65.40 1/29/70

Second Supplement to Memorandum 69-133

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

A letter from Ralph F. Clark is attached. Although the letter refers to a memorandum which has been superseded, his comments are nevertheless pertinent and should be taken into account in considering what actions the Commission might decide to take concerning aircraft noise damage.

Respectfully submitted,

John H. DeMoully
Executive Secretary

2nd Supplement to Memorandum 69-133 EXHIBIT I

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January 27, 1970

California Law Revision Commission
School of Law
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Care Of: Mr. John H. DeMoully
Executive Secretary

Gentlemen:

I first wish to express my sincere appreciation for allowing me the opportunity to appear before your Commission in the October, 1969 meeting. I sincerely hope that my discussion at the meeting as well as the comments which follow in this letter will prove fruitful in your problem of recommending a statue regarding inverse condemnation and potential damages due to airport noise.

I am not an attorney and will, therefore, attempt to direct my suggestions and recommendations insofar as they pertain to my expertise which is real estate appraiser and counselor.

I have reviewed your proposed draft statue Exhibit 1, Memorandum 69-113, and will attempt to respond to the basic inquiry which was propounded, namely, should the focus of the statue be on the value of the rights to be acquired or on the damages to individual interests.

The most perplexing problem as I presently view the posture of the airport case problem, is the matter of costs of trial preparation and presentation. It then becomes practically mandatory to secure experts for the proper presentation of the case. Let me illustrate my point.

Section 1 states in effect that the airport owner-operator shall be liable only if the property owner can show that the interference materially and substantially deprives the owner of the use and enjoyment of his property.

In order to present believable evidence, it would first be necessary to show that in fact a loss in fair market value has occurred. The accepted method in the past for this evidence has been to go to the market place and study the sales of comparable properties. In the case of airport orientated residential homes, a difficulty is encountered because not only must the homes in the subject neighborhood be carefully considered but a search must be made for a similar neighborhood unaffected by airport influences and it too analyzed.

It then becomes necessary for the expert to design a local factor index assuming that all the other norm considerations of comparability are met to determine if appreciation and/or depreciation of market value is a localized airport condition and/or a local phenom due to general economic factors. To illustrate this point, I have attached to my letter a copy of such an index exhibit which was prepared by our office in connection with our study of the San Francisco International Airport. Note that even the untrained eye can realize the complexity, time, and cost involved in preparing such an exhibit.

Thus, from this primary observation it would appear that the problem of noise might best be considered as a nuisance and trespass rather than a taking of property rights which would mitigate the problem of properly presenting evidence concerning the elements comprising the fair market value of the subject property.

It would thus seem to avoid the problem for both condemnor and condemnee of going through the laborious steps of proving to the court that the estimate of market value has taken into account items of useability including its tranquility, quietude, and privacy. Then showing that these are qualities which are prized and desired and which would undoubtedly be items that an owner and prospective purchaser would take into account in fixing the property's fair market value.

On the other side of the coin, the argument for the use of acquisition of easements is also persuasive. It is generally concluded that the payment of damages is of little benefit to the condemnor. The "take" type of requirement assumes that the condemnor is acquiring value which should be reflected, in the subject instances, in the airport's land holdings. As a practical matter, it is common knowledge that in the present public real estate acquisition programs in which the federal government participates, the federal dollar is only contributed towards the acquisition and not to the damages to the remainder property if such there be.

Secondly, as a practical approach to the problem is the fact that due to the many public acquisitions in the past decade of various and sundry types of easements, qualified expert real estate personnel are sufficiently available to generally measure the dollar valuation of the imposition of the easement on the total fair market value of the property. Thus, in response to the Commissions initial query, the value of an avigation easement is probably easier and less costly to parties involved than to measure the damages to one or more property interests. A reading of the numerous court decisions indicates the confusion in the proper presentation of evidence regarding the damages and reported results of conflicting decisions being rendered.

Thirdly, following the language of Silveira (236 ACA Pg. 663) "A condemnation award must once and for all fix the damages, present and prospective, that will accrue reasonably from the construction of the improvement and in this connection must consider the most injurious use of the property reasonably possible." Damage cases to date have largely relied in the presentation of evidence on the studies and writings of Bold, Beranek and Newman, Inc., Acoustical Engineers. This nationally recognized firm is basically responsible for the design of the present Composite Noise Rate technique commonly referred to as CNR in determining land use compatability at various airports.

The difficulty of the present formulas in measuring sound nuisance is that upon departure from factual decibels which can be read by instrument, the projected technique introduces expert judgement to a substantial degree. It must then become readily apparent that noise intrusion damage as introduced in court, will in effect rely largely on the judgement of an expert.

Two problems exist as I now view it. (1) There is an extremely limited field of qualified noise experts and their per diem fees are exceedingly high. (2) The court and/or jury will be placed in a position of having two experts presenting probable divergent views.

As late as August, 1968 an expert consulting acoustical engineer in a report to a client stated "Obviously, there is, as yet, no generally accepted method for measuring or accessing loudness of noise annoyance." The author then recites that there is a long list of investigations presently being conducted in connection with the problem of subjective sound or noise. The author states that Hewlett Packard Company of Palo Alto is manufacturing a HP Model 8051A Loudness Analyzer based on the Zwicker system but points out that it is subject to testing and acceptability for accuracy and providing factual data.

In December 15, 1968 National Aircraft Noise Abatement Council newsletter at page 8 further comments and discusses on the problem of noise measurement and the adoption of "noise contours" for land use planning purposes and/or the adoption of zoning laws. Page 9 recites "It is undeniable that the whole noise contour concept is a highly controversial and unsettled one".

I would conclude, therefore, that at this time in the absence of recognized scientific technology to properly access noise damage to real property from aircraft, that this matter should be left to the trier and not attempted to be introduced as legislation in condemnation.

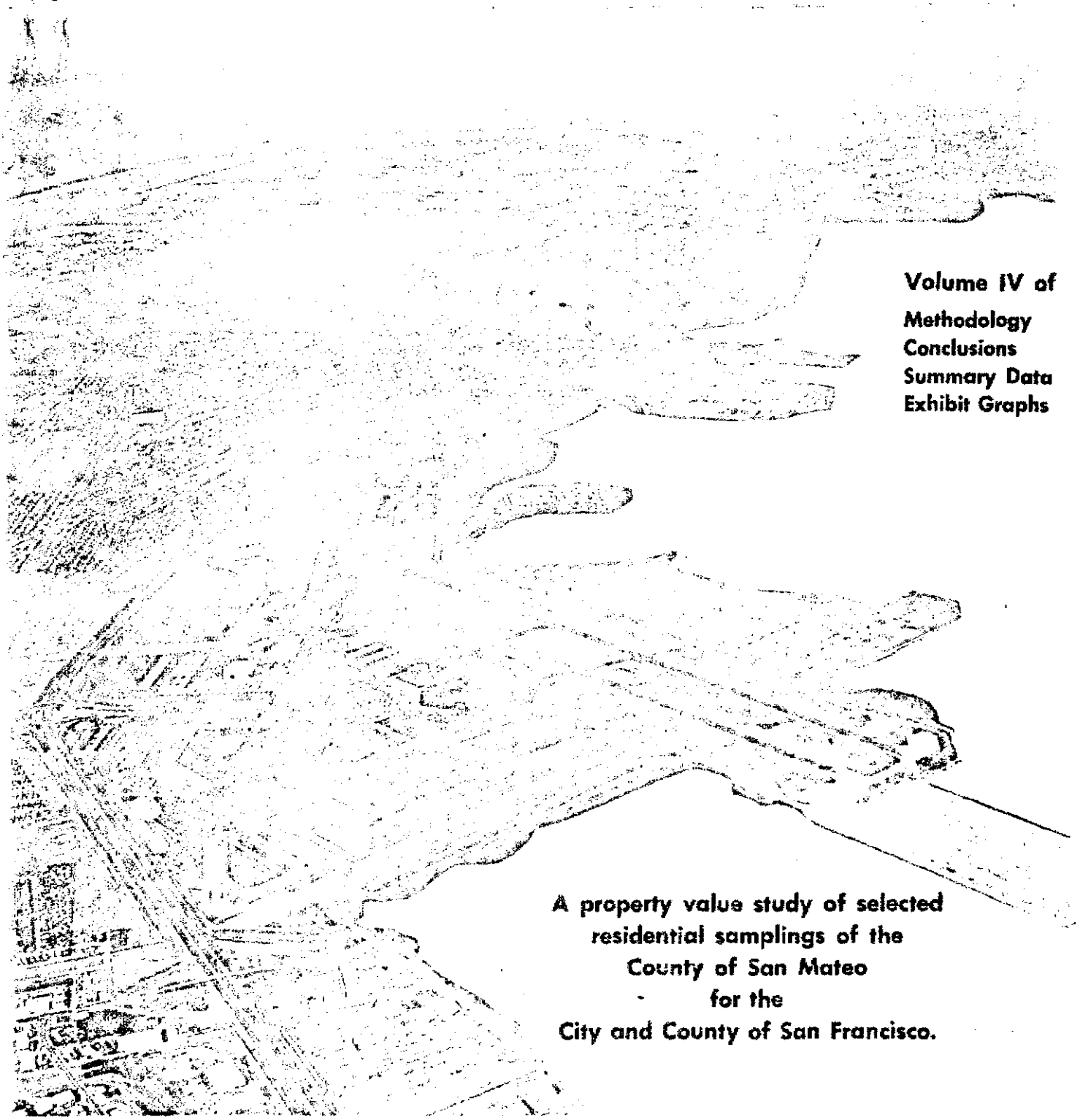
In closing, I would like to make one further comment in regards to proposed draft with reference to Section 8. As written is it not contradictory to the multiple court rulings in considering the highest and best use of the property to be its present zoning and/or "the reasonable probability" of other zoning applicable at the time of the trial. As stated earlier, I am not an attorney, but it would seem that the language used in Section 8 specifically instructs the trier of the fact to consider only the existing zoning at the time of valuation. I wonder if this is the author's intent?

I look forward to attending your meeting on February 6, 1970 in Los Angeles and if the Commission desires, I will be available for whatever assistance I may provide at that time.

Respectfully yours,

Ralph F. Clark

Ralph F. Clark, M.A.I., C.R.E.



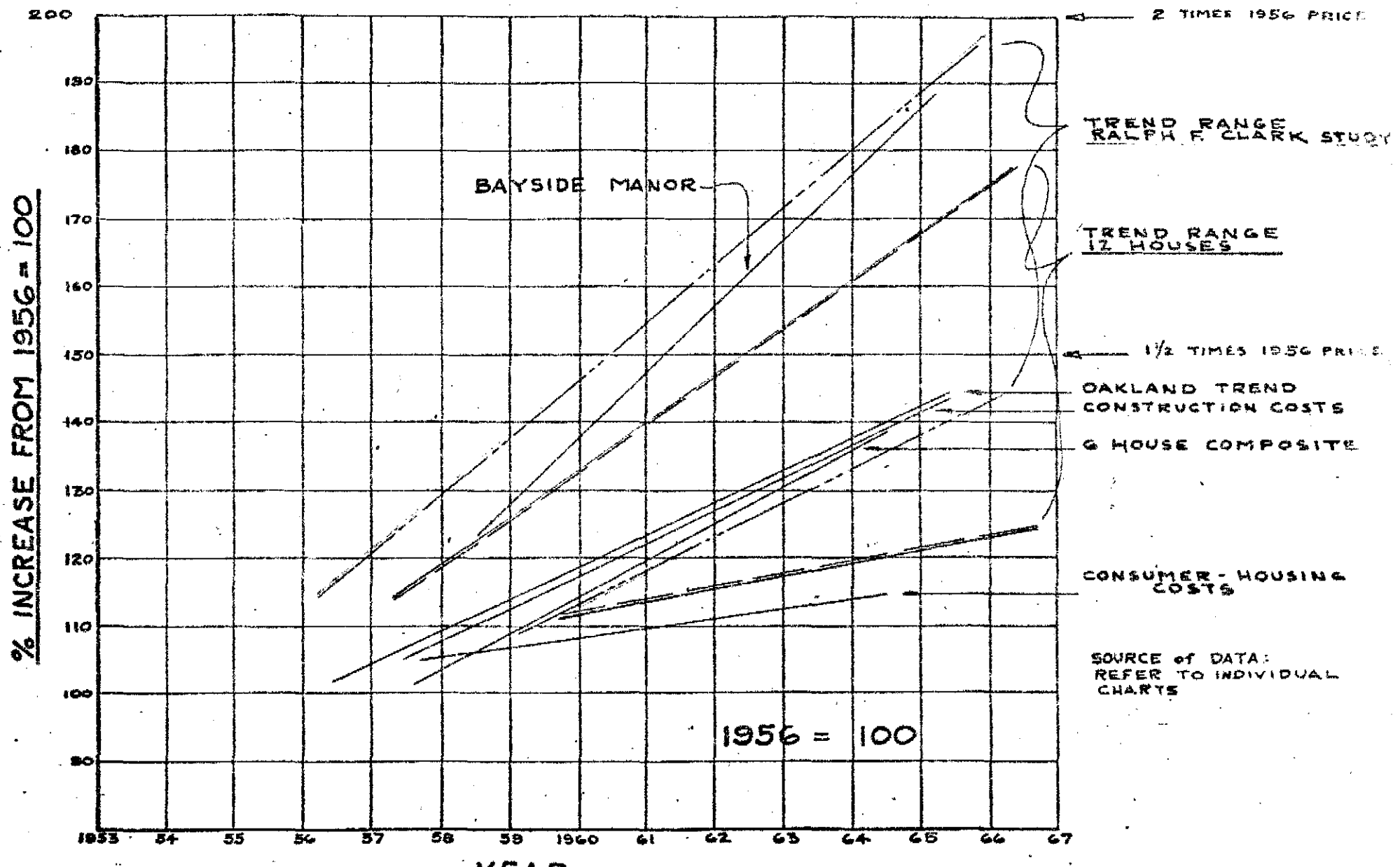
Volume IV of

Methodology
Conclusions
Summary Data
Exhibit Graphs

A property value study of selected residential samplings of the County of San Mateo for the City and County of San Francisco.

"S.F. INTERNATIONAL AIRPORT-JET AIRCRAFT AND THE HOME OWNER"

RALPH F. CLAI
M.A.I.



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