the
31 airlines or the C. A. A. acting as an authorized representative of
32 the United States. We think however that respondent, which was the

1 promoter, owner, and lessor of the airport, was in these circum-
2 stances the one who took an air easement in the constitutional
3 sense."

4 The reasoning advanced by the United States Supreme Court
5 that the county was the taker of the air easement was to the effect
6 that the county had decided, subject to the approval of the C.A.A.,
7 where the airport would be built, what runways it would need, their
8 direction and length and what land and navigation easements would
9 be needed. The court made the statement that the federal govern-
10 ment takes nothing under these circumstances. But no such gratui-
11 tous statement was made with respect to the airlines. The court
12 concluded that in designing the airport the county had to acquire
13 some private property, but that "by constitutional standards it did
14 not acquire enough."

15 Is Griggs a holding that a governmental airport operator
16 who becomes liable to a damaged plaintiff in inverse condemnation
17 is precluded from shifting liability to the airlines operating the
18 jet aircraft which cause the damage or to the manufacturers of the
19 aircraft being used by the airlines? Griggs does not really touch
20 upon this problem. Griggs reached the Supreme Court of the United
21 States only because the damaged property owner was claiming that
22 his rights under the Fourteenth Amendment were being denied by the
23 state. In his action, the damaged property owner was claiming that
24 his property was being taken without due process of law by a state
25 governmental entity, and that this violated his rights under the
26 due process clause of the Fourteenth Amendment to the United States
27 Constitution. The United States Supreme Court agreed with this
28 contention, and this is the real holding of the Griggs case.
29 Griggs does not determine what rights, if any, damaged property
30 owners possess under state law. If we were dealing solely with
31 rights under federal law, clearly the City could make no claim that
32 it had a right to have its liability in inverse condemnation to a

1 damaged property owner shifted to the Airlines or to the Aircraft
2 Manufacturers under the Fourteenth Amendment to the United States
3 Constitution.

4 In claiming that the City is the only party which may be
5 held liable for inverse condemnation, reliance is placed upon
6 Sneed v. County of Riverside, 218 Cal.App.2d 205 (1963). In Sneed,
7 the complaint by private property owners alleged two bases for re-
8 covery. The complaint alleged that plaintiffs' properties were
9 near an airport owned and operated by the county, and that this
10 property had been damaged by (1) a county airport approach zoning
11 ordinance which created height restrictions, and (2) the flight of
12 a large number of aircraft over plaintiffs' properties. The trial
13 court sustained a demurrer to the complaint but the appellate court
14 reversed, holding that the complaint stated a cause of action in
15 inverse condemnation on each ground alleged. Sneed, however, is
16 not a holding that if a plaintiff alleges a cause of action in
17 inverse condemnation there can be no other theory of recovery stated
18 by a plaintiff, or that airlines or aircraft manufacturers may not
19 be held liable for damage to his property or person from jet air-
20 craft noise, fumes and vibrations.

21 One argument advanced by the Airlines to support their
22 view of no obligation to indemnify the City on the cross-complaint
23 for plaintiffs' recovery in inverse condemnation is that the Air-
24 lines have no right to exercise the power of eminent domain, nor
25 to obtain any air or flight easement to which the City is entitled
26 in the event the City is held liable to the plaintiffs. The City
27 resists this argument by asserting that the Airlines do have the
28 right of eminent domain, even though they are private parties, and
29 that this right is given to them under state law. In Linggi v.
30 Garovotti, 45 Cal.2d 20 (1955), the court upheld the right of a
31 private person, an apartment building owner, to condemn a right-of-
32 way for a sewer line over adjoining land, but indicated that a

1 private plaintiff must prove by a preponderance of the evidence his
 2 right and justification for the proposed condemnation, and that a
 3 somewhat stronger showing of such requirement is necessary than if
 4 the condemnor is a public or a quasi-public entity.

5 The right of a private person to acquire property by
 6 eminent domain is set forth in Civil Code section 1001, and this
 7 right is given for any of the uses specified in section 1238 of the
 8 Code of Civil Procedure, but there are stringent and strict limi-
 9 tations on the rights of a private person, as indicated in Linggi.
 10 People v. Oken, 159 Cal.App.2d 456 (1958), is an illustration of
 11 the stringent requirements. There the court held that a private
 12 citizen could not, under Civil Code section 1001, sue to acquire
 13 property for the public purpose of constructing and operating a
 14 public school. A private person must be authorized to devote the
 15 property to the public use in question, said the court, and such
 16 authorization was found nonexistent in the Oken case. Looking at
 17 the public uses set forth in section 1238 of the Code of Civil
 18 Procedure, we find "airports" as one of the specified uses. The
 19 provision for "airports" found in the Code of Civil Procedure sec-
 20 tion 1238(20) reads as follows: "Airports for the landing and
 21 taking off of aircraft, and for the construction and maintenance of
 22 hangars, mooring masts, flying fields, signal lights and radio
 23 equipment."

24 Even if it be assumed that the Airlines are authorized to
 25 devote property to an airport use within the meaning of Civil Code
 26 section 1001, it is exceedingly doubtful if the language of Code
 27 of Civil Procedure section 1238(20) can be construed to authorize
 28 the taking of an easement in airspace. Although Code of Civil
 29 Procedure section 1239 defines the various rights and estates in
 30 land which may be taken for public use, Code of Civil Procedure
 31 sections 1239.2, 1239.3 and 1239.4 were added in 1945, 1961 and
 32 1965, respectively to deal specifically with airspace easements.

1 Civil Code section 1001 was enacted in 1872 and has remained un-
 2 changed, while Code of Civil Procedure section 1238, which was
 3 likewise enacted in 1872, has been amended several times. The
 4 language of section 1238(20), considered in conjunction with sec-
 5 tions 1239.2, 1239.3 and 1239.4, indicates quite clearly that the
 6 former section is limited to the taking of an interest in land for
 7 the airport proper and not for any flight easement over land which
 8 is adjacent to or near the airport proper. There is neither author-
 9 ity nor reason to justify a holding that the Airlines may exercise
 10 any right of eminent domain or acquire by eminent domain proceed-
 11 ings any air easements for the public use of airports.

12 The contention is made by the Airlines that if the City
 13 is able to shift to the Airlines liability for an inverse condemna-
 14 tion judgment in favor of plaintiffs, the airspace easement which
 15 the City would obtain as a result of the judgment would have to be
 16 given to the Airlines, creating an untenable and unjust result. An
 17 inequitable result would be reached, assert the cross-defendant
 18 Airlines, because only the cross-defendant Airlines would be held
 19 responsible, and yet there are many other airlines which fly into
 20 and out of Los Angeles International Airport and are not named as
 21 cross-defendants in this action. Reference is made to the Haugen
 22 affidavit, in which it is stated that in addition to the scheduled
 23 commercial airlines which are named as cross-defendants, the Los
 24 Angeles International Airport is used by military jet aircraft,
 25 general aviation jet aircraft, supplemental air carrier jet air-
 26 craft and chartered jet aircraft of scheduled air carriers not
 27 authorized to provide scheduled service to and from Los Angeles;
 28 that, in addition, regularly scheduled jet service to and from Los
 29 Angeles International Airport has been inaugurated by Braniff
 30 International Air Lines, Eastern Airlines, Northeast Airlines,
 31 Northwest Orient Airlines, Airlift International, Seaboard World
 32 Airlines, Aerolineas Argentinas, Avianca Airlines, BOAC and

1 Lufthansa German Airlines. The Airlines contend that these users of
2 the Los Angeles International Airport would escape responsibility
3 for their fair share of the total burden of the cost if an inverse
4 condemnation liability is shifted from the City to only the Air-
5 lines named as cross-defendants; that otherwise, the City is in a
6 position to allocate any cost to the City from a judgment in plain-
7 tiffs' favor equitably among all the aircraft users of the Airport
8 through the lease and operating agreements which the City has with
9 all the Airlines. This contention is not persuasive. It is gener-
10 ally held no defense for a person sued that another not named may
11 be equally liable for the asserted claim. The liability of the
12 person sued must be determined on the basis of his own responsi-
13 bility for the loss alleged without regard to whether there are
14 others who may have contributed also to the loss.

15 The Airlines also point out that one of the purposes of
16 the Federal Airport Act was to prevent the type of result which
17 might be reached if there could be a shifting of liability in in-
18 verse condemnation from the airport operator to certain of the Air-
19 lines sued in an indemnity action. Reference is made to provisions
20 in the Federal Airport Act for grants to airports for airport
21 development and the assurances required of the airport proprietor
22 to permit use of the airport by all aircraft carriers. Cross-
23 defendants point to the sections of the Federal Airport Act which
24 authorize the Administrator to make grants of federal funds to pub-
25 lic entities for airport development, including acquisition of
26 "land or interest therein or easements through or other interest
27 in air space." (49 U.S.C. §§ 1103, 1104, 1112[a][2] [1964].) The
28 contention here made is that Congress intended the airport pro-
29 prietors to acquire all the air easements necessary for airport
30 development through the partial use of grants for this purpose from
31 the federal government. In turn, the airport proprietors would be
32 able to spread the cost of these acquisitions among all airport

1 users on an equitable basis through the lease and operating agree-
2 ments with the Airlines and concession holders.

3 It is doubtful, however, if the provisions of the Federal
4 Airport Act may be interpreted to provide for the acquisition by an
5 airport owner of airspace easements, justified only on a theory
6 that jet aircraft flying over property in the vicinity of an air-
7 port emanate such noise, fumes and vibrations as to lower the
8 market value of the property owners' lands. Section 1112 of the
9 United States Code, which deals with allowable project costs for
10 which federal grants may be made, defines "allowable project costs"
11 to include land interests and airspace easements as quoted above.
12 Section 1101(a)(5) defines a "project" as a project for the accom-
13 plishment of "airport development" with respect to a particular
14 airport. Section 1101(a)(3) defines "airport development" to in-
15 clude "any acquisition of land or any interest therein, or of any
16 easement through or other interest in airspace, which is necessary
17 to permit any such work or to remove or mitigate or prevent or
18 limit the establishment of airport hazards" Section
19 1101(a)(4) defines "airport hazard" as meaning "any structure or
20 object of natural growth on or in the vicinity of a public airport,
21 or any use of land near such airport, which obstructs the air space
22 required for the flight of aircraft in landing or taking off at
23 such airport or is otherwise hazardous to such landing or taking
24 off of such aircraft."

25 In considering the definitions of "project," "airport
26 development" and "airport hazards," it seems clear that the federal
27 statutory authorization for inclusion of the costs of acquiring
28 airspace easements as a part of project costs is limited to those
29 airspace easements necessary to prevent airport hazards. And the
30 airport hazards refer to obstructions to aircraft traffic, such as
31 buildings and trees. Thus, federal grants for airport development
32 were not intended to include costs of acquisition of an airspace

1 interest or easement made "necessary to provide an area in which
 2 excessive noise, vibration, discomfort, inconvenience or inter-
 3 ference with the use and enjoyment of real property located
 4 adjacent to or in the vicinity of an airport and any reduction in
 5 the market value of real property by reason thereof will occur
 6 through the operation of aircraft to and from the airport," as
 7 provided for in section 1239.3 of the California Code of Civil
 8 Procedure.

9 The conclusion that the City would obtain airspace ease-
 10 ments as a result of an inverse condemnation judgment in favor of
 11 the plaintiffs is predicated on the theory that a judgment in in-
 12 verse condemnation necessarily is founded on a "taking" of private
 13 property for a public use. The California Constitution, however,
 14 provides compensation where an owner's property has been "damaged"
 15 for a public use as well as where there has been a "taking" of his
 16 property for a public use. In Albers v. County of Los Angeles,
 17 62 Cal.2d 250 (1960), the court allowed a recovery against the
 18 County under Article I, section 14 of the California Constitution
 19 for a damaging of private property by the construction of a govern-
 20 ment project. In so holding, the court did not refer at all to any
 21 taking by the County of any interest in plaintiffs' properties.
 22 Nor did the court speak in terms of any easement in favor of the
 23 County because of the judgment for damages awarded to the property
 24 owners.

25 Steiger v. City of San Diego, 163 Cal.App.2d 110 (1958),
 26 is a case which deals specifically with the question of the right
 27 of a governmental entity to obtain an easement in an inverse con-
 28 demnation action brought by damaged property owners. In Steiger,
 29 the public improvement caused water to be dumped on the plaintiffs'
 30 lands, resulting in soil erosion and a diminution in the market
 31 value of the properties. Here the trial court awarded damages to
 32 plaintiffs but refused to grant an easement in favor of the City

1 which constructed the improvement. The appellate court upheld the
 2 judgment awarding damages to plaintiffs and refusing to grant an
 3 easement in favor of the City of San Diego. The court interpreted
 4 the "or damaged" provisions in the California Constitution as being
 5 different from the "taking" provisions and concluded, therefore,
 6 that the City of San Diego was not automatically entitled to an
 7 easement because of the judgment rendered against it. The justifi-
 8 cation for refusing the City an easement rests in the view that
 9 there can be a damaging of private property for a public use within
 10 the meaning of the state Constitution without a taking of private
 11 property for public use being involved.

12 In Albers and in Steiger, we have cases of physical
 13 damage to private property resulting from the construction and main-
 14 tenance of a governmental project. In the case at bench, plaintiffs
 15 have alleged actual physical damage to their properties resulting
 16 from jet aircraft noise, fumes and vibrations. In addition, how-
 17 ever, the plaintiffs' complaint has to be construed as alleging a
 18 reduction in market values without any physical damage as a result
 19 of jet aircraft noise, fumes and vibrations. Cases such as Albers
 20 and Steiger indicate that where private property has been "damaged"
 21 by action of a public entity for a public use, the situation does
 22 not necessarily require nor make appropriate an easement in favor
 23 of the public entity under all circumstances. The nature of the
 24 injury or damage to plaintiffs' properties resulting from a public
 25 entity's project appears to be the more important consideration in
 26 terms of whether the public entity is entitled to an easement,
 27 rather than the question of whether the property owners are seeking
 28 and obtaining "compensation" or "damages" for the injury involved.

29 A realistic view is that damage to private property in
 30 the form of decreased market value resulting from jet aircraft noise,
 31 fumes and vibrations constitutes a "damaging" of such property or
 32 interest therein, rather than a "taking" of such property. A

1 "taking" in the usual sense of an ouster or dispossession of an
2 owner by the public entity is largely fictional and unrealistic in
3 jet aircraft noise situations. It would seem to follow, therefore,
4 in the case at bench that the City would not necessarily be en-
5 titled to an easement in the event of a recovery by plaintiffs for
6 a diminution in property values caused by jet aircraft flights.
7 The argument of the cross-defendant Airlines that the City should
8 not be entitled to indemnity from the Airlines if the plaintiffs'
9 recovery is predicated on inverse condemnation, because the City's
10 flight easement granted in return for the payment of damages would
11 be shifted to the cross-defendant Airlines and not all airlines
12 using the Airport, is therefore not well taken and must be rejected.
13 If the City is not necessarily entitled to an easement, even though
14 it is required to pay compensation or damages to the affected prop-
15 erty owners, the flight easement problem would not be a bar to a
16 right of indemnity on the part of the City against the cross-defend-
17 ant Airlines, assuming, of course, that the City would otherwise
18 be entitled to such indemnity.

19 But even if it were considered appropriate to grant the
20 City an airspace easement under the circumstances of a recovery by
21 plaintiffs, this would not automatically necessitate a transfer of
22 such easement to the Airlines in the event of an indemnity recovery
23 by the City against the Airlines. Such an easement exists for the
24 public use of aircraft flights. The City could be required to hold
25 the easement in trust for use by all airlines using the Airport,
26 with any airlines not named as cross-defendants required to pay a
27 proportionate share of the judgment, which would reduce the amount
28 of the indemnity from the cross-defendant Airlines. Such a result
29 would not appear to violate any provisions of the grant agreements
30 between the City and the Federal Aviation Administration.

31 It is a basic position of the cross-defendant Airlines
32 that even if the City's potential liability to plaintiffs is

1 predicated on a damaging of plaintiffs' residential properties, as
2 contrasted with a taking of plaintiffs' properties, such liability
3 cannot be shifted to the Airlines because the stipulation of facts
4 and the affidavits submitted by the Airlines establish that they
5 are carrying out their flight operations in the very way contem-
6 plated by the construction and operation of the Airport; that they
7 are flying strictly in accordance with the rules and regulations of
8 the Federal Aviation Administration. The affidavits submitted by
9 the cross-defendant Airlines are to the effect that the City made
10 the decision to construct the Airport and the north runway and then
11 to open the north runway to jet aircraft traffic; that these de-
12 cisions were solely those of the City; that the traffic control
13 personnel of the Federal Aviation Administration are the ones who
14 assign the use of the various runways to the specific aircraft
15 landing and taking off from the Airport; that no aircraft owner or
16 operator determines which of the three runways shall be used. It
17 is thus the contention of the Airlines that the responsibility for
18 the use, operation and effects of the north runway rests solely
19 upon the City because of its decision to construct and operate the
20 Airport and to open the north runway in June of 1967 for jet air-
21 craft use.

22 The City, however, disputes this contention that it made
23 the sole decision to construct the north runway and that it made
24 the sole decision to open this runway for jet aircraft use in June
25 of 1967. The affidavits submitted on the part of the City state
26 that all decisions relative to the opening of the north runway and
27 its hours of use and its method of use by jet aircraft were coopera-
28 tive decisions made by and between the City, the Airlines and the
29 Federal Aviation Administration.

30 The findings which the Airlines request the court to make
31 from the stipulation of facts and affidavits submitted by the Air-
32 lines are to the effect that the City was free in June of 1967 to

1 open, or not to open, the north runway to jet aircraft traffic;
2 that the City has been free at all times to make decisions regard-
3 ing what types of aircraft shall be permitted to use the north run-
4 way and at what hours and under what conditions. In light of the
5 stipulation of facts and the affidavits submitted by the respective
6 parties, we need to consider pertinent questions such as these:

7 Does the City have the authority and power to restrict the use of
8 the north runway of the Los Angeles International Airport to jet
9 aircraft with an Effective Perceived Noise Level rating in decibels
10 considerably lower than that of current jet aircraft? Does the
11 City possess the authority and power to impose on all jet aircraft
12 presently certified by the Federal Aviation Administration a maxi-
13 mum Effective Perceived Noise Level rating in decibels lower than
14 that now in use? According to the Basnight affidavit, the Federal
15 Aviation Administration is at present studying the feasibility and
16 economics of imposing retrofit noise standards for jet aircraft
17 types currently certified. Does the City have the authority and
18 power to impose maximum noise levels for all jet aircraft using the
19 north runway? Does the City have the authority and power to re-
20 strict each cross-defendant Airline to a specified number of jet
21 aircraft landings and takeoffs per day?

22 According to the Moore affidavit on behalf of the City,
23 the City has nothing to do with establishing the specifications or
24 the design of jet aircraft, nor does the City control the flight of
25 any aircraft which operates to and from the Airport upon approval
26 and certification by the Federal Aviation Administration. Accord-
27 ing to the Lockwood affidavit submitted on behalf of the City, the
28 four-runway complex of the Los Angeles International Airport, con-
29 sisting of the two south runways and two north runways, has been
30 planned since 1946, a date long before the advent of jet aircraft,
31 and planned as a part of the National Airport Plan; that the federal
32 monetary grants made since 1949 to aid in completing the runways and

1 related facilities included the north Runway 24L/6R. According to
2 the Lockwood affidavit, the commercial airlines operating jet air-
3 craft at the Los Angeles International Airport increased from six
4 in 1959 to twenty-two in the year 1967 and now stand at twenty-six,
5 as a result of the airlines having been awarded routes to Los
6 Angeles International Airport by the Civil Aeronautics Board. Mr.
7 Sherman, in his affidavit on behalf of the City, adds that the
8 City has been under contractual obligation to allow use of the north
9 Runway 24L/6R since 1959, and that the City must allow commercial
10 jet aircraft to operate on all runways of the Airport, including
11 the north Runway 24L/6R.

12 The Court takes judicial notice that there is now present
13 on the scene a new jet aircraft type, the jumbo jet Boeing 747.
14 The question may be asked: At whose request was this aircraft
15 developed, the Manufacturer, the City of Los Angeles, the Airlines
16 or the Federal Aviation Administration? There is no evidence be-
17 fore the Court as to the Effective Perceived Noise Level rating of
18 this new jet aircraft or how it compares with other jet aircraft
19 in terms of fumes or vibrations claimed by plaintiffs for jet air-
20 craft being used at the time of the filing of this lawsuit. Could
21 the City have refused permission for the Airlines to operate the
22 Boeing 747 jet aircraft on the north runway? It is the City's
23 position, stated in the affidavits submitted by it in opposition to
24 the affidavits submitted by the Airlines, that it had no choice in
25 any of these matters, and that if there is damage to plaintiffs'
26 properties as a result of jet aircraft noise, fumes and vibrations,
27 then such damage is being committed by the Manufacturers of such
28 aircraft and the Airlines which actually use and fly such aircraft.

29 Exhibit F attached to the stipulation of facts, which is
30 an amendment to the lease and operating agreement between the City
31 and Western Air Lines and typical of the lease agreements between
32 the City and the other Airlines, recites that the major capital

1 expansion program, including enlargement and development of the Los
2 Angeles International Airport, is necessary because of the introduc-
3 tion of new and larger aircraft by the Airlines and the increase in
4 the use of air transportation by the traveling public. Exhibit F
5 requires the Airlines to render to the City each month a true state-
6 ment of all revenue aircraft trips arriving at the Airport during
7 the month. Do the provisions of Exhibit F lead to an inference that
8 the Airlines determine the introduction of jet aircraft types and
9 the number of trips of jet aircraft flown into the Airport each day
10 or month without any concurrence required on behalf of the City?
11 There is no dispute regarding the fact that an Airline must main-
12 tain adequate service on the routes authorized by the Civil Aero-
13 nautics Board. But neither the stipulation of facts nor any affi-
14 davits submitted by the parties indicate how the determination is
15 made regarding the number of flights required on a designated route
16 to constitute adequate service, and yet it is clear that the total
17 number of jet flights per day using the north runway at the Los
18 Angeles International Airport may have a material bearing upon the
19 issues raised by plaintiffs' complaint of whether there has been
20 property damage and personal injury to residents resulting from
21 noise, fumes and vibrations emanating from jet aircraft using this
22 one runway.

23 The stipulation of facts and the opposing affidavits in-
24 dicate that the questions regarding the authority of the City in
25 opening the north Runway 24L/6R and controlling its use by jet air-
26 craft are highly disputed issues. Both the City and the cross-
27 defendant Airlines, through the conflicting affidavits submitted,
28 rely in large measure upon the provisions of the Grant Agreements
29 executed by and between the City and the Federal Aviation Administra-
30 tion for a determination of the powers of the City with respect to
31 the Airport. A typical Grant Agreement is attached to the stipula-
32 tion of facts as Exhibit G. The Grant Agreements provide that the

1 City must operate the Airport for the use and benefit of the public,
2 and must keep it open to all types, kinds and classes of aeronau-
3 tical use without discrimination between types, kinds and classes.
4 There is the proviso that the City may establish fair conditions to
5 be met by all users of the Airport "as may be necessary for the safe
6 and efficient operation of the airport." There is the further pro-
7 viso that the City may prohibit or limit any given type, kind or
8 class of aeronautical use of the Airport if such action is neces-
9 sary for the safe operation of the Airport or necessary to serve the
10 civil aviation needs of the public.

11 Do these provisos authorize the City to place limits on
12 the noise, vibrations or fumes emitted by jet aircraft using the
13 Airport? According to Mr. Lockwood, when in 1960 the Airport
14 attempted to implement an operational regulation designed to reduce
15 the noise volumes for east takeoffs, the Federal Aviation Administra-
16 tion claimed federal preemption which prevented the implementation
17 of the proposed regulation. Would the Federal Aviation Administra-
18 tion take the position that the 1968 amendment to the Federal
19 Aviation Act, giving the Federal Aviation Administration the right
20 to impose noise standards on both new aircraft and existing aircraft,
21 creates a federal preemption of noise regulation? The stipulation
22 of facts sets forth that in 1963 the City's Board of Airport Com-
23 missioners passed a resolution stating that the Board would place
24 operating restrictions on supersonic aircraft operations at the
25 Airport to control the noise levels from such aircraft unless cer-
26 tain operating sound levels were achieved in the aircraft design;
27 that in 1969 the Board adopted a resolution to the effect that any
28 new aircraft would be denied the use of the Airport facilities in
29 the event such aircraft imposed noise levels upon adjacent communi-
30 ties which would exceed those currently in existence. These two
31 resolutions adopted by the City's Board of Airport Commissioners
32 indicate a belief by the City that it does have some authority under

1 the Grant Agreements to establish rules and regulations which have
2 a bearing on curbing or lessening noise levels of jet aircraft.

3 The Basnight affidavit speaks of the vital interest of
4 the Federal Aviation Administration in the alleviation of unneces-
5 sary noise disturbances to the residents of communities adjoining
6 airports and lists the various committees and agencies of the
7 government which have embarked on extensive research programs seek-
8 ing means of advancing the art of aviation noise control. Mr.
9 Basnight states that the sum of \$43,000,000 has been allocated under
10 the various noise-related programs, and that the Administration on
11 December 1, 1969 adopted regulations prescribing noise standards
12 which must be met as a condition of type certification for all new
13 subsonic turbojet-powered aircraft. The affidavit does not state,
14 however, what the new noise standards are, whether they are less
15 than the Effective Perceived Noise Level rating of presently cer-
16 tified jet aircraft, or, if the maximum noise level standard is
17 less, how much less. Nor does Mr. Basnight tell us what success has
18 been achieved in jet aircraft noise abatement by the expenditure of
19 the \$43,000,000.

20 The question involved is not so much how interested every
21 government agency may be in the alleviation of jet aircraft noise,
22 but rather, what success has been achieved and is being achieved in
23 the lessening of jet aircraft noise. Regardless of the amount of
24 money expended to curb jet aircraft noise, fumes and vibrations,
25 and regardless of the great need of the public for jet-powered air-
26 craft, the fact remains that under constitutional, statutory and
27 common law principles, if the plaintiffs are able to prove their
28 allegations that the noise, fumes and vibrations from jet aircraft
29 using the north runway of the Los Angeles International Airport have
30 resulted in substantial damage to plaintiffs, there will be liability
31 on the part of the City of Los Angeles for such damage. Although
32 Mr. Basnight states that in prescribing noise standards for new

1 aircraft the Federal Aviation Administration does not intend to
2 impose such standards on the airport proprietor, in this case the
3 City of Los Angeles, and although he states that the Airport pro-
4 prietor is free to impose limitations on the use of its Airport, he
5 limits the Airport proprietor's freedom with the cautious words that
6 this freedom is subject to the contractual limitations contained in
7 the Grant Agreements executed by and between the Airport proprietor,
8 in this case the City of Los Angeles, and the Federal Aviation
9 Administration, and that the Airport proprietor must make a deter-
10 mination as to what limitations will best serve both the local de-
11 sire for quiet and the local need for the benefits of air commerce.
12 The Basnight affidavit points out a realistic and practical, if not
13 legal, limitation on the City's authority over the Airport by stat-
14 ing that the "Los Angeles International Airport is a vital and
15 integral part of the nationwide system of public airports. It is
16 the major air terminal for scheduled foreign and domestic flights
17 located on the west coast of the United States. Any restrictions on
18 its use or operation would directly affect the overall national air-
19 port system." (Emphasis added.)

20 The affidavits submitted by the City and the cross-defend-
21 ant Airlines are too conflicting and insufficient to warrant a fair
22 interpretation at this time of the provisions of the Grant Agree-
23 ments between the defendant City and the Federal Aviation Administra-
24 tion to determine how extensive or how circumscribed is the regula-
25 tory power of the City with respect to establishing rules and regu-
26 lations governing jet aircraft use of the north runway. The affi-
27 davits and the provisions of the Grant Agreements establish that the
28 question of what restrictions the City may impose on the use by the
29 Airlines of the Los Angeles International Airport and its three run-
30 ways, including the north Runway 24L/6R, is a highly contested issue.
31 Such an issue can only be resolved by a trial on the merits.

32 Even in the absence of the City's Assurances contained in

1 the Grant Agreements with the Federal Aviation Administration, the
2 City would be precluded from adopting some types of Airport regula-
3 tions affecting the interstate airlines as an unconstitutional bur-
4 den upon interstate commerce. A challenge by interstate truck car-
5 riers to an Illinois highway safety statute, requiring all trucks
6 and trailers to have their rear wheels equipped with contour rather
7 than straight mudguards, was sustained by the United States Supreme
8 Court on the ground that the statute placed an unconstitutional
9 burden on interstate commerce. (Bibb v. Navajo Freight Lines, 359
10 U.S. 520 [1959].) On the other hand, many state highway safety
11 statutes applicable alike to interstate and intrastate commerce
12 have been upheld, despite the fact that they may have an impact on
13 interstate commerce. See Southern Pacific Co. v. Arizona, 325 U.S.
14 761, 783 (1944).

15 Would a jet aircraft noise-limitation regulation imposed
16 by the City on jet aircraft using the Los Angeles International
17 Airport fall within the burden-on-interstate commerce ban? In the
18 event such a regulation conflicted with more stringent or less
19 stringent regulations imposed by governmental owners of public air-
20 ports in other states in an effort to curb or minimize jet aircraft
21 noise, fumes or vibrations, could such regulations be successfully
22 challenged as undue burdens on interstate commerce? Certainly the
23 City does not possess unlimited power to impose whatever restric-
24 tions it desires on jet aircraft using the Airport in order to
25 lessen jet aircraft noise, fumes or vibrations. However, the extent
26 to which the Commerce Clause constitutes a limitation on the City's
27 power to control the use of its Airport, including the north runway,
28 need not be considered or determined at this stage of the proceed-
29 ings in the case at bench.

30 The City claims a right of indemnity against the Aircraft
31 Manufacturers and the Airlines under the principles of implied or
32 equitable indemnity arising from the relationship of the parties and

1 the circumstances involved. In addition, the City claims a right of
 2 indemnity against the Airlines by virtue of the written contractual
 3 agreement of indemnity in the leases between the City as lessor and
 4 the Airlines as lessees. So far as the written indemnity agreements
 5 between the City and the Airlines are concerned on these motions for
 6 summary judgment, no evidence has been tendered regarding the inten-
 7 tion of the parties to these agreements. Hence, the principle found
 8 in Markley v. Beagle, 66 Cal.2d 951, 962 (1967), would appear
 9 applicable. There the court points out that "in the absence of con-
 10 flicting extrinsic evidence the interpretation of the contract is a
 11 question for the court."

12 The cross-defendant Airlines assert that the City's
 13 theory of implied indemnity is precluded because of the presence of
 14 the written contracts of indemnity between the City and the Airlines.
 15 Thus, in Markley, at page 961, the court said, "Since the parties
 16 expressly contracted with respect to the contractors' duty to in-
 17 demnify the owners, the extent of that duty must be determined from
 18 the contract and not from the independent doctrine of equitable
 19 indemnity."

20 The indemnity provisions of the lease between the City and
 21 Western Air Lines and some of the other cross-defendant Airlines
 22 state that the "Lessee agrees to indemnify and hold Lessor harmless
 23 from and against all loss and damage to which Lessor may be subject
 24 by reason of any act or negligence of Lessee causing damage to per-
 25 sons or property, or both, in connection with Lessee's use and
 26 occupancy of and operation at said Airport; provided, however, that
 27 Lessee shall not be liable for any damage, injury or loss occasioned
 28 by the negligence of Lessor, its agents or employees, "

29 The indemnity provisions of the City's lease with cross-
 30 defendant Airlines Continental Air Lines, Inc., Delta Air Lines, Inc.,
 31 National Airlines, Inc., Pacific Southwest Airlines, Aeronaves de
 32 Mexico, S.A., Compagnie Nationale Air France, Scandinavian Airlines

1 System, Union de Transport Aeriens and Varig Airlines state that
2 the "Airline shall keep and hold City herein harmless from
3 any and all costs, liability, damage or expense claimed by
4 any one by reason of injury or damage to person or property sus-
5 tained in, on or about the demised premises, or arising out of Air-
6 line's operations in or on the demised premises, as a proximate re-
7 sult of the acts or omissions of Airline, its agents, servants or
8 employees, or arising out of any condition occasioned by the acts or
9 omission of Airline in its demised premises, or arising out of the
10 operations of Airline upon or about the demised premises, excepting
11 such liability as may be the result of the direct and proximate
12 negligence, acts or omissions of the City "

13 There is nothing in the stipulation of facts or the affi-
14 davits to indicate any intention of the parties or reasons for the
15 adoption of different language in the two types of written indemnity
16 contracts. A question arises as to whether the language used in the
17 indemnity agreements is broad enough to cover the claimed injuries
18 to property and persons of the plaintiffs occurring outside of and
19 away from the Airport itself. Are such injuries caused "in connec-
20 tion with Lessee's use and occupancy and operation at said Airport,"
21 as provided in one type of lease, or sustained "in, on or about the
22 demised premises," as provided in the second type of lease? The
23 above language would appear to cover injury or damage sustained in
24 close proximity to the Airport itself and not be limited to injury
25 sustained within the four corners of the Airport property. If such
26 a limitation were intended, the natural inference would be that the
27 parties would have written into the agreements that indemnity would
28 be limited to injury sustained on the Airport property and not just
29 in connection with the lessee's use and occupancy of the demised
30 premises or on or about the demised premises. The actual language
31 used, however, would not seem to cover injuries sustained a consider-
32 able distance from the Airport.

1 There is no indication from plaintiffs' complaint of how
2 far from the Airport in terms of feet, yards or miles the various
3 properties are located which plaintiffs assert have been damaged by
4 jet aircraft flights or where plaintiffs received personal injuries.
5 In the absence of evidence, and none has been presented for purposes
6 of these motions for summary judgment, the Court is unable to deter-
7 mine whether the plaintiffs are living, and their real properties
8 are located, sufficiently close to the demised premises to bring the
9 case within the confines of the indemnity agreement. In the absence
0 of evidence, the Court cannot rule that the distance is so great
1 that it makes inoperable the written indemnity coverage. It could
2 well be that evidence at the trial will demonstrate that some of the
3 plaintiffs are located close enough to the Airport to come within
4 the ambit of the indemnity agreements, while others are so far dis-
5 tant as to be excluded. If some of the plaintiffs are located at
6 such a distance to be excluded under such language, we then have the
7 further question of whether the written indemnity clause would
8 necessarily preclude implied indemnity with respect to the loss or
9 damage incurred as to these plaintiffs.

0 Although the indemnity agreements do not provide specific-
1 ally for the Airlines to be liable only for their negligent acts
2 which cause damage, the Airlines urge that this should be the inter-
3 pretation of the language used. There is authority for this inter-
4 pretation. The language used in the indemnity agreements is not
5 unlike that used in the Massachusetts case of Massachusetts Turnpike
6 Authority v. Perini Corp., 208 N.E.2d 807 (1965). Here the Turnpike
7 Authority had contracted with the defendant contractor to construct
8 a tunnel as a public project. In the construction process, private
9 property owners had their property damaged, brought suit against the
0 Authority and recovered judgment. There was no proof of any negli-
1 gence of the defendant contractor or its employees in the construc-
2 tion of the tunnel. The Turnpike Authority sued the contractor for

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indemnity. The Turnpike Authority had a written indemnity agreement with the defendant contractor which required the defendant to be responsible for all claims against the plaintiff Turnpike Authority arising out of, or in consequence of, the "acts" of the defendant in the performance of the work. The Massachusetts court held that the parties intended that the word "acts" should mean negligent acts of defendant and not that the contractor was to be responsible for damages occurring from plaintiff's "taking" of property for public use or for damages which were "unavoidable" as a result of the construction of the public project.

The doctrine of Massachusetts Turnpike Authority is similar to the cases which hold that if a contractor carries out the construction of a public agency project according to the plans and specifications and without any negligence on his part, the only liability with respect to damage caused third persons by the construction of the project is on the public agency and cannot be shifted to the contractor. An example of such a case is Steiger v. City of San Diego, 163 Cal.App.2d 110 (1958), cited supra, in which a public improvement caused water to be dumped on the plaintiffs' lands which resulted in soil erosion and a diminution in market value. The injured landowners sued both the contractors and the City which constructed the improvement. The contractors were dismissed on motions for nonsuits on the theory that they carried out the construction work in accordance with the plans and specifications without negligence, and, in such a case, only the governmental entity is liable in inverse condemnation. Lombardy v. Peter Kiewit Sons' Co., 266 Cal.App.2d 599 (1968), cited supra, is a similar holding with respect to a freeway construction.

The City urges, however, that the role of the Airlines and the Aircraft Manufacturers is more akin to the role of the Southern Pacific Company in Breidert v. Southern Pacific Co., 61 Cal.2d 599 (1964). Here the plaintiffs brought an action in inverse

1 condemnation against the City of Los Angeles and the Southern
 2 Pacific Company for damages to their real properties resulting from
 3 the impairment of an easement of access to the system of public
 4 streets following the closing of a railroad crossing. The trial
 5 court granted a judgment of dismissal after demurrers to the
 6 amended complaint were sustained without leave to amend. This rul-
 7 ing was reversed on appeal. The defendant railroad contended that
 8 it was not a proper party defendant to this action for inverse con-
 9 demnation. However, the Supreme Court answered that since the
 10 defendant railroad was "an active joint participant in closing the
 11 crossing, it is a proper party to the present litigation." Relying
 12 upon this case, it is the City's contention that the Airlines and
 13 Aircraft Manufacturers are not simply an "active joint participant"
 14 in causing any damage which plaintiffs are asserting, but that they
 15 constitute the only active parties which caused such damage.

16 To be compared with the public project construction cases,
 17 such as Massachusetts Turnpike Authority, Steiger and Lombardy, are
 18 the public project construction cases which hold that if a contrac-
 19 tor is negligent in the designing or construction of a public
 20 project and such negligence is the proximate cause of damage to
 21 third persons, the doctrine of sole responsibility on the public
 22 entity has no application. An example of this factual and legal
 23 situation is found in the case of Alisal Sanitary Dist. v. Kennedy,
 24 180 Cal.App.2d 69 (1960). Here the plaintiff public entity con-
 25 tracted with defendants to design and construct improvements to a
 26 sewage disposal plant, including new manholes. There was a flood of
 27 sewage from a manhole which destroyed the celery crop of landowners
 28 nearby. The landowners brought suit against the public entity on
 29 theories of inverse condemnation and nuisance and recovered a judg-
 30 ment based on both theories. In the present suit, the public en-
 31 tity sought indemnity from the defendant contractors. Defendant
 32 contractors interposed the defense that the landowners' recovery

1 against the plaintiff public entity was in inverse condemnation,
2 and that such liability could not be shifted to the contractors
3 who constructed the improvement. The court rejected this conten-
4 tion because the landowner's recovery against the public entity was
5 on the dual theory of inverse condemnation and nuisance. Under the
6 circumstances involved, the court said that the public entity had a
7 right to sue the contractors under the principles of implied
8 indemnity.

9 It is significant that in Alisal the public entity's com-
10 plaint for indemnity alleged that the defendants had negligently
11 planned and constructed the sewer line so as to permit its flooding.
12 It is the allegation and proof of negligence on the part of the con-
13 tractor which takes Alisal out of the doctrine that a contractor
14 who constructs a public project in accordance with plans and specifi-
15 cations and without negligence cannot be held liable for any damage
16 to private persons resulting from the construction and operation of
17 the public project.

18 Do the stipulation of facts and affidavits submitted by the
19 Airlines incontrovertibly place the relationship between the City and
20 the Airlines to be substantially similar to the relationship between
21 the public entity and a contractor exemplified by the cases of
22 Steiger, Lombardy and Massachusetts Turnpike Authority, or do the
23 stipulation of facts and affidavits submitted by the City indicate
24 that the relationship between the City and the Airlines is substan-
25 tially similar to the relationship between the public entity and a
26 contractor exemplified by such cases as Alisal Sanitary Dist. v.
27 Kennedy and Breidert v. Southern Pacific Co.? If there is doubt on
28 this, then a triable issue has been raised between the City as cross-
29 complainant and the Airlines as cross-defendants. It is the Court's
30 conclusion that the stipulation of facts and the opposing affidavits
31 set forth contrary inferences of facts as to the relationship be-
32 tween the City and the Airlines, as posed supra, and hence a triable

1 issue is presented with respect to the nature of this relationship.

2 The cross-defendant Aircraft Manufacturers argue that, as
3 manufacturers of jet aircraft, their relationship with the Airport
4 is similar to that of the contractors in Steiger and Lombardy, per-
5 forming according to the plans and specifications laid down for the
6 Airport by the City. This argument can have no validity on a de-
7 murrer in the face of contrary allegations of the cross-complaint.

8 The City's allegations in the cross-complaint that the jet
9 aircraft used by the Airlines were negligently designed and manu-
10 factured by the cross-defendant Aircraft Manufacturers, and that any
11 jet aircraft noise, fumes and vibrations which caused damage alleged
12 by plaintiffs were the result of the negligent design and manufac-
13 ture of jet aircraft and jet aircraft engines by the cross-defendant
14 Aircraft Manufacturers clearly state a cause of action for indemnity
15 against the Aircraft Manufacturers under the doctrine of the Alisal
16 Sanitary District case.

17 The Airlines contend that both under the written indemnity
18 agreements and under the principles of implied indemnity there can
19 be no right of recovery by the City against the Airlines because the
20 City would be an active participant with the Airlines on any theory
21 of the City's liability to plaintiffs. Similarly, the Aircraft
22 Manufacturers assert in support of their demurrers that the City's
23 cross-complaint on its face fails to show a right of indemnity be-
24 cause there is a failure of the cross-complaint to allege a differ-
25 ence in the character of negligence allegedly committed by the City
26 as contrasted with that claimed to have been committed by the
27 demurring cross-defendant Aircraft Manufacturers. It is contended
28 that the cross-complaint merely alleges a difference in the degree
29 of negligence between the cross-complainant City and the cross-
30 defendant Aircraft Manufacturers, and hence there is a failure to
31 state a cause of action under accepted principles of implied
32 indemnity.

1 The written contracts of indemnity between the City and
2 the Airlines state quite clearly that the City cannot be indemnified
3 for loss or damage caused by the City's own negligence. If the
4 plaintiffs recover from the City on a theory of negligence, the
5 City is precluded from shifting such liability to the Airlines by
6 virtue of this provision of the written indemnity agreement. It
7 would be immaterial also, as to the type of negligence on the part
8 of the City found to exist by the trier of fact, whether the negli-
9 gence consists of acts of omission or acts of commission. Indemnity
10 would be precluded, although the City's negligence concurred with
11 negligence on the part of the Airlines in causing damage to plain-
12 tiffs, because the written agreements do not bar indemnity only in
13 the event of the "sole" negligence of the City.

14 The written contracts of indemnity between the City and
15 the Airlines are thus to be distinguished from that involved in the
16 case of John E. Branagh & Sons v. Witcosky, 242 Cal.App.2d 835
17 (1966). Here a subcontractor's contract with the contractor con-
18 tained an indemnity clause in which the subcontractor agreed to in-
19 demnify and save harmless the contractor for all loss and liability
20 in connection with the work to be performed "excepting only such
21 injury or harm as may be caused solely and exclusively by the fault
22 or negligence of the contractor." An employee of another subcon-
23 tractor was hurt as a result of the active negligence of the defend-
24 ant subcontractor and of the plaintiff contractor concurring in
25 proximately causing the injury. The court held that the plaintiff
26 contractor was entitled to a right of indemnity from the subcon-
27 tractor because the subcontractor had agreed to indemnify the con-
28 tractor for the contractor's own negligence, and such an agreement
29 is not against public policy. In having excluded only the sole
30 negligence of the contractor-indemnitee, the agreement thus expressly
31 provided for indemnity where the loss was occasioned by the concur-
32 rent negligence of the indemnitee and indemnitor. The court rejected

1 the contention of the subcontractor that the agreement should be
 2 interpreted to bar indemnity for concurrent active negligence of
 3 the indemnitee, and concluded that there was no language in the
 4 agreement to justify making a distinction between active and passive
 5 negligence, which are concepts used in cases of implied indemnity.

6 In the indemnity agreements involved in the case at bench,
 7 the language bars indemnity by the City for its own negligence, but
 8 the term "sole or exclusive" negligence is not present. However,
 9 the John E. Branagh & Sons case would indicate that the concept of a
 10 differentiation between active and passive negligence does not apply
 11 in indemnity agreements in the absence of some language indicating
 12 that the concept was intended to be applicable. It would appear,
 13 therefore, that the City has waived any right to indemnity if a loss
 14 or liability to the plaintiffs is based on either active or passive
 15 negligence of the City, even though such negligence concurs with
 16 negligence of the Airlines in causing damage to plaintiffs. The
 17 language of the indemnity agreement between the City and the Airlines
 18 is such that a reasonable interpretation leads to the conclusion
 19 that the City simply did not provide for indemnity against its own
 20 negligence, whether such negligence is the sole cause of injury or
 21 is concurrent with that of the Airlines, since words such as
 22 "solely," "exclusively" or some like term do not appear in the
 23 agreement.

24 In dealing with implied indemnity, the cases make a dis-
 25 tinction between the kinds of negligence by an indemnitee which will
 26 bar his recovery from an indemnitor. The doctrine has developed
 27 that one who has helped bring about the damage should not be allowed
 28 to shift his responsibility to another. Thus, in San Francisco
 29 Unified Sch. Dist. v. Cal. Bldg. Maintenance Co., 162 Cal.App.2d 434
 30 (1958), the court held that the doctrine of implied indemnity neces-
 31 sarily arose in favor of the public entity from a contract it had
 32 with the defendant maintenance company which provided that the

1 maintenance company was to be held "responsible for payment of any
2 and all damages resulting from his operations." Here the plaintiff
3 had to pay damages to defendant's employee who was injured while
4 washing windows of a school building owned by plaintiff, and then
5 plaintiff sought indemnity from defendant. In reaching its conclu-
6 sion, the court used this language: "Whether the school district
7 should be precluded from recovery by reason of its conduct, that is,
8 whether the conduct of the district helped to bring about the dam-
9 age, is at least a question of fact and should have been left to the
10 jury. Under such circumstances it was error to grant the nonsuit."
11 (San Francisco Unified Sch. Dist., supra, at p. 449.)

12 The distinction usually made by the cases is between
13 "passive" and "active" negligence, with the latter being necessary
14 to preclude recovery in implied indemnity. Other contrasting terms
15 used are "nonfeasance" and "misfeasance." "An indemnity clause in
16 general terms will not be interpreted, however, to provide indemnity
17 for consequences resulting from the indemnitee's own actively negli-
18 gent acts." (Markley v. Beagle, 66 Cal.2d 951, 962 [1967].)
19 (Emphasis added.) "Mere nonfeasance, however, such as a negligent
20 failure to discover a dangerous condition arising from the work will
21 not preclude indemnity under a general clause such as the one in
22 this case." (Markley, supra, at p. 962.)

23 In considering the question of what acts of a cross-
24 complainant in helping to bring about the loss will bar indemnity
25 against a cross-defendant, we find some assistance in the case of
26 Atchison T. & S. F. Ry. Co. v. Lan Franco, 267 Cal.App.2d 881 (1968).
27 Here a passenger on a railroad sued the railroad and a truck driver
28 and truck owner for personal injuries arising out of a truck-train
29 collision. The railroad filed a cross-complaint for indemnity
30 against its codefendants, the truck driver and truck owner, on the
31 theory that the railroad's liability would be predicated on passive
32 negligence and the truck driver's and owner's liability would be

1 predicated on active negligence, and hence the railroad would be
 2 entitled to indemnity against the defendants committing the active
 3 negligence. The truck owner demurred to the railroad's cross-
 4 complaint. The appellate court upheld the trial court in sustain-
 5 ing the demurrer. The reasoning of the court was that if the rail-
 6 road were to be held liable it would, of necessity, be based upon
 7 active negligence in a truck-train collision, and therefore no
 8 legal ground for indemnity could possibly be stated by the railroad.
 9 This case is an example of the principle that if a complaint for
 10 indemnity and declaration of rights makes no showing for recovery as
 11 a matter of law, or if the alleged controversy is purely illusory
 12 and hypothetical, a demurrer should be sustained. See also Wilson
 13 v. Transit Authority, 199 Cal.App.2d 716 (1962); Silver v. City of
 14 Los Angeles, 217 Cal.App.2d 134 (1963).

15 However, in Jefferson Incorporated v. City of Torrance,
 16 266 Cal.App.2d 300 (1968), we have a cross-complaint by one defend-
 17 ant in a property damage action against a second defendant, seeking
 18 declaratory relief that the cross-complaining defendant is entitled
 19 to indemnity from the second defendant if the plaintiffs recover a
 20 judgment against the cross-complaining defendant. The trial court
 21 sustained the cross-defendant's demurrer on the ground that the
 22 cross-complaint failed to show grounds for a declaration of indemnity
 23 in the cross-complainant's favor. This ruling of the trial court
 24 was reversed by the appellate court. The basis of the decision is
 25 that a complaint for declaratory relief is to be construed liberally
 26 as against demurrer, and a complaint for declaratory relief need not
 27 establish that plaintiff is entitled to a favorable declaration,
 28 and hence a demurrer may not be sustained on this ground. The
 29 court's view was that where the plaintiff's right to recover has not
 30 been tried and adjudicated and it is impossible to tell on what
 31 theory plaintiff may recover, and where the question of indemnity
 32 may well depend on the facts established by plaintiff and the theory

1 of the plaintiff's recovery, the validity of a declaratory relief
2 cross-complaint for indemnity must be determined by the triable
3 issues presented by the complaint and the cross-complaint.

4 Both the cross-defendant Airlines and the cross-defendant
5 Aircraft Manufacturers consider that the case at bench falls within
6 the principles of the San Francisco School District and the Lan
7 Franco cases. However, for the Court to sustain a demurrer to the
8 City's cross-complaint or to grant a summary judgment in favor of
9 cross-defendants under the principle of these two cases, the Court
would have to conclude that under no hypothesis of recovery by
plaintiffs against the City would the City have a right to indemnity
because the City's conduct of necessity would amount to active negli-
gence. Plaintiffs have alleged a wide variety of negligent acts and
omissions on the part of the City as the proximate cause of alleged
injury to the properties and persons of plaintiffs. Some of the
negligence alleged falls into the category of nonfeasance or passive
negligence. Others fall into the category of misfeasance or active
negligence. Only recovery by plaintiffs for active acts of negli-
gence on the part of the City will bar the City from a right of in-
demnity under the Lan Franco case.

In the San Francisco Unified School District case, the
court held that it becomes a question of fact for the trier of fact
as to whether the indemnitee has helped to bring about the damage
for which he seeks indemnity from the indemnitor. The stipulation
of facts and affidavits submitted by the cross-defendant Airlines in
the case at bench do not establish as a matter of law that the acts
done by the City are of the character which would preclude indemnity
under this principle which bars indemnity to one who helps bring
about the damage. Whether the conduct of the City helped to bring
about the damage to plaintiffs is a disputed question of fact. It
is thus a triable issue, and cannot be disposed of on a motion for
summary judgment. This result is supported by the case of Alisal

1 Sanitary Dist. v. Kennedy, supra. There the defendant contractors
2 raised the defense that the plaintiff governmental entity was neg-
3 ligent along with the defendant contractors, and that such concur-
4 ring negligence would preclude indemnity recovery. However, the
5 court said that the complaint on its face did not show that plain-
6 tiff was actively negligent with the defendants so as to preclude
7 indemnity.

8 Alisal would seem to be persuasive in the demurrer situa-
9 tion presented in the case at bench. It cannot be said that the
0 City's cross-complaint against the Aircraft Manufacturers on its
1 face establishes that the City was actively negligent with respect
2 to any alleged liability of the City to plaintiffs so as to pre-
3 clude a claim of indemnity from the cross-defendant Aircraft Manu-
4 facturers.

5 In the event plaintiffs in the case at bench are able to
6 establish a right of recovery against the City on a theory of
7 nuisance, without proof of any negligence on the part of the City,
8 the problem of indemnity will involve a consideration of different
9 principles from those involved in recovery on a negligence theory.
0 The question of indemnity for nonnegligent nuisance will revolve
1 around whether acts and operations of the cross-defendant Airlines
2 and Aircraft Manufacturers come within the principle that their
3 operations at the Airport are simply carrying out the functions of
4 the Airport as a public project in accordance with its plan and pur-
5 pose, and hence liability would be limited to the City as the opera-
6 tor of the Airport, or whether the nuisance created is such that
7 the operation of jet aircraft at the Airport is analogous to the
8 principle of a contractor who has defectively designed and con-
9 structed the public project which caused damage, so that the City
0 may point the finger of responsibility to the cross-defendant Air-
1 lines and Aircraft Manufacturers. A determination of which situa-
2 tion exists in the case at bench can only be made by a full-scale

1 trial on the merits.

2 The cross-defendant Airlines assert, in support of their
3 position regarding the relationship of the Airlines to the Airport,
4 that in opening the Airport and the north runway, the City was well
5 aware of the use to be made of the Airport by the Airlines with
6 their jet aircraft, and that the operations of jet aircraft to and
7 from and at the Airport, therefore, are strictly in accordance with
8 the plans and specifications of the Airport as a public project, all
9 of which was with the full knowledge, consent and expectation of
10 the City. The City, on the other hand, asserts in support of its
11 theory of the relationship between the Airport and the Airlines
12 that at the time of the planning and building of the Airport and the
13 north runway the City was unaware of the implications involved in
14 the use of jet aircraft and the possible damaging effects of jet
15 aircraft emitting noise, fumes and vibrations. The affidavits sub-
16 mitted on both sides point out to some extent the limitations on
17 decision making imposed on the City in the year 1967, when the north
18 runway was opened to unimpeded use by jet aircraft. Thus, Mr.
19 Donald J. Haugen, Chief of the Los Angeles Tower-Terminal Radar
20 Control of the Federal Aviation Administration, states in his affi-
21 davit that the current level of traffic requires the use of all
22 three runways under the circumstances in which those runways are
23 presently being assigned, and that if one or more of these runways
24 were unavailable, congestion and delays would inevitably result.

25 It appears clear, therefore, that one question to be de-
26 cided on the trial is whether, when the City made its initial de-
27 cision to locate the Los Angeles International Airport where it is
28 now located, and to continue to expand it within the blueprint for
29 the National Airport System, that decision created a sole responsi-
30 bility and liability for all aircraft uses and developments of the
31 Airport for the future. This decision was finalized, for all in-
32 tents and purposes, in 1946, when a four-runway complex was planned.

1 This was before the advent of jet aircraft. As conditions developed
2 and changed since 1946, to what extent did the City appreciate its
3 responsibilities under the Grant Agreements through which it re-
4 ceived substantial assistance from the federal government in the
5 development of the Airport? To what extent did the City realize
6 or foresee that jet aircraft were on the horizon, and that property
7 owners in the immediate vicinity of the Airport would contend that
8 jet aircraft on their takeoff and landing patterns would produce
9 such noise, fumes and vibrations as to cause substantial damage to
10 persons and property?

11 All of these matters must be developed by evidence sub-
12 jected to the test of cross-examination to determine the true facts.
13 At this stage of the case, it cannot be determined which allega-
14 tions, if any, may be proved by the plaintiffs upon trial or on
15 what theory, if any, plaintiffs may recover a judgment against the
16 City. By the same token, it cannot be determined except by evidence
17 at a trial whether the City is able to bring itself within some of
18 the legal principles discussed herein to entitle it to a declara-
19 tion of rights and indemnity against the cross-defendant Airlines
20 and Aircraft Manufacturers.

21 The special demurrer of the Flying Tiger Line, Inc., is
22 directed to the point that from the City's cross-complaint it can-
23 not be determined what lease or leases the second cause of action
24 refers to or what are the essential terms of such leases which are
25 alleged to contain the contractual indemnity rights asserted by the
26 City. In the City's memorandum of points and authorities in oppo-
27 sition to the demurrer of Flying Tiber Line, Inc., there is attached
28 a copy of the Lease and Operating Agreement relied upon by the City,
29 and the City requests the Court to take judicial notice of this
30 document. This the Court will do.

31 In light of the views expressed herein, there is no neces-
32 sity to discuss the problem of indemnity in the event plaintiffs

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recover a judgment against the City on theories advanced other than those of inverse condemnation, nuisance or negligence.

The motions for summary judgment made by the cross-defendant Airlines are denied. The demurrers of Flying Tiger Line, Inc., The Boeing Company, McDonnell Douglas Corporation, General Electric Company and United Aircraft Corporation are overruled, and each demurring cross-defendant is given twenty days within which to file an answer to the City's first amended cross-complaint.

DATED this 17th day of April, 1970.

BERNARD S. JEFFERSON

Bernard S. Jefferson
Judge of the Superior Court