

#36.65

9/2/71

Memorandum 71-59

Subject: Study 36.65 - Condemnation (Airports)

Summary

Code of Civil Procedure Section 1239.3--authorizing condemnation of interests in airspace over land near airports in order to secure the right to inflict aircraft flight disturbance upon such land--was reserved from the discussion in Memorandum 71-45 of various authorizations of condemnation to protect airport operations. Section 1239.3 differs from the latter provisions in that the area in which it authorizes condemnation is not defined by reference to airport boundaries or projections of actual flight paths and in that its purpose is to permit foreclosure of potential inverse claims arising out of flight disturbance.

Proper disposition of Section 1239.3 for purposes of the comprehensive statute raises the question whether it should be extended to permit acquisition of land itself rather than merely airspace rights and what limits, if any, should be placed upon the acquisition of the fee.

Background

Section 1239.3 provides:

1239.3. Airspace above the surface of property or an air easement in such airspace may be acquired under this title by a county, city, port district, or airport district if such taking is necessary to provide an area in which excessive noise, vibration, discomfort, inconvenience or interference with the use and enjoyment of real property located adjacent to or in the vicinity of an airport and any reduction in the market value of real property by reason thereof will occur through the operation of aircraft to and from the airport.

The purpose of the section is:

to permit appropriate governmental bodies to take the initiative in securing rights which might otherwise be the subject of actions for

inverse condemnation under the principle that interference with the use and enjoyment of such property by excessive noise, vibration, discomfort, and inconvenience through the operation of aircraft to and from an airport may be compensable even where the property involved is not subject to direct overflights. [City of Oakland v. Nutter, 13 Cal. App.3d 752, 766, 92 Cal. Rptr. 347 (1970).]

Section 1239.3 was passed in 1965 apparently in response to the holding in Loma Portal Civic Club v. American Airlines, Inc., 61 Cal.2d 582, 394 P.2d 548 (1964). There, an injunction against the airlines was denied owners of residential property underlying and on the periphery of airport approach paths. The landowners claimed loss of use and enjoyment due to overflight disturbances. The court pointed out that the flights involved were conducted under federal and state certificates of public necessity and convenience and had great public value, holding that injunctive relief would be denied where a "public use" had attached to private property via governmental activity. The court hinted broadly that the remedy available to the landowners was a suit for damages against the entity operating the airport.

Loma Portal is a judicial declaration that overflights which disturb and damage underlying property--at least those flights conducted pursuant to certificates of public necessity and convenience--are a "public use." Section 1239.3 converts the judicial declaration into a legislative declaration and permits the public authority to take by direct condemnation private property to which the public use will attach in the form of noise and vibration disturbances, and the like, rather than having to proceed with overflights and await the inverse action. Cf. Van Alstyne, California Inverse Condemnation Law, 10 Cal. L. Revision Comm'n Reports 1, 68-70 (1971).

### Analysis

The companion provisions to Section 1239.3--Sections 1239.2 and 1239.4 (see Memorandum 71-45)--permit the taking of airspace rights and interests in land "where necessary to protect the approaches of any airport." The quoted language has been construed as a limitation with regard to Section 1239.2; it is unlikely that it does not have the same effect in Section 1239.4. Section 1239.3 is distinguished on the ground that it is not limited in application to property within or underlying actual flight paths but permits condemnation in any area to which overflight noise, vibration, and the like may penetrate. See Oakland v. Nutter, *supra*. Section 1239.3, however, permits the taking only of airspace interests. (Noticeably, Section 1239.3 is not applicable to one major airport condemnor, the State Department of Aeronautics. This defect can and should be remedied if the substance of Section 1239.3 is to be continued.)

It appears that no constitutional limitation would prevent an appropriate extension of Section 1239.3 to permit the taking of interests in land itself, including fee interests. Insofar as there is a concurrence of judicial and legislative opinion that maintenance of disturbing low-level flights over private property is a public use, authorization of the taking of any kind of property necessary for the use would seem to be justifiable.

However, there is a persuasive rationale for having adopted the present limitation to airspace rights. The physical extension of overflight disturbance from actual paths of flight will vary from case to case. Thus, an unlimited authorization to take land interests--including fees--wherever some disturbance will be inflicted is potentially unfair to landowners in that it permits the taking of maximum interests where minimal damage will occur. This

limitation problem, and the potential for abuse it entails, is avoided where only airspace rights are authorized to be taken since the taking of any amount of airspace for the purpose of inflicting disturbance where little disturbance will occur in no way disposes the landowner.

Moreover, a blanket authorization to take as much as the fee in land where any degree--or any specified degree--of overflight disturbance will occur would not be constitutionally justified merely on the ground that disturbing overflights are a public use. Since the crux of the public use is infliction of overflight disturbance (nondisturbing overflights are, of course, privileged), the degree of disturbance that will occur in any case determines the interest that may be taken. Cf. Van Alstyne, California Inverse Condemnation Law, 10 Cal. L. Revision Comm'n Reports 1, 68-70 (1971). It would seem to be inappropriate, for instance, to provide simply that, where  $x\%$  ( $x$  being anything less than 100) of damage will occur, any interest, including the fee in the land, may be taken.

That there would be practical limitations on abuse of an authorization to take any interest where some disturbance will occur--for instance, the fact that overreaching would be financially difficult for most airport condemnors and would tend to substantiate additional claims for compensation of the part of neighboring landowners, and the fact that condemnees would retain a vestigial right to contest particular takings as not serving a public purpose in that minimal disturbance will occur--would not seem to make an unlimited authorization to take land more attractive either on policy or constitutional grounds.

Nevertheless, there are significant problems for condemnors in an airspace rights limitation, avoidance of which problems may constitute an additional public use that would justify authorizing taking interests in land where overflight disturbance will occur.

An airspace rights limitation presents problems of appropriate drafting and valuation of airspace rights for purposes of overflight disturbances. Indeed, these problems may be sufficiently significant to defeat the purpose of Section 1239.3 since disputes over proper valuation may be as great an evil as the inverse litigation the section was designed to avoid and, improper drafting may lead to actual inverse litigation at a later time. This problem could be alleviated by a provision permitting condemnor to take the whole fee and dispose of rights to use the land in manners (prescribed by condemnor) commensurate with its burden of overflight disturbance. The purpose and effect of such a provision would be essentially the same as that of recently approved Section 304 of the Comprehensive Statute (right to acquire property for incidental purposes).

Furthermore, cases will arise in which the taking of a sufficient airspace right will cost substantially the whole value of the property. This problem is essentially the same as that presented by excess condemnation of physical and financial remnants, and has essentially the same solution as the first problem. (See Comprehensive Statute, Division 4, Chapter 7, Sections 420 and 421.)

Thus, it would seem adequate and permissible to extend Section 1239.3 to permit the taking of land, in addition to airspace rights, in cases that would be brought within the provisions of the remnant and incidental condemnation sections by the taking of airspace rights for the purpose of inflicting overflight disturbance. The remnant and incidental condemnation procedures and limitations would apply.

A handful of alternatives to the above proposal suggest themselves:

1. A provision permitting taking of the land itself where market value has been damaged x%. Such a provision has been mentioned above as of doubtful constitutionality and objectionable from the standpoint of a policy of fairness to landowners.

2. A provision permitting taking of the land itself if it lies within legislatively established zones defined by levels of overflight disturbance. Such a provision is in essence the same as (1) above. Where the level of disturbance within a zone in which taking of land is permitted was not substantially equal to total damage to market value, the same constitutional and policy objections would apply.

3. A provision permitting the taking of such interest as would be compensable in an inverse action. Except that it would permit the taking of fees in some cases, such a provision merely changes the form, not the substance, of the existing provision. The change in form invites in each case the sort of inverse litigation Section 1239.3 was designed to foreclose.

#### Conclusion

The substance of Section 1239.3, made applicable to all airport condemnors, should be extended to permit the taking of land, in addition to airspace rights, where to do so could be justified as remnant or incidental condemnation, and according to the procedures and limitations specified in the remnant and incidental condemnation provisions (Sections 304 and 421 of the Comprehensive Statute). A draft statute--proposed Public Utilities Code Section 21654--embodying these conclusions is attached as Exhibit I.

Respectfully submitted,

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EXHIBIT I

PUBLIC UTILITIES CODE § 21654

Staff recommendation August 1971

Public Utilities Code Section 21654. Acquisition of property for overflight disturbance (added)

21654. (a) Any person authorized to exercise the power of eminent domain for airport purposes may acquire by purchase, gift, devise, lease, condemnation or otherwise, airspace or an easement in such airspace above the surface of property within, beyond, adjacent to, or in the vicinity of, the boundaries of an airport or airport site, or the aircraft approach paths thereto, where necessary to permit imposition upon property of excessive noise, vibration, discomfort, inconvenience, interference with use and enjoyment, and any consequent reduction in market value, due to operation of aircraft to and from the airport.

(b) Any person authorized to acquire property pursuant to subdivision (a) may also acquire, by purchase, gift, devise, lease, or condemnation pursuant to Sections 304 and 421 of the Eminent Domain Code, land, or any interests therein, underlying property authorized to be taken by subdivision (a).

Comment. Section 21654 continues and expands the authority (formerly found in Code of Civil Procedure Section 1239.3) of cities, counties, airport districts, and the San Diego Unified Port District to condemn to provide areas where overflight disturbance will result in the taking of property values,

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which takings might otherwise be the subject of inverse condemnation actions. The authority of former Section 1239.3 is also extended by Section 21654 to the State Department of Aeronautics and any other airport condemnors previously not covered by specific grant.

Subdivision (a). Subdivision (a) modifies the language of former Code of Civil Procedure Section 1239.3 in order to make it clear that airspace or airspace rights may be taken in any area to which overflight disturbance will penetrate. Acquisitions are not limited in area by reference to the boundaries of an airport or airport site or the actual flight paths of aircraft.

Subdivision (b). Subdivision (b) expands the authority of former Code of Civil Procedure Section 1239.3 by permitting the taking of land, or any interest therein, in any area to which overflight disturbance will penetrate, where, except for the airspace rights limitation contained in subdivision (a), to do so would be rendered permissible as remnant or incidental condemnation (under Sections 304 or 421 of the Eminent Domain Code) by a taking of such airspace or airspace rights as are described by subdivision (a). For example, where it would be extremely difficult to draft or properly evaluate an airspace easement that would permit infliction of all the foreseeable overflight disturbance that might occur in a particular case, or where any such easement that might be acquired probably would be subject to dispute or litigation at a later time, it would be permissible, under Section 304 of the Eminent Domain Code, to take the fee in the land, granting back rights to only such



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uses of the land as would be commensurate with its foreseeable burden of overflight disturbance. It would also be permissible, where the taking of an adequate airspace easement would cost substantially the value of the whole property, to take a fee under Section 421 of the Eminent Domain Code (remnant condemnation).

The right to take under either Section 304 or Section 421 of the Eminent Domain Code includes, of course, the right to dispose of property thus acquired pursuant to Sections 304(b) and 422 of the Eminent Domain Code.