

## Memorandum 71-45

Subject: Study 36.65 - Condemnation (Airports)

Summary

The eminent domain title of the Code of Civil Procedure, the State Aeronautics Act in the Public Utilities Code, and the Airport Approaches Zoning Law in the Government Code contain provisions relating to condemnation for airport purposes. See attached study. These sections must be disposed of in drafting a comprehensive eminent domain title:

(1) Subdivision 20 of Code of Civil Procedure Section 1238, declaring airport facilities a public use, is unnecessary and should not be continued; all public entities authorized to provide and operate airports have adequate independent condemnation authority; condemnation by private persons for private airports should not be authorized.

(2) Code of Civil Procedure Sections 1239.2 and 1239.4 authorize condemnation to protect airport approaches. Public Utilities Code Sections 21633-21635 are to the same effect. The substance of these provisions, extended in applicability to all entities authorized to provide and maintain airports, should be recodified in the State Aeronautics Act.

(3) Government Code Section 50485.13, repeating and conditioning the authority of Code of Civil Procedure Sections 1239.2 and 1239.4, is superfluous and should be repealed.

(4) Code of Civil Procedure Section 1239.3, relating to condemnation to provide areas for overflight interference with nearby property, will be considered in a separate memorandum.

## Analysis

Code of Civil Procedure Section 1238(20). Subdivision 20 adds to the Section 1238 list of declared public uses:

20. Airports for the landing and taking off of aircraft, and for the construction and maintenance of hangars, mooring masts, flying fields, signal lights and radio equipment.

All public entities authorized to provide and maintain airports have been delegated adequate condemnation authority for the purpose independently of subdivision 20. See the Comment to repealed subdivision 20, Exhibit I (attached). It is doubtful that subdivision 20 confers any useful condemnation authority upon operators of private airports. See attached research study. Repeal of subdivision 20 would make it clear that private persons have no airport condemnation authority. The Commission has previously determined that there should be no private condemnation authority for similar public facilities (byroads, sewers, and the like).

Code of Civil Procedure Sections 1239.2-1239.4. Sections 1239.2 and 1239.4 permit cities, counties, and airport districts to take airspace easements and fee interests in land beneath approach zones to airports or adjacent to or in the vicinity of airports, for the purpose of providing approach protection. The text of the sections is set out and discussed in the attached research study. The sections must be removed from the Code of Civil Procedure, and the substance of the sections, along with the substance of Public Utilities Code sections of similar import, should be recodified in the State Aeronautics Act. Exhibit II contains the text of the proposed new sections. The Comments to the new sections indicate the extent to which they broaden existing law. Sections 1239.2 and 1239.4 as repealed with Comments are contained in Exhibit III.

Public Utilities Code Sections 21633-21635. In addition to providing the State Department of Aeronautics general condemnation authority for the

purpose of providing and maintaining airports, Sections 21633, 21634, and 21635 permit the taking of the same interests and serve the same purposes as do Code of Civil Procedure Sections 1239.2 and 1239.4, although more broadly phrased. The substance of the sections should be recodified with the Code of Civil Procedure sections in the State Aeronautics Act. See Exhibit II. The general condemnation authority of the department should be continued in a single section numbered 21633. See Exhibit III.

Additionally, Section 21635 reiterates general condemnation rules presently applicable under the eminent domain title of the Code of Civil Procedure. This section can be repealed without changing existing law. See the Comment to the repealed section, Exhibit III.

Section 21634 also requires that removal and relocation expenses be paid where property is acquired by means other than condemnation. The same provision with regard to acquisitions by cities and counties is found in Government Code Section 50485.13. This provision, broadened to include all entities providing airports and to include relocation of all airport hazards, should be continued in a separate section of the State Aeronautics Act. See attached research study and provision in Exhibit II.

Government Code Section 50485.13. The removal and relocation expenses provision of Section 50485.13 should be continued. The remaining portion of the section is surplussage and may be repealed. The section as repealed is set out with Comment in attached Exhibit III.

Respectfully submitted,

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Memorandum 71-45

EXHIBIT I

CODE OF CIVIL PROCEDURE § 1238

Staff recommendation July 1971

Subdivision 20

~~20.--Airports-for-the-landing-and-taking-off-of-aircraft,-and  
for-the-construction-and-maintenance-of-hangars,-mooring-masts,  
flying-fields,-signal-lights-and-radio-equipment.~~

Comment. Subdivision 20 is superseded by provisions conferring adequate condemnation authority on all public entities authorized to operate airports. See Govt. Code §§ 26020 (counties), 50470 (cities, counties, cities and counties); Pub. Util. Code §§ 21633 (State Department of Aeronautics), 22553 (airport districts); Harb. & Nav. Code App. 1, §§ 4, 5, 27 (West Supp. 1967) (San Diego Unified Port District). Insofar as subdivision 20 may have authorized condemnation for airport purposes by private persons (see 9 Ops. Cal. Atty. Gen. 187 (1947)), it is not continued.

Memorandum 71-45

EXHIBIT II

PUBLIC UTILITIES CODE § 21652

Staff recommendation July 1971

Sec. . Article 2.6 (commencing with Section 21652) is added to Chapter 4 of Part 1 of Division 9 of the Public Utilities Code, to read:

Article 2.6. Removal of Obstructions

§ 21652. Acquisition of property for hazard elimination (added)

21652. (a) Any person authorized to exercise the power of eminent domain for airport purposes may acquire by purchase, gift, devise, lease, condemnation, or otherwise, any property necessary to permit the safe and efficient operation of the airport or to permit the removal, elimination, obstruction-marking, or obstruction-lighting of airport hazards, or to prevent the establishment of airport hazards.

(b) As used in this section, "property" includes real and personal property and any right or interest therein, whether within, beyond, adjacent, or in the vicinity of, the boundaries of the airport or airport site, and, by way of illustration and not by way of limitation, includes air rights, airspace, air easements, and easements in airport hazards.

Comment. Section 21652 continues the authority of the Department of Aeronautics (formerly found in Section 21633), of cities, of counties, and of airport districts (formerly found in Code of Civil Procedure Sections 1239.2 and 1239.4, and Government Code Section 50485.13) to condemn or otherwise acquire property for the elimination and prevention of airport hazards. See Public Utilities Code Section 21017 ("airport hazard" defined). In addition, it extends this authority to entities previously not covered by a specific grant, e.g., San Diego Unified Port District. See Harb. & Nav. Code App. 1, §§ 4, 5, 27 (West Supp. 1967). For a listing

Staff recommendation July 1971

of statutes authorizing the power of eminent domain for airport purposes, see Comment to former Code of Civil Procedure Section 1238, subdivision 20.

Subdivision (a). Subdivision (a) is based upon language formerly found in Public Utilities Code Section 21633 (authority of Department of Aeronautics). As a specific authorization of condemnation for airport protective purposes, it duplicates more general language allowing condemnation of property necessary for a project found in Eminent Domain Code Section 304. This duplication is deemed useful for the detail contained in subdivision (a), and is therefore retained.

Subdivision (b). Subdivision (b) is intended to make clear that property of any character or degree may be condemned for airport protective purposes. As such, it supersedes the restrictive language of former Code of Civil Procedure Section 1239.2, and it duplicates the more general definition of property found in Eminent Domain Code Section 101. This duplication is deemed useful for the detail contained in subdivision (b), and is therefore retained.

Subdivision (b) should be broadly interpreted to allow the condemnation of a fee or any lesser interest. It therefore subsumes the authority formerly found in Code of Civil Procedure Section 1239.4 to acquire land, reserving an "irrevocable free license" in the former owner to use and occupy such land. Subdivision (b) permits a condemnor to take land subject to such an interest where necessary.

§ 21653. Removal or relocation of structures for airport purposes (added)

21653. (a) Any person authorized to exercise the power of eminent domain for airport purposes may by contract or otherwise provide, by condemnation if necessary, for the removal or relocation of any airport hazard or the removal or relocation of all private structures, railways, highways, mains, pipes, conduits, wires, cables, poles, and all other facilities, structures, and equipment that may interfere with the location, expansion, development, or improvement of the airport and other air navigation facilities or with the safe approach thereto and takeoff therefrom by aircraft.

(b) Any person acting under authority of subdivision (a) shall pay the cost of such removal or relocation.

Comment. Section 21653 continues the authority of the Department of Aeronautics (formerly found in Section 21634), of cities and of counties (formerly found in Government Code Section 50485.13), to require the removal or relocation of airport hazards. See Pub. Util. Code § 21017 ("airport hazard" defined). In addition, it extends this authority to entities previously not covered by a specific grant, e.g., airport districts. See Pub. Util. Code § 22553.

Section 21653 also continues the authority of the Department of Aeronautics to require the removal and relocation of structures, facilities, and equipment that might interfere with the location, expansion, development, or

improvement of the airport and its facilities, and extends this authority to other public entities. In addition, it requires payment for relocation or removal of airport hazards generally.

For a listing of statutes authorizing the power of eminent domain for airport purposes, see Comment to former Code of Civil Procedure Section 1238, subdivision 20.

Subdivision (a). Subdivision (a) is based upon former Public Utilities Code Section 21634 (authority of Department of Aeronautics). While subdivision (a) is phrased as a separate grant of authority to require removal or relocation, such authority can be exercised in connection with an eminent domain proceeding brought under Section 21652.

It should be noted that, the removal or relocation of property held for or devoted to a public use, may be required only after the court in which proceedings are pending finds that the relocation for airport purposes is of greater public necessity than the public use for which the property was previously held or used. See Eminent Domain Code § 471; see Comment to former Pub. Util. Code § 21635.

Subdivision (b). Subdivision (b) is based on former Public Utilities Code Section 21634 (authority of Department of Aeronautics). It requires the person initiating removal or relocation proceedings under subdivision (a) to pay for the removal or relocation. This is the normal rule in eminent domain proceedings generally. See Code Civ. Proc. § 1248(6). Subdivision (b) extends this rule to removal or relocations accomplished by any means.

EXHIBIT III

CODE OF CIVIL PROCEDURE § 1239.2

Staff recommendation July 1971

Code of Civil Procedure Section 1239.2 (repealed)

Sec. . Section 1239.2 of the Code of Civil Procedure is repealed.

~~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.~~

Comment. The substance of former Section 1239.2 of the Code of Civil Procedure is continued in Public Utilities Code Section 21652.

CODE OF CIVIL PROCEDURE § 1239.4

Staff recommendation July 1971

Code of Civil Procedure Section 1239.4 (repealed)

Sec. . Section 1239.4 of the Code of Civil Procedure is repealed.

~~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.~~

Comment. The substance of former Section 1239.4 of the Code of Civil Procedure is continued in Public Utilities Code Section 21652.

Government Code Section 50485.13 (repealed)

Sec. . Section 50485.13 of the Government Code is repealed.

~~50485.13.--In any case in which:--(a)-it is desired to remove, lower, or otherwise terminate a nonconforming structure or use; or (b)-the approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations under this article; or (c)-it appears advisable that the necessary approach protection be provided by aquisition of property rights rather than by airport zoning regulations, the city or county within which the property or nonconforming use is located or the city or county owning the airport or served by it may acquire, by purchase, grant, or condemnation in the manner provided by the law under which a city or county is authorized to acquire real property for public purposes, such air right, air navigation easement, or other estate or interest in the property or nonconforming structure or use in question as may be necessary to effectuate the purposes of this article.--In the case of the purchase or grant of any property or any easement or estate or interest therein or the aquisition of the same by the power of eminent domain by a city or county making such purchase or exercising such power, there shall be included in the damages for the taking, injury or destruction of property the cost of the removal and relocation of any structure or public utility which is required to be moved to a new location.~~

GOVERNMENT CODE § 50485.13

Staff recommendation July 1971

Comment. Section 50485.13 of the Government Code, granting to cities and counties the power of eminent domain to eliminate airport hazards, is superseded by other sections.

The power to condemn for the elimination of airport hazards is continued in Public Utilities Code Section 21652. To the extent that entities were limited in their exercise of eminent domain under Section 50485.13 to situations in which zoning would have been inadvisable or unconstitutional, the limitation is not continued. Any entity authorized to condemn for airports may condemn to eliminate airport hazards without limitation under Public Utilities Code Section 21652. It should be noted, however, that cities and counties are mandated to achieve this end, to the extent legally possible, by exercise of the police power, rather than by exercise of the power of eminent domain. Section 50485.2.

The requirement that cities and counties pay the cost of relocation of structures when acquiring property to eliminate airport hazards is continued in Public Utilities Code Section 21653.

The authority of cities and counties to condemn property outside their limits for airport purposes is retained in Government Code Section 50470.

PUBLIC UTILITIES CODE § 21633

Staff recommendation July 1971

Public Utilities Code Section 21633. Acquisition of property (amended)

Sec. . Section 21633 of the Public Utilities Code is amended to read:

21633. For the purposes of this article, the department, by purchase, gift, devise, lease, condemnation, or otherwise, may acquire real or personal property, or any interest therein . ~~including easements in airport hazards or land outside the boundaries of an airport or airport site, necessary to permit safe and efficient operation of the airports or to permit the removal, elimination, obstruction marking, or obstruction lighting of airport hazards, or to prevent the establishment of airport hazards.~~

Comment. Section 21633 as amended continues the authority of the Department of Aeronautics to acquire property for airport purposes. The portion of Section 21633 that formerly authorized acquisition of property for the elimination of airport hazards is continued in Section 21652.

Public Utilities Code Section 21634 (repealed)

Sec. . Section 21634 of the Public Utilities Code is repealed.

~~21634. --The department may contract or otherwise provide, by condemnation if necessary, for the removal or relocation of any airport hazard or the removal or the relocation of all private structures, railways, highways, mains, pipes, conduits, wires, cables, poles, and all other facilities and equipment which may interfere with the location, expansion, development, or improvement of the airports and other air navigation facilities or with the safe approach thereto or takeoff therefrom by aircraft, and may pay the cost of the removal or relocation. --When exercising its power of removal or relocation, the department shall pay the cost of removal and relocation of any private structures, railways, mains, pipes, conduits, wires, cables, poles, or any other structure or equipment required to be moved to a new location.~~

Comment. The substance of former Section 21634 is continued in Section 21653.

Public Utilities Code Section 21635 (repealed)

Sec. . Section 21635 of the Public Utilities Code is repealed.

~~21635.--In the condemnation of property, the department shall proceed in the name of the state in the manner provided by the Code of Civil Procedure.--For the purpose of making surveys and examinations relative to any condemnation proceedings, it is lawful to enter upon any land.--The power of the department, by condemnation, to acquire or require the relocation of any railway, highway, main, pipe, conduit, wires, cables, poles, and all other facilities and equipment or other property held for or devoted to a public use shall be exercised only after the court in which the condemnation proceedings are pending finds that the taking or relocation for the public use of the department is of greater public necessity than the public use for which the property is presently held or used.--The court may fix the terms and conditions for the enjoyment of a right of common use, in lieu of taking or relocation, as it determines will best suit the public interest and necessity.~~

Comment. Section 21635 is not continued. The requirement that the Department of Aeronautics proceed in the name of the state is expressed in Section 21631. The rules governing the conduct of eminent domain proceedings generally are prescribed in the Eminent Domain Code. See Eminent Domain Code Section 200. Particular provisions of former Section 21635 may be found in the following sections:

- Entry for survey and examination . . . . . Em. Dom. Code § 500
- More necessary use requirement. . . . . Em. Dom. Code § 451
- Right of common use . . . . . Em. Dom. Code § 471,  
[CCP § 1247(1)]

THE POWER TO CONDEMN FOR AIRPORTS  
AND RELATED FACILITIES

Code of Civil Procedure Section 1238(20)

Introduction

Takings for airport purposes were first authorized in 1935. In that year, subdivision 20 was added to Section 1238 of the Code of Civil Procedure to declare as a public use "airports for the landing and taking off of aircraft, and for the construction and maintenance of hangars, mooring masts, flying fields, signal lights and radio equipment."<sup>1</sup> Before 1937, it had been a debated question whether the acquisition and maintenance of an airport was a permissible undertaking for a municipality.<sup>2</sup>

Department of Aeronautics

The State Aeronautics Act authorizes the Department of Aeronautics to provide airports and air navigation facilities,<sup>3</sup> to acquire property for this purpose,<sup>4</sup> and to condemn property in the name of the state in the manner provided by the Code of Civil Procedure.<sup>5</sup> The department is also authorized to acquire existing airports but is forbidden to acquire airports owned or controlled by a political subdivision without the consent of that

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1. Cal. Stats. 1937, Ch. 193, § 1, p. 487.

2. See *Krenwinkle v. City of Los Angeles*, 4 Cal.2d 611, 51 P.2d 1098 (1935). See also *Pipes v. Hilderbrand*, 110 Cal. App.2d 645, 243 P.2d 123 (1952). An interesting history of the early development of one of the major airports in the state is set forth in *City & County of San Francisco v. Western Airlines, Inc.*, 204 Cal. App.2d 105, 22 Cal. Rptr. 216 (1962).

3. Pub. Util. Code § 21631.

4. Pub. Util. Code § 21633.

5. Pub. Util. Code § 21635.

subdivision.<sup>6</sup> Further, the department is authorized to provide ("by condemnation if necessary") for the removal and/or relocation of "airport hazards" or other structures, facilities, or equipment that interferes with airports.<sup>7</sup> In exercising the power of eminent domain for this latter purpose, however, there must be a judicial determination that the taking or relocation "is of greater public necessity" than any existing public use for which the property is held or used.<sup>8</sup> The only remarkable feature of the department's power of condemnation appears to be the lack of any conclusive resolution of necessity applicable to its takings.<sup>9</sup> The authority of the department to condemn thus is not dependent upon or affected by subdivision 20 of Section 1238.<sup>10</sup>

#### Local Public Entities

Cities, counties, airport districts, and the San Diego Unified Port District<sup>11</sup> are authorized to provide, maintain, and operate airports. All

6. Pub. Util. Code § 21632.

7. Pub. Util. Code § 21634.

8. Pub. Util. Code § 21635.

9. At least as to takings of property for which the Legislature has made a specific appropriation, it might be possible for the division to route the acquisition through the Property Acquisition Law (Govt. Code §§ 15850-15866) and thereby make applicable the conclusive resolution of the State Public Works Board. See Govt. Code § 15855; State v. City of Los Angeles, 256 Cal. App.2d 930, 64 Cal. Rptr. 476 (1967).

10. Section 21004 provides a detailed recital of public purpose, but it is not clear whether the thrust of the recital runs to the law of eminent domain, sovereign immunity, or other purpose.

11. Port districts are included in Code of Civil Procedure Section 1239.3 (which authorizes the taking of "air easements"), but it does not appear that port districts formed under the general law (Harb. & Nav. Code §§ 6200-6372) are authorized to provide air facilities. However, the San Diego Unified Port District is expressly authorized to provide "air terminal facilities." See Harb. & Nav. Code App. 1 § 4 (West Supp. 1971). The district operates the Lindberg Airport in San Diego. See Loma Portal Civic Club v. American Airlines, Inc., 61 Cal.2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964).

of these local public entities have been granted adequate condemnation authority for airport purposes by separate statutes that do not depend upon subdivision 20 of Section 1238.<sup>12</sup>

### Private Airports

In 1947, the California Attorney General undertook to determine whether the right of eminent domain might be exercised in connection with privately owned airports open to public use; and, if so, what quantum of "public service" might be required. Acknowledging the absence of definitive answers to these questions, the opinion nevertheless concluded that:<sup>13</sup>

the right of eminent domain can be exercised for the acquisition of property necessary for privately owned airports which are devoted to a public use. It is a judicial question in each case as to whether the proposed use will be deemed a public one . . . . In the absence of some legislation setting forth the requirements to be met by airports in devoting their facilities to public use, it is difficult to attempt to specify what conditions would have to be proved in a condemnation proceeding. It would seem that the mere maintenance of a landing strip upon which airplanes might land, subject to the unregulated control of the owner of the airport as to charges imposed therefor, with no obligation being assumed by the owner for the continued operation or maintenance of the airport, might fall short of the necessary proof. However, . . . this is a matter for judicial determination under the facts of each case.

Notwithstanding the detailed regulation imposed and authorized by the State Aeronautics Act,<sup>14</sup> there still is no "legislation setting forth

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12. See Govt. Code §§ 26020 (county), 50470, 50485.13 (city, county, city and county); Harb. & Nav. Code App. 1 §§ 4, 5, 27 (West Supp. 1971) (San Diego Unified Port District); Pub. Util. Code § 22553 (airport districts).

13. 9 Ops. Cal. Atty. Gen. 187, 190 (1947). The opinion discusses and relies upon *Gravelly Ford Canal Co. v. Pope & Talbot Land Co.*, 36 Cal. App. 556, 178 P. 150 (1918) (the public must be entitled, as of right, to use or enjoy the property taken) and *Black Rock Placer Min. Dist. v. Summit Water & Irr. Co.*, 56 Cal. App.2d 513, 133 P.2d 58 (1943) (public use is a question for determination by the court with respect to the facts of the particular case).

14. Pub. Util. Code §§ 21001-21694.

the requirements to be met by airports in devoting their facilities to public use."<sup>15</sup>

The only appellate decision bearing on this question implies that a privately owned and operated airport may not be established or enlarged through exercise of the power of eminent domain merely because it is available to the flying public. In that case, the California Supreme Court sustained a lower court injunction against objectionable overflights in connection with a privately operated airfield and rejected the contention that only damages for "inverse condemnation" should have been awarded.<sup>16</sup>

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15. However, there has been judicial determination that airports operated by cities are municipally operated "public utilities," thereby meeting requirements for a power of condemnation. *City & County of San Francisco v. Western Airlines, Inc.*, 204 Cal. App.2d 105, 22 Cal. Rptr. 216 (1962).

16. *Anderson v. Souza*, 38 Cal.2d 825, 243 P.2d 497 (1952). The court discusses the problem as follows:

Pertinent to the problem now being discussed is the nature of the airfield involved. It is a private airfield which cannot exercise the power of condemnation and the establishment of which requires no finding by any public agency of public convenience and necessity. The owners and operators of such an airport, notwithstanding they are engaged in a legitimate business, the encouragement and furtherance of which is a publicly-declared policy of our Legislature . . . must nevertheless conduct it with due regard for the rights of others, and if because of location the operation of such a business will result in depriving others of their property rights, it cannot be permitted, for to do so would, in practical effect, condemn the property of others in violation of constitutional guarantees. . . .

The State Aeronautics Commission Act contemplates 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. No such power is given or could be given to those putting their property to private use, even though incidentally the general purposes of the act are thereby subserved. We conclude there is nothing to distinguish a private airport from any other private business with regard to enjoining operations which create a nuisance. [38 Cal.2d at 842, 243 P.2d at .]

For an opposite result in the case of a publicly operated airport, see *Sneed v. County of Riverside*, 218 Cal. App.2d 205, 32 Cal. Rptr. 318 (1963).

It, therefore, appears that the taking of property for airport and related purposes is limited to those public entities authorized to establish and maintain air facilities.<sup>17</sup> There is a possibility of one rather remote exception. In an apparently singular decision rendered in 1939, the Supreme Court of Florida held that Pan American Airways might condemn property in Florida to provide terminal facilities.<sup>18</sup>

The possibility that a scheduled air carrier might take property to provide its own facilities was touched upon by the recent decision of the California Supreme Court in Loma Portal Civic Club v. American Airlines, Inc.<sup>19</sup> In that case, property owners sought to enjoin overflights by scheduled carriers operating under federal certificates of public convenience and necessity. The court concluded that denial of the injunction was proper as a matter of law because "there is an overriding public interest in the operation of aircraft with federal airworthiness certificates in federally certificated, scheduled passenger service, in a manner not creating eminent danger, and in accordance with applicable statutes and regulations."<sup>20</sup> The court notes that there was no alternative prayer for damages and that the public entity operating the airport was not made a defendant.<sup>21</sup> Thus, it would seem that

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17. Nichols notes that, in this field, a distinction is drawn between publicly operated airports and privately operated airfields, but he does not discuss the question further. See 2 P. Nichols, *Eminent Domain* § 7.514 at 742 (3d rev. ed. 1963).

18. *Central Hanover Bank & Trust Company v. Pan American Airways*, 188 So. 820 (Fla. 1939). The decision emphasized that the condemnor was engaged in the public transportation of persons and property and operated on regular schedules and between fixed termini.

19. 61 Cal.2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964).

20. 61 Cal.2d at 594, 394 P.2d at , 39 Cal. Rptr. at .

21. With reference to the respective liabilities of the entity operating the airport and the scheduled carriers, the leading decision of the Supreme Court of the United States (*Griggs v. Allegheny County*, 369 U.S. 84 (1962)) holds that the liability in "inverse condemnation" is that of the entity rather than of the carriers.

a common air carrier operating under either a federal or state certificate of public convenience and necessity<sup>22</sup> conceivably might be authorized by subdivision 20 to take property to provide its own terminal facilities.

It is notable that, at least as to the elimination of "airport hazards," the State Division of Aeronautics (as well as counties and cities) are not limited in activities, including land acquisition, to dealing with publicly owned or operated airports but apparently are authorized to engage in their activities with respect to privately operated airports.<sup>23</sup>

#### Conclusion

Subdivision 20 has been superseded by numerous provisions conferring adequate condemnation authority on all public entities authorized to operate airports. Insofar as subdivision 20 may have been intended to grant the power of eminent domain to operators of private airports, it is undesirable and should not be continued.

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22. Intrastate passenger air carriers are now required to hold a certificate of public convenience and necessity obtainable from the Public Utilities Commission. See Pub. Util. Code §§ 2740-2765 (West Supp. 1971). In no other case would the statutory or regulatory framework by which the criterion of public use could be established by a taker for airport purposes appear to exist.

23. Notice the definition of "airport" in both the State Aeronautics Act (Pub. Util. Code § 21013) and in the Airport Approaches Zoning Law (Govt. Code § 50485.1).

## Taking Fee or Air Easement in Property Near Airport

### Introduction

The general authority of various public entities to condemn property for airport purposes has been supplemented by a number of statutes that cover specifically takings to protect airport approaches from obstructions and to permit condemnation of rights that might otherwise be the subject of inverse condemnation actions for interference with the use and enjoyment of property, caused by excessive noise, vibration, and the like, through the operation of aircraft to and from an airport. The statutes enabling takings for protective purposes are discussed in this part of the study and suggestions are made for their disposition. The statutes enabling takings to prevent inverse condemnation actions, viz. Code of Civil Procedure Section 1239.3, are not discussed in this study but will be considered separately.

### Code of Civil Procedure Sections 1239.2 and 1239.4

Sections 1239.2 and 1239.4 were enacted in 1945<sup>24</sup> to make clear that cities, counties, and airport districts could condemn airspace rights or fee interests in property for the purpose of removing flight hazards and protecting airport approaches.<sup>25</sup> These sections provide:

24. Cal. Stats. 1945, Ch. 1242, p. 2354. Section 1239.4 was amended in 1961. See text at note 26 infra.

25. A 1947 opinion of the Attorney General notes that it was merely arguable "that the acquisition of airspace rights is necessarily included within the power to acquire airports under subdivision 20 of Section 1238 . . . ." 9 Ops. Cal. Atty. Gen. 188 at 192 (1947). Compare City of Oakland v. Nutter, 13 Cal. App.3d 752, 765, \_\_\_ Cal. Rptr. \_\_\_, \_\_\_ (1970) ("In alleging that the air easement was for airport purposes and that such purposes included the landing and taking off of aircraft, the city included rather than excluded such use of the airspace involved. It brought itself within the broad provisions of subdivision 20 of section 1238 of the Code of Civil Procedure.").

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.

Sections 1239.2 and 1239.4 are designed to provide adequate authority to condemn either airspace or an air easement (Section 1239.2) or the fee (Section 1239.4) where necessary to protect the approaches of an airport. The original limitation on takings under Section 1239.4--that the fee could be taken only subject to an irrevocable free license reserved to the former owner to use the land for compatible purposes--apparently presented practical problems in operating airports and the section was amended in 1961<sup>26</sup> to permit the acquisition of a fee without such a limitation. However, it is likely that a fee interest could have been taken absent this amendment. See Santa Barbara v. Cloer, 216 Cal. App.2d 127, 30 Cal. Rptr. 743 (1963).

In City of Oakland v. Nutter,<sup>27</sup> the court notes that Section 1239.2 permits condemnation of "airspace necessary to protect the approaches to an airport (which by definition implies airspace overlying property which is subject to overflights by planes landing or taking off.)." Presumably, the

26. Cal. Stats. 1961, Ch. 965, § 1, p. 2606.

27. 13 Cal. App.3d 752, 765, \_\_\_\_ Cal. Rptr. \_\_\_\_, \_\_\_\_ (1970).

same limitation would apply where a fee is sought to be taken under Section 1239.4 to protect the approaches of an airport. Nevertheless, in the Nutter case, the city of Oakland invoked Section 1239.2 to acquire "an air easement" "or airport purposes" over land lying beneath an approach path to the Oakland airport "to protect the approaches of" the airport, and the court held that the affected landowners were entitled to recover severance damages in the condemnation action for the loss of value to their remaining property resulting from overflight disturbances by planes using the severed easement to take off from or land at the airport.

Sections 1239.2 and 1239.4 to a certain extent overlap and are inconsistent. They should be consolidated so that it is clear that cities, counties, and airport districts may take any necessary interest in property, regardless of the location of the property, to assure the safety of airport approaches.

Government Code Section 50485.13

Government Code Section 50485.13 provides:

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

be necessary to effectuate the purposes of this article. In the case of the purchase or grant of any property or any easement or estate or interest therein or the acquisition of the same by the power of eminent domain by a city or county making such purchase or exercising such power, there shall be included in the damages for the taking, injury or destruction of property the cost of the removal and relocation of any structure or public utility which is required to be moved to a new location.

This section was enacted in 1953 as part of the Airport Approaches Zoning Law.<sup>28</sup> The law is basically designed to encourage cities and counties to zone for glide angle and clear approaches, with Section 50485.13 included as a safety valve, enabling condemnation where zoning is ineffective, unconstitutional, or inadvisable.

The grant of condemnation authority is a limited one--to cities and counties only, for property beneath the approaches to airports, and not merely adjacent or in the vicinity.<sup>29</sup> These limitations are ineffective in view of the broader Code of Civil Procedure provisions and may be discontinued without adverse effect.

In addition to being a limited grant of authority, exercise of the eminent domain power under Section 5048.13 is restricted to those situations where zoning fails. Moreover, cities and counties are admonished to eliminate airport hazards in approaches through the exercise of the police

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28. Cal. Stats. 1953, Ch. 1741, § 1, p. 3496; Govt. Code §§ 50485-50485.14.

29. See Section 50485.1 ("airport hazard" defined) and Sneed v. County of Riverside, 218 Cal. App.2d 205, 32 Cal. Rptr. 318 (1963) ("contemplates actual use of the airspace zoned, by aircraft," 218 Cal. App.2d at 209). Contrast Code of Civil Procedure Section 1239.4 (cities, counties, and airport districts may condemn "land adjacent to, or in the vicinity of, such airport").

power "to the extent legally possible."<sup>30</sup> This limitation is undesirable in that resort to compensation for taking property rights should be encouraged rather than discouraged.<sup>31</sup> It should not be continued.

Where a city or county does condemn property under Section 50485.13, or where it purchases the property, it is required to include as damages for the taking the cost of removal and relocation of any structure or public utility that is required to be moved to a new location. While this is the normal rule in eminent domain proceedings,<sup>32</sup> this section attempts to extend compensation for relocation to purchases. Whether this attempt can practically be accomplished may be questioned; however, it is at least a useful declaration of legislative policy and should be continued.

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30. Section 50485.2.

31. Cf. Peacock v. County of Sacramento, 271 Cal. App.2d 845, 77 Cal. Rptr. 391 (1969).

32. See Code of Civil Procedure Section 1248(6).

Public Utilities Code Sections 21633-21635

Section 21633 of the Public Utilities Code provides:

21633. For the purposes of this article, the department, by purchase, gift, devise, lease, condemnation, or otherwise, may acquire real or personal property, or any interest therein including easements in airport hazards or land outside the boundaries of an airport or airport site, necessary to permit safe and efficient operation of the airports or to permit the removal, elimination, obstruction-marking, or obstruction-lighting of airport hazards, or to prevent the establishment of airport hazards.

It is apparent that this section, enacted in 1953,<sup>33</sup> was designed to fill out the authority of the Department of Aeronautics to eliminate airport hazards in the same way the Sections 1239.2 and 1239.4 of the Code of Civil Procedure were intended to amplify the authority of cities, counties, and airport districts. It is clear that Section 21633 authorizes the taking of land and other interests crossed by flight paths; but whether land "outside the boundaries of an airport or airport site" means land merely adjacent to or in the vicinity of the airport is undetermined. In this sense, Section 21633 may not be as broad as the comparable Code of Civil Procedure sections.

However, Section 21633 does go well beyond the sections authorizing cities, counties, and airport districts to remove airport hazards. It allows condemnation for preventive purposes and for the "safe and efficient operation of the airports." The extent of the latter authority is unknown. Conceivably, it may authorize the taking of property that might be damaged by proximity to the airport.<sup>34</sup> This broadened authority should be continued.

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33. Cal. Stats. 1953, Ch. 151, § 1, p. 937; based on Cal. Stats. 1947, Ch. 1379, § 7, subdivision (2), 2d sentence, p. 2933.

34. However, it is unlikely that the Legislature in 1953 intended the language of Section 21633 to be addressed to the problem of aircraft noise damage, a problem disposed of in 1965 by Code of Civil Procedure Section 1239.3. The compensability of damage to land near airports because of the noise and vibrations of planes passing in the vicinity of (but not directly over) the land, was not clearly suggested before 1960, and was not generally

An adjunct to Section 21633 is Section 21634, which provides:

21634. The department may contract or otherwise provide, by condemnation if necessary, for the removal or relocation of any airport hazard or the removal or the relocation of all private structures, railways, highways, mains, pipes, conduits, wires, cables, poles, and all other facilities and equipment which may interfere with the location, expansion, development, or improvement of the airports and other air navigation facilities or with the safe approach thereto or takeoff therefrom by aircraft, and may pay the cost of the removal or relocation. When exercising its power of removal or relocation, the department shall pay the cost of removal and relocation of any private structures, railways, mains, pipes, conduits, wires, cables, poles, or any other structure or equipment required to be moved to a new location.

The section basically authorizes the Department of Aeronautics to use its powers to remove or relocate airport hazards. This may be accomplished independently of the preceding section or "by condemnation if necessary." When the department does require the relocation or removal of airport hazards generally, including vegetation, it may pay the costs of relocation. But, when it requires relocation or removal of structures or equipment, payment of costs is mandatory. This latter requirement is comparable to the requirement imposed on cities and counties by Government Code Section 50485.13 (supra). However, the mandatory payment of relocation costs should be extended to any airport hazards and not merely limited to structures and equipment.

Section 21635 provides procedural regulations for the condemnation actions authorized in Sections 21633-21634:

21635. In the condemnation of property, the department shall proceed in the name of the state in the manner provided by the Code of Civil Procedure. For the purpose of making surveys and examinations relative to any condemnation proceedings, it is lawful to enter upon any land. The

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until the mid-sixties. See Van Alstyne, Just Compensation of Intangible Detriment, 16 U.C.L.A. L. Rev. 491, 523-535 (1969). The advent of compensability for such damages coincides, of course, with the appearance of large numbers of jet transports. The impetus to enactment of Code of Civil Procedure Section 1239.3 was probably the 1964 case, Loma Portal Civic Club v. American Airlines, Inc., 61 Cal.2d 582, 394 P.2d 548, 39 Cal. Rptr. 708.

power of the department, by condemnation, to acquire or require the relocation of any railway, highway, main, pipe, conduit, wires, cables, poles, and all other facilities and equipment or other property held for or devoted to a public use shall be exercised only after the court in which the condemnation proceedings are pending finds that the taking or relocation for the public use of the department is of greater public necessity than the public use for which the property is presently held or used. The court may fix the terms and conditions for the enjoyment of a right of common use, in lieu of taking or relocation, as it determines will best suit the public interest and necessity.

Since all the specific procedural rules provided by this section may be found in the Code of Civil Procedure already,<sup>35</sup> the section may be discontinued without adverse effect. The discontinuance is desirable in that it helps to consolidate all procedural provisions relating to the exercise of eminent domain into one code, thus enhancing uniformity. The requirement that the Department of Aeronautics proceed in the name of the state is expressed more broadly in Section 21631.

Disposition of Code of Civil Procedure Sections 1239.2 and 1239.4, Government Code Section 50485.13, Public Utilities Code Sections 21633-21635

The statutory scheme permitting various entities to condemn for airport purposes consists of broad authorizations to provide, maintain, and operate, coupled with broad grants of eminent domain power. However, elaborations of that power as applied to airport hazard elimination are scattered, inconsistent, and incomplete.<sup>36</sup>

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35. See, e.g., Code of Civil Procedure Sections 1237 (eminent domain to be exercised in manner provided in code); 1240(3), 1241(3)(more necessary public use); 1242 (entry for survey); 1247.1 (common use).
36. For example, the San Diego Unified Port District, alone among port districts, has general authority to operate and maintain airports (ceded to it by San Diego County and cities within the county). It may condemn for that purpose. Harb. & Nav. Code App. 1 §§ 4, 5, 27 (West Supp. 1967); compare Harb. & Nav. Code §§ 6200-6372. However, the airport condemnation authority of the Port District is not elaborated at all in the other codes, with the exception of Code of Civil Procedure Section 1239.3, relating to aircraft noise damage.

Although these hazard-elimination provisions could be deleted from the codes without affecting the power of entities to condemn for those purposes, their deletion would probably upset airport operators and cause the loss of some useful detail. If they are retained, they should be consolidated into uniform sections applicable to all condemnors and granting the maximum extent of condemnation power, coupled with the mandatory requirement of payment of relocation and removal costs.

The appropriate place for the recodification is the State Aeronautics Act. An article relating to Removal of Obstructions might be added next to Article 2.7,<sup>37</sup> which relates to Regulation of Obstructions.

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37. Public Utilities Code Sections 21655-21660, added by Cal. Stats. 1969, Ch. 398, § 7.