

#36.65

9/28/71

Memorandum 71-72

Subject: Study 36.65 - Condemnation (Airports)

Summary: At the September meeting, the Commission requested submission of a memorandum regarding the policy of Government Code Section 50485.2--that elimination of airport hazards "should be accomplished, to the extent legally possible, by exercise of the police power," rather than by eminent domain. Section 50485.2 is set out in Exhibit I.

Concern was expressed at the September meeting that Section 50485.2 imposes a questionable policy of reliance on police power regulation where fairness to landowners would dictate the use of eminent domain. Essentially the same policy is made to apply to open space acquisitions (see Government Code Section 65912), but, apparently, not elsewhere.

It appears that Section 50485.2 may have inspired some abuses. It also appears, however, that the language of Section 50485.13¹ could be read as

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1. Public Utilities Code Section 21652 (tentatively approved at the September meeting) replaces Government Code Section 50485.13. Section 50485.13 provides in pertinent part:

50485.13. Acquisition of property containing nonconforming use; eminent domain; damages. In any case in which: (a) it is desired to remove, lower, or otherwise terminate a nonconforming structure or use; or (b) the approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations under this article; or (c) it appears advisable that the necessary approach protection be provided by acquisition of property rights rather than by airport zoning regulations, the city or county within which the property or nonconforming use is located or the city or county owning the airport or served by it may acquire, by purchase, grant, or condemnation in the manner provided by the law under which a city or county is authorized to acquire real property for public purposes, such air right, air navigation easement, or other estate or interest in the property or nonconforming structure or use in question as may be necessary to effectuate the purposes of this article. [Emphasis added.]

sufficiently tempering the policy of Section 50485.2 as to make it innocuous, and that the repeal of Section 50485.13 as recommended by the Commission would justify an appropriate amendment to Section 50485.2. See Exhibit I for suggested amendment to Section 50485.2.

Analysis: Section 50485.1 defines "airport hazard" as follows:

"Airport hazard" means any structure or tree or use of land which obstructs the airspace required for the flight of aircraft in landing or taking off at an airport or is otherwise hazardous to such landing or taking off of aircraft.

("Structure" means any object constructed or installed by man

"Tree" means any object of natural growth.)

The definition is written in the present tense. Thus, Section 50485.2, in requiring police power regulation to prevent "creation or establishment" of airport hazards, presents the prospect merely of zoning against future use. The section does not in terms contemplate the taking of present uses, except insofar as its final sentence provides that "the elimination, removal, alteration, or marking and lighting of existing airport hazards are public purposes for which a city or county may raise and expend public funds and acquire land or property interests therein." (Emphasis added.) The distinction between future uses and present nonconforming uses is carried out in Section 50485.13.

The policy in question is one which emphasizes zoning in situations analogous to the traditional ones of police power regulation to exclude nuisances and height restriction zoning, both of which activities are modernly regarded as well within the police power. See Sneed v. County of Riverside, 218 Cal. App.2d 205, 32 Cal. Rptr. 318 (1963); Berger, Nobody Loves an Airport, 43 So. Cal. L. Rev. 631, 750-763 (1970).

Notwithstanding the intent of the policy may be proper, however, airport approaches zoning has been subject to abuses. Three general types of abuse have appeared: zoning to depress values prior to condemnation (Kissinger v. City of Los Angeles, 161 Cal. App.2d 454, 327 P.2d 10 (1958); see also Smith v. County of Santa Barbara, 243 Cal. App.2d 126, 52 Cal. Rptr. 292 (1966), indicating that zoning which stabilizes current values to avoid future condemnation may not be improper); taking of easements of flight in the guise of height regulations (Sneed v. County of Riverside, supra; see also Morse v. County of San Luis Obispo, 247 Cal. App.2d 600, 55 Cal. Rptr. 710 (1967), which distinguishes Sneed on grounds which parallel those set forth in Smith, supra); and excessive regulation which forecloses imminent development (Peacock v. County of Sacramento, 271 Cal. App.2d 845, 77 Cal. Rptr. 391 (1969)). The bulk of the cases (Kissinger, Smith, Morse, and Peacock) center upon the general rule that, where the value of land is established by a use which is at least imminent, regulation which impedes the use is potentially a taking. That rule, although its application is uncertain in any case, is likely to be the dividing line beyond which zoning for airport protection is not "legally possible."

Unlike the provisions relating to open space acquisition, however, the Airport Approaches Zoning Law provides a ready escape from any strictures imposed by the policy of Section 50485.2, in that it permits resort to acquisition by "purchase, grant, or condemnation" in any case in which "it appears advisable." Section 50485.13. Probably, the term "advisable" was intended to indicate cases in which an extraordinary degree of protection was required, but it does not abuse the term to read it to include cases in which acquisition of property interests would be legally advisable. Thus read, the provision of Section 50485.13 obviates any implications of Section 50485.2 that acquisition of property interests is permissible only where legally necessary.

Insofar as approval of Public Utilities Code Section 21652 contemplates repeal of Section 50485.13, it appears to change the policy of the Airport Approaches Zoning Law: The language of Section 50485.2 becomes a strict statement of policy rather than mere precatory language. This would seem to be sufficient reason for recommending an amendment to Section 50485.2.

Respectfully submitted,

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EXHIBIT I

GOVERNMENT CODE § 50485.2

Staff recommendation September 1971

Government Code § 50485.2. Airport hazards; legislative finding and declaration; nuisance; public purpose (amended)

50485.2. It is hereby found that an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity and also, if of the obstruction type, in effect reduces the size of the area available for the landing, taking off and maneuvering of the aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein. Accordingly, it is hereby declared: (a) that the creation or establishment of an airport hazard is a public nuisance and an injury to the community served by the airport in question; and (b) that it is therefore necessary in the interest of the public health, public safety, and general welfare that the creation or establishment of airport hazards be prevented by appropriate use of the authority conferred by this article and Article 2.6 (commencing with Section 21652) of Part I of Division 9 of the Public Utilities Code ~~; and (c) that this should be accomplished, to the extent legally possible, by exercise of the police power~~. It is further declared that both the prevention of the creation or establishment of airport hazards and the elimination, removal, alteration, mitigation, or marking and lighting of existing airport hazards are public purposes for which a city or county may raise and expend public funds and acquire lands or property interests therein.

GOVERNMENT CODE § 50485.2

Staff recommendation September 1971

Comment. The amendment to Section 50485.2 is necessitated by the repeal of Section 50485.13. Notwithstanding the statement of policy regarding use of the police power contained in Section 50485.2, Section 50485.13 permitted acquisition of airport approach protection by means other than police power regulation "[i]n any case in which . . . it appears advisable." The result was creation of a broad discretion in local governments as to the means to be employed in acquiring airport approach protection. The language of Section 50485.2 has been amended to achieve approximately the same statement as was formerly derived from reading Sections 50485.2 and 50485.13 together. See Public Utilities Code Sections 21652 and 21653, dealing with acquisitions for airport approach protection.