65.40 10/29/69

Memorandum 69-133

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

The discussion of aircraft noise damage at the October 1969 meeting was of a general nature and wide ranging. The views expressed by the various legal experts who attended the meeting indicate that there is considerable uncertainty in this field of law and that the various trial courts are inconsistent on even such basic matters as the test to be applied to determine whether the plaintiff has established a case--a "taking" of property--that permits him to obtain a jury determination of damages. At the same time, various suggestions were made that offer sufficient promise to merit further consideration.

See Exhibit I, blue, attached, for an interesting article concerning the expected future developments in dealing with the aircraft noise problem. Commissioner Miller sent us this article.

Pursuant to the direction of the Commission at the October meeting, this memorandum attempts to outline the basic issues, policy considerations, and other factors bearing on inverse condemnation liability for aircraft noise damage. At the December 1969 meeting, we hope that the Commission can make tentative decisions on the various policy questions listed below.

BACKGROUND RESEARCH STUDY

Attached is a printed copy of the Commission's background research study. Van Alstyne, Just Compensation of Intangible Detriment: Criteria for Legislature Modifications in California, 16 U.C.L.A. L. Rev. 491 (1969). The portions pertinent to aircraft noise damage are pages 491-492, 523-544. You should reread this portion of the study prior to the meeting if you can find the time. Significant actions were taken by the 1969 Legislature. See Exhibit

IV (each violation of standards based on noise level acceptable to reasonable person residing near airport punishable by $1,000 fine); Exhibit V (long-range management of noise environment).

SCOPE OF STUDY

Inverse condemnation liability, of course, is concerned only with damage to property as distinguished from bodily injury. It is assumed that our effort will be limited to inverse condemnation liability and that liability, if any, for personal injury will be based on the statutes governing tort liability. We are concerned in this study only with landing and takeoff (plus aircraft noise in preparing for takeoff)--not with sonic booms.

PROPER DEFENDANT

In Griggs v. Allegheny County, 369 U.S. 84 (1962), the United States Supreme Court determined that the airport operator--the defendant county, which had planned and built the airport with federal approval and financial assistance--was the responsible entity that had "taken" an aviational easement in the constitutional sense. Noting that appropriate approach and glide paths are indispensable to airport operation, the court concluded that the county was responsible for acquisition of the necessary easements as well as the necessary land on which the runways were built. To develop the airport, the county had to acquire some private property. "Our conclusion," said the court, "is that by constitutional standards it did not acquire enough."

Although the law is unclear, a private airport operator probably does not have the right of eminent domain. If he does not have this right, there would be no inverse condemnation liability and there is nothing to distinguish the private airport from any other private business with regard to enjoining operations which create a nuisance. Thus, the California Supreme Court has

sustained a lower-court injunction against objectionable over-flights in connection with a privately operated airfield and rejected the contention that only damages for "inverse condemnation" should have been awarded. Anderson v. Souza, 38 Cal.2d 825, 243 P.2d 497 (1952).

It appears that the operator of the airport--rather than the air carriers--should be liable in inverse condemnation in any case where the operation causing the damages cannot be enjoined. As a practical matter, requiring the injured property owner to bring his action against the various air carriers causing the injury would create difficult problems as to the extent of each carrier's liability and might leave the plaintiff without any effective remedy. There is no reason to change the existing law as to the proper defendant. As Professor Van Alstyne points out in the attached study:

> The airport operator, having primary responsibility for airport planning and development, is strategically situated to deal with "externalized" costs of airport operation consisting of noise burdens imposed on surrounding land users. These costs usually can be minimized and distributed by the airport management in the manner least harmful to the general social welfare, either by improving airport operational characteristics, eliminating external perception of airport-generated noise, or compensating for the external losses and distributing the costs of so doing in an equitable fashion among those airport users who are so benefited. [Footnotes omitted.]

Accordingly, the staff recommends that the operator of the airport--whether a public or private entity--be liable in inverse condemnation in any case where the operation causing the damages cannot be enjoined.

At the October meeting, it was suggested that airport operators be given a right of indemnity against the aircraft operators. The suggestion seems sound in principle, but it is easy to imagine great practical difficulties in enforcing the right. Even identifying the airlines could be difficult, but more difficult would be relating each airlines noise contribution to the effect on property value. Perhaps to achieve rough justice, it would be

necessary to prorate recovery on the basis of number of flights or some similar rule of thumb. On what basis is the proration to be made--past flights or future flights or some combination of these? The question arises whether the statute can or should provide in some way for this problem. Going beyond the question of indemnification, should the property owner be permitted (or required) to sue the aircraft operator directly?

The staff recommends against including a contribution provision in the statute and against providing the property owner a right to sue the air carrier directly.

FUNCTION OF JUDGE AND JURY

In inverse condemnation cases, the function of the jury has been limited to the determination of the amount of "just compensation." The judge is the one, for example, who determines whether a zoning regulation has so limited the use of the property as to amount to a "taking" for which compensation must be paid. The judge determines whether the property has been sufficiently deprived of access to amount to a "taking." And the judge determines whether there is such a substantial interference with the rights of the property owner as to require compensation in an aircraft noise case.

Consideration should be given to whether there is any need for the court to determine that there has been a "taking" or "damaging" in an aircraft noise case. Such cases could be decided merely by directing the jury to determine the loss of value caused by the aircraft noise and awarding the property owner the amount so determined. If there actually is no loss of value, the jury presumably would so find. If there is actually some loss of value, no injustice would result in awarding the property owner the amount of such actual loss. On the other hand, if such a procedure were adopted, there is little doubt that the number of actions for aircraft noise damage

would substantially increase because many persons who would not now have a cause of action under the "substantial interference" test would be entitled to recover damages. Moreover, public entities operating airports would be required to go to trial in every case; there would be no preliminary screening by the judge to eliminate those cases where there is no "substantial interference." It is possible that considerable public money would be expended in litigating cases where the amount of damage is relatively slight. On balance, it appears that it would be best not to depart from the traditional inverse condemnation allocation of functions between judge and jury. It is better to expend public moneys in compensating persons who have a significant loss than to expend it in litigating cases where a significant recovery is unlikely. In other words, it is better to use public moneys to pay persons we know are actually injured (as, for example, to pay reasonable moving expenses in condemnation cases) than it is to expend those moneys in litigating cases where the loss has not been shown to be significant.

Accordingly, the staff recommends that the judge--rather than the jury--determine whether there has been a "taking" or "damaging" in aircraft noise cases.

RESTRICTING RECOVERY TO DAMAGE CAUSED BY OVERFLIGHTS

The research consultant demonstrates that drawing an arbitrary line between compensability and noncompensability based on overflights and proximity and lateral flights defies logical or practical justification. See Study at pages 526-535. The Commission has determined that compensation will be required in appropriate cases whether the damage is caused by overflights or by proximity or lateral flights.

STANDARD FOR DISTINGUISHING CASES WARRANTING COMPENSATION

PURPOSE SERVED BY ENACTING STATUTORY STANDARD. Assuming that the more liberal "substantial interference" test (holding aircraft noise damage compensable whether or not accompanied by overflights) is adopted, it would be useful, if possible, to develop statutory standards for sifting cases warranting compensation from the larger mass of claims. Such statutory standards would supply specificity to the judicially developed rule limiting inverse compensation in analogous situations to "substantial" interference with property rights. If specific standards can be formulated for statement in statutory form, such standards will assist public officials, lawyers, judges, property owners, and others to identify the line between compensability and noncompensability and will encourage public entities to acquire the necessary noise easements by purchase or direct condemnation in appropriate cases.

Our consultant suggests that the ideal would be "a set of rules which would provide some assurance that truly deserving noise damage claims--those of sufficient magnitude and intensity--which are accompanied by demonstrably adverse collateral consequences will be compensated, while claims that are tenuous, de minimis, or unfounded will be rejected."

STANDARD NOW USED IN CALIFORNIA COURTS. At the September meeting, it was reported that the City of Los Angeles in recent airport cases has been able to convince the trial court that inverse condemnation is permitted (that is, there has been a constitutional "damaging") only where there has been substantial damage and apparently "substantial" was equated to damage

(loss of value) in excess of 10 percent of the before value of the property. The issue in these cases was determined by the judge on the basis of evidence of loss of value. If the judge determines that there is not "substantial damage," the plaintiff has no opportunity to obtain a jury decision on the amount of his damages--he gets nothing. Presumably, if the court determines that there is a "substantial" taking, the parties then try the issue of "just compensation" before the jury and the determination of the amount of just compensation is made by the jury. In effect, the parties try the issue of compensation twice--once before the judge when he is determining whether there is a "taking" or "damaging" in the constitutional sense and, if the judge finds there is a "taking" or "damaging," again before the jury when the jury determines "just compensation."

Mr. Rogers, San Francisco attorney, reported that a quite different approach is used in Northern California. He stated that, in cases involving the Oakland airport, the court permitted the property owners to go to the jury on the issue of "just compensation" simply on a showing of the quantum of noise imposed without regard to valuation evidence. This is analogous to the court determination of substantial interference with an owner's easement of access in the loss of access cases. The apparent advantage to the property owner of the Oakland approach is that preliminary determinations are made on the basis of "noise" evidence alone. Although the property owner loses if the noise levels are too low to find "substantial interference," he recovers whatever damages he has suffered if he does get to go the the jury on the issue of "just compensation." Under the Oakland procedure, there is no need to present valuation evidence twice--once before the judge and once before the jury. Yet, under the Oakland procedure, a case could be

sent to the jury where there is no loss in value at all; the noise level is very high but the benefits from proximity to the airport more than offset any loss of value because of the noise. Hence, under the Oakland procedure, cases can be tried to the jury where the damages are minimal or nonexistent.

STATUTORY STANDARDS SUGGESTED BY RESEARCH CONSULTANT. The research consultant suggests standards that are designed to permit the property owner to go to the jury only in a case where (1) the noise level is high and (2) the decrease in property value is significant. In effect, his standard would require a showing equivalent to both the Oakland and the Los Angeles procedures combined. There is merit to his approach. We want to minimize the number of actions and yet allow recovery in truly deserving noise damage cases. Some of his suggestions are set out below. (See also Study pages 536-543.)

1. A general standard should be provided that rejects the view that mere diminution in value alone constitutes an adequate measure of noise damage but such standard should not limit recovery to "overflight" cases. The consultant suggests the following: Plaintiff must establish, by clear and convincing evidence, that the aircraft operations of which complaint is made were of such frequency and caused noise, dust, vibrations, fumes, and other forms of annoyance with such intensity that they interfered materially with use of plaintiff's property in such a physically disagreeable manner as to deprive plaintiff of the full use and enjoyment of the property and thereby caused a significant diminution of the market value of the property for its highest and best use.

2. Under the consultant's scheme, the plaintiff would have to establish a "significant diminution" in the market value of the property for its highest and best use in every case. A percentage figure could be provided, such as 10 percent, but this is not recommended by the staff. Assuming that the plaintiff can show a "significant reduction" in property value, the following rebuttable presumption might be stated in the statute to aid in establishing causation by aircraft operations:

> A diminution of property value claimed to have been caused by aircraft operations shall be presumed to have been caused thereby if the plaintiff establishes that during the six month period immediately preceding the commencement of the action, or such other period of time as may be fixed by the court in light of the circumstances of the case, (a) the number of actual separate incidents of actionable aircraft operations averaged more than twenty per day; (b) the peak noise pressure level during such incidents averaged more than 90 perceived noise decibels on each of 75% of said days, and during not less than one-third of all such incidents exceeded 100 perceived noise decibels for a period of ten seconds or more; and (c) the mean distance between the flight paths flown by the offending aircraft, at their nearest point to plaintiff's property, and the location of maximum noise perception on plaintiff's property, averaged less than 2,000 feet during not less than one-third of all such incidents. [Footnotes omitted.]

This presumption should be a presumption affecting the burden of proof. This would mean that the public entity could prove that the decrease in value was caused by other than aircraft noise and the property owner who could not meet the standard above could still show that noise that did not meet the statutory standard had caused the decrease in value.

Certain problems are involved in developing the standards to be used in any such presumption. Not the least of these is the question of how much noisiness in "noisy." We think the discussion at the October meeting indicated that the techniques for measuring noise are sufficiently advanced that reasonably accurate and objective determinations can be made regarding

the amount of noise present at a given time and place. The far more difficult determination is the subjective one of how much (intensity, frequency, duration) noise should be tolerated. Should the levels be different depending on the actual use being made of the property, or the possible uses permitted under applicable zoning? (Simply as an aside, the Commission could choose to restrict the entire application of the statute to residential property on the unproved assumption that this would cover the most serious problems and provide background for later expansion.) The variables are practically countless. Noise at night or on Saturday or Sunday in an industrial area would probably have little effect on value; the same noise pattern might affect residential areas significantly. Should there be multiple standards; e.g., one imposition per day of noise exceeding 120 PNdB may be equivalent in effect to three impositions exceeding 110 PNdB? What allowance must be made for seasonal variations or changes in operations due to weather conditions? Should the applicable test periods be prior to the time of filing the suit or related to the time of trial? Professor Van Alstyne suggested fixing these periods with reference to trial. This permits both plaintiff and defendant a better opportunity to measure the noise and is analogous to determining valuation with reference to conditions at time of trial in the usual condemnation case. However, the staff believes that one period at least should be fixed prior to filing suit. Plaintiff should be able to know with some degree of certainty whether he is going to prevail at least with respect to past damage. Subsequent changes should not affect liability for past damage.

Consideration should be given to a series of standards similar to that proposed by the consultant that would vary depending upon the zoning of the property. For example, if the property is zoned residential, it would be expected that a lower noise level would cause a decrease in the property value than the level that would cause a decrease in the value of property zoned for industrial purposes. If the standards varied according to the zoning of the property, the public entity would be encouraged to rezone the property to make its use compatible with airport noise. Perhaps, the standard should be what the highest and best use of the property is, taking into account the uses to which the property may be devoted under the existing zoning. This would cover the case where the property cannot be economically used for commercial purposes (even though the existing zoning would permit its use for commercial purposes) because the residence on the property is worth too much to permit economical use of the property for commercial purposes at the time of trial.

3. The consultant does not suggest any standard that would establish a conclusive presumption that any decrease in value was not caused by aircraft noise. Consideration might be given, however, to prescribing such a standard in the statute. The standard would be developed using the type of factors set out in suggestion 2 above. The difficulty with the conclusive presumption is that it cuts off recovery even where substantial damage has been caused by aircraft noise. If this fact were established, the courts probably would find the presumption unconstitutional.

4. At the October meeting, it was suggested that consideration be given to creating presumptions based on distance from runways. This suggestion offers the advantages of greater certainty and far less expensive determination than the more complex suggestion 2 above. However, it does not allow for existing difference in operations (number of flights), much less for future technical changes in the field (e.g., noisier or more quiet airplanes). Perhaps further technical advice will demonstrate the usefulness of the distance-from-runways approach. However, the staff believes that if liability is to be based on noise-caused damage, that the presumptions--if any are to be used--should be based on noise rather than on distance.

CONDITIONAL ORDER THAT THERE IS NOT A "TAKING" OR "DAMAGING" CONTINGENT UPON REZONING OF PROPERTY FOR USES COMPATIBLE WITH AIRCRAFT NOISE. Professor Van Alstyne suggests that it might be appropriate "to authorize the court, before assessing compensation for a constitutional 'damaging,' to give the public entity a reasonable period of time in which to consider and enact, if it elected to do so, a change in zoning of the subject land, deferring the question of loss of value until after the rezoning had been stabilized. A change of zoning classification--under this . . . proposal--might well confer benefits, measurable as an increment to market value, that would completely offset any detriment caused by the aircraft noise."

The staff believes that there is merit to this suggestion. Perhaps the valuation of the property in the "after" condition (as affected by the noise) should be required to be determined solely upon the basis of the uses permitted by zoning existing at time of trial (ignoring any possibility of

rezoning). If this were the rule, the public entity could accomplish a rezoning prior to trial or, if this is not possible, could obtain a conditional order that the noise does not constitute a "taking" or "damaging," such an order being conditional upon the rezoning of the property for a particular use or uses within a specified time. The procedure whereby such a conditional order could be obtained should be considered so that the property owner would not be required to present a valuation case to the jury and win only to find that the fruits of his victory are lost because the public entity then decides to rezone. In other words, the decision to rezone should be made before the property owner is required to expend any substantial amount for appraisal information.

RELATIONSHIP OF INVERSE AND DIRECT CONDEMNATION

The problem of inverse condemnation liability for aircraft noise damage might be considered without regard to the rules applicable in direct condemnation actions to acquire aircraft noise easements. Thus, the method of computing damages in the inverse condemnation action might be based on tort principles rather than on eminent domain principles and the persons entitled to compensation in the inverse action might not be the same persons who are entitled to compensation in the eminent domain action. However, if the rules adopted for inverse and direct condemnation are made different, there would be significant discrepancies in the nature of the interest acquired, the amount of compensation to be paid, or the persons entitled to compensation, and significant problems would be created. For example, suppose the public entity brings a direct condemnation action to acquire an aircraft noise easement in parcel A, which is under the flight path. The owner of parcel B--which is adjacent to parcel A and is subject to the same noise level and same loss of value but is not under the flight path--brings an action in inverse condemnation. Should the amount of damages be computed differently in the two cases? Should different persons (tenants, licensees, former owners, and the like) be entitled to recover compensation in the inverse action than are entitled to compensation in eminent domain action? Should interest be computed on the award in the same manner without regard to whether it is an eminent domain action or an inverse action?

It is the general view of the staff that the portion of the statute that deals with the determination of the interest acquired and computation of the amount of compensation payable and determination of the persons entitled to share in the award should apply both to eminent domain and inverse condemnation actions. The same interest is being acquired in both cases. The rights of the persons who have interests in the property should not vary merely because

in one case the public entity decides to bring an eminent domain action and, in the other, does not. The public entity might, however, be encouraged to bring an eminent domain action by providing, for example, a more favorable rule on interest in the eminent domain action. For example, interest in an eminent domain action might accrue on the award from the time of the taking (i.e., imposition of noise) or the filing of the complaint, whichever is the later. In the inverse action, it could accrue from the time of the taking (which could not be more than five years or the public entity would have acquired an easement by prescription). (These are examples, not recommendations.)

Accordingly, the staff recommends that the portion of the statute relating to the interest acquired, persons entitled to share in the award, and the computation of the amount of just compensation apply to both eminent domain actions and inverse condemnation actions with only such differences as are required to reflect the fact that the property owner has commenced the inverse condemnation action and to give recognition to the policy of encouraging public entities to purchase or acquire necessary easements by eminent domain. Incidentally, this may be a sound recommendation to apply to inverse condemnation actions generally. In other words, the provisions of a comprehensive eminent domain statute relating to the interest acquired, persons entitled to share in the award, and computation of the amount of just compensation probably should generally be the same in eminent domain and inverse condemnation actions. The staff recommendation, however, is merely that the approach to the aircraft noise problem be on the basis that we are attempting to draft a compensation statute that will apply to both eminent domain and inverse condemnation actions. We can test this approach in the aircraft noise field and, if it is found to be worthwhile in that field, consider using the same approach in such other areas as water damage.

SPECIAL COMPENSATION STATUTES APPLICABLE IN AIRPORT ACQUISITION CASES

Several significant compensation statutes were enacted by the 1969 Legislature.

CALIFORNIA LEGISLATURE AIRPORTS, AIRWAYS AND AIRPORT TERMINALS DEVELOPMENT AND RELOCATION ACT OF 1969. Chapter 1228 of the Statutes of 1969 (Exhibit III attached) provides a comprehensive and far-reaching method of dealing with relocation problems when property is acquired for airport purposes. It is not clear whether payments under the statute are mandatory (Section 21690.8 provides that "payment of moving expenses shall be made to eligible persons in accordance with the provisions of this act and such rules and regulations as shall be adopted by the public entity." No comparable provision is included in other moving expense statutes.) or discretionary (Other sections provide that the public entity "may" compensate a displaced person, and the like.). Section 21690.15 gives the displaced person a right to have a determination as to eligibility or the amount of a payment "reviewed by the public entity" and such "review shall include the right to the appointment of an independent appraiser approved by the owner to review the amount of the award under Section 21690.13."

The statute provides for actual and reasonable moving expenses (no dollar limits). It provides for payments according to a schedule in lieu of actual moving expenses. It provides a fixed relocation payment for a move or dislocation of a farm or business operation. Significant is a provision permitting (or requiring?) payment of an amount "which, when added to the acquisition payment, equals the average price required for a comparable dwelling determined, in accordance with standards established by the public entity, to be a decent, safe, and sanitary dwelling adequate to accommodate the displaced owner." Another provision provides for a payment to a tenant of an amount not to exceed $1,500 to permit the displaced tenant to rent suitable replacement housing.

LOS ANGELES INTERNATIONAL AIRPORT. Chapter 942 of the Statutes of 1969, relating to the Los Angeles International Airport, adds Public Utilities Code Section 21690.20, which provides in part:

> Expansion and development has and is expected to require the acquisition of many homes in the vicinity of the airport and has rendered other homes in areas subjected to aircraft noise nearly uninhabitable. Property owners in the vicinity of the airport are either unable to sell their homes or able to sell only at depressed market prices. Under present laws, the Department of Airports of the City of Los Angeles is required only to pay homeowners "fair market value" for their property. With increasing property costs and current high interest rates, it is impossible for a homeowner to purchase a comparable dwelling in a comparable residential area for amounts now being paid as "fair market value."

Section 21690.20 further provides that Chapter 942 is designed "to enable the city to (1) assist displaced homeowners to relocate in comparable residential areas and housing, (2) provide, where available, replacement housing acceptable to affected homeowners, and (3) purchase affected homes to compensate homeowners for the depressed values of their property."

Chapter 942 is set out as Exhibit II. The chapter sets up a board which is authorized to award amounts "for the payment of additional compensation for the depressed value of the affected property resulting from the presence and operation of the airport, provided that such owner has not previously recovered any sums in the nature of an inverse condemnation award by reason of the presence and operation of the airport."

MEANS OF AVOIDING INVERSE CONDEMNATION ACTIONS OR AVOIDING PAYMENT OF COMPENSATION

"DIRECT" CONDEMNATION AND ZONING POWER. As previously indicated, we would not want to make any revisions in the law relating to compensation in inverse condemnation cases for aircraft noise damage that would discourage airport operators from purchasing noise easements or from acquiring such easements

by eminent domain in proper cases. In addition, we will want to keep in mind those cases where the exercise of the police power (i.e., zoning) is a means of avoiding the payment of compensation.

One means available to the airport operator who seeks to avoid inverse condemnation actions is to acquire the necessary aircraft noise easements by purchase or condemnation. Local public entities in California have express statutory authority to acquire airspace or air easements by eminent domain for noise abatement purposes. Section 1239.3 of the Code of Civil Procedure 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 use of zoning powers to ensure low-density land use in the vicinity of airports may provide a means of protecting against inverse condemnation liability under some circumstances. This practice has received judicial approval in California. E.g., Morse v. San Luis Obispo County, 247 Cal. App.2d 600, 55 Cal. Rptr. 710 (1967)(rezoning of land near airport which permitted density of one residential dwelling per acre at time of purchase by plaintiff landowners to require five acres for single family dwelling was, in absence of showing of taking of property for public purpose and in view of intent to preserve agricultural nature of area and to deny intensification of habitation near airport, presumed to be reasonable exercise of the zoning power).

Government Code Sections 50485-50485.14 (Airport Approaches Zoning Law) are designed to eliminate or prevent the establishment of airport hazards in approach areas. Chapter 398 of the Statutes of 1969 added Sections 21655-21660

to the Public Utilities Code. These sections set up a permit system and restrict construction within one mile of an airport and, in certain other cases, without a permit. In cases where airport hazards cannot constitutionally be removed or precluded by use of the zoning or building permit power, Sections 1239.2 and 1239.4 of the Code of Civil Procedure provide authority to condemn the necessary interest:

> 1239.2. Airspace above the surface of property or an air easement in such airspace may be acquired under this title by a county, city or airport district if such taking is necessary to protect the approaches of any airport from the encroachment of structures or vegetable life of such height or character as to interfere with or be hazardous to the use of such airport.

> 1239.4. Where necessary to protect the approaches of any airport from the encroachment of structures or vegetable life of such a height or character as to interfere with or be hazardous to the use of such airport, land adjacent to, or in the vicinity of, such airport may be acquired under this title by a county, city or airport district reserving to the former owner thereof an irrevocable free license to use and occupy such land for all purposes except the erection or maintenance of structures or the growth or maintenance of vegetable life above a certain prescribed height or may be acquired by a county, city or airport district in fee.

Accordingly, it should be kept in mind (1) that inverse condemnation liability may be avoided in some cases by zoning of land for uses compatible with aircraft noise--ordinarily prior to its development as residential property--and (2) that inverse condemnation actions can be avoided if the airport operator is willing to acquire by purchase, or eminent domain if necessary, the right to impose a noise easement on the property. For an excellent discussion of airport approach zoning and inverse condemnation, see Peacock v. County of Sacramento (Exhibit VI attached).

ACQUISITION OF AIRCRAFT NOISE EASEMENT BY PRESCRIPTION. A municipal corporation may acquire an easement by prescription. Thus, in Reinsch v. City of Los Angeles, 243 Cal. App.2d 737, 52 Cal. Rptr. 613 (1966), it was

held that the City of Los Angeles had acquired a prescriptive right to maintain a drainpipe across the plaintiff's property where such use "was actual, open and notorious, hostile and adverse to the plaintiffs, under claim of right, continuous and uninterrupted for the statutory period of five years." The court noted that, since the easement was acquired by prescription, the property owner had no right to compensation on a theory of inverse condemnation. The court referred to Ocean Short R.R. v. City of Santa Cruz, 198 Cal. App.2d 267, 17 Cal. Rptr. 892 (1961)(petition for hearing by Supreme Court denied), where it was held that an inverse condemnation action brought by a railroad against a city which had constructed a street on the railroad's right of way was barred by the five-year statute relating to acquisition of title by adverse possession. In the Ocean Shore R.R. case, the court stated:

> It has been held that a constitutional right is always subject to reasonable statutory limitations as to the time within which to enforce it, if the Constitution itself does not provide otherwise. . . . The power of the Legislature to provide reasonable periods of limitation is unquestioned and the fixing of time limits within which particular rights must be asserted is a matter of legislative policy. . . . The only restriction as to the legislative power with respect to a statute of limitations is that it must not be so manifestly inequitable as to amount to a denial of justice, and unless such is the case its determination is final. [198 Cal. App.2d at 273. Citations omitted.]

In Frustuck v. City of Fairfax, 212 Cal. App.2d 345, 374, 28 Cal. Rptr. 357 (1963), the court considered whether a three-year period (trespass) or a five-year period (adverse possession) should be applied as the statute of limitations in inverse condemnation actions and concluded:

> The rationale of [the cases that apply the five-year statute] is that the owner's right of recovery is founded upon and grows out of his title to land and that until such title is lost by adverse possession the owner should have the right to maintain an action to recover that which represents the property itself. We are of the opinion that the applicable statute of limitation is that found in the five-year limitation. We reason that acts

> constituting inverse condemnation amount to more than those of simple trespass. The former involve the taking or damaging of real property for a public use. When an act of trespass amounts to a taking or damaging for a public use it is more than a mere trespass on an interest in land, but it takes from the owner of the land something necessary and essential to the use and enjoyment of the property and thus results in the taking away of a valuable property right. [Emphasis in original.]

At least so far as an aircraft noise easement is concerned, the reasoning of the Frustuck case is persuasive that the period for acquisition of an aircraft noise easement by prescription should be five years, the five years to commence from the time the property owner first has a cause of action in inverse condemnation.

Accordingly, if the noise level and property damage is such that the property owner has a cause of action in inverse condemnation, his failure to bring such action for five years should give the public entity operating the airport an aircraft noise easement by prescription.

The staff believes that it would be desirable to clarify this matter by statute and makes the following suggestion as to the policy that should be incorporated in the statute: An airport operator should acquire an aircraft noise easement by prescription if the public entity establishes by clear and convincing evidence that the property owner had a cause of action in inverse condemnation for damage from such noise and that such action was not brought within five years from the time the cause of action arose. The noise level presumption--if one is adopted for inverse condemnation cases--should apply in the cases where an easement by prescription is claimed. The easement so acquired should be for the highest noise level that continuously existed for the entire five-year period. If it is desired to impose a higher noise level on the property, the rule applicable to aircraft noise easements acquired by purchase or condemnation should apply--the rule might be, for example, that

the property owner is entitled to recover damages for the loss of value resulting from the imposition of the additional noise (i.e., the difference between the value of the property with noise at the easement level and the value of the property with noise at the higher level). The public entity should be entitled to bring a quiet title action (or some other form of action?) to determine whether it has acquired such an easement.

NATURE OF PROPERTY INTEREST TO BE ACQUIRED

It has been assumed in the foregoing discussion that the interest to be acquired in the eminent domain or inverse condemnation action is an aircraft noise easement (unless, of course, the airport operator determines to condemn a greater interest such as the fee--rather than merely an easement--in an eminent domain action).

In the leading Griggs case, the United States Supreme Court found that the defendant county had taken an aviational easement. Noting that appropriate approach and glide paths are indispensable to airport operation, the court concluded that the county was responsible for acquisition of the necessary easements as well as the necessary land on which the runways were built. To develop the airport, the county had to acquire some private property. "Our conclusion," said the court, "is that by constitutional standards it did not acquire enough." Section 1239.3 of the Code of Civil Procedure provides that "airspace above the surface of property or an air easement in such airspace" may be taken by eminent domain if such taking is necessary to protect against aircraft noise damage. Other provisions of the eminent domain statute also provide for acquisition of airspace or an air easement to protect the approaches of an airport. See Code Civ. Proc. §§ 1239.2 (acquisition of airspace or air easement to protect approaches from encroachment), 1239.4 (acquisition of fee--or fee subject to license--to protect approaches from encroachments).

The staff recommends that the statute be drafted on the theory that the airport operator has taken or is seeking to acquire an aircraft noise easement unless he is seeking to condemn a greater interest in an eminent domain action.

DETERMINING AMOUNT OF "JUST COMPENSATION"

Assuming that the judge determines that there has been a "taking" or "damaging" of the property in an aircraft noise damage case or the public entity seeks to condemn an aircraft noise easement, how is the jury to determine the amount of just compensation?

MEASURE OF DAMAGES IN INVERSE CONDEMNATION CASES GENERALLY. The general principles governing the measure of damages in inverse condemnation cases are summarized in Frustuck v. City of Fairfax, 212 Cal. App.2d 345, 367-368, 28 Cal. Rptr. 357 (1963), as follows:

> Ordinarily, the recognized measure of damages in cases such as this is the difference in the value of the real property immediately before and immediately after the injury. . . . This method, however, is not exclusive. Accordingly, where appropriate to a particular situation, the measure of damages may be the cost of making repairs . . . ; the loss of use of the property . . . ; lost profits . . . ; loss of prospective profits . . . ; increased operating expenses pending repairs . . . ; all of the detriment proximately caused by the injury as in other tort actions . . . and present and prospective damages that are the natural, necessary or reasonable incident of the taking of property . . . . It has also been held, in a nuisance case, that if it appears improbable as a practical matter that a nuisance can or will be abated, the plaintiff should not be left to the troublesome remedy of successive actions, but should be entitled to recover damages for anticipated injury to land. . . . Whatever the proper measure of damages may be, in a given case, the recovery therefor is still subject to the fundamental rule that damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery. . . . Moreover, even where damages are recoverable for prospective detriment, the occurence of such detriment must be shown with such a degree of probability as amounts to a reasonable certainty that such detriment will result from the original injury. [Citations omitted.]

COMPENSATION FOR PHYSICAL DAMAGE TO PROPERTY. Where the aircraft noise (which includes noise, vibration, fumes, discomfort, inconvenience, or interference with the use and enjoyment of the property) has caused actual physical damage (broken windows, cracked plaster, and the like), the property owner should be entitled to recover for such damage as an additional item

of recovery to the extent that he is not compensated for such damage in the general award. This is consistent with the measure of damage stated in the Frustuck case quoted above. The staff recommends that a provision be included in the statute to make clear that damages are to include compensation for actual physical damage to the property in appropriate cases.

In connection with physical damage to property from aircraft noise, consideration should be given to providing the airport operator a right of indemnity or contribution from the air carrier causing the damage. It is possible that in a particular case the damage will be caused by a single operation of one aircraft and the guilty air carrier can be easily identified. In such a case, it would appear desirable as a matter of policy to place the ultimate responsibility for the damages on the air carrier. In addition, it might be desirable to give the property owner a direct right of action against the air carrier in this limited situation. On the other hand, it is unlikely that physical damage will result from the mere operation of aircraft in landing and takeoff operations and such detail may not as a practical matter add anything to the statutory scheme except complexity and confusion.

In connection with physical damage, consideration might be given to imposing absolute liability on the owner or operator of any aircraft causing physical damage to property by sonic boom. The statute might go further and impose absolute liability upon the owner or operator of any aircraft that causes physical damage (or personal injury) by falling on property.

RIGHT OF PROPERTY OWNER TO RECOVER FOR BOTH PAST AND FUTURE DAMAGE GENERALLY. In the normal nuisance case, the injured person obtains an injunction against continuance of the nuisance and damages for the nuisance while it existed. This, of course, is not possible in an aircraft noise damage case. The question presented in such a case is whether the property owner can recover for future damage as well as past damage in an inverse condemnation action or whether he can only recover for past damage and must bring successive actions. As pointed out in the Frustuck case: "It has also been held, in a nuisance case, that if it appears improbable as a practical matter that a nuisance can or will be abated, the plaintiff should not be left to the troublesome remedy of successive actions, but should be entitled to recover damages for anticipated injury to land." On balance, to require successive actions in an aircraft noise damage case would be to leave the property owner without an effective remedy since he would have to bring an action at least once every five years and the cost of such an action would be substantial. Accordingly, the staff recommends that the statute provide that the property owner in an inverse condemnation case for aircraft noise damage is entitled to recover damages not only for past injury (to the extent such damages are recoverable) but also for anticipated injury from continuance of the use of the noise easement in the future. The principles governing the amount of recovery for past and future damages will be discussed later in this memorandum.

When the public entity brings a direct condemnation action, the issue is presented whether the compensation should include damages for past use of the aircraft noise easement or whether compensation should be limited

to the value of such easement for the future only. The staff recommends that the property owner be entitled to recover for past injury in a direct condemnation action to acquire an aircraft noise easement. The statute should so provide and a procedural method of claiming damages for past injury should be provided in the statute. We are not concerned at this point with how damages for past injury are to be computed. However, does the Commission have any suggestions as to the procedural method for claiming damages for past injury?

DAMAGES FOR "TAKING" OR "DAMAGING" PRIOR TO JUDGMENT. Just how should damages for use of an aircraft noise easement prior to judgment be computed? The problem of computing such damages exists in an eminent domain case as well as in an inverse condemnation case.

The staff recommends that recovery for past damages in an eminent domain or inverse condemnation action for an aircraft noise easement should be limited to allowing interest on the award from the time the action is commenced (or from the time the noise easement caused substantial interference, whichever is the later). For the purposes of this recommendation, if a claim is required to be presented to the public entity in an aircraft noise case, the action would be deemed to be commenced when the claim is presented to the public entity. If the fee or an interest greater than an aircraft noise easement is sought to be acquired by eminent domain, the condemnor should be permitted to elect to pay interest from the time the action is commenced on the entire award or to have the trier of fact (or perhaps this should be a matter for the judge) determine the amount of damages for the use of the noise easement from the time the action is commenced until the time of judgment.

The staff makes this recommendation because (1) the computation of damages for past use will be exceedingly complex and uncertain in result and (2) no real injustice results to the property owner if this recommendation is adopted.

The method of computation of damages for past use will be exceedingly complex and uncertain in result. The usual method for determining damages for trespass to real property is on the basis of opinion evidence concerning the value of the property before and after the tort (i.e., the value of the property in the "before" and "after" condition). However, this method yields to others if they are more appropriate to a particular situation. For example, assume that the noise level and injury to the property in the past and foreseeable future is fairly constant. In such a case, it might be appropriate to apply the principle used in eminent domain cases where possession is taken prior to judgment. In "immediate possession" cases, the courts have held that allowing interest on the award at the legal rate of interest from the time possession is taken is an appropriate method of compensating the property owner for the use of his property prior to judgment. In an aircraft noise case, it might be appropriate to determine the difference in the property value in the before and after condition (with the noise easement and without the noise easement) and then allow interest from the time the noise easement was in fact imposed on the property. This could be a period of up to five years. The problem, however, is not this simple. If the noise level has been increasing and there was no cause of action until a fairly short time before the action was commenced, how is the damage, if any, for past injury to be computed? What if the damage in the past, or some portion of the past five

years, is not sufficient to constitute a "substantial interference" with the rights of the property owner? Another variation of this method would be to tamper with the date of valuation and to allow interest from the date of valuation. This is substantially the same as the method first described except that the damages might not be the same if the date of valuation is changed. A problem with using the above approach in an eminent domain case is that the interest to be acquired may be a fee and interest could not be allowed on the award for the fee to allow for past injury since this might overcompensate the owner.

In the usual cases, the method suggested by the staff would not be unjust to the property owner. In considering an award for past injury, it should be recognized that in many cases the property owner will suffer no out-of-pocket loss for the so-called past injury. The so-called injury is not an actual loss since the property owner has not suffered any loss. He is fully compensated for his loss when he is awarded the difference between

the value of his property in the before and after condition--the so-called damages for imposition of the easement in the future. On the other hand, the fact that the aircraft noise easement has been imposed in the past will preclude the property owner from selling his property at the value it would have absent such easement. In fact, he will be unable to dispose of his property at a price that will enable him to replace it with equivalent property that is not subject to a noise easement because any purchaser would have to discount the possibility of recovery for the aircraft noise easement damages in an inverse condemnation action against the public entity operating the airport. In addition, the property owner has used the property, or rented it to another, in a less desirable condition because of the noise.

It also should be recognized that the property owner is not without a remedy. He can bring an inverse condemnation action. Assuming that he can recover all damages--both past and future--in such action, the fact that he has not brought the action until now may be a factor that would justify limiting his recovery to the so-called before and after value with interest to the time the action was commenced where the noise level existed at that time. This would be a simple rule and would avoid the complex problems described above. The property owner could control when the inverse condemnation action is brought and thus could recover for any damages he believes he is entitled to recover by bringing the action as soon as the cause of action accrues. In this connection, it should be recognized that interest is not allowed on damages, for example, in a personal injury action from the time the injury occurred, or expenditures (such as

medical expenditures) were made, even though justice would appear to require such payment.

It should be noted that the problem faced by the property owner in the aircraft noise damage case is different from that faced, for example, by the owner of property that everyone knows will ultimately be taken for highway purposes by eminent domain. In the latter case, there is nothing the property owner can do to have the matter of damages determined and, for all practical purposes, he may be unable to improve or dispose of his property. In the aircraft noise case, the property owner can commence the inverse condemnation action as soon as the noise reaches a level and the damages suffered are significant enough to give him a cause of action. Hence, the property owner is in full control of the situation and it is not unfair to limit his recovery to damages suffered after the action is commenced. The rule in eminent domain actions should be consistent so that public entities will be encouraged to acquire the necessary property interest by purchase or condemnation.

In unusual cases, the court should be able to direct the jury to apply a measure of "past" damages that is suitable to the particular case, but in no event is "past" damage to include damages that occurred prior to the commencement of the action. Thus, where aircraft noise makes a house useless as a residence when a new runway is opened up, computation of the damages using the interest-on-the-award method might not be appropriate. Instead, the court might direct the jury to determine the fair rental value of the property during the period it was rendered uninhabitable (after the action was commenced) and to award that amount as compensation for "past" damages. In cases where the property is leased, the interest-on-the-award method of computing "past" damages might not be appropriate. Similarly, in cases where

the property is rezoned prior to trial to avoid damages, justice may require computing past damages using a method other than the interest-on-the-award.

Accordingly, the staff recommends that the statute authorize the court to direct the jury to use a different method of computing "past" damages where the usual method--the interest-on-the-award method--would not be appropriate under the circumstances of the particular case. However, the burden should be on the injured party to show that the usual method of computing damages is not appropriate.

DAMAGING FOR "TAKING" AN AIRCRAFT NOISE EASEMENT ("FUTURE" DAMAGES). You will recall that the previous discussion indicated that the Legislature has found that property owners are unable to purchase comparable property with the awards now being paid in cases where residential property is acquired for airport purposes. Legislation enacted at the 1969 session should do much to eliminate this problem.

The problem that exists when property is acquired for airport purposes is that the comparable sales may be depressed--that is, the comparable sales may reflect (1) the reluctance of buyers to purchase residential property in the vicinity of an airport and (2) the resulting depression in the prices paid when comparable property is sold. The staff believes that this problem can be avoided in inverse cases and, accordingly, that there is no reason why well-established eminent domain principles cannot be used to determine the damages in such cases.

The staff recommends that the damages in an inverse aircraft noise case should be determined as follows: The basic measure of the damages should be the difference between the value of the property in the "before" condition and in the "after" condition. The value in the "before" condition should be determined as if the property were not subject to unusual aircraft noise and

did not benefit from being in the vicinity of the airport. (If a noise easement has been acquired by purchase, eminent domain, or prescription, the "before" value would be the "fair market value" of the property for its highest and best use as burdened by the easement.) The value in the "after" condition should be determined by the value of the property for its highest and best use under the zoning existing at time of trial (ignoring any possibility of rezoning) and at such noise level as is reasonably anticipated for the future. The judgment should specify the noise level permitted and any significant increase in such noise level should give rise to a new inverse condemnation action. The public entity should be allowed to determine (reasonably and in good faith) the noise level permitted under the easement to be acquired (which could be either higher or lower than the noise level actually existing at time of trial) and the damages should be computed on the basis that that noise level will be maintained.

Unless a different method of computing "past" damage would be appropriate, interest should be allowed on the award from the time the claim was presented (if the claim is to be required) or the time the action was commenced (if the claims filing requirement is eliminated). This will compensate for past damage as previously discussed.

The date of valuation should be the date of the trial.

This basic measure should be made applicable to direct condemnation actions to acquire aircraft noise easements but the rights given property owners under the 1969 legislation should be preserved.

PERSONS ENTITLED TO SHARE IN AWARD

The staff recommends that the general rules applicable in direct condemnation actions be used to determine the persons entitled to share in the award. These rules require that the person who seeks to share in the

award have some interest that was taken. This would raise a problem if interest on the award was the only method used for compensating for past damage. What if a tenant has leased a residence on a five-year lease and a new runway is opened up one year after the lease was executed that makes the property unusable as a residence? If the recommended rule that there be no compensation for damages prior to the commencing of the action is adopted, the lessee would need to commence an action immediately, would--I assume--be entitled to the interest on the award (as compensation for loss of his interest in the property) for the remainder of the term, and would have to continue to pay the rent provided in the lease for the balance of the term. The lessor's loss--if the lessee defaults on the lease--is the entire rent for the period of default. It is apparent from this analysis that the problems that are involved in dividing the award among the various persons entitled to share in the award can be complex and difficult. What if the property is rezoned industrial prior to trial? The tenant would still need to be compensated for his loss.

If a five-year statute of limitations is adopted and damages for "past" injury are significantly limited, we do not believe that it would be desirable to give a former owner a right to share in the award. The complications that would be created if it were sought to permit the former owner to obtain compensation would far outweigh any supposed "justice" that might be achieved by permitting him to share in the award.

It appears that some additional amount of recovery should be allowed for "past" damage in cases where a tenant occupies the property and the tenant and the owner of the property would not be fairly compensated under the general compensation scheme suggested by the staff or where the property owner is not adequately compensated under that scheme.

APPLICABILITY OF CLAIMS STATUTE

Inverse condemnation claims are now subject to the claims statute. See Govt. Code §§ 905, 905.2. This statute requires a claim to be filed within one year after the "accrual" of the cause of action and that an action be filed generally not later than six months after the claim is rejected.

The staff recommends that the claims statute not apply to inverse condemnation claims for aircraft noise damage and that such actions be permitted within the five-year statute that determines whether a prescriptive right has been acquired.

The application of the claims statute in inverse condemnation cases creates difficult problems. In an aircraft noise case, the statute serves little purpose. The public entity knows about the operation of the airport. The operation ordinarily will be continuing and the public entity will have more information than the claimant about the number of flights, and so on. The claims statute may actually extend, rather than reduce, the period of limitation as the following analysis indicates. In any case, the application of the claims statute to this type of case creates more problems than it resolves. See the following discussion of the Statute of Limitations.

STATUTE OF LIMITATIONS

It has been assumed that the five-year (adverse possession) statute will apply to inverse condemnation for aircraft noise easements. It has been further assumed that interest to the time the action was commenced ordinarily will adequately compensate for "past" damage.

The problem of when (at what point) the cause of action accrues presents not only extremely difficult practical problems, but theoretical difficulties as well. If the theory is inverse, arguably the first objectionable flight constitutes a prescriptive act. But see Pierpont Inn, Inc. v. State, 70

Adv. Cal. 293 (1969)(suggestion that an earlier filing might not have been premature, but a claim filed prior to completion of project was not untimely where project had commenced more than two and one-half years before claim filed, the two-year statute being the applicable statute). The argument could also be reversed. That is, a taking does not occur until five years has passed. After the five-year period has been completed, the claimant then has one year to file a claim and then approximately six months to sue. But a prescriptive analysis seems rather inadequate here. We know the owner cannot generally enjoin the flights and we have generally assumed in the discussion above that it is not the aircraft operations themselves that form the predicate for liability but rather the damage to property that they cause. Accordingly, an owner has no cause of action until damage is caused (but does have one as soon as substantial damage is caused). Closely analogous is the theory applied in nuisance cases--that a cause of action is deemed to accrue at the point where there has been a substantial interference with the use of property--and a similar analysis seems to have been approved in the Pierpont Inn case. However, a fine distinction might be noted. Relief is provided in a nuisance case for a substantial interference with the owner's use of his property; the aircraft noise situation seems to require damage to property. The two are not necessarily synonymous. Property values may be held up by other factors even though one could find a substantial interference with use. It seems, therefore, that our statute must make quite clear the approach to be followed in determining when a cause of action has accrued. The staff suggests that the proper point is that at which aircraft operations cause damage to property as reflected in a significant change in the market value of that property.

It also has been assumed in the previous discussion that the running of the five-year statute would give the entity a prescriptive easement. It seems theoretically the running of the period of limitations could have one of two effects. Assuming no change in operations, the running of the applicable period could: (1) bar all claims for damage based on such level of operations or (2) merely cut off claims for damage occurring prior to the applicable period. The law is less than clear in this area, but the latter approach seems to have been followed in Bellman v. County of Contra Costa, 54 Cal.2d 363, 353 P.2d 300, 50 Cal. Rptr. 692 (1960)(recovery allowed for those items of damage--caused by continuing land subsidence--which accrued within the applicable time period prior to the date of filing the claim, as well as such items as accrue after that date). But cf. Powers Farms v. Consolidated Irr. Dist., 19 Cal.2d 123, 119 P.2d 717 (1941)(no claim at all filed but distinguished in Bellman as being a case where the fact of damage from irrigation seepage was known but the extent of damage was not known. This language in the Bellman opinion implies that the period of limitations commences in the latter situation when fact of damage is known). Obviously, the Bellman approach allows a greater extension of liability. Probably one's belief as to what the rule should be is based largely on the circumstances. Where, for example, a new airport or runway is built, operations are commenced, property values quickly drop, and the applicable period is reasonably long, it seems the owner should be compelled to act at the risk of losing all right to recover. On the other hand, where the situation is more complex, operations are generally increasing but in a fluctuating manner, property values are falling in relation to unaffected areas but sharp changes are not evident,

there is some justice in allowing the owner to recover at least what damage has recently occurred. The staff believes that the five-year prescriptive easement concept is the best solution to this complex problem.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 69-133 EXHIBIT I

A-24—INDEPENDENT (AM) PRESS-TELEGRAM (PM) Long Beach, Calif., Wed., Oct. 16, 1968

BOEING ASSURES AIRPORT EXECUTIVES:

New 747 Quieter Than Other Jetliners

By HERB SHANNON
Aerospace Editor

Flight tests of the new Boeing 747 jumbo jet show that the huge four-engine aircraft is definitely quieter than jetliners now in operation, airport executives from around the world were assured at a meeting in Los Angeles Tuesday.

In a telegram released at the 22nd annual Airport Operators Council International convention in the Century Plaza Hotel, a company spokesman said the "perceived noise decibel" rating of the 747 was substantially quieter than a Boeing 707 intercontinental model tested under the same conditions.

In the tests, Boeing said the perceived noise decibel (PNdB) system was selected because it is the most common measurement of airport sounds. The 710,000-pound 747 equipped with test engines was found to be 8 to 10 PNdB quieter during landing approach than the much smaller 707.

Under similar conditions for takeoff, readings from the end of the runway showed the 747 to be 3 to 5 PNdB quieter than the 707 and sideline noise averaged 5 PNdB less for the 747.

Boeing said the differences are significant, since the reductions were achieved although the 747 is more than twice as heavy as the 707 and has engines more than twice as powerful.

Kearney Robinson, Boeing chief engineer-airport compatibility, said the company recently achieved a breakthrough in the noise problem by developing an aircraft which makes no sound at all.

"It also doesn't fly," he commented, showing a slide of a dozen or more 747's lined up outside Boeing's final assembly plant with concrete block counterweights in place of the engines which have been delayed by development problems.

ROBINSON SAID the reductions in noise levels on the test aircraft were due to sound suppression devices and other engine design improvements.

The British-French Concorde supersonic transport was also described as a "good airport neighbor" on takeoff by E. H. Burgess, SST sales manager for the British Aircraft Corp.

He said the Concorde was considerably quieter than current long-haul four-engine jetliners when heard under the flight path on takeoff, but admitted it was a different story on landing approach.

"Noise is one of the problems SSTs must face," he conceded. "Sideline readings of up to 121 PNdB were reached on landings, compared to a maximum of 116 for the Boeing 707."

Burgess did not say whether any reactions to the Concorde's shock wave, or sonic boom, were recorded. The two test aircraft produced so far only recently were flown faster than the speed of sound.

Burgess said the target date for the first Concorde commercial operations is May 1973. The supersonic transport, he added, is designed to carry up to 140 passengers non-stop from Paris to New York in about three hours.

Oscar Bakke, associate administrator for plans for the Federal Aviation Administration, urged the operators to explore the possibility of acquiring property around airports, especially areas subject to the noise nuisance.

"What could be more logical?" he asked, pointing out that this approach would solve the problem of complaints and also make land available for airport-associated industry.

Bakke also advocated further study of off-airport terminals for both passengers and cargo to alleviate ground congestion. He said both El Al and Pan American airlines were bussing and trucking passengers and freight direct to planes from outlying terminal facilities in the New York area and predicted most high density airports would convert to this method in the future.

The convention of more than 600 operators of both foreign and domestic airports continues through Thursday, when the group will be addressed by John A. Volpe, U.S. Secretary of Transportation.

Memo 69-133 EXHIBIT II
AIRPORTS

CHAPTER 942

ASSEMBLY BILL NO. 2206

An act to add Article 5 (commencing with Section 21690.20) to Chapter 4 of Part 1 of Division 9 of the Public Utilities Code, relating to airports.

The people of the State of California do enact as follows:

SECTION 1. Article 5 (commencing with Section 21690.20) is added to Chapter 4 of Part 1 of Division 9 of the Public Utilities Code, to read:

ARTICLE 5. LOS ANGELES INTERNATIONAL AIRPORT RELOCATION AND DEVELOPMENT

21690.20.

The Legislature hereby finds that Los Angeles International Airport is one of the important air terminals of the world, making a significant contribution daily to the economy of California.

Since 1959, jet air traffic at the airport has increased from 80 flights daily to nearly 1,000 daily. This increasing air traffic and necessary expansion of airport facilities has had an adverse affect on the residents of the surrounding areas. Expansion and development has and is expected to require the acquisition of many homes in the vicinity of the airport and has rendered other homes in areas subjected to aircraft noise nearly uninhabitable. Property owners in the vicinity of the airport are either unable to sell their homes or able to sell only at depressed market prices. Under present laws, the Department of Airports of the City of Los Angeles is required only to pay homeowners "fair market value" for their property. With increasing property costs and current high interest rates, it is impossible for a homeowner to purchase a comparable dwelling in a comparable residential area for amounts now being paid as "fair market value."

The City Council of the City of Los Angeles has initiated this legislation to enable the city to (1) assist displaced homeowners to relocate in comparable residential areas and housing, (2) provide, where available, replacement housing acceptable to affected homeowners, and (3) purchase affected homes to compensate homeowners for the depressed values of their property.

There is precedent for the provision of replacement housing, where available, in Chapter 953 of the Statutes of 1968, by which the Department of Public Works is authorized to provide relocation assistance and replacement housing to certain individuals and families displaced because of construction of certain state highway projects. Further, there is precedent for relocation payments to compensate certain homeowners in Public Law 90-495[1] and in Chapter 3 of the Statutes of 1968, First Extraordinary Session.

[1] 23 U.S.C.A. § 133.

21690.21.

Unless the context otherwise requires, the following definitions shall govern the construction of this article:

(a) "Airport" means Los Angeles International Airport.

(b) "Department" means the Department of Airports, City of Los Angeles.

(c) "Mayor" means the Mayor of the City of Los Angeles.

(d) "Board" means the Los Angeles International Airport Property Acquisition Board.

21690.22.

Notwithstanding any other provision of law, the department is authorized to:

(a) Assist homeowners displaced by the expansion of the airport to relocate in comparable residential areas and housing.

(b) Provide, where available, replacement housing acceptable to affected homeowners.

(c) Purchase affected property to compensate homeowners for the depressed values of their property as a result of the proximity of the airport to enable such homeowners to purchase comparable housing under more normal market conditions.

21690.23.

The department is authorized to expend any available funds, including state and federal funds, for the purpose of purchasing homes from homeowners displaced by the expansion of the airport and relocating or providing suitable replacement housing for such persons, notwithstanding any other provision of law.

21690.24.

Upon establishment of a program for additional payments to homeowners by the department pursuant to this article, and in the event that property is acquired for the expansion of the airport, the affected property owners may petition as provided in Section 21690.26 for the payment of additional compensation for the depressed value of the affected property resulting from the presence and operation of the airport, provided that such owner has not previously recovered any sums in the nature of an inverse condemnation award by reason of the presence and operation of the airport.

21690.25.

Upon establishment by the department of a program for such additional compensation, the mayor shall appoint, subject to the approval of the city council, five persons who shall constitute the board.

21690.26.

The members of the board shall serve at the pleasure of the mayor, and any action taken by a majority thereof shall constitute the action of the board. The board shall hear petitions from homeowners dislocated by reason of airport expansion and operations for amounts to be paid in excess of market value of affected property. The board shall establish procedures for the conduct of its business.

21690.27.

The Board of Airport Commissioners of the City of Los Angeles is directed to pay any sum awarded by the board pursuant to Section 21690.26.

21690.28.

The provisions of this article are available only to persons who own residential property condemned or sold for airport purposes.

21690.29.

If any provision of this article or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the article which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Approved Aug. 23, 1969.

Filed Aug. 27, 1969.

Memo 69-133 EXHIBIT III

PUBLIC UTILITIES—AIRPORT RELOCATION AND DEVELOPMENT

CHAPTER 1228

ASSEMBLY BILL NO. 375

An act to add Article 4.5 (commencing with Section 21690.5) to Chapter 4 of Part 1 of Division 9 of the Public Utilities Code, relating to airport relocation and development.

The people of the State of California do enact as follows:

SECTION 1. Article 4.5 (commencing with Section 21690.5) is added to Chapter 4 of Part 1 of Division 9 of the Public Utilities Code, to read:

ARTICLE 4.5. AIRPORT RELOCATION AND DEVELOPMENT

21690.5.

This article may be cited as the "California Legislature Airports, Airways and Airport Terminals Development and Relocation Act of 1969."

21690.6.

The Legislature hereby finds that the state's airport and airway system is inadequate to meet current and projected growth in aviation and that substantial expansion and improvement of the system is required to meet the demands of interstate and intrastate commerce, the postal service and the national defense. The Legislature finds that users of air transportation are capable of making a greater financial contribution to the expansion and improvement of the system through increased user fees. The Legislature finds, however, that such users should not be required to provide all of the funds necessary for future development of the system, and that revenues obtained from the general taxpayer will continue to be required to pay for the use of such facilities by the military and for the value to national defense and the general public benefit in having a safe, efficient airport and airway system available and fully operational in the event of war or national emergency. The Legislature also finds that the continued development and expansion of an adequate and up-to-date comprehensive state airport and airway system will require the acquisition of agricultural, residential, commercial, industrial and miscellaneous types of properties for the same; and that many persons and businesses will have to be relocated. The Legislature finds further that it is in the best interests of the people of the State of California to help all those persons forced to relocate when airport expansion and construction requires them to lose their businesses and homes. It is the purpose of this act to provide the means by which adequate compensation and immediate assistance will be provided for relo-

deletions by asterisks * * *

cation and moving expenses and other costs involved in the necessary moving of a business or home to make way for airport expansion and development.

21690.7.

(a) "Displaced person" means any individual, family, business or farm operation which moves from real property acquired for federal, state or local airport expansion and development.

(b) "Individual" means a person who is not a member of a family.

(c) "Family" means two or more persons living together in the same dwelling unit who are related to each other by blood, marriage, adoption or legal guardianship.

(d) "Business" means any lawful activity conducted primarily for the purchase and resale, manufacture, processing or marketing of products, commodities, or other personal property, or for the sale of services to the public, or by a nonprofit corporation.

(e) "Farm operation" means any activity conducted primarily for the production of one or more agricultural products or commodities for sale and home use, and customarily producing such commodities or products in sufficient quantity to be capable of contributing materially to the operator's support.

(f) "Airport expansion and development" means the construction, alteration, improvement, or repair of airport hangars; airport passenger or freight terminal buildings and other buildings required for the administration of an airport; public parking facilities for passenger automobiles; roads within the airport boundaries; and any acquisition of land adjacent to or in the immediate vicinity of a public airport, including any interest therein, or any easement through or any other interest in airspace, for the purpose of assuring that activities and operations conducted thereon will be compatible with normal airport operations.

(g) "Public entity" includes the state, the Regents of the University of California, a county, city, city and county, district, public authority, public agency, and any other political subdivision or public corporation in the state when acquiring real property or any interest therein for airport expansion and development, except the Department of Public Works of this state.

21690.8.

The payment of moving expenses shall be made to eligible persons in accordance with the provisions of this act and such rules and regulations as shall be adopted by the public entity.

21690.9.

The public entity is authorized to adopt rules and regulations to implement the payment of moving expenses as authorized by this act. Such rules and regulations may include provisions authorizing payments to individuals and families of fixed amounts not to exceed two hundred dollars ($200) in lieu of their respective reasonable and necessary moving expenses.

21690.10.

The public entity is authorized to give relocation advisory assistance to any individual, family, business or farm operation displaced because of the acquisition of real property for any state or federal airport project.

21690.11.

In giving relocation advisory assistance, the public entity may establish a local relocation advisory assistance office to assist in obtaining replacement facilities for individuals, families and businesses affected by airport expansion or development.

21690.12.

(a) As a part of the cost of construction the public entity may compensate a displaced person for his actual and reasonable expenses in moving himself, family, business or farm operation, including moving personal property.

(b) Any displaced person who moves from a dwelling may elect to receive in lieu of his actual and reasonable moving expenses a moving expense allowance, determined according to a schedule established by the public entity not to exceed two hundred dollars ($200), and in addition a dislocation allowance of one hundred dollars ($100).

(c) Any displaced person who moves or discontinues his business or farm operation may elect to receive in lieu of his actual and reasonable moving expenses a fixed relocation payment in an amount equal to the average annual net earnings of the business or farm operation, or five thousand dollars ($5,000), whichever is lesser. In the case of a business, no payment shall be made under this subdivision unless the public entity is satisfied that the business cannot be relocated without a substantial loss of patronage, and is not a part of a commercial enterprise having at least one other establishment, not being acquired, which is engaged in the same or similar business. For purposes of this subdivision, the term "average annual net earnings" means one-half of any net earnings of the business or farm operation, before federal, state and local income taxes, during the two taxable years immediately preceding the taxable year in which such business or farm operation moves from the real property acquired for such project, and includes compensation paid by the business or farm operation to the owner, his spouse, or his dependents during such two-year period. To be eligible for the payment authorized by this subdivision the business or farm operation must make its state income tax returns available and its financial statements and accounting records available for audit for confidential use to determine the payment authorized by this subdivision.

21690.13.

In addition to the payments authorized by Section 21690.12, the public entity, as a part of the cost of construction, may make a payment to the owner of real property acquired for an airport project, which is improved with a single-, two- or three-family dwelling actually owned and operated by the owner for not less than one year prior to the first written offer for the acquisition of such property. Such payment shall be the amount, if any, which, when added to the acquisition payment, equals the average price required for a comparable dwelling determined, in accordance with standards established by the public entity, to be a decent, safe, and sanitary dwelling adequate to accommodate the displaced owner, reasonably accessible to public services and place of employment and available on the market. Such payment shall be made only to the displaced owner who purchases a dwelling, that meets standards established by the public entity, within one year subsequent to the date on which he is required to move from the dwelling acquired for the project.

21690.14.

In addition to the payment authorized by Section 21690.12, as a part of the cost of construction, the public entity may make a payment to any individual or family displaced from any dwelling not eligible to receive a payment under Section 21690.13, which dwelling was actually and lawfully occupied by such individual or family for not less than 90 days prior to first written offer for the acquisition of such property. Such payment, not to exceed one thousand five hundred dollars ($1,500), shall be the additional amount which is necessary to enable such individual or family to lease or rent for a period not to exceed two years, or to make the down-payment on the purchase of a decent, safe, and sanitary dwelling of standards adequate to accommodate such individual or family in areas not generally less desirable in regard to public utilities and public and commercial facilities.

21690.15.

Any displaced person aggrieved by a determination as to eligibility for a payment authorized by this act, or the amount of a payment, may have his application reviewed by the public entity. This review shall include the right to the appointment of an independent appraiser approved by the owner to review the amount of the award under Section 21690.13.

21690.16.

The public entity is authorized to adopt rules and regulations relating to relocation assistance as may be necessary or desirable under state and federal laws and the rules and regulations promulgated thereunder. Such rules and regulations shall include provisions relating to:

(a) A moving expense allowance, as provided in Section 21600.12, subdivision (b), for a displaced person who moves from a dwelling, determined according to a schedule, not to exceed two hundred dollars ($200);

(b) The standards for decent, safe and sanitary dwellings;

(c) Procedure for an aggrieved displaced person to have his determination of eligibility or amount of payment reviewed by the public entity; and

(d) Eligibility for relocation assistance payments and the procedure for claiming such payments and the amounts thereof.

21690.17.

No payment received by a displaced person under this act shall be considered as income for the purposes of the Personal Income Tax Law or the Bank and Corporation Tax Law, nor shall such payments be considered as income of resources to any recipient of public assistance and such payments shall not be deducted from the amount of aid to which the recipient would otherwise be entitled under Part 3 (commencing with Section 11000) of Division 9 of the Welfare and Institutions Code.

SEC. 2. Nothing contained in this act shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of damages not in existence on the date of enactment of this act.

SEC. 3. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect the provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Approved Aug. 30, 1969.

Filed Aug. 31, 1969.

Mmeo 69-133 EXHIBIT IV CHAPTER 1585

ASSEMBLY BILL NO. 645

An act to add Sections 21669, 21669.1, 21669.2, 21669.3, and 21669.4 to the Public Utilities Code, relating to airports and making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

The people of the State of California do enact as follows:

SECTION 1. Section 21669 is added to the Public Utilities Code, to read:

21669.

The department shall 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. The standards shall be based upon the level of noise acceptable to a reasonable person residing in the vicinity of the airport.

SEC. 2. Section 21669.1 is added to the Public Utilities Code, to read:

21669.1.

There is hereby established an advisory committee to assist the department in the adoption of noise standards. The committee shall be composed of seven members appointed by the Governor as follows:

(a) Two members, one of whom shall be representative of homeowners concerned with aircraft noise.

(b) One member each from the Department of Public Health, the League of California Cities, the County Supervisors Association, the Department of Education, and the Air Transport Association.

The existence of the committee shall terminate on January 1, 1971.

SEC. 3. Section 21669.2 is added to the Public Utilities Code, to read:

21669.2.

In its deliberations the department and the advisory committee shall be governed by the following guidelines:

(a) Statewide uniformity in standards of acceptable airport noise need not be required, and the maximum amount of local control and enforcement shall be permitted.

(b) Due consideration shall be given to the economic and technological feasibility of complying with the standards promulgated by the department.

SEC. 4. Section 21669.3 is added to the Public Utilities Code, to read:

21669.3.

The department shall submit a comprehensive report of the noise regulations adopted pursuant to Sections 21669, 21669.1 and 21669.2 to the Legislature on or prior to April 1, 1970, and the regulations shall go into effect on January 1, 1971 in the absence of legislative action adopting different standards.

SEC. 5. Section 21669.4 is added to the Public Utilities Code, to read:

21669.4.

(a) The violation of the noise standards by any aircraft shall be deemed a misdemeanor and the operator thereof shall be punished by a fine of one thousand dollars ($1,000) for each infraction.

(b) It shall be the function of the county wherein an airport is situated to enforce the noise regulations established by the department. To this end, the operator of an airport shall furnish to the enforcement authority designated by the county the information required by the department's regulations to permit the efficient enforcement thereof.

(c) Penalties assessed for the violation of the noise regulations shall be used first to reimburse the General Fund for the amount of any money appropriated to carry out the purposes for which the noise regulations are established, and second be used in the enforcement of the noise regulations at participating airports.

SEC. 6. There is hereby appropriated from the General Fund in the State Treasury to the Airport Assistance Revolving Fund, as a loan, the sum of fifty thousand dollars ($50,000) to be used in carrying out the purposes of Sections 21669, 21669.1 and 21669.2 of the Public Utilities Code as added by this act, and to be repaid as follows:

(a) Any penalties assessed for the violation of noise regulations pursuant to this act shall first be used to reimburse the General Fund until such loan is repaid; and

(b) If legislation is enacted to impose a tax on aircraft jet fuel, the revenues from which are to be deposited in the Airport Assistance Revolving Fund, such revenues shall first be used to reimburse the General Fund until such loan is repaid.

(c) From any federal grants that may be obtained by the department for the purpose of promulgating the standards called for by his act.

Memo 69-133

EXHIBIT V

CHAPTER 1013

SENATE BILL NO. 941

An act to amend Sections 16000 and 16080 of, the Government Code, relating to environmental quality control.

The people of the State of California do enact as follows:

SECTION 1. Section 16000 of the Government Code is amended to read:

16000.

The Legislature finds that:

(a) Rapid population growth, economic development and urbanization have affected the quality of California's natural environment.

(b) The proliferation of noise from transportation sources have led to the exposure of large sectors of the populace to an unacceptable degree of noise.

(c) The anticipated rates of construction of new airports and extension of existing airports, construction of freeways and mass rapid transit lines, and the introduction into service of intraurban short takeoff and land and vertical takeoff and land aircraft operating at low cruising altitudes will rapidly escalate the urban noise problem unless systematic preventive measures are taken.

(d) There is a large discrepancy between the technology available for control of urban noise and the degree to which it is being utilized in practice, through such means as land use planning, noise control provisions in building design and construction, and legal control over the movements of noise-producing transportation vehicles.

(e) Improvement of the quality of California's physical environment consistent with the maximum benefit to the people of the state is a matter of statewide, regional, and local concern calling for coordinated public and private action in the interest of the health, safety, and welfare of present and future generations.

SEC. 2. Section 16080 of the Government Code is amended to read:

16080.

The council shall:

(a) Make a thorough study of relevant policies, practices, and programs in the state that relate significantly to environmental quality, including noise emission control.

(b) Identify major environmental quality problems, giving consideration to all of the possible interrelationships between the degradation or improvement of air, land, and water resources.

(c) Develop long-range goals and make recommendations, after holding public hearings, as to policies, criteria, and programs as guides in the protection, management, and improvement of California's environmental quality.

(d) Identify problems in existing environmental quality control efforts in the state, including unmet or inadequately met needs, undesirable overlaps or conflicts in jurisdiction, between or among federal, state, regional, and local agencies, and any efforts that may be unnecessary or undesirable.

(e) Recommend, after holding public hearings, such legislative and administrative actions as may be necessary to establish goals, policies, and criteria and to implement programs that will effectively protect, manage, and improve environmental quality on a long-range basis.

(f) Review and make recommendations, after holding public hearings, on proper state, regional, or local governmental mechanisms, which would formulate broad policies, objectives and criteria for the coordinated protection, management, and improvement of California's physical environment.

(g) Make recommendations for immediate action by state agencies as defined in Section 11000 of the Government Code which would effectively preserve and enhance California's natural environment.

(h) Appoint a scientific advisory group to consider and report to the council on the state of the art of urban noise-control technology and to recommend appropriate actions necessary to effectively protect, manage, and improve the noise environment on a long-range basis. This advisory group shall be composed of not less than five nor more than 10 members. To provide the necessary depth and breadth in modern acoustics, members of the scientific advisory group shall be practicing acoustical engineers.

(i) Avail itself of technical information available from federal agencies involved in research and administrative measures for the control of noise such as the Departments of Transportation, Housing and Urban Development, and Health, Education and Welfare. Specifically, the council shall apprise itself of technical advisement available from the Interagency Aircraft Noise Abatement Program, including its Land Use and Airports Panel and its Legislative and Legal Panel.

Memo 69-133 **EXHIBIT VI**

[Civ. No. 11547. Third Dist. Apr. 16, 1969.]

[As modified Apr. 29, 1969.]

IRENE PEACOCK, as Executrix etc., Plaintiffs and Appellants, v. COUNTY OF SACRAMENTO, Defendant and Appellant.

[1] **Eminent Domain—Inverse Condemnation—Sufficiency of Evidence.**—In an inverse condemnation action against a county, the trial court correctly found that a taking of plaintiffs' property (referred to as the "take" area) occurred, where the county, in contemplation of the acquisition of a private airport for public use, adopted a height restriction ordinance pursuant to Gov. Code, §§ 50484-50485.14, where the board of supervisors later rezoned certain property, including the "take" area, to a classification more restrictive, as to height, where the rezoning was followed by the adoption of a general plan for development of the airport, where no such actions were taken with respect to any other private airfield in the county, where the impact of these actions on plaintiffs' land was to "freeze" development of any meaningful kind within the "take" area, where further decisions by the board rejecting plaintiffs' plans for subdivision development confirmed and ratified the "freeze," and where, although the airfield was never acquired, the restrictions were still in effect at the time plaintiffs commenced their action.

[2] **Id.—Inverse Condemnation—Interest Taken.**—In an action in inverse condemnation against a county, the evidence properly supported the finding of the trial judge that the interest taken was the fee rather than a mere temporary taking of an easement in air space, where various actions of the county board of supervisors taken in connection with their goal of keeping the approach areas of a proposed airport clear of any obstructions pending determination of boundaries, approach patterns, roadways, and other facilities inherent in the project brought about a restrictive interpretation of a height regulation ordinance which frustrated the efforts of plaintiffs to develop their property by the logical extension of their adjacent subdivisions and deprived them totally of the economic use of the property involved.

[3] **Id.—Inverse Condemnation—Continuance of Proceedings.**—In an inverse condemnation action, the trial court did not abuse

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[1] See Cal.Jur.2d, Eminent Domain, §§ 374, 375; Am.Jur.2d, Eminent Domain, § 478.

McK. Dig. References: [1] Eminent Domain, § 212; [2, 3] Eminent Domain, § 204.

its discretion in denying defendant county's motion for a continuance, even though the question of abandonment of the project involving the property taken was before the county board of supervisors at the time of the motion, where such question had been before the board for many months prior to the trial date, where the county had had several years to prepare for trial, where plaintiffs had many times before filing suit expressed their intention to bring an inverse condemnation suit but were requested each time by county officers or county supervisors to defer their suit until the county's plans were fully developed in order that the county could purchase plaintiffs' property, where plaintiffs had several times acceded to such requests, and where the county was aware that a previous inverse condemnation suit involving property similarly situated had been successfully prosecuted.

APPEAL from a judgment of the Superior Court of Sacramento County. William A. White, Judge. Affirmed.

Action for inverse condemnation. Judgment for plaintiff affirmed.

Gale & Goldstein and Stanley J. Gale for Plaintiffs and Appellants.

John B. Heinrich, County Counsel, and Thomas A. Darling, Deputy County Counsel, for Defendant and Appellant.

JANES, J.—This is an appeal by defendant county from a judgment for plaintiffs in an action brought on the theory of inverse condemnation.[1] Plaintiffs have filed a cross-appeal from that part of the judgment which found the taking to have occurred on November 13, 1963, but have requested that the cross-appeal be dismissed if the judgment appealed from by the county is affirmed. The trial was bifurcated as to the following issues: (1) whether a taking by inverse condemnation had in fact occurred, and (2) damages. The issue on the main appeal is primarily whether the court correctly found a taking—permanent in nature—to have occurred; we are not concerned with the issue of valuation.

I. *Background*

The action is based on a claim by plaintiffs that the county through a series of acts deprived plaintiffs of the use and

[1]The original plaintiffs were L. J. Reese and J. W. Peacock. Mr. Peacock died after judgment was entered and his widow, Irene Peacock, acting as Executrix of his estate, has been substituted as a plaintiff.

value of certain real property located immediately south of Phoenix Field, a privately owned airport in the northeast area of Sacramento County. The evidence was in conflict as to the size of the area involved; the court ultimately determined, however, that the affected parcel, herein referred to as the "take" area, encompassed 26½ acres.

The controversy centers upon the impact on plaintiffs' property rights of a series of actions taken by the Sacramento County Board of Supervisors, which actions were based upon what was initially an assumption and subsequently became a publicly stated intention that the county would eventually purchase Phoenix Field for use as a public aviation facility. The "take" area with which we are concerned was included in that additional property which the county would have had to purchase in order to operate the facility in accordance with their expressed plans. The activities of the board involved in this case, commenced in 1958 and had not been concluded at the time the subject proceeding was initiated.

In 1955 plaintiff Reese, the owner of a large tract of land which extended south from Sunset Avenue (the existing boundary of Phoenix Field) to the American River, entered into an agreement with plaintiff Peacock for sale of the property, in successive phases. Peacock's purchase and subsequent development started with the southernmost portion of this property, followed by generally contiguous sections to the north. His plan was to develop the property immediately south of the airport last, because of its potential commercial value once the area south of it was developed. Development of the "take" area was in the planning stages by 1959; subdivision maps had been prepared, the County Engineer's office had been contacted regarding sewer facility commitments and arrangements had been made regarding the bonding of improvements.

In 1958, however, the county had entered into an agreement with Leigh-Fisher and Associates, Airport Consultants, authorizing (1) an analysis of the then existing air trade characteristics of the area and (2) recommendations for an area civil airport development program. The Leigh-Fisher report was published in 1959, and, although it was concerned primarily with the concept of a new metropolitan airport, it included recommendations for "a county-wide system of [smaller] county airports to serve all the aviation needs of the community." The report expressed the need for a permanent public airport facility in the northeast area of the county, and

recommended that primary consideration be given the possible use of Phoenix Field to serve that need. It was further pointed out by the report that Phoenix Field was situated in a rapidly developing residential area and the recommendation was made that the county take immediate action "to provide compatible land uses and maintain proper approach criteria . . . ." suggesting the use of zoning regulations as a method of implementing this purpose.

After the Leigh-Fisher report was submitted to the board of supervisors in 1959, a joint city-county airport study committee was formed to review the report and its recommendations. In January 1960, the study committee adopted a resolution recommending that the county assume responsibility for airport development in line with the recommendations of the Leigh-Fisher report, and in March 1960, that resolution was ratified by the Board of Supervisors. Hearings were held by the board of supervisors, looking toward adoption of zoning measures to control further development of the area necessary for Phoenix Field expansion, and Mr. Peacock and his attorney attended several such hearings and protested the intended zoning restrictions.

On April 6, 1960, the board of supervisors adopted Ordinance 697, which by its terms applied only to ". . . the airport commonly known as Phoenix Field." The effect of the ordinance was to establish requirements in regard to clear airspace for the existing runway. The ordinance prohibited any structure or vegetation with a height in excess of zero feet in an area extending 200 feet from either end of the runway. A clear airspace requirement of 20:1, or 1 feet of elevation for 20 feet of distance was established for the next 10,000 feet of land, i.e., at 200 feet from the end of the "ground zero" zone, no structure was permitted in excess of 10 feet; any excess would constitute an "obstruction." The county considered this ratio to be required by "TSO-N18" (Technical Standard Order, U.S. Dept. of Commerce) for compliance with certain federal standards with which the county sought to comply in order to be eligible for participation of federal funds. Contemporaneously with enactment of Ordinance 697 the county entered into a lease-leaseback agreement with the private owners of Phoenix Field in order to create the public interest in the airport necessary to qualify for eligible federal funds. Thereafter the sub-lessee, the Fair Oaks Flying Club, operated the airport as a public facility.

By the time Ordinance 697 was adopted, the county had

become aware of the need to acquire an interest in the adjacent clear zones and land area in order to qualify for participating federal funds; after enactment of the ordinance the county prepared various plans for development of the Phoenix Field project which were concerned with both the facility itself and the surrounding area, including recommendations for acquisition of nearby lands, and it repeatedly made clear its intention to purchase the necessary additional land. The plans were not limited to the existing facility, but also included plans for development of various two-runway systems, and the area of clear space required for the several plans prepared varied from one plan to another.

On June 12, 1963, the board of supervisors rezoned certain property in the area of Phoenix Field, including the subject "take" area, from an agricultural classification designated A-I-C to a different agricultural classification known as A-I-B. Although the A-I-B classification permitted a greater density of use for residential purposes (one single family home per acre as opposed to one for each two acres under the A-I-C classification), the A-I-B zoning was slightly more restrictive in certain areas of height regulation than Ordinance 697, and was a type of zoning specifically designed for use in airport and airport approach areas. Although directed by the board of supervisors (under the authority of Ordinance 697) to initiate proceedings for adoption of an airport approach zoning ordinance pursuant to the Airport Approaches Zoning Law of the State of California,[2] the county planning director attempted to accomplish the desired result by the zoning reclassification. This zoning, or any other height restrictive or protective scheme, was not adopted relative to any other private airport in the county.

Finally, in November of 1963, a general Phoenix Field Land Use Plan was submitted to the board of supervisors for approval and the plan was adopted by the board on November 13, 1963. The future airport contemplated by the general plan of November 1963 was a two-runway field involving a clear area greater than that established by Ordinance 697.[3] By resolution passed on February 10, 1964, the board of supervi-

[2](Gov. Code, §§ 50485-50485.14.)

[3]Because the various study plans and proposals varied slightly as to the alignment of the clear area, there was some confusion as to the exact area required. The trial court, in its judgment, selected the area delineated by the county in this general plan as the area of the actual take.

sors directed the taking of necessary steps to effectuate the general plan.

Negotiations thereupon commenced for purchase of both the airport site and the "take" area. The county's plans became less certain, however, toward the end of 1964 and beginning of 1965, because of difficulty in reaching an agreement as to price with the members of the Fair Oaks Flying Club, owners of the Field proper, and on March 24, 1965, the board took action, upon recommendation of its director of airports, to instruct the county executive and other responsible county officers (1) "to take the necessary steps to cancel the existing lease between the County and the Fair Oaks Flying Club relative to Phoenix Field. . . ." (2) "to prepare an ordinance rescinding the height ordinance [Ordinance 697] previously adopted by the Board of Supervisors for Phoenix Field. . . ." (3) "to initiate action and the necessary public hearings for the deletion of Phoenix Field from the General Plan of the County. . . ." and (4) to direct . . . "Public works to continue to look for sites in the area." The order of March 24, 1965, was temporarily suspended, however, by action of the board on April 7, 1965, in order to permit the City-County Chamber of Commerce to assist in purchase negotiations for the field. This "moratorium" on the abandonment order was continued for an additional 60 days by action of the board on June 2, 1965. On September 13, 1965 the board confirmed its intention to abandon the Phoenix Field project and ordered that the steps previously directed be taken.

During the period of time expended by the county in the foregoing acts and planning—commencing with authorization of the Leigh-Fisher report and ending essentially with the filing of this action in October of 1964—plaintiffs have been frustrated in the economic development of their remaining property in that they have been unable to obtain approval of any subdivision maps because of the prospective effect of the entire Phoenix Field project. Early attempts to acquire sewer commitments were unsuccessful because of the uncertain nature of the airport development. Plaintiffs were unable throughout the entire period to obtain information from the county as to the boundaries of the proposed project, although they were assured repeatedly that the lines would soon be fixed and that the land involved in the airport development would be purchased by the county. Property taxes were raised substantially, although plaintiffs were unable to use the prop-

erty; they were told this would be taken into consideration at the time of purchase.

Mr. Peacock submitted a subdivision map in July 1962, which proposed the development of 69 lots. The map was rejected and Peacock consulted with the planning director in an effort to prepare an acceptable map. He was told that all the land in the area was "frozen" until the county determined how much land it needed for the airport project. Although the 69-lot subdivision did not include any land within the clear zone required under Ordinance 697, the Planning Commission ultimately rejected the map, on September 11, 1962, its report stating that the proposed subdivision "would be in conflict with prospective public development" of Phoenix Field, and further, that it did not allow for a proposed relocation of Sunset Avenue. Prior to receipt of the rejection plaintiffs' engineer had prepared a new proposal for the same subdivision, but consisting of 41 lots, and conforming to the proposed road changes. This map was submitted in October 1962, but was also rejected. A third subdivision map was conditionally approved, the conditions imposed by the planning Commission resulting in a net of 25 lots. However, the cost of sewer connections, which would have been initially absorbed by the larger number of lots, was now to be apportioned to only 25, and the plan was considered economically unfeasible. Road alignments involved also remained in a state of flux and the subdivision was not pursued. Timely appeal was taken to the board of supervisors from the actions of the planning commission, but the planning action was upheld as a policy decision necessary for protection of the proposed Phoenix Field Project, and plaintiffs' subdivision was disapproved. Mr. Peacock was repeatedly told by various county officials and several members of the board of supervisors that he should not bring a threatened suit in inverse condemnation because the county fully intended to purchase the subject property.[4] This evidence was received for the limited purpose of demonstrating that the county was equitably estopped from asserting a defense of limitations.[5]

[4]The board of supervisors was aware that another property owner in the Phoenix Field area had successfully prosecuted an inverse condemnation suit against the county.

[5]Government Code section 911.2, formerly Code of Civil Procedure, section 715. The point is not of major significance, since a claim was filed against the county in August of 1963, less than one year after the date of taking as determined by the trial court, and the court found an estoppel to exist.

Plaintiffs then filed their present complaint, alleging that the effect of the enactment of Ordinance 697, and subsequent actions and enactments by the county, has been to so restrict the useable height of their land that the property affected has been permanently taken and damaged, without compensation, contrary to the provisions of the California Constitution, article I, section 14. The pretrial order framed the issues as follows:

"1. Did the action of the defendant cause injury or damage to the subject property for which plaintiffs are entitled to compensation?

"2. Has defendant taken the property by inverse condemnation?

"3. What is the take or valuation date?

"4. What is the measure of damages?

"5. What are the damage and compensation to be awarded?

Prior to trial the order was amended to include the issues of defense of limitations and estoppel to plead such defense. The first phase of the action (the phase involved in this appeal) was terminated by the issuance of an interlocutory decree of inverse condemnation, and the court made extensive findings. We summarize those relevant to this appeal.

II. *The Findings*

County Ordinance 697, enacted May 5, 1960, was a height restriction ordinance enacted pursuant to the Airport Approaches Zoning Act. (Gov. Code, §§ 50485-50485.14); said ordinance provided for clear zones and areas wherein vegetation could not be grown or any structure erected, and its effect as to plaintiffs was to deprive them of the beneficial use of portions of their property, in that it prohibited them from growing any vegetation or erecting any structures thereon, although airspace above their property was used by the general public.

The lease-leaseback agreement between the county and the Fair Oaks Flying Club created a public interest in Phoenix Field, which continued during the period of county study regarding the location and development of a publicly owned facility and pending completion of study plans concerning such facility as part of a comprehensive overall aviation plan of the defendant county. Said agreement was executed in connection with adoption of Ordinance 697 to maintain the status quo of land uses in the area, pending completion of such studies, and was still in effect at the time of trial.

During the period between May 5, 1960, and November 13, 1963, the county, through its appropriate officials, affirmatively prevented plaintiffs from making normal, logical subdivision use of their property in extension of their adjoining prior subdivisions, which uses would have been permitted but for the restrictive provisions of said ordinance, the restrictive zoning of A-I-B classification and the proposed development plans of Phoenix Field.

Ordinance 697 was an interim study ordinance and was not repealed by the A-I-B rezoning of June 12, 1963. A-I-B zoning is a specific type of zoning designed for land adjacent to airports, but was not applied to land adjacent to any other private airport in the county. The land configuration of this zoning was identical with the configuration of the land to be acquired by the county under the general plan of November 13, 1963.

By the enactment of Ordinance 697 and the zoning of said property as A-I-B, "the County intended to and did, in fact, maintain the status quo and use of the property as unimproved lands and prevent the development thereof and the construction of improvements thereon during the study period. By such acts the County intended to prevent any increase of cost in the acquisition of the said lands between the time of the enactment of the ordinance and such time as the County would be ready to acquire or purchase the subject property. Absent such restrictive regulation zoning, the County recognized that the subject property would probably be developed with residential units and at the time that the County would be ready to acquire the property, the cost of acquisition would increase because of the improvements that would have been normally constructed upon the subject property. By such actions the County of Sacramento intended to, and in fact did, prevent any development of the subject property, deprive the plaintiffs of any beneficial use of their property, and maintain the status quo thereof during the period from the enactment of Ordinance 697 until the present time."

Acquisition of a public interest in and to the Field, the clear zones, and the approach zones, and the "take" area was a necessary and integral part of the total county project since the plan would not have qualified for federal fund participation in the absence of some such interest. Application for such participation was made. Administrative officials were instructed to implement the county's plan, and pursuant

thereto negotiations for purchase of such areas were carried on through 1964 until the latter part of that year, at which time the county withdrew from negotiations and declared a moratorium on the expenditure of funds previously budgeted for the purchase of Phoenix Field and the "take" area.

On November 13, 1963, the county enacted a general plan for Phoenix Field and the surrounding area with the intent to culminate and complete the study plans begun under Ordinance 697 (section 5 of which provided for a permanent enactment) and further affirmed continuance of the public use of the field and the restrictive use limitations of the ordinance and zoning previously imposed. Ordinance 697 was merged into the general plan and supplanted by it, but the restrictive effect on plaintiffs' land continued, in addition to further restrictive measures contained in the general plan. The period between enactment of Ordinance 697 on May 5, 1960, and adoption of the general plan on November 13, 1963, was a reasonable time for the County to complete its study under the interim provisions of Ordinance 697.[6] The adoption of the restrictive provisions of the general plan, however, and continuation of the previous restrictions thereby regarding the use of the land after November 13, 1963, "was unreasonable, a deprivation of due process, and a compensatory restriction upon the use of plaintiffs' lands."

Under the authority of Ordinance 697, the rezoning of June 12, 1963, and the general plan of November 13, 1963, "the defendant and its officers committed various acts evidencing their intention and position that the Phoenix Field Project was in existence and that the prohibitory provisions of said enactments applied to plaintiffs' lands, all of which deprived plaintiffs of any practical, substantial or beneficial use thereof."

[6]At the time of enactment of Ordinance 697, Government Code section 65806 provided:

"§ 65806. If the planning commission, or the department of planning, in good faith, is conducting or intends to conduct studies within a reasonable time for the purpose of, or holding a hearing for the purpose of, or has held a hearing and has recommended to the legislative body the adoption of any zoning ordinance or amendment or addition thereto, or in the event that new territory may be annexed to a city, the legislative body to protect the public safety, health and welfare may adopt as an urgency measure, a temporary interim zoning ordinance prohibiting such and any other uses which may be in conflict with such zoning ordinance." In 1961 this section was amended to provide that such measures could only be effective for one year, unless extended under specified procedures for another year, with a maximum of two such extensions (Stats. 1961 ch. 1871, § 1) but such amendment has been interpreted not to apply retroactively. (39 Ops. Cal.Atty.Gen., p. 241.)

"The exceptional and extraordinary circumstances heretofore enumerated culminating in the adoption of the general plan of November 13, 1963, constituted a take of the subject property by inverse condemnation" by the county without compensation. By reason of said general plan and the restrictive use and zoning, plaintiffs' land had no practical value or beneficial use to plaintiffs in any manner consistent with its value; the highly oppressive effect of the restrictions was to deny plaintiffs use of their land and to dedicate it to a public use.

Finally the court fixed the date of November 13, 1963, as the date upon which the county took the subject property, finding that the said take was of the fee and not of any lesser interest or easement in or across the property. The boundaries of the "take" area were determined to be those set forth in the county's general plan. The county having negotiated with plaintiffs for the sale and purchase of the "take" area according to the boundaries set forth in the general plan, the court concluded that it was proper and reasonable that the boundaries of the "take" area be defined by said general plan.

Thereupon the court reached conclusions of law generally responsive to the summarized findings of fact, determining that plaintiffs' right to compensation vested absolutely and irrevocably on November 13, 1963, and that "[A]ny act or acts of the defendant which may remove said restrictions or whereby defendant may abandon the public use of said lands shall not divest or deprive plaintiffs of their right to compensation for said taking." The interlocutory judgment was then entered.

III. *Contentions on Appeal*

The county contends on appeal (1) that none of the three county enactments and actions involved, standing alone, constituted inverse condemnation; (2) that these actions, cumulatively, and the actions of county officials related thereto did not constitute inverse condemnation; (3) that the finding that plaintiffs' property was taken by inverse condemnation is not supported by the fact that two of plaintiffs' subdivision maps were not approved, nor by the evidence indicating that the board of supervisors was aware of or considered the fact that its planning actions would affect the value of the subject property; (4) that the court's finding that Ordinance 697 and the rezoning of June 12, 1963, were done for the purpose of preventing an increase in the value of the property was

beyond the power of the court to make, since that issue was not before the court either by the pleadings or the pretrial order; and (5) that if any of the county's actions did constitute inverse condemnation, the "take" was only of a temporary easement in airspace.

IV. *The Issue of Inverse Condemnation*

[1] Significantly, the trial court did not find that any of the county's enactments or actions, standing alone, constituted inverse condemnation. Rather, the court agreed with the position of the county at trial that Ordinance 697 was enacted as and was an interim study ordinance, and that the period between its enactment and the adoption of the general plan for Phoenix Field was a reasonable time for completion of such study. Nor did the court hold that the rezoning of the property in June of 1963 furnished a basis for relief, although of the five private airports referred to in the Leigh-Fisher reports only property adjacent to Phoenix Field was so reclassified. (See *Kissinger* v. *City of Los Angeles* (1958) 161 Cal.App.2d 454 [327 P.2d 10].) Further, the court did not consider the enactment and adoption of the general plan, *per se*, as constituting inverse condemnation, but reached its conclusion partly on the basis of the continuation of the restrictive measures beyond what was found to be a reasonable time for their existence.

The county's two initial contentions are based in part on the provisions of Public Utilities Code sections 21402 and 21403, which provide that aircraft have a right of flight over land, including the right of flight within the zone of approach of any public airport without restriction or hazard,[7] contend-

[7]Public Utilities Code, sections 21402 and 21403, read, at the time of trial, as follows:

"21402. The ownership of the space above the land and waters of this State is vested in the several owners of the surface beneath, subject to the right of flight described in Section 21403. No use shall be made of such airspace which would interfere with such right of flight; provided, that any use of property in conformity with an original zone of approach of an airport shall not be rendered unlawful by reason of a change in such zone of approach.

"§ 21403. (a) Flight in aircraft over the land and waters of this State is lawful, unless at altitudes below those prescribed by federal authority, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the land or waters of another, without his consent, is unlawful except in the case of a forced landing. The owner, lessee, or operator of the aircraft is liable, as provided by law, for damages caused by a forced landing.

"(b) The right of flight in aircraft includes the right of safe access to public airports, which includes the right of flight within the zone of

ing that those sections operated to impose the restrictions of TSO-N18 upon plaintiffs' property at the time the lease-leaseback agreement became operative, and hence that Ordinance 697 was of no additional restrictive effect. The county contends further that even if it is assumed that the restrictions were created by Ordinance 697, rather than by sections 21402 and 21403, such restrictions constituted a valid exercise of the county's planning and zoning powers, as distinguished from an appropriation for public use of a compensable interest in plaintiffs' property.

In *Anderson* v. *Souza* (1952) 38 Cal.2d 825 [243 P.2d 497], however, the court (adopting the opinion of Justice Van Dyke of this court) in speaking of the predecessor to the present Aeronautics Commission Act and the companion Federal Act (U.S.C.A., Title 49, § 176a) stated: "'. . . these declarations were not intended to and do not divest owners of the surface of the soil of their lawful rights incident to ownership.'" (p. 839.) And at page 842 it is stated: "'The State Aeronautics Commission Act contemplates the the furtherance of aviation, with its manifold benefits to the public, by operation of both public and private fields, but with respect to the public fields it provides for their establishment by counties, cities and other municipal agencies, requires the finding of public convenience and necessity and contemplates the use of the power of condemnation.'"

The Airport Approaches Zoning Law (Gov. Code, §§ 50485-50485.14), in relationship to which Ordinance 697 was enacted, also contemplates use of the power of eminent domain in instances where constitutional limitations preclude the use of the zoning power. Further recognition by the Legislature of this limitation is found in Civil Procedure, section 1239.4, which provides: "§ 1239.4. Where necessary to protect the approaches of any airport from the encroachment of structures or vegetable life of such a height or character as to interfere with or be hazardous to the use of such airport, land adjacent to, or in the vicinity of, such airport may be acquired under this title by a county, city or airport district reserving to the former owner thereof an irrevocable free license to use and occupy such land for all purposes except

approach of any public airport without restriction or hazard. The zone of approach of an airport shall conform to the specification of the Technical Standard Order of the Civil Aeronautics Administration of the Department of Commerce designated TSO-N18. (§ 21403 was amended by Stats. 1967, ch. 651, § 1, in respects not here material.)

the erection or maintenance of structures or the growth or maintenance of vegetable life above a certain prescribed height or may be acquired by a county, city or airport district in fee."

In support of the contention that the county's actions were a valid exercise of the police power which could not amount to a compensable taking, the county cites *Smith* v. *County of Santa Barbara* (1966) 243 Cal.App.2d 126 [52 Cal.Rptr. 292] and *Harrell's Candy Kitchen, Inc.* v. *Sarasota-Manatee Airport Authority* (Fla. 1959) 111 So.2d 439. The facts of both cases are distinguishable from the instant one. *Smith* upheld as a valid exercise of regulatory power a rezoning of property from residential to design industrial in an area involved in possible airport expansion; the ordinance there, however, merely changed the allowable use of the property rather than to virtually prohibit its use by its owners and to devote it to a public use. In *Harrell's Candy Kitchen, supra,* the constitutionality of airport approach regulations was upheld, hence the case stands generally for the proposition advanced by the county. The regulation there, however, limited use of the subject property to 27.64 feet and plaintiffs desired to use an additional 13.36 feet for an ornamental roof for advertising purposes. The restrictive action of the airport Authority was not a denial of any use, such as found by the court in the case at bench, but a limitation still allowing some beneficial use. Further, as noted in *Sneed* v. *County of Riverside* (1963) 218 Cal.App.2d 205, 212 [32 Cal.Rptr. 318] [hearing denied], the Florida case is considered an expression of the minority view in the United States. Cases on the subject, collected in 77 A.L.R.2d 1355 following the leading case of *Ackerman* v. *Port of Seattle* (1960) 55 Wash.2d 400 [348 P.2d 664, 77 A.L.R.2d 1344], declare the majority rule as follows: "§ 3. Zoning ordinances purporting to limit the use of land and regulate the height of structures on land near or surrounding an airport, thus having the effect of granting a free path of airspace over which planes can fly or take off and land at low altitudes, have frequently been held unconstitutional as a 'taking' of private property without just compensation, especially since the governing body could procure the land by eminent domain proceedings." (p. 1362.)

The view expressed finds support in *Sneed, supra,* where it is stated at page 209: "In summary, the zoning law and the zoning ordinance permit elimination of airport hazards in approaches to airports through the exercise of the police

power, 'to the extent legally possible' (Gov. Code, § 50485.2); where 'constitutional limitations' prevent the necessary approach protection under the police power, the necessary property right may be acquired by purchase, grant, or condemnation in the manner provided by law.

"While height restriction zoning has long been recognized as a valid exercise of the police power, there has been a reluctance to extend this method to the protection of approaches to airports; instead, air easements with payment of compensation appear to be the more acceptable, although not undisputed, method of protecting approach zones. (See 13 Hastings L.J. 397, *Airport Zoning and Height Restriction.*)

"We believe there is a distinction between the commonly accepted and traditional height restriction zoning regulations of buildings and zoning of airport approaches in that the latter contemplates actual use of the airspace zoned, by aircraft, whereas in the building cases there is no invasion or trespass to the area above the restricted zone."

In further support of the contention that all three actions—the ordinance, the rezoning and adoption of the general plan—were permissible exercises of the police power, the county cites *Metro Realty* v. *County of El Dorado* (1963) 222 Cal.App.2d 508 [35 Cal.Rptr. 480], and *Morse* v. *County of San Luis Obispo* (1967) 247 Cal.App.2d 600 [55 Cal.Rptr. 710]. *Metro* involved an attack upon an interim ordinance enacted at the request of the planning commission, which had announced its intention to hold hearings upon the proposed adoption of a comprehensive water conservation and development plan. The ordinance was declared to be an emergency measure, required by the pendency of the comprehensive plan. Plaintiff's property was within one of 31 potential reservoir sites, all of which were similarly restricted by the ordinance. The ordinance was a short term measure, limited in duration by the amended provisions of Government Code section 65806.[8] In upholding the validity of the ordinance this court noted the temporary duration of the provisions restricting development of plaintiff's property and pointed out the following significant factors in the evidence: ". . . (1) plaintiff is not being singled out as a lonely object of regulation. The ordinance affects *all* new would-be home subdividers within 31 potential reservoir sites spread throughout the entire county; also (2) the lands here involved have been unused and unus-

[8]For the text of section 65806, see footnote 6, *supra*, p. 14.

able for generations. They are precipitous or hilly; rocky, brush-covered; (3) there are no subdivisions in the immediate vicinity. An attempt to launch a homesite development on plaintiff's lands would be a pioneering adventure. . . ." (p. 513.)

Recognizing that the police power is not illimitable, we nevertheless found upon the facts there presented that the ordinance in *Metro, supra,* was neither oppressive nor unreasonable, in view of the temporary character of the restrictions placed against plaintiff and others, and after weighing against such hardship the necessity for such temporary restrictions during the evolution of a countywide water plan, we there pointed out that ". . . Reasonableness . . . is the yardstick by which the validity of a zoning ordinance is to be measured and reasonableness in this connection is a matter of degree. A temporary restriction upon land use may be (and we feel is under the facts here) a mere inconvenience where the same restrictions indefinitely prolonged might possibly metamorphize into oppression." (p. 516.)

Morse, supra, is equally distinguishable from the instant case. There plaintiffs' complaint alleging that the rezoning of an area in the vicinity of a county airport resulted in inverse condemnation was dismissed after a demurrer was sustained, and the ruling was upheld on appeal. Plaintiffs' property, when purchased by them, was zoned A-1 (agricultural), permitting a density of one residential dwelling per acre. They submitted a subdivision map under a county zoning ordinance which provided that applications for rezoning would be given consideration in relation to the general development of the community. Their map proposed R-1 use, a zoning under which the allowable density would be increased from one to five residential structures per acre. Thereupon the planning commission undertook to review zoning of the entire area in the general vicinity of the county airport, and after a public hearing the commission recommended and the board of supervisors acted to decrease rather than increase the allowable density of the area to A-1-5, a classification which required five acres for a single-family dwelling. Unlike the case at bench, the new zoning appropriated no airspace above plaintiffs' property nor did it create any restrictions upon height; nor in the opinion of the appellate court did it attempt to anticipate condemnation by spot-zoning. ". . . So far as the pleadings disclose, the reclassification neither resulted in the use of plaintiffs' air-

space for public purposes nor did it take away plaintiffs' right to continue the existing use of the property." (p. 604.) The case stands for no more than the proposition that the facts there pleaded by plaintiffs showed only that the rezoning ordinance was a proper regulation of land use, rather than a device for taking plaintiffs' property.

In distinguishing *Sneed* v. *County of Riverside, supra,* 218 Cal.App.2d 205, the *Morse* court clearly demonstrates the applicability of *Sneed* to the case presently before us:

"Plaintiffs cite *Sneed* v. *County of Riverside,* 218 Cal.App. 2d 205 [32 Cal.Rptr. 318], in support of their argument that this rezoning constituted a taking of private property for public use without compensation. In *Sneed,* the County of Riverside enacted an ordinance imposing height restrictions on all structures on certain property, the effect of which was to create an easement in the airspace above plaintiff's property for use as an approach zone to the county airport. Under the ordinance the maximum height limits on Sneed's land directly adjoining the runway had been lowered to four feet, less than the height of existing structures on the land. Large numbers of aircraft took off and landed at the airport by flying at low altitudes over his property. The basic issue, according to the court, was whether the Riverside ordinance was a height-limit ordinance authorized by the police power or whether in reality it created an air easement over plaintiff's property without the payment of compensation. After distinguishing between municipal regulations which restrict or destroy certain rights indigenous to the private ownership of property (noncompensable losses) and regulations which trasnfer those rights to public enjoyment (compensable takings), the court concluded that a regulation which lowers the height of existing buildings within the approach patterns of an airport contemplates a public use of airspace above private land, in effect an air easement, for which compensation must be paid. . . ." (*Morse* v. *County of San Luis Obispo, supra,* 247 Cal.App.2d 600, 603-604.)

The county contends—independently of the effect of Ordinance 697 and the rezoning of the area—that enactment of the general plan of November 1963 furnished no basis for a finding that plaintiffs' property was taken in inverse condemnation. The court, however, made no such singular finding. The evidence of its cumulative effect with the other county enactments, considered in relation to acts of the county's officers administering the various restrictive provisions, contributed

to the court's determination of a taking. The court found the actions of the county to be reasonable up to a point in time determined to be November 13, 1963; the actions of the county in continuing the restrictions beyond that date were found to be unreasonable and oppressive, constituting a compensable taking of plaintiffs' land. The finding has substantial support in the record as a whole. The evidence discloses much confusion and uncertainty upon the part of various county officers, as well as several members of the Board of Supervisors as to the meaning and effect of the "clear" zones established by the official documents in evidence and as to the boundaries of the proposed airport project. Patently erroneous interpretations were at times made by county officers upon the question whether in specified clear zones all vegetation and structures were prohibited from ground level or only above the excess height limitations prescribed by Ordinance 697. The impact on plaintiffs' land—in the phraseology of a county officer—was to "freeze" development of any meaningful kind within the area determined by the court to have been taken, and such action by the county's representatives was confirmed and ratified by "policy decisions" of the Board of Supervisors in rejecting plaintiffs' plans for subdivision development in that part of their land in which under the terms of the ordinance itself building obstructions would have been permitted to a height substantially above "zero" or ground level. The trial judge undoubtedly looked to this evidence of action by the county as well as its officers as supportive of the finding—with which we agree—that plaintiffs were denied any practical or beneficial use of their affected property.

Nor are we persuaded, under the facts presented, by the suggestion that plaintiffs were required first to seek judicial review, under section 11525 of the Business and Professions Code, of the decisions denying their proposed subdivisions.[6] *Kirschke* v. *City of Houston* (Tex.Civ.App. 1959) 330 S.W.2d 629, cited by the county, is distinguishable from the instant case. *Kirschke* involved the denial of a building permit by the city based upon an anticipated need for plaintiffs' property for highway purposes. In affirming a judgment after demurrer sustained to a complaint sounding in inverse condemnation, the Texas court pointed out that plaintiffs should have sought relief by mandamus or mandatory injunction, as the

[6]The provisions for judicial review of subdivision determinations were revised and placed in Business and Professions Code, section 11525.1 in 1965. (Stats. 1965 ch. 1180 and 1341.)

city was not liable in damages because denial of the permit was an exercise of the governmental function and had not resulted in any taking or damage to plaintiffs' property. The complaint attacked in *Kirschke*, however, showed plainly not only that there had yet been no highway construction, but ". . . no lines or boundaries [were] established, no ordinance passed, no money appropriated and no set-backs required." (p. 633.) Moreover, contrary to the findings we review in the instant case, the acts complained of did not, in that court's view, amount to a taking. (See *Frustuck* v. *City of Fairfax* (1963) 212 Cal.App.2d 345, 370-371 [28 Cal.Rptr. 357]; *Sneed* v. *County of Riverside, supra*, at p. 212.)

We allude but briefly to the county's contention that the finding of a taking by inverse condemnation is unsupported by the fact that the two subdivisions were disapproved or by the evidence indicating awareness and consideration by the Board of Supervisors of the fact that its planning actions would affect the value of the property. The thrust of the argument is really directed to the propriety of the inferences to be drawn from that evidence, and the rule requiring resolution of conflicting inferences on appeal in support of the judgment below is dispositive of this contention. (3 Witkin, Cal. Procedure (1954) Appeal, § 88, pp. 2251-2252.) The attack upon the finding that the ordinance and rezoning were adopted for the purpose of depressing or preventing an increase of value in plaintiffs' property is equally undeterminative of this appeal. That neither the pleadings nor the pretrial order framed such an issue is now of little consequence. The evidence itself was relevant to the question whether the purpose of the enactments was to maintain the "status quo," itself a proper subject of inquiry, and the facts set forth in the questioned finding were therefore relevant and material to the issues pleaded.

V. *Extent of the "Take"—Easement or Fee?*

[2] Finally, it is the contention of the county—relying upon *Pacific Telc. etc. Co.* v. *Eshleman* (1913) 166 Cal. 640 [137 P. 1119, Ann.Cas. 1915C 822, 50 L.R.A. N.S. 652], and *Sneed* v. *County of Riverside, supra*, 218 Cal.App.2d 205—that if a compensable taking did occur it was merely temporary in nature and only of an easement in airspace. The *Eshleman* case, however, does no more than demonstrate the principle, on dissimilar facts, that a taking may be of less than the fee interest in property (p. 664), while *Sneed* illus-

trates, at no advantage to the county, the difference between the taking therein and that found in the case at bench. As pointed out in the report of *Sneed* (at p. 207) the interest allegedly taken from plaintiff there consisted in terms of an air navigation easement over his property, the easement ranging from 4 feet in height at that part of his property closest to the airport to a height of 75 feet at that farthest away. No question arose as to the extent of the interest taken, but only as to whether plaintiff's complaint stated a cause of action for relief. That it did, and effectively, is shown by our excerpts from the case.[10] The actual extent of the easement, and the mode of valuation, were left for trial.

While the taking which occurs as a result of inverse condemnation may be only temporary, and may in a given situation involve substantially less than the taking of a fee interest in property, we are satisfied, under the exceptional circumstances shown in the instant case, that the evidence properly supports the finding of the trial judge that the interest taken was the fee. Earlier in this opinion we have indicated our own observation that the terms "clear zone" and "clear area" were sometimes misunderstood and upon other occasions interpreted by officials of the county in different ways with reference to the areas of airspace required by Ordinance 697 to be kept unencumbered. Their goal of keeping the approach areas of the proposed airport "clear" of any obstructions pending determination of boundaries, approach patterns, roadways, and other facilities inherent in the project brought about a restrictive interpretation of the regulation which, as the record shows, frustrated the efforts of plaintiffs to develop their property by the logical extension of their subdivisions. It is shown by the record that at one relevant period plaintiffs were even told by a county representative that they could not construct a golf course in the "frozen" area, as the "flags" would not be permitted to extend above the putting greens. It is no answer to suggest that the ordinance and zoning provisions could not be in such manner modified or effectively interpreted by mere officers of the county, as a number of county supervisors expressed the same views, and the Board of Supervisors itself, in officially denying plaintiffs' appeals from denial of their subdivision applications, ratified the acts of their officers and decided that as a matter of policy no subdivision development would be permitted in the affected

[10]See pages 24-25, *supra*.

area which tended to conflict with the proposed airport in its planning stages. The trial court took pains to point out that there was at no time any question of bad faith or wilful procrastination upon the part of the supervisors or other county officers; they were simply faced with many important budgetary and other fundamental planning problems relating to the project, which at times seemed and eventually turned out to be insuperable. Meanwhile, however, plaintiffs were deprived totally of the economic use of their property within the "take" area, as the court found.

[8] Related to the basic question of the extent of the interest taken is the charge by the county that the trial court abused its discretion in denying the county's motions for continuance, in the stages of the proceeding approaching trial, at a time when the question of abandonment of the project was then before the Board of Supervisors. However, the county had before it the question of possible abandonment of the project for many months in advance of the trial date. On March 24, 1965, the board took its first formal action to abandon the project, although this initial move was suspended a few weeks later to permit further negotiation with the Fair Oaks Flying Club for purchase of their interests. On June 2, 1965, this "moratorium" on abandonment was continued for an additional 60 days and it was not until September of 1965 that the board finally confirmed its intention to abandon the entire project.

Meanwhile the case had been pretried on March 10, 1965, and the trial date fixed at July 7, 1965. Thereafter, on June 10, 1965, the court modified its pretrial order to provide that:

"'. . . the trial shall then proceed or shall proceed at such later time to which it is reasonably continued by the trial judge. . . .

"'The purpose of this order is to allow the County of Sacramento sufficient time to take action which may affect the issue of what damages and compensation are to be awarded without penalizing plaintiffs by delaying the trial of the other issues here involved which, in the Court's view, do not rest on what future action may or may not be taken by the County.'"

When finally called for trial on July 12, 1965, the county's motion for a continuance was denied. There was no abuse of discretion. The county had had several years to prepare for trial. Plaintiffs had many times before filing suit expressed their intention to bring an inverse condemnation suit, and each time they were requested by county officers or county

supervisors to defer their suit until the county's plans were fully developed in order hat the county could purchase the property. Plaintiffs had several times acceded to such requests. The county was aware that the previously-mentioned inverse condemnation suit involving property similarly situated had been successfully prosecuted. Denial of the motion for continuance was not an abuse of discretion. "The factors which influence the granting or denial of a continuance in any particular case are so varied that the trial judge must necessarily exercise a broad discretion." (2 Witkin, Cal. Procedure (1954) Trial, § 20, pp. 1746-1747.)

Pursuant to their stated request, the cross-appeal by plaintiffs is dismissed. The judgment is affirmed. Plaintiffs respondents are to recover costs on appeal.

Pierce, P. J., and Regan, J., concurred.