#65.40 5/12/70

Memorandum 70-56

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

The Commission has devoted considerable time at previous meetings to aircraft noise damage. This memorandum summarizes previous action and suggests what action should be taken in the future on this topic.

Our consultant, Professor Arvo Van Alstyne, discussed aircraft noise damage in a portion of his study published in the UCLA Law Review. See 16 UCLA L. Rev. 491, 523-544 (1969). The major portion of the study is devoted to suggestions as to standards that might be enacted to make clear when a cause of action for aircraft noise damage arises. The Commission devoted substantially all of its attention to this problem.

The consultant recommended enactment of a presumptive standard based on a combination of noise level and distance. The Commission considered the possibility of enacting a presumptive standard based on noise level but rejected this approach primarily because of the cost of proof under present technology and the difficulty of establishing such standards. The Commission considered the possibility of enacting a presumptive standard based on distance from runways but rejected this approach because it has no relationship to the number or type of aircraft operated, use of the affected property, and the like. Accordingly, such a standard fails to provide a meaningful measure of the scope of aircraft operations or their impact on surrounding property.

The Commission considered the opinion of Judge Jefferson (attached to the First Supplement to Memorandum 70-19) and in substance adopted the standard of that opinion--that a cause of action for aircraft noise

damage arises when "the market value of real property has been reduced by jet noise to an extent which is reasonably measurable." Damage in the amount of $400 was considered sufficient in the view of Judge Jefferson. No other actions have been taken by the Commission.

We now have a second opinion by Judge Jefferson in Greater Westchester Homeowners' Association v. City of Los Angeles. We attach a copy of this opinion which considers liability of the airport operator, aircraft operator, and aircraft manufacturer for damages to property and for personal injury caused by aircraft noise.

The staff believes that an examination of the two opinions by Judge Jefferson will reveal that the opinions provide the person whose property or person is injured by aircraft noise with a maximum amount of protection. We do not believe that it would be a profitable expenditure of the Commission's time to draft legislation in this area at this time. The appellate courts will no doubt be considering the problems involved in aircraft noise damage cases in the near future. Accordingly, the staff suggests that we merely keep abreast of the developments in this area of law so that we will be alert to the need to devise legislative solutions to problems if such need arises. Dr. Garbell, who already has been of substantial assistance to the Commission, has indicated a willingness to keep abreast of developments and from time to time to report them to the Commission.

For your information, attached as Exhibit I is an article from the May 11 issue of the Los Angeles Daily Journal.

Respectfully submitted,

John H. DeMoully
Executive Secretary

California Plans Curb on Jet Noise

By Paul Corcoran

Airplane noise, particularly the roar of jetliners, is somewhat like sin. No one has anything good to say about either one.

Everyone agrees all that can be done should be done to curb this major environmental nuisance, short of closing down airports.

But there are airport operators in California who believe that is just what will happen—that they will have to stop business—if new noise standards set forth by the State Aeronautics Board go into effect as scheduled next Jan. 1.

Airport officials and advisers, who decline to be quoted by name, say the plans are unworkable, conflict with federal regulations, and that such airports as Los Angeles International, San Francisco and San Diego "cannot live with them."

The little-publicized entry of California into the fight to reduce aviation noise pollution may have historic ramifications as to the role the states have in a field where the federal government, specifically the Federal Aviation Administration (FAA), is dominant.

Legal authorities both in California and in Washington say there is serious doubt about the constitutionality of all or part of the regulations.

No other state currently is attempting a comparable control program.

Spurred on by voter concern over airport noise, the California Legislature passed a bill by Assemblyman John Foran of San Francisco authorizing the Department of Aeronautics to "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."

"That's the real hooker," said John Powers, acting director of the FAA's Office of Noise Abatement in Washington. He referred to the word "aircraft" and the fact that the regulation would apply to planes in flight.

"It is my understanding that no state can pass laws which restrict or inhibit aircraft in flight," Powers said. The FAA legal staff confirmed this. The law does not prohibit the airport operators, as proprietors, from determining the permissible noise level at the airports.

After a slow start, and as complaints mounted against jet noise, the FAA made a thorough study of the problem and issued new antinoise standards the first of which went into effect Dec. 1, 1969.

Transportation Secretary John A. Volpe said the regulations are sufficiently rigid to result in "an approximate halving of the noise around airports."

Thus far, however, this has not satisfied either those who are subject to the regulations—the airlines—or the people who complain that noise is so bad it causes jangled nerves and psyches them so much they become physically sick.

"It is the nature of this office that I don't satisfy anyone," said Powers with resignation. "We feel we have been fair when everyone complains."

There are certain factors that must be taken into consideration in adopting standards.

"The law requires that standards be technologically feasible economically reasonable and appropriate to the aircraft, Powers said.

The economic factor influenced federal officials in exemptin first-generation jets from some of the regulations governing nois of aircraft engines.

Cost of "retrofitting"—replacing noisy engines with thos sufficiently quiet to meet new restrictions—would have bee prohibitive if all the first-generation airliners were overhauled a once, FAA and industry spokesmen indicated. However, the FA has stated it plans to issue a separate set of antinoise rules t cover noise from the first generation of jetliners—the 707s, 727s 737s, DC-8s and DC-9s.

This, likely, will mean the retrofitting will be required by th end of 1972.

A primary goal of the California Aeronautics Departmen plan is to give residents in the vicinity of airports "a specific lega means of determining actual violations of the law," explaine Gov. Ronald Reagan in announcing criteria had been proposed This redress is not possible at this time nor has it been, th governor said.

The fact that so little has been done to meet the airport nois problem prompted the state to act on its own.

Joseph R. Crotti, state aeronautics director, said the acceptable level would be 65 community-decibels over a specific period of time, depending on a variety of factors, including geography, climate and air traffic. A complicated formula—differing somewhat from the FAA's "Effective Perceived Nois Decibels"—was developed by the California Aeronautics Board.

The standards, according to provisions of the law, are "based upon the level of noise acceptable to a reasonable person residing in the vicinity of the airport." Airports are to be classified according to the type and volume of air traffic. Not only the airport, but areas around airports in arbitrarily determined noise impact territory, would be covered by the California standards, which are subject to amendment by the Legislature.

In theory, networks of complex monitoring devices would record sound above the maximum allowable level. The counties would be responsible for reporting violations.

Violators would be subject to fines of up to $1,000. In addition, they would have to put improved mufflers on their jet engines.

While the California plan is an honest attempt to achieve some relief for her citizens, it has an Alice-in-Wonderland quality that bemuses airport operators. They are concerned about the impact such standards would have on aviation, yet few have stated opposition publicly because of the current tide of public support for all things of an environmental nature.

"How are you going to determine the noise impact area, and how far it extends?" one official asked. "The standards are impractical, unenforceable and the whole thing may be illegal."

Powers and others on the federal level stressed that proprietors already have the right to tighten noise standards at airports, and that some already are doing so. The Port of New York, operator of Kennedy and LaGuardia, is just one jurisdiction with more rigid standards than required by federal law. Los Angeles is another.

But admittedly, many airports do not exercise such a prerogative.

For better or worse, California is setting out on its own to attack a problem that is little understood but very real.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

GREATER WESTCHESTER HOMEOWNERS' ASSOCIATION, etc., et al., Plaintiffs, -vs- CITY OF LOS ANGELES, etc., et al., Defendants.	NO. 931,989
CITY OF LOS ANGELES, a municipal corporation, Cross-Complainant, -vs- AERONAVES DE MEXICO, S.A., a corporation, et al., Cross-Defendants.	MEMORANDUM OPINION

This is an action brought by several thousand plaintiffs seeking damages against the City of Los Angeles. Plaintiffs allege that they are homeowners, residents and their families living in the vicinity of the north runway of the Los Angeles International Airport, which is owned and operated by the defendant City. Plaintiffs allege that beginning in June of 1967 the defendant City opened the north runway for use by jet aircraft, and that plaintiffs' residential properties have been damaged and plaintiffs have suffered personal injuries as a result of noise, fumes and

vibrations emanating from jet aircraft using the north runway. Defendant City has filed a cross-complaint against various Airlines, including all of the major Airlines, and also against four Manufacturers of jet aircraft and jet engines. In its cross-complaint, defendant City seeks to hold the Airlines and the Aircraft Manufacturers responsible for any damages plaintiffs may recover against the defendant City. All of the Aircraft Manufacturers and one of the Airlines have demurred to the City's cross-complaint. The remaining Airlines have filed motions for summary judgment in their favor. This memorandum opinion deals with the demurrers to the cross-complaint and the motions for summary judgment which the moving Airlines seek.

Plaintiffs allege in their first amended complaint that on June 24, 1967 defendant City of Los Angeles, sometimes hereinafter referred to as the City, authorized jet aircraft to take off from, and land on, the north runway of the Los Angeles International Airport, sometimes hereinafter referred to as the Airport. Plaintiffs allege that the use of the north runway since June 24, 1967 has, through noise, vibrations and fumes coming from jet aircraft, damaged the properties of plaintiffs in a variety of ways, including (1) ouster of plaintiffs from their properties; (2) taking away the use of these properties; (3) physical damage to the properties; (4) impairing the utility of the properties; (5) impairing the ability of owners to sell their properties; (6) impairing the ability of owners to borrow on security of their properties; (7) making the homes hazardous to live in; (8) making the homes uninhabitable and (9) making living in their homes a health hazard. Plaintiffs assert that these various effects upon their properties create the legal consequence that the City has taken and damaged their properties for a public use, namely, the maintenance and operation of an airport. These allegations are contained in one count.

In a separate count, plaintiffs allege that the same acts which constitute a taking and damaging of their residential properties have also proximately caused plaintiffs to suffer personal injuries, such as a hearing loss and damage to the nervous system.

In another count, plaintiffs allege that the noise, fumes and vibrations from jet aircraft using the north runway have caused injury to the health of plaintiffs, are offensive to the senses, obstruct and interfere with the enjoyment of plaintiffs' properties and hence constitute a public and private nuisance.

In another count, plaintiffs allege that as a result of the acts of defendant which constitute a taking and damaging of their properties and the creation and maintenance of a nuisance, plaintiffs have suffered bodily injury, injury to their nervous systems, emotional upset, loss of hearing, physical and mental pain and an impaired ability to work.

In a separate count, plaintiffs allege that they have been damaged as a result of the defendant City's negligent operation and management of the Airport and jet aircraft use of the Airport. In this count, plaintiffs list the following twenty-two alleged negligent acts of the City:

(1) Failure to acquire sufficient property to create a clear zone around the Airport to prevent damage to persons and property;

(2) Expansion of the Airport without regard to people and land uses in proximity thereto;

(3) Expansion of the Airport without taking available precautions to prevent damage to people and land uses in proximity thereto;

(4) Exposure of people to noise in excess of the limits proscribed by the State of California Industrial Safety Orders;

(5) Failure to erect baffles around the Airport to reduce noise exposure;

(6) Failing to require jet aircraft to use available noise-suppression devices;

(7) Failure to impose noise limits on jet aircraft;

(8) Failure to warn those in proximity to the Airport of damage from noise, vibrations and fumes of jet aircraft;

(9) The establishment of a noise limitation level which permits damage to persons and property;

(10) The dissemination of misleading information about the damaging effects on people and land uses of noise, vibrations and fumes from jet aircraft;

(11) The use of Airport property in violation of statutes and ordinances;

(12) The failure to require landing and takeoff patterns which minimize noise, vibrations and fumes around plaintiffs' homes;

(13) Failure to limit the hours of use of the runways;

(14) Failure to limit movements of jet aircraft;

(15) Failure to limit the use of the runways;

(16) The requirement that jet aircraft use runways in proximity to plaintiffs' homes;

(17) Failure to prevent runups in areas in proximity to plaintiffs' homes;

(18) Failure to create adequate runup areas;

(19) Failure to condemn plaintiffs' properties before taking or damaging the same;

(20) Operation of the Airport with knowledge that the operation was a dangerous condition, hazardous to the health of people and destructive to property in proximity to the Airport;

(21) Prevention of plaintiffs from changing noncompatible land use to compatible land use;

(22) Deliberate blighting of the area in proximity to the Airport.

In a separate count, plaintiffs allege that before June 24, 1967 defendant City knew that shock waves and vibrations caused by the present use of the Airport would invade the plaintiffs' properties.

In another count, plaintiffs allege that the north runway is on land zoned by defendant City for residential use; that the runway is not a permitted use in a residential zone, and that defendant City is subject to, and is violating, its own laws.

In another count, plaintiffs allege that defendant City has, on numerous occasions, entered into a written contract with the Federal Aviation Administration, which provides (1) that defendant City will extinguish any claims against the Airport which will affect the operation of the Airport, and (2) that defendant City will acquire any property rights with respect to properties of plaintiffs which are being used for the operation of the Airport; that plaintiffs have property rights being used by the defendant City for Airport purposes, and that defendant City has not acquired these property rights.

In a separate count, plaintiffs allege the making of the contract between the City and the Federal Aviation Administration, and then allege that the plaintiffs have claims against the Airport which affect its operation, and that defendant City has not extinguished these claims.

In another count, plaintiffs allege that the City entered into a covenant which provided that the north runway, as well as the airspace in proximity to plaintiffs' properties, would be used only for emergency landings; that this covenant was evidenced by a written memorandum signed by duly authorized representatives of defendant City; that plaintiffs have performed all duties and conditions under the covenant which they were to perform, and that on June 24, 1967 the defendant City breached this covenant by authorizing jet aircraft to regularly use the north runway, as well as

the airspace in proximity to the plaintiffs' properties, for take-offs and landings that were not emergencies.

In a separate count, plaintiffs allege that the north runway is constructed on land subject to a deed restriction; that the deed restriction is to the effect that property shall not be used for any business, commercial or other nonresidential purpose; that plaintiffs' properties are subject to and benefit from this deed restriction; that the Airport's land and the plaintiffs' lands are subject to the deed restriction which was derived through predecessors in interest from a common grantor, who owned all the land now subject to the deed restriction as a single parcel; that all deeds to the land from the common grantor uniformly contained the deed restriction; that the City is using land subject to the deed restriction as an Airport, which is a business, commercial and nonresidential use; that all of the Airport's uses subject to the deed restriction are in violation of the deed restriction.

In an amendment to the first amended complaint, plaintiffs allege that through the sixteen counts of their first amended complaint they are seeking compensation for damages to their properties and to their persons caused by noise, vibrations and fumes from jet aircraft using the Airport; that eight of the sixteen counts seek damages to the properties and the other eight counts seek damages for personal injury; that no duplicate relief is sought; that all of the counts of the first amended complaint are based on essentially the same facts; that the difference in the various counts simply state different legal theories by which compensation is sought.

Defendant City of Los Angeles has filed a first amended cross-complaint for declaratory relief and indemnity, wherein the City, as cross-complainant, seeks a judgment declaring that the Airlines and Aircraft Manufacturers named as cross-defendants in the cross-complaint should be responsible for, and hold the City

free and harmless from, and indemnify the City for, any judgment which the plaintiffs may obtain against the City. The cross-defendant Airlines from which the City seeks indemnity are the following: Aeronaves de Mexico, Air Canada, Air France, Air New Zealand, Ltd., Air West, Inc., American Airlines, Inc., Continental Air Lines, Inc., Delta Air Lines, Inc., Flying Tiger Line, Inc., Japan Air Lines Co., Ltd., Mexicana de Aviacion, National Airlines, Inc., Pacific Southwest Airlines, Pan American World Airways, Inc., Peruvian Airlines, Inc., Scandinavian Airlines System, Inc., Trans World Airlines, Inc., Union de Transport Aeriens, United Air Lines, Inc., Varig Airlines and Western Air Lines, Inc.

Defendant City by its cross-complaint also seeks indemnity from the following corporations alleged to be designers and manufacturers of commercial jet aircraft and jet-powered engines: The Boeing Company, General Electric Company, McDonnell Douglas Corporation and United Aircraft Corporation.

In its cross-complaint against the Airlines, the City alleges that these Airlines operate with a Certificate of Public Convenience and Necessity from the Federal Aviation Administration, and that the City has no control over the right of the Airlines to operate in and out of the Los Angeles International Airport; that the City has no control over the schedules for mail transportation; that the City does not select or control the jet aircraft used by the Airlines, and that the City has no control over the landings and takeoffs made by the Airlines. The City alleges that if, under the allegations of the complaint of plaintiffs, there has been damage and injury to plaintiffs' residential properties on any theory of taking or damaging, or the commission of a nuisance, or any negligent use of jet aircraft, or any trespass from jet aircraft, or any violation of zoning laws, or any breach of contract, or any violation of a deed restriction, or any breach of covenant, that the cross-defendant Airlines are the true parties who have

committed such taking, damaging or injury to plaintiffs' residential properties by the means specified, and that such cross-defendants are jointly responsible for any such damage suffered by plaintiffs.

The City also alleges that the cross-defendant Airlines are liable for any judgment which may be rendered in favor of plaintiffs and against the defendant City by reason of an express contractual agreement of indemnity, included as provisions in the leases of Airport space which have been entered into between the City as lessor and these cross-defendant Airlines as lessees.

In the cross-complaint against the cross-defendant Airlines, the City also alleges that for the same reasons alleged with respect to the property damage claimed by plaintiffs, the cross-defendant Airlines are responsible for any personal injuries suffered by plaintiffs from noise, fumes and vibrations of jet aircraft using the Airport north runway on any theory of liability predicated on nuisance, negligence, trespass, violation of zoning laws, breach of contract, violation of deed restriction or violation of covenant.

In its cross-complaint against the Aircraft Manufacturers, the City alleges that the cross-defendant Aircraft Manufacturers have negligently designed and manufactured jet aircraft and engines which use the Los Angeles International Airport, so that noise, fumes and vibrations from such jet aircraft may cause damage and injury to persons and property, and that these cross-defendants are jointly liable for any damage done by the jet aircraft used by the Airlines and negligently designed and manufactured by these cross-defendants. The theory of the City's cross-complaint against the Aircraft Manufacturers is basically that any injury or damage to plaintiffs' properties or persons resulting from jet aircraft noise, fumes and vibrations is caused by the negligent design and manufacture of jet aircraft and jet engines by the manufacturers,

irrespective of whether plaintiffs' claim against the City is predicated on an inverse condemnation theory, negligence theory, trespass theory, nuisance or any other theory.

The City in its cross-complaint also asserts that there is an actual controversy between the City and all cross-defendants relative to the legal rights, duties and responsibility for the alleged damage to plaintiffs and, for that reason, plaintiffs seek a declaration of rights.

In its cross-complaint against the cross-defendant Airlines, the City is relying upon two legal theories of a right of indemnity. One is the doctrine of implied indemnity, predicated on the City's relationship with the Airlines, by virtue of which the Airlines operate jet aircraft into and out of the Los Angeles International Airport. The second legal theory is that of contractual indemnity, arising from the written provisions for indemnity contained in the Airport leases executed by and between the City as lessor and the Airlines as lessees.

The four cross-defendant Aircraft Manufacturers have all filed a general demurrer to the City's cross-complaint. One of the Airlines, namely, Flying Tiger Line, Inc., has also filed a general and special demurrer to the City's cross-complaint. All of the cross-defendant Airlines other than Flying Tiger Line, Inc., have filed motions for summary judgment against the City with respect to the cross-complaint. The parties have filed with the court extensive memoranda of points and authorities in support of, and in opposition to, the motions for summary judgment and the demurrers. In addition, the court entertained extensive oral argument on the motions and demurrers.

The motions for summary judgment have been submitted on a stipulation of facts entered into between the cross-complainant City and the moving cross-defendants, together with affidavits submitted by the respective parties. The stipulation of facts was entered

into solely for the limited purpose of the motions for summary judgment. The facts stipulated to are, in essence, the following:

That the Los Angeles International Airport is a public airport which is and has been owned by the City of Los Angeles for more than thirty years; that it is operated by the City's Department of Airports under the direction of a Board of Airport Commissioners; that over the years the City has improved and enlarged the Airport to its present condition and size; that in the course of the City's enlargement and improvement of the Airport the runway north of the terminal complex was constructed during the year 1959; that this north runway is known as Runway 24L/6R; that in constructing this runway the City was implementing a master plan which had been publicly disclosed as early as 1945; that the construction of this north runway was financed (1) with revenue collected from Airport users and concessionaires, (2) with proceeds obtained from the public sale of bonds and (3) with grants received from the federal government.

That on or about June 12, 1967, Clifton A. Moore, then First Deputy General Manager of the Los Angeles Department of Airports, wrote a letter to Mr. A. B. Bush of the Federal Aviation Administration, then Chief of the Los Angeles Tower, a copy of which is attached as an exhibit to the stipulation of facts. In this letter it was stated that effective June 24, 1967 clearance was granted for the unlimited use of Runway 24 for takeoffs and Runway 6 for landings of all types of aircraft. (The one north runway is given the designation 24L at its easterly terminus and 6R at its westerly terminus.)

That on or about December 14, 1967, the same Mr. Moore, on behalf of Francis T. Fox, then General Manager of the Los Angeles Department of Airports, sent a letter to Merle H. Nichols of the Federal Aviation Administration, then Assistant Chief of the Los Angeles Tower, a copy of which letter is attached as an exhibit

to the stipulation of facts. The letter of December 14, 1967 stated that it was confirming the verbal clearance given by Mr. Fox for the use of Runway 6 for takeoff of four-engine jet aircraft; that whenever there were traffic or departure delays during east wind conditions, this runway was to be available for use between the hours of 7:00 a.m. and 9:00 p.m., and that between those hours in periods of slack traffic, the Number 7 runways would receive primary usage. (The Number 7 runways are the two south runways designated 25L/7R and 25R/7L, respectively.)

As a part of the stipulation of facts, there was attached a copy of Resolution No. 2059, adopted by the Board of Airport Commissioners on September 25, 1963. Resolution No. 2059 was to the effect that the Board of Airport Commissioners urged and requested all those in positions of authority to make policy decisions on the development of a supersonic aircraft, to direct their efforts so that supersonic aircraft would produce sound levels under the approach and departure flight paths of the aircraft which would be less than the levels produced by the current jet subsonic aircraft. This Resolution No. 2059 also stated that the Board would place operating restrictions on supersonic aircraft operations at the Airport to control the noise levels from such aircraft unless certain operating sound levels were achieved in the aircraft design. The stipulation of facts sets forth that at no time to date have any of the cross-defendant Airlines operated any supersonic transport aircraft at the Airport.

Attached as an exhibit and made a part of the stipulation of facts is a copy of the minutes of a meeting of the Board of Airport Commissioners of the City, held on October 22, 1969, which relates to the adoption of Resolution No. 5456. The minutes state that this resolution would reconfirm and restate that any aircraft then in service or that would be placed in service in the future would be denied the use of airport facilities at the Los Angeles

International Airport in the event such aircraft imposed noise levels upon adjacent communities which would exceed those currently in existence. The stipulation of facts sets forth that at no time to date have any of the moving airlines operated any scheduled aircraft at the Airport which have imposed noise levels upon adjacent communities greater than the noise levels imposed on those communities by the aircraft which were operating at the Airport on October 22, 1969.

Attached to and made a part of the stipulation of facts is a copy of a lease and operating agreement between the City and Western Air Lines, Inc., and a copy of an amendment thereto. It is stated in the stipulation that this agreement between the City and Western Air Lines has been in full force and effect since November 10, 1967. The stipulation sets forth that other cross-defendant Airlines are lessee parties to leases and operating agreements with the City which are legally identical with the lease and operating agreement between the City and Western Air Lines, as modified by the amendment to the Western Air Lines lease made in the fall of 1967. It was further stipulated that other cross-defendant Airlines are lessee parties to leases and operating agreements with the City which were legally identical with the lease and operating agreement and amendment thereto between the City and Western Air Lines, with the lone variation occurring in Article 22 of the Western Air Lines lease and operating agreement pertaining to the matter of indemnity. The variation in Article 22 occurring in some of the leases and operating agreements is set forth in the stipulation of facts. The stipulation of facts also makes clear that the City's claim against the cross-defendant Airlines for contractual indemnity is based entirely on the leases and operating agreements previously referred to in the stipulation.

In support of the motions for summary judgment, the moving Airlines submitted affidavits by Arvin O. Basnight, the Director of

the Western Region of the Federal Aviation Administration, which is composed of nine western states, including California; Donald J. Haugen, Chief of the Los Angeles Tower-Terminal Radar Control of the Federal Aviation Administration, and Floyd E. Wescott, Vice-President of Operations of Pacific Southwest Airlines. In opposition to the motions for summary judgment, the City submitted affidavits by Clifton A. Moore, General Manager of the Los Angeles Department of Airports since October 1968; Bert J. Lockwood, Assistant to the General Manager of the Los Angeles Department of Airports and an employee at Los Angeles International Airport since 1947, and Milton N. Sherman, Assistant City Attorney of the City of Los Angeles assigned to the Department of Airports.

Mr. Basnight in his affidavit states that the Federal Aviation Administration has promulgated extensive regulations governing the Airlines, which include rules governing the certification of aircraft types, the licensing of operating personnel, the air worthiness certification of individual aircraft and the operation of a system of air traffic control, including rules for the operation of aircraft approaching, landing and taking off from airports. He states that each of the cross-defendant Airlines holds a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board, which specifies that each Airline is authorized to conduct commercial operations over certain specified routes into and out of the Los Angeles International Airport, with the exception that Pacific Southwest Airlines operates only in intrastate commerce within the State of California under a Certificate of Public Convenience and Necessity from the California Public Utilities Commission.

Mr. Basnight further states that pursuant to Federal Aviation Regulations, the Federal Aviation Administration has issued to each of the cross-defendant Airlines operations specifications and an operating certificate; that these certificates require that

each airline conduct its operations in accordance with its operations specifications; that the operations specifications specify, among other things, the kinds of operations authorized, the types of airplanes authorized for use and the various airports at which operations are authorized.

Mr. Basnight further states that pursuant to the Federal Aviation Act and the regulations issued thereunder, the Federal Aviation Administrator has prescribed certification procedures for transport aircraft; that these regulations are designed to assure that each type of transport aircraft proposed for use in the carriage of persons and property meets applicable air worthiness requirements and contains no feature or characteristic which makes it unsafe for such use; that each type of aircraft operated at the Los Angeles International Airport by each of the cross-defendant Airlines, including all types of jet aircraft, has been type certificated by the Administrator of the Federal Aviation Administration.

Mr. Basnight further states that the Federal Aviation Act authorizes the Administrator to issue an air worthiness certificate for any aircraft if he finds, after inspection, that such aircraft is in a condition for safe operation and conforms to the type certificate therefor; that each and every aircraft, including jet aircraft, operated by the domestic cross-defendant Airlines, namely, American, Continental, Delta, Flying Tiger, Pacific Southwest, Pan American, Trans World, United and Western, is required to have an air worthiness certificate issued by the Administrator approving the use of said aircraft on certificated operations.

He further states that prior to the initial use of the three existing runways at Los Angeles International Airport for jet aircraft landings and takeoffs, a determination was made by the Federal Aviation Administration that such use of each runway would not be unsafe either to persons or property on the ground or to persons or property in the air.

Mr. Basnight also states that under the Federal Airport Act, the Los Angeles International Airport has been developed as part of a national plan for the establishment of a nationwide system of public airports, adequate to meet the present and future needs of civil aeronautics, in accordance with the standards established by the Administrator; that in order to bring about the establishment of a nationwide system of public airports adequate to meet the present and future needs of civil aeronautics, the Administrator is authorized "to make grants of funds to sponsors of airport development." (See U.S. Code, section 1103.) Mr. Basnight further tells us that the Los Angeles International Airport has, and is being, developed and improved under federal government project grants totalling more than twenty million dollars; that included in the total are eleven grants relating specifically to the north runways, beginning in 1949 and extending to 1968. (The total of the eleven grants set forth by Mr. Basnight amounts to $14,299,216.) Mr. Basnight also tells us that each project grant has involved a Grant Agreement containing certain assurances by the sponsor of the Airport, which, in this case, is the City of Los Angeles, and under such grant agreements the City has agreed to "keep the airport open to all types, kinds, and classes of aeronautical use, without discrimination between such types, kinds, and classes; provided, that the sponsor may establish such fair, equal, and not unjustly discriminatory provisions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport; and provided further, that the sponsor may prohibit or limit any given type, kind or class of aeronautical use of the airport, if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public."

The Basnight affidavit states that the Los Angeles International Airport is a vital and integral part of the nationwide system of public airports; that it is a major air terminal for

scheduled foreign and domestic flights located on the west coast of the United States, and that any restrictions on its use or operation would directly affect the overall national airport system.

The Basnight affidavit also states that the Federal Aviation Administration is vitally interested in the alleviation of noise disturbances to the residents of communities adjoining airports; that extensive research programs have been undertaken by Congress, the National Aeronautics and Space Administration, the Department of Housing and Urban Development and the Department of Health, Education and Welfare to seek technical advances in the area of aviation noise control; that to date approximately forty-three million dollars have been allocated under these noise-related programs; that under the Federal Aviation Act, section 611, 49 United States Code, section 1431 (1968), the Administrator is directed to prescribe rules and regulations as he finds necessary to provide for the control and abatement of aircraft noise; that in prescribing such rules, he must consider whether any such rule or regulation is, among other things, "consistent with the highest degree of safety in air commerce," and whether it is "economically reasonable, technologically practical and appropriate for the particular aircraft, aircraft engine, appliance or certificate to which it will apply."

Mr. Basnight adds that pursuant to the authority of section 1431, the Administrator on December 1, 1969 adopted regulations prescribing noise standards which must be met as a condition to type certification for all new, subsonic turbojet-powered aircraft, and that, in addition, the Federal Aviation Administration is currently studying the question as to whether there is a need for the promulgation of retrofit noise standards for jet aircraft types already certified. He states that in promulgating noise standards for new aircraft, and in determining the need for standards as to existing aircraft, the Federal Aviation Administration

is seeking to obtain maximum noise control which is technically practical and economically reasonable under the current state of noise abatement technology.

Mr. Basnight concludes by asserting that in prescribing these noise standards the Federal Aviation Administration does not intend to impose them on the airport proprietor, and that subject to contractual limitations contained in the grant agreements executed between the airport proprietor and the Federal Aviation Administration, the proprietor is free to impose such limitations on the use of an airport as he determines will best serve both the local desire for quiet and the local need for the benefits of air commerce.

Mr. Donald J. Haugen, Chief of the Los Angeles Tower-Terminal Radar Control of the Federal Aviation Administration, states in his affidavit that the current level of traffic requires the use of all three runways under the circumstances in which those runways are presently being assigned. He states that if one or more of these runways were unavailable, congestion and substantial delays would inevitably result.

The affidavit of Floyd E. Wescott, Vice-President of Operations of Pacific Southwest Airlines, states that Pacific Southwest Airlines operates intrastate in California under a Certificate of Public Convenience and Necessity issued by the California Public Utilities Commission; that this certificate authorizes routes, the minimum number of flights and types of aircraft, and specifically restricts Pacific Southwest Airlines to using the Lockheed electra-jet, the Boeing 727, the Boeing 737 and the Douglas DC 9 jet aircraft; that Pacific Southwest Airlines is the holder of a Commercial Operator Certificate issued by the Administrator of the Federal Aviation Administration. Attached to Mr. Wescott's affidavit and made a part thereof is a copy of the Certificate of Public Convenience and Necessity issued to Pacific Southwest Airlines by

the California Public Utilities Commission, a copy of the Commercial Operator Certificate issued by the Federal Aviation Administration, and a copy of the Standard Air Worthiness Certificate issued by the Federal Aviation Administration for each aircraft being used, certifying that the particular aircraft is in condition for safe operation.

Mr. Clifton A. Moore, the General Manager of the Los Angeles International Airport, states in his affidavit that the City of Los Angeles does not establish the specifications for the design of any aircraft and does not manufacture, own, operate or control any aircraft or the flight of any aircraft which operates to and from the Los Angeles International Airport; that all aircraft is approved and certified by the Federal Aviation Administration, and that upon such certification the Los Angeles International Airport must accommodate any airlines which are awarded routes to the Los Angeles International Airport; that such routes are awarded by the Civil Aeronautics Board and by a treaty agreement by the United States Government for international carriers.

Mr. Moore further states that the north Runway 24L/6R was completed in 1959, but that for many years the use of this runway was restricted by mutual agreement between the City of Los Angeles, the Airlines and the Federal Aviation Administration, and that no restrictions on the use of this runway were the result of unilateral action on the part of the City.

Mr. Moore further states that the letters dated June 12, 1967 and December 14, 1967, and attached as Exhibits A and B, respectively, to the stipulation of facts, were sent after coordination with, and approval by, the Federal Aviation Administration and were not the result of unilateral action on the part of the City. Mr. Moore also asserts that increased air traffic for the Los Angeles International Airport, brought about by the federal government's awarding routes to Los Angeles to additional airlines, and

the desire by the general public for increased flight services, were the factors which required the opening of the north Runway 24L/6R.

In his affidavit, Mr. Bert J. Lockwood, Assistant to the General Manager of the Los Angeles International Airport, states that the aircraft certified by the Federal Aviation Administration and operating at the Los Angeles International Airport are certified with safety as the main criterion for approval; that noise produced by aircraft is a secondary consideration by the Federal Aviation Administration in certifying aircraft for flight. Mr. Lockwood also states that the Los Angeles International Airport was planned as a four-runway complex since 1946; that this plan became a part of the national airport plan; that the City has received federal monetary grants since 1949 to aid in completing the runways and related facilities of the Airport, including the north Runway 24L/6R. Mr. Lockwood points out that in 1959 there were six commercial airlines that operated jet aircraft at the Los Angeles International Airport; that in 1967, twenty-two commercial airlines were operating jet aircraft at the Los Angeles International Airport, and that since then four additional major airlines have been awarded routes to this Airport by the Civil Aeronautics Board.

Mr. Lockwood further states that in approximately the year 1960 the Department of Airports for the City prepared an operational regulation, the purpose of which was to reduce noise volumes for east takeoffs from the Los Angeles International Airport; that this was to be accomplished by requiring all takeoffs to be made to the west until the tail-wind component of surface wind exceeded ten knots; that the Department of Airports attempted to implement this operational procedure which was considered safe by the Boeing Company, which was the manufacturer of most of the jet aircraft operating at this time at the Airport. Mr. Lockwood states that Chief Pilots groups made objections to the Department of Airports

and the Federal Aviation Administration, stating that company regulations limited down-wind component to five knots; that thereafter the Department of Airports was notified by the Federal Aviation Administration that such a regulation was considered as entering an area of flight regulations that had been preempted by the Federal Aviation Administration, and that the Department of Airports, therefore, could not implement the proposed regulation; that as a result the proposed regulation was never implemented.

The Lockwood affidavit also states that depending on Airline company policy, Airlines taking off from the Los Angeles International Airport utilize different climb speeds or climb techniques; that these different procedures create different sound levels into the Airport environment; that one technique used by some Airlines creates a greater sound level into the surrounding community than another technique used by other Airlines.

Milton N. Sherman, Assistant City Attorney assigned to the Department of Airports, states in his affidavit that he participated in the negotiation and preparation of the exhibit attached to the stipulation of facts pertaining to a change in the landing fees paid by the Airlines; that the priority of expansion projects to be completed under this agreement between the City and the Airlines was established by negotiation with the Airlines operating at the Los Angeles International Airport, with the requirements of the Airlines being given utmost consideration; that the Airlines desiring additional facilities for expanded operations contracted to pay additional landing fees as might be required to service the Airport bonds to insure completion of the projects covered by this exhibit for Airport expansion.

Mr. Sherman further states that he is familiar with the contractual requirements imposed upon the City of Los Angeles through the grants from the United States Government; that the City of Los Angeles has been under contractual obligation to allow the

use of north Runway 24L/6R since the year 1959. He further states that pursuant to the contractual agreement, the City of Los Angeles must allow commercial jet aircraft to operate on all of the runways at Los Angeles International Airport, including the north Runway 24L/6R. He also states that the Board of Airport Commissioners' Resolution No. 5456, adopted on October 22, 1969, referred to in an exhibit to the stipulation of facts, was adopted following coordination with the Airlines operating at the Los Angeles International Airport; that the formal resolution, with appropriate recitals and text, has not yet been prepared, due to the required continual coordination with the Airlines and the Federal Aviation Administration; that the Airlines operating at the Los Angeles International Airport have contracted for operating rights and leasehold facilities with the City of Los Angeles, for which they pay an appropriate fee, and that the City, for such fees, has in part contracted to maintain and operate and keep the Airport in good repair.

The stipulation of facts and affidavits summarized herein constitute the factual premise upon which must be based the Court's ruling either granting or denying the motions for summary judgment.

The principles applicable to motions for summary judgment are so well settled that citation of authorities is unnecessary. The question to be decided by the trial court on this motion is whether facts have been presented which give rise to triable issues. It is not the function of the Court to pass on or determine the issues themselves - that is, the true facts in the case. Issue finding, rather than issue determination, is the pivot on which the summary judgment law turns. Summary judgment becomes appropriate only if the affidavits in support of the moving party or an agreed statement of facts would be sufficient to sustain a judgment in favor of the moving party, and the opponent does not by counter-affidavit show facts sufficient to present a triable issue of fact.

Further, the affidavits of the moving party must be strictly construed, while those of the party opposing the motion for summary judgment are to be liberally construed. Any doubts as to the propriety of a summary judgment should be resolved in favor of denying the motion.

The summary judgment procedure is a drastic procedure, and should, therefore, be exercised with caution. The summary judgment procedure cannot be considered a substitute for the open trial method of eliciting and determining factual disputes. See Stationers Corp. v. Dunn and Bradstreet, Inc., 62 Cal.2d 412 (1965). Another salient principle of summary judgment procedure is that if only questions of law are involved, these may be determined and applied on a motion for summary judgment. See Simeon v. Russell, 194 Cal.App.2d 592 (1961).

It is the contention of the cross-defendant Airlines that under the stipulation of facts and the affidavits submitted by them that there are no triable issues between the cross-complainant City and the cross-defendant Airlines; that there are only questions of law involved, with the consequence that these cross-defendants are entitled to a summary judgment in their favor.

Two basic contentions of both the demurring cross-defendants and those making motions for summary judgment are as follows:

(1) That plaintiffs cannot, on any recognized legal basis, recover a judgment against the City for any alleged property damage or personal injuries on any of the theories set forth in their complaint, and hence the City can state no basis for indemnity recovery against cross-defendants;

(2) That the only possible theory of recovery by plaintiffs against the City would be a recovery for property damage only in inverse condemnation, and that on such a theory the City alone is responsible for the taking or damaging of plaintiffs' residential properties, and there is no legal basis upon which the City may

shift its liability in inverse condemnation over to the Airlines which use the Airport or to the Manufacturers of the jet aircraft and jet engines used by the Airlines.

Cross-defendants place their chief reliance upon Lombardy v. Peter Kiewit Sons' Co., 266 Cal.App.2d 599 (1968), where it was held that a complaint against the State and a contractor did not state a cause of action in either inverse condemnation or nuisance. There the complaint alleged that plaintiffs were property owners next to a freeway, and that the building and operation of the freeway by the defendants resulted in fumes, noise, dust, shocks and vibrations, causing mental, physical and emotional distress to the plaintiffs and damage to their real property. The court held that this complaint did not state a cause of action in inverse condemnation because there was no allegation of substantial damage to the property itself. The court likewise held that plaintiffs' complaint stated no cause of action on a theory of nuisance because state highways are constructed and maintained under the authority of the state constitution and state legislation, and section 3482 of the Civil Code provides that there can be no nuisance for a governmental activity maintained under express authority of law.

Lombardy does seem to hold that substantial damage to real property, which is a requisite for an action in inverse condemnation, requires a physical damage to the property itself. In the case at bench, plaintiffs' complaint does allege actual physical damage resulting from jet aircraft pollution in the form of noise, fumes and vibrations. Lombardy cites as authority for its holding Albers v. County of Los Angeles, 62 Cal.2d 250 (1960), and Frustuck v. City of Fairfax, 212 Cal.App.2d 345 (1963). In Albers, the crucial issue revolved around an interpretation by the Supreme Court of the "or damaged" provision of Article I, section 14 of the California Constitution. There the court held that the construction of a public project according to the plans and specifications and

which construction caused physical damage to private property and which was not the result of foreseeability or negligence, nevertheless gave private property owners a right of action against the County for damages, even though had such injury been inflicted at common law by a private person no cause of action would have been stated. This right of action under these circumstances is one granted by the Constitution itself and is not dependent either upon common law or statutory provision. In Albers, the court distinguished the physical property damage case presented there from the market value diminution without physical damage case presented in People v. Symons, 54 Cal.2d 855 (1960), and which is also presented in Lombardy.

Symons and Lombardy certainly indicate that there can be no recovery for a decrease in property values to neighboring landowners caused by the construction and operation of a freeway, with its traffic noises from automobiles and trucks, the screech of brakes and the exhaust contaminants emitted by trucks and automobiles. But Albers cannot be accepted as authority for holding that recovery in inverse condemnation in California may take place only in the event of actual physical damage to real property from a governmental project. There is every reason to hold that Albers, Symons and Lombardy are not intended to stand in the face of changing conditions created by the advent of jet aircraft. The Albers, Symons and Lombardy principles must be restricted in their application to the narrow, factual situations presented.

That the doctrines of Albers, Symons and Lombardy are to be limited to the factual situations presented in these cases is clearly set forth by the Supreme Court in Loma Portal Civic Club v. American Airlines, Inc., 61 Cal.2d 582 (1964), decided after Symons and Albers. In the Loma Portal Civic Club case, property owners sought an injunction against a number of commercial airlines to enjoin jet flights over their homes near an airport in San Diego

on the theory that such flights constituted a nuisance. The trial court granted the defendant commercial airlines a summary judgment denying injunctive relief. The Supreme Court sustained the trial court. This case was decided on the factual setting, as set forth by the pleadings and affidavits, that the plaintiffs did not claim that a significant portion of the defendants' overflights was in violation of federal law, nor that flights were so conducted as to be imminently dangerous to the plaintiffs, nor that such flights were inconsistent with, rather than in furtherance of, the public interest. It was conceded that the defendant airlines were operating under an obligation to provide safe and adequate service in the public interest; that their activities were conducted under extensive governmental supervision, enforceable by effective sanctions, and that their operations, as a general matter, had been determined to be in the public interest. The Supreme Court accepted the view that for the City of San Diego, the national interest in commerce, transportation and defense was furthered and advanced by the operation of scheduled passenger, freight and postal jet carriage into and out of the city; that the people of the City of San Diego and of the State of California were benefiting from these flight operations, and that no contention could fairly be made that the airlines' operations were not in furtherance of the public interest. The court, therefore, placed the justification for the denial of injunctive relief against the airlines operating jet flights over the lands of the plaintiffs upon the basis of an overriding public interest.

Thus, the court in Loma Portal Civic Club points out that it is established law that public policy denies an injunction and permits only the recovery of damages where private property has been put to a public use by a public service corporation and the public interest has intervened, citing cases such as People v. Ocean Shore Railroad, 32 Cal.2d 406, 421 (1948), and Hillside Water

Co. v. City of Los Angeles, 10 Cal.2d 677, 688 (1938). This principle is based upon the policy of protecting the public interest in the continuation of the use to which the property has been put; that the airlines' aircraft jet service is in the public interest, and that the public has come to rely on and has a substantial stake in the continuation of that service.

In ascertaining this public policy in maintaining jet aircraft service for passenger, freight, mail and military transportation, the Supreme Court points out that numerous statutory provisions provide guidance; that the federal legislation is found in the Federal Aviation Act, which declares "to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States" (49 U.S.C. § 1304), and which defines navigable airspace to include "airspace needed to insure safety in take-off and landing of aircraft" (49 U.S.C. § 1301[24]); that the California public policy in this area is found in section 21403 of the Public Utilities Code, which provides in subparagraph (a) that "flight in aircraft over the land and water 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 . . . . ," and which provides in subparagraph (b) that "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 approach of any public airport without restriction or hazard . . . . "

The Supreme Court further points out that the provisions as set forth in Public Utilities Code section 21403(b) indicate a policy against interference with such operations by the injunctive process; that another indication of California policy in this area is found in section 731a of the Code of Civil Procedure which restricts the use of the injunctive process for specified zones uses,

including airport uses, and that this indicates an intent that such uses are favored in the state and are not to be enjoined unless it is clearly established that such uses are being carried out in both an unnecessary and an injurious manner.

The court in Loma Portal Civic Club makes clear that its holding that an injunction is not available against jet aircraft flight operations in the vicinity of a public airport, conducted by regularly scheduled airlines and not alleged to be conducted in violation of federal orders or regulations or in an imminently dangerous manner, is solely because there is an overriding public interest and public policy in the operation of jet aircraft under the conditions set forth for the safe, regular air transportation of goods and passengers.

The Loma Portal Civic Club case is especially significant because the court makes a special point of stating what the case does not hold or determine. Thus, the court makes this highly significant observation: "Nothing herein is intended to be a determination of the rights of landowners who suffer from airplane annoyances to seek damages from the owners or operators of aircraft or to seek compensation from the owner or operator of an airport." (Loma Portal Civic Club, supra, at p. 591.) (Emphasis added.)

Also, the court specifically considers and rejects the contention of the airlines that the refusal of an injunction can be supported on the ground of federal preemption. The acceptance of federal preemption, said the court, would preclude the state from taking any action in the field. In reaching the conclusion that the federal preemption theory was untenable, the court points out that noise abatement is a federal as well as a state aim, "and when not inconsistent with safety, enforcement of a damage remedy under a nuisance theory, for example, would not necessarily present a conflict with federal law but might well reinforce it." (Loma Portal Civic Club, supra, at p. 592.) The Supreme Court thus concludes

that Congress did not intend by the Federal Aviation Act to nullify state-created liability and rights in the areas of definition and adjustment of property rights and the protection of health and welfare.

The claim of state preemption as a defense must be rejected for the same reasons that the claim of federal preemption as a defense cannot stand. Section 21401(a) of the Public Utilities Code provides that flight of aircraft over land and waters of the state is lawful unless at altitudes proscribed by federal authority, or "unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath." Although in the case at bench the plaintiffs' complaint does not allege in specific language that jet aircraft are flown in such a way as to be imminently dangerous to persons and property of the plaintiffs, a fair construction of their complaint indicates that the specific allegations constitute allegations that jet aircraft are operated in such numbers, at such times and at such a height that, because of the noise, fumes and vibrations emanating therefrom, such aircraft have damaged and ousted plaintiffs from the possession of their properties and caused personal injury to residents and, therefore, such jet aircraft flights have been so conducted as to be imminently dangerous to persons and property lawfully on the land beneath.

In Anderson v. Souza, 38 Cal.2d 825 (1952), a case dealing with a private airport, the Supreme Court held that the passage of the 1947 State Aeronautics Commission Act was not intended to take away common law and long-established statutory law declaring that nuisances may be abated at the suit of those injured thereby. This is a rejection of a claim of state preemption. Anderson, therefore, is authority for holding that state preemption is not a valid defense to plaintiffs' claims for recovery against the defendant City. The Loma Portal Civic Club case, dealing with the current state statutory law regulating aircraft, indicates no change in view

by the Supreme Court with respect to the question of state pre-emption, decided adversely to the preemption defense advanced in Anderson.

Although Loma Portal Civic Club does not indicate what type of "airplane annoyances" suffered by landowners will give rise to a damage action against an airport operator or aircraft operators, the result seems inescapable that substantial damage in terms of decreased property values or personal injury suffered from jet aircraft noise, fumes or vibrations would come within the nuisance concept there enunciated by the court.

The quoted statement in Loma Portal Civic Club indicates a recognition by the California Supreme Court that there is a significant difference between noise, fumes and vibrations emanating from jet aircraft and those coming from automobiles and trucks on a street or freeway. This difference is so pronounced that the legal consequences of jet noise should not be the same as the legal consequences of street and freeway noise of cars and trucks, as enunciated by cases such as Lombardy and Symons. The sounds emanating from cars and trucks on streets and freeways are simply minor contrasted with the irritating and offensive sounds emanating from current jet aircraft. If this were not so, we would not have Mr. Basnight, Director of the Western Region of the Federal Aviation Administration, stating in his affidavit in this case that "The F.A.A. is vitally interested in the alleviation of unnecessary noise disturbances to the residents of communities adjoining airports. Congress, the National Aeronautics and Space Administration, the Department of Health, Education and Welfare and the F.A.A. have embarked on an extensive research program whereunder they are seeking technological advances in the art of aviation noise control. To date approximately forty-three million dollars has been allocated under these and noise related programs." Nor would Congress in 1968 have added section 611 to the Federal Aviation Act,

directing the Administrator of the Federal Aviation Administration to prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise, as set forth in Mr. Basnight's affidavit.

In the quoted statement from Loma Portal Civic Club, it is to be noted that the court spoke in terms of landowners seeking "compensation" from the airport owner or operator and "damages" from the aircraft owners or operators. But the Albers case indicates that there is no magic involved in whether plaintiff is seeking "compensation" or "damages" in inverse condemnation or whether plaintiff is relying on a "taking" as contrasted with a "damaging" of his property. The words "compensation," "damages," "taking" and "damaging" are not words of art, nor can any strict or narrow interpretation of such words stand in the way of a plaintiff's recovery if the facts alleged or proved entitle him to a recovery. Thus, in the concluding paragraph of the opinion in Albers, an inverse condemnation case, we find that the Supreme Court ordered the trial court to enter a new judgment awarding to two plaintiffs "additional damages in the amount of . . . . with interest thereon . . . . and additional damages in the amount of . . . . with interest thereon . . . . " (Albers, supra, at p. 274.) (Emphasis added.) It is to be noted in Albers that the Supreme Court did not order the trial court to enter a new judgment awarding the two plaintiffs "additional compensation." Albers indicates, therefore, that the use of the two terms "compensation" and "damages" in the Loma Portal Civic Club case is of no special significance.

In discussing Albers, Lombardy, Symons and Loma Portal Civic Club, we are dealing with the California constitutional, statutory and common law. Irrespective of plaintiffs' rights under California law, plaintiffs' complaint alleges a cause of action in inverse condemnation under federal law. If plaintiffs are able to prove a substantial diminution in the market value of their

residential properties, without physical damage, resulting from jet aircraft noise, fumes and vibrations, they may recover judgment against the City under the due process clause of the Fourteenth Amendment to the United States Constitution. This is the result of the United States Supreme Court case of Griggs v. Allegheny County, 369 U.S. 84 (1962), which holds that flight of aircraft over an owner's property creating a substantial reduction in value from the jet aircraft noise constitutes a taking of the owner's property by the governmental entity operating the airport within the federal constitutional sense requiring compensation.

If the United States Supreme Court considers jet aircraft noise to be of such offensive character and magnitude to create a cause of action in inverse condemnation, it is highly unlikely that the California appellate courts will consider the cases of Albers, Symons and Lombardy as authority preventing the court creation of rules of law similar to Griggs under our state Constitution, statutes and common law. The jet noise in Griggs which the Supreme Court recognized as creating a cause of action in the landowner affected was described in the Griggs opinion as the following "accurately summarized uncontroverted facts": "'Regular and almost continuous daily flights, often several minutes apart, have been made by a number of airlines directly over and very, very close to the plaintiff's residence. During these flights it was often impossible for people in the house to converse or to talk on the telephone. The plaintiff and the members of his household (depending on the flight which in turn sometimes depended on the wind) were frequently unable to sleep even with ear plugs and sleeping pills; they would frequently be awakened by the flight and the noise of the planes; the windows of their home would frequently rattle and at times plaster fell down from the walls and ceilings; their health was affected and impaired, and they sometimes were compelled to sleep elsewhere. Moreover, their house was so close to the runways

or path of glide that as the spokesman for the members of the Airlines Pilot Association admitted, "If we had engine failure we would have no course but to plow into your house."'" (Griggs, supra, at p. 588.)

It therefore seems to this Court that the plaintiffs' complaint alleges a good cause of action in inverse condemnation which, under Article I, section 14 of the California Constitution provides for compensation both in the case of a taking or damaging of real property for public use. Are plaintiffs, however, limited to a recovery, insofar as property damage is concerned, to the theory of inverse condemnation, even if plaintiffs prove all of the allegations set forth in their complaint? Plaintiffs have alleged in their complaint that they are entitled to recover on theories of nuisance, negligence and others in addition to that of inverse condemnation. It is the contention of cross-defendants that the law does not allow recovery on such additional theories.

Cross-defendants point to plaintiffs' first amended complaint, as amended, which states that all of the counts of their complaint are based on essentially the same facts, and differ from each other only in that they set forth different legal theories upon which the court may award compensation. The cross-defendants also point out that in prior rulings in this case at bench it was held that "the substance of the cause of action of any plaintiff is either for inverse condemnation of their property or personal injuries," and that this ruling is the law of the case and must be applied in passing on the present motions for summary judgment. But prior rulings in this case at bench do not constitute a holding that plaintiffs' right of recovery for a taking or damaging of their residential properties is limited to a theory of inverse condemnation. And even if the prior rulings constituted such a holding, the theory of the law of the case has no application. The theory of the law of the case does not preclude a subsequent trial judge from

making a ruling contrary to that made previously in the same case by a different trial judge. It is only when the appellate court has made a ruling in a case that the law of the case doctrine becomes applicable to require all subsequent proceedings to be in consonance with the law of the case determined by the appellate court.

Cross-defendants request the Court to take judicial notice of prior rulings in other cases in the Superior Court. Reference is made to holdings by trial judges in other cases to the effect that section 3482 of the Civil Code precludes plaintiffs from being able to allege a cause of action against a governmental operator-owner of an airport on the theory of nuisance. Section 3482 provides that "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." Although such rulings of other judges of the Superior Court are entitled to all due deference and consideration, they are not binding upon this Court. We must look to the appellate courts for such binding authority. Thus, the Lombardy, Symons and Albers cases are binding upon this trial court but only on the factual situations involved there, namely, the law relating to freeway noise, fumes and vibrations and actual physical damage to real property.

The cross-defendants cite a number of appellate cases as supporting their legal position that plaintiffs' claim against the City for property damage is, of necessity, limited to the theory of inverse condemnation. One case cited is that of Frustuck v. City of Fairfax, 212 Cal.App.2d 345 (1963). This case is cited as holding that a landowner whose property is taken or damaged for a public purpose has only the one remedy of an inverse condemnation action. However, a careful reading of Frustuck indicates that this case simply holds that a damaged landowner is not entitled to damages and an injunction which would prevent the public entity from exercising the right of eminent domain.

Cases such as Cothran v. San Jose Water Works, 58 Cal.2d 608 (1962), which speak in terms of a remedy in inverse condemnation for a landowner whose property has been taken for a public purpose, are not addressing themselves to the question of whether such a damaged landowner may recover a judgment for damages against a governmental entity on theories other than that of inverse condemnation. We are not limited, however, to a consideration of this question on principle only. Prior decided cases have held that a landowner may recover from a public entity for damage to his property on more than one theory, even though the facts are the same.

Other decided cases indicate and establish quite clearly that damaged landowners may recover from a public entity on theories of nuisance and negligence in addition to that of inverse condemnation. One such case is Granone v. County of Los Angeles, 231 Cal.App.2d 629 (1965). There plaintiffs sued the defendant county and county flood control district for damages arising out of a flooding of their lands and the destruction of crops thereon. The plaintiffs claimed that the defendants in a flood control project had installed defectively designed culverts at a street intersection and had negligently maintained such culverts, with the result that the culverts caused flooding of plaintiffs' lands. The plaintiffs' complaint set forth four causes of action, three of which were the theories of inverse condemnation, common law negligence and the maintenance of a nuisance, respectively. A judgment for damages was rendered in favor of plaintiffs, and on appeal the court held that the plaintiffs were entitled to recover on each of these three legal theories. In Granone, the Supreme Court denied a hearing requested by defendants.

Another pertinent case is Ambrosini v. Alisal Sanitary Dist., 154 Cal.App.2d 720 (1957). In this case, a landowner brought an action against a sanitary district for damages to a celery crop due to the overflow of a sewer outfall line at a manhole owned and

operated by defendant public entity. The plaintiff's complaint alleged two causes of action, one in inverse condemnation and one for the maintenance of a nuisance. Judgment was rendered by the trial court in favor of plaintiff on both causes of action. On appeal, the court held that the plaintiff was entitled to recovery on both grounds alleged. Here, also, the Supreme Court denied the defendant's petition for a hearing.

Another case in point is Behr v. County of Santa Cruz, 172 Cal.App.2d 697 (1959), in which the plaintiff alleged that the defendant county maintained a rubbish dump from which fire spread and damaged plaintiff's property. Plaintiff alleged that this dump constituted a nuisance because the county maintained it in such a fashion that it was injurious to and caused an obstruction to the free use of plaintiff's property so as to interfere with the comfortable enjoyment of life and property. Plaintiff secured a money judgment for the damage to his property on a nuisance theory. Defendant appealed on the basis that the county was authorized to maintain and operate a dump by section 2582 of the Government Code and had an immunity from liability on any nuisance theory by virtue of Civil Code section 3482. The court rejected defendant's position and stated, "The rule in California is that a public agency or municipality may be liable for the maintenance of a nuisance even though it is exercising a governmental function in the activity at issue, and any person whose property is affected or whose personal enjoyment is lessened by a nuisance may maintain an action for damages." (Behr, supra, at p. 711.)

Granone, Ambrosini and Behr would appear to be good authority for holding that plaintiffs have stated a cause of action for recovery on the ground of a nuisance in the case at bench. Lombardy v. Peter Kiewit Sons' Co., supra, certainly takes an opposite view - that section 3482 of the Civil Code precludes freeways and streets with motor vehicle noise and fumes from being considered

a nuisance. This holding of Lombardy, however, cannot be considered binding nor too persuasive in the case of airport jet aircraft noise, fumes and vibrations in light of the contrary ideas enunciated by the Granone, Ambrosini and Behr cases.

In the case at bench, plaintiffs have alleged that the defendant City has maintained the Los Angeles International Airport in such a fashion that jet aircraft use of the Airport, with the emission of noise, fumes and vibrations, constitutes a nuisance, causing damage to plaintiffs' residential properties and their persons. Such allegations by plaintiffs, if proved, would seem to bring the case within the principle that, although the City has authority, expressly by statute, to maintain an airport from which jet aircraft arrive and depart, this authority cannot be construed to permit the City to maintain the Los Angeles International Airport in such a manner as to create a nuisance. If the jet aircraft operating at the Los Angeles International Airport are doing so in such manner, at such times and in such numerous flights that they have become "injurious to health" or "offensive to the senses" or "an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property," then the operation of the Airport can be considered a nuisance within the definition of this term in section 3479 of the Civil Code. In the face of such proof, Civil Code section 3482 cannot be used as a defense to liability.

In like fashion, Granone is authority for holding that if plaintiffs are able to prove their allegations regarding the negligent maintenance and operation of the Airport by defendant City, with damage to plaintiffs resulting therefrom, then plaintiffs are entitled to recover under a common law negligence theory.

Although it might appear that nuisance and negligence are synonymous, this is not true. In Sturges v. Charles L. Harney, Inc., 165 Cal.App.2d 306, 318 (1958), the question was considered

whether there can be a nuisance without negligence. Although the court recognized that the torts of negligence and nuisance may be, and frequently are, coexisting and practically inseparable, yet "a nuisance need not grow out of acts of negligence but may be the result of skillfully directed efforts - efforts which may be skillfully directed toward accomplishing the desired end, but may not have due regard for the rights of others."

In the case at bench, do the plaintiffs' allegations that they suffered personal injuries as a result of jet aircraft noise, fumes and vibrations state a good cause of action for recovery from the City? If the freeway noise cases represented by Symons and Lombardy, cited supra, were to govern the airport jet aircraft noise problem, there could be no recovery by plaintiffs for any personal injuries suffered. If plaintiffs have alleged a good cause of action for property damage on nuisance and negligence theories, it would seem to follow that these same two theories would support a recovery for personal injuries resulting from the same set of facts. Authority for this view is found in the dicta set forth in the Loma Portal Civic Club case and in the holding of Bright v. East Side Mosquito Abatement Dist., 168 Cal.App.2d 7 (1959). Here the plaintiff's complaint alleged personal injuries sustained as a result of the defendant public entity's creating a nuisance by the creation of a blanket of chemical fog to kill mosquotoes. It was alleged that the fog covered a highway and prevented plaintiff from being able to perceive the road traffic, with the result that plaintiff had an automobile accident and received personal injuries. The trial court sustained a demurrer to the complaint without leave to amend and a judgment of dismissal followed. On appeal, the court held that the complaint stated a good cause of action on a nuisance theory. The defendant relied upon section 3482 of the Civil Code legalizing a nuisance for a governmental entity. Reliance upon section 3482 of the Civil Code as a defense was

predicated upon the view that the defendant governmental entity was engaged in the very activity for which it was created, to wit, spraying for mosquitoes. The court, however, rejected this immunity argument based upon Civil Code section 3482 by holding that while the defendant governmental entity was authorized by statute to abate mosquitoes, such power cannot be construed to permit the governmental entity to abate mosquitoes in such a manner as to create a nuisance.

It is urged by cross-defendants that the plaintiffs in this action have stated no cause of action against the City because there is no allegation of a breach of duty by the defendant City to any individual plaintiff, and, therefore, the City states no cause of action for indemnity against the cross-defendants. This point is without merit. There is little doubt, of course, that in dealing with questions of liability for damage to real property and to the persons of residents living in the vicinity of airports resulting from jet aircraft noise, fumes and vibrations, we are dealing with essentially new conditions and new concepts which remain to be finally determined by our appellate courts. We do, however, have indications from other decided cases of the way in which the law is being directed. The growth of a mobile population and crowded cities and the development of ever increasing mechanical means of living inevitably bring changes in the law which must govern this type of society. Under the changing conditions of modern living, our Supreme Court has indicated that where compensation is sought for injury and damage, the inquiry is being shifted from the nature of the wrong committed, which undergirds the concept of "duty," to the nature of the harm done.

The test of liability is coming to be the reasonable expectation of the person injured by the act of another to be free from such injury. The status and relationship of the parties have become important considerations in determining liability. This

changing concept is seen in such cases as Dillon v. Legg, 68 Cal.2d 728 (1968), in which a negligent automobile driver who struck a child was held liable to the mother for physical injury resulting from the emotional shock of having witnessed the accident. Before Dillon, it would have been said that the automobile driver owed no duty to the mother who was not struck by the automobile. In Elmore v. American Motors Corp., 70 Cal.2d 578 (1969), a bystander was permitted to recover for injuries resulting from a defectively designed automobile part. Before Elmore, it would have been said that the automobile manufacturer owed no duty to the bystander. In Rowland v. Christian, 69 Cal.2d 108 (1968), it was held that a landowner may become liable to a trespasser who gets hurt on the premises. Before Rowland, it would have been said that the landowner owed no duty to a trespasser.

These cases, even without the extension of the law of inverse condemnation as seen in Albers, and even without the intimation from Loma Portal Civic Club, lead to the conclusion that in the case at bench plaintiffs have alleged a cause of action against the City even though there is no allegation of a duty owed by the City in the common law sense of that term. Certainly, it would be a reasonable expectation on the part of property owners and residents living near an airport to be free from personal injury or substantial diminution of property values caused by noise, fumes and vibrations from jet aircraft flights in the vicinity of their properties.

The cross-defendant Airlines and Aircraft Manufacturers assert that in the event plaintiffs are able to recover from the defendant City on an inverse condemnation theory, no legal basis exists for the City to shift its liability over to the Airlines or the Aircraft Manufacturers. For this position, cross-defendants rely principally upon the decision of the United States Supreme Court in Griggs v. Allegheny County, 369 U.S. 84 (1962). The

Airlines and Aircraft Manufacturers assert that Griggs is a holding that only the airport operator is liable in inverse condemnation for damage to private property resulting from jet aircraft use of a public airport and not the Airlines operating the aircraft or the Manufacturers who build such aircraft and jet engines. Griggs did hold that Allegheny County, which owned and operated the Greater Pittsburgh Airport, was bound under the Fourteenth Amendment to the United States Constitution to compensate a property owner who was damaged as a result of aircraft flights over his land. The point was made in Griggs, which is accepted here under the pleadings, stipulation of facts and affidavits, that the jet aircraft which caused the damage were operating within the navigable airspace declared by Congress, and operating within all rules and regulations prescribed by the Federal Aviation Administration. In Griggs, the court held that the fact that the approach patterns were within the navigable airspace declared by Congress did not preclude a holding that there had been a "taking" of private property for public use by the governmental owner and operator of the airport.

The case of Griggs reached the United States Supreme Court because the Supreme Court of Pennsylvania had determined that if the jet aircraft flights over the property owner's land constituted a "taking" in the constitutional sense, it was not the County of Allegheny which had committed the "taking." The United States Supreme Court held that it was the governmental entity of the County of Allegheny which had taken a flight easement over the owner's private property for a public use, and that the defendant county was required to pay just compensation to the owner by virtue of the Fourteenth Amendment to the United States Constitution. In so holding, the Supreme Court said, "It is argued that though there was a 'taking,' someone other than respondent was the taker - the airlines or the C. A. A. acting as an authorized representative of the United States. We think however that respondent, which was the

promoter, owner, and lessor of the airport, was in these circumstances the one who took an air easement in the constitutional sense."

The reasoning advanced by the United States Supreme Court that the county was the taker of the air easement was to the effect that the county had decided, subject to the approval of the C.A.A., where the airport would be built, what runways it would need, their direction and length and what land and navigation easements would be needed. The court made the statement that the federal government takes nothing under these circumstances. But no such gratuitous statement was made with respect to the airlines. The court concluded that in designing the airport the county had to acquire some private property, but that "by constitutional standards it did not acquire enough."

Is Griggs a holding that a governmental airport operator who becomes liable to a damaged plaintiff in inverse condemnation is precluded from shifting liability to the airlines operating the jet aircraft which cause the damage or to the manufacturers of the aircraft being used by the airlines? Griggs does not really touch upon this problem. Griggs reached the Supreme Court of the United States only because the damaged property owner was claiming that his rights under the Fourteenth Amendment were being denied by the state. In his action, the damaged property owner was claiming that his property was being taken without due process of law by a state governmental entity, and that this violated his rights under the due process clause of the Fourteenth Amendment to the United States Constitution. The United States Supreme Court agreed with this contention, and this is the real holding of the Griggs case. Griggs does not determine what rights, if any, damaged property owners possess under state law. If we were dealing solely with rights under federal law, clearly the City could make no claim that it had a right to have its liability in inverse condemnation to a

damaged property owner shifted to the Airlines or to the Aircraft Manufacturers under the Fourteenth Amendment to the United States Constitution.

In claiming that the City is the only party which may be held liable for inverse condemnation, reliance is placed upon Sneed v. County of Riverside, 218 Cal.App.2d 205 (1963). In Sneed, the complaint by private property owners alleged two bases for recovery. The complaint alleged that plaintiffs' properties were near an airport owned and operated by the county, and that this property had been damaged by (1) a county airport approach zoning ordinance which created height restrictions, and (2) the flight of a large number of aircraft over plaintiffs' properties. The trial court sustained a demurrer to the complaint but the appellate court reversed, holding that the complaint stated a cause of action in inverse condemnation on each ground alleged. Sneed, however, is not a holding that if a plaintiff alleges a cause of action in inverse condemnation there can be no other theory of recovery stated by a plaintiff, or that airlines or aircraft manufacturers may not be held liable for damage to his property or person from jet aircraft noise, fumes and vibrations.

One argument advanced by the Airlines to support their view of no obligation to indemnify the City on the cross-complaint for plaintiffs' recovery in inverse condemnation is that the Airlines have no right to exercise the power of eminent domain, nor to obtain any air or flight easement to which the City is entitled in the event the City is held liable to the plaintiffs. The City resists this argument by asserting that the Airlines do have the right of eminent domain, even though they are private parties, and that this right is given to them under state law. In Linggi v. Garovotti, 45 Cal.2d 20 (1955), the court upheld the right of a private person, an apartment building owner, to condemn a right-of-way for a sewer line over adjoining land, but indicated that a

private plaintiff must prove by a preponderance of the evidence his right and justification for the proposed condemnation, and that a somewhat stronger showing of such requirement is necessary than if the condemnor is a public or a quasi-public entity.

The right of a private person to acquire property by eminent domain is set forth in Civil Code section 1001, and this right is given for any of the uses specified in section 1238 of the Code of Civil Procedure, but there are stringent and strict limitations on the rights of a private person, as indicated in Linggi. People v. Oken, 159 Cal.App.2d 456 (1958), is an illustration of the stringent requirements. There the court held that a private citizen could not, under Civil Code section 1001, sue to acquire property for the public purpose of constructing and operating a public school. A private person must be authorized to devote the property to the public use in question, said the court, and such authorization was found nonexistent in the Oken case. Looking at the public uses set forth in section 1238 of the Code of Civil Procedure, we find "airports" as one of the specified uses. The provision for "airports" found in the Code of Civil Procedure section 1238(20) reads as follows: "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."

Even if it be assumed that the Airlines are authorized to devote property to an airport use within the meaning of Civil Code section 1001, it is exceedingly doubtful if the language of Code of Civil Procedure section 1238(20) can be construed to authorize the taking of an easement in airspace. Although Code of Civil Procedure section 1239 defines the various rights and estates in land which may be taken for public use, Code of Civil Procedure sections 1239.2, 1239.3 and 1239.4 were added in 1945, 1961 and 1965, respectively to deal specifically with airspace easements.

Civil Code section 1001 was enacted in 1872 and has remained unchanged, while Code of Civil Procedure section 1238, which was likewise enacted in 1872, has been amended several times. The language of section 1238(20), considered in conjunction with sections 1239.2, 1239.3 and 1239.4, indicates quite clearly that the former section is limited to the taking of an interest in land for the airport proper and not for any flight easement over land which is adjacent to or near the airport proper. There is neither authority nor reason to justify a holding that the Airlines may exercise any right of eminent domain or acquire by eminent domain proceedings any air easements for the public use of airports.

The contention is made by the Airlines that if the City is able to shift to the Airlines liability for an inverse condemnation judgment in favor of plaintiffs, the airspace easement which the City would obtain as a result of the judgment would have to be given to the Airlines, creating an untenable and unjust result. An inequitable result would be reached, assert the cross-defendant Airlines, because only the cross-defendant Airlines would be held responsible, and yet there are many other airlines which fly into and out of Los Angeles International Airport and are not named as cross-defendants in this action. Reference is made to the Haugen affidavit, in which it is stated that in addition to the scheduled commercial airlines which are named as cross-defendants, the Los Angeles International Airport is used by military jet aircraft, general aviation jet aircraft, supplemental air carrier jet aircraft and chartered jet aircraft of scheduled air carriers not authorized to provide scheduled service to and from Los Angeles; that, in addition, regularly scheduled jet service to and from Los Angeles International Airport has been inaugurated by Braniff International Air Lines, Eastern Airlines, Northeast Airlines, Northwest Orient Airlines, Airlift International, Seaboard World Airlines, Aerolineas Argentinas, Avianca Airlines, BOAC and

Lufthansa German Airlines. The Airlines contend that these users of the Los Angeles International Airport would escape responsibility for their fair share of the total burden of the cost if an inverse condemnation liability is shifted from the City to only the Airlines named as cross-defendants; that otherwise, the City is in a position to allocate any cost to the City from a judgment in plaintiffs' favor equitably among all the aircraft users of the Airport through the lease and operating agreements which the City has with all the Airlines. This contention is not persuasive. It is generally held no defense for a person sued that another not named may be equally liable for the asserted claim. The liability of the person sued must be determined on the basis of his own responsibility for the loss alleged without regard to whether there are others who may have contributed also to the loss.

The Airlines also point out that one of the purposes of the Federal Airport Act was to prevent the type of result which might be reached if there could be a shifting of liability in inverse condemnation from the airport operator to certain of the Airlines sued in an indemnity action. Reference is made to provisions in the Federal Airport Act for grants to airports for airport development and the assurances required of the airport proprietor to permit use of the airport by all aircraft carriers. Cross-defendants point to the sections of the Federal Airport Act which authorize the Administrator to make grants of federal funds to public entities for airport development, including acquisition of "land or interest therein or easements through or other interest in air space." (49 U.S.C. §§ 1103, 1104, 1112[a][2] [1964].) The contention here made is that Congress intended the airport proprietors to acquire all the air easements necessary for airport development through the partial use of grants for this purpose from the federal government. In turn, the airport proprietors would be able to spread the cost of these acquisitions among all airport

users on an equitable basis through the lease and operating agreements with the Airlines and concession holders.

It is doubtful, however, if the provisions of the Federal Airport Act may be interpreted to provide for the acquisition by an airport owner of airspace easements, justified only on a theory that jet aircraft flying over property in the vicinity of an airport emanate such noise, fumes and vibrations as to lower the market value of the property owners' lands. Section 1112 of the United States Code, which deals with allowable project costs for which federal grants may be made, defines "allowable project costs" to include land interests and airspace easements as quoted above. Section 1101(a)(5) defines a "project" as a project for the accomplishment of "airport development" with respect to a particular airport. Section 1101(a)(3) defines "airport development" to include "any acquisition of land or any interest therein, or of any easement through or other interest in airspace, which is necessary to permit any such work or to remove or mitigate or prevent or limit the establishment of airport hazards . . . . " Section 1101(a)(4) defines "airport hazard" as meaning "any structure or object of natural growth on or in the vicinity of a public airport, or any use of land near such airport, which obstructs the air space required for the flight of aircraft in landing or taking off at such airport or is otherwise hazardous to such landing or taking off of such aircraft."

In considering the definitions of "project," "airport development" and "airport hazards," it seems clear that the federal statutory authorization for inclusion of the costs of acquiring airspace easements as a part of project costs is limited to those airspace easements necessary to prevent airport hazards. And the airport hazards refer to obstructions to aircraft traffic, such as buildings and trees. Thus, federal grants for airport development were not intended to include costs of acquisition of an airspace

interest or easement made "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," as provided for in section 1239.3 of the California Code of Civil Procedure.

The conclusion that the City would obtain airspace easements as a result of an inverse condemnation judgment in favor of the plaintiffs is predicated on the theory that a judgment in inverse condemnation necessarily is founded on a "taking" of private property for a public use. The California Constitution, however, provides compensation where an owner's property has been "damaged" for a public use as well as where there has been a "taking" of his property for a public use. In Albers v. County of Los Angeles, 62 Cal.2d 250 (1960), the court allowed a recovery against the County under Article I, section 14 of the California Constitution for a damaging of private property by the construction of a government project. In so holding, the court did not refer at all to any taking by the County of any interest in plaintiffs' properties. Nor did the court speak in terms of any easement in favor of the County because of the judgment for damages awarded to the property owners.

Steiger v. City of San Diego, 163 Cal.App.2d 110 (1958), is a case which deals specifically with the question of the right of a governmental entity to obtain an easement in an inverse condemnation action brought by damaged property owners. In Steiger, the public improvement caused water to be dumped on the plaintiffs' lands, resulting in soil erosion and a diminution in the market value of the properties. Here the trial court awarded damages to plaintiffs but refused to grant an easement in favor of the City

which constructed the improvement. The appellate court upheld the judgment awarding damages to plaintiffs and refusing to grant an easement in favor of the City of San Diego. The court interpreted the "or damaged" provisions in the California Constitution as being different from the "taking" provisions and concluded, therefore, that the City of San Diego was not automatically entitled to an easement because of the judgment rendered against it. The justification for refusing the City an easement rests in the view that there can be a damaging of private property for a public use within the meaning of the state Constitution without a taking of private property for public use being involved.

In Albers and in Steiger, we have cases of physical damage to private property resulting from the construction and maintenance of a governmental project. In the case at bench, plaintiffs have alleged actual physical damage to their properties resulting from jet aircraft noise, fumes and vibrations. In addition, however, the plaintiffs' complaint has to be construed as alleging a reduction in market values without any physical damage as a result of jet aircraft noise, fumes and vibrations. Cases such as Albers and Steiger indicate that where private property has been "damaged" by action of a public entity for a public use, the situation does not necessarily require nor make appropriate an easement in favor of the public entity under all circumstances. The nature of the injury or damage to plaintiffs' properties resulting from a public entity's project appears to be the more important consideration in terms of whether the public entity is entitled to an easement, rather than the question of whether the property owners are seeking and obtaining "compensation" or "damages" for the injury involved.

A realistic view is that damage to private property in the form of decreased market value resulting from jet aircraft noise, fumes and vibrations constitutes a "damaging" of such property or interest therein, rather than a "taking" of such property. A

"taking" in the usual sense of an ouster or dispossession of an owner by the public entity is largely fictional and unrealistic in jet aircraft noise situations. It would seem to follow, therefore, in the case at bench that the City would not necessarily be entitled to an easement in the event of a recovery by plaintiffs for a diminution in property values caused by jet aircraft flights. The argument of the cross-defendant Airlines that the City should not be entitled to indemnity from the Airlines if the plaintiffs' recovery is predicated on inverse condemnation, because the City's flight easement granted in return for the payment of damages would be shifted to the cross-defendant Airlines and not all airlines using the Airport, is therefore not well taken and must be rejected. If the City is not necessarily entitled to an easement, even though it is required to pay compensation or damages to the affected property owners, the flight easement problem would not be a bar to a right of indemnity on the part of the City against the cross-defendant Airlines, assuming, of course, that the City would otherwise be entitled to such indemnity.

But even if it were considered appropriate to grant the City an airspace easement under the circumstances of a recovery by plaintiffs, this would not automatically necessitate a transfer of such easement to the Airlines in the event of an indemnity recovery by the City against the Airlines. Such an easement exists for the public use of aircraft flights. The City could be required to hold the easement in trust for use by all airlines using the Airport, with any airlines not named as cross-defendants required to pay a proportionate share of the judgment, which would reduce the amount of the indemnity from the cross-defendant Airlines. Such a result would not appear to violate any provisions of the grant agreements between the City and the Federal Aviation Administration.

It is a basic position of the cross-defendant Airlines that even if the City's potential liability to plaintiffs is

predicated on a damaging of plaintiffs' residential properties, as contrasted with a taking of plaintiffs' properties, such liability cannot be shifted to the Airlines because the stipulation of facts and the affidavits submitted by the Airlines establish that they are carrying out their flight operations in the very way contemplated by the construction and operation of the Airport; that they are flying strictly in accordance with the rules and regulations of the Federal Aviation Administration. The affidavits submitted by the cross-defendant Airlines are to the effect that the City made the decision to construct the Airport and the north runway and then to open the north runway to jet aircraft traffic; that these decisions were solely those of the City; that the traffic control personnel of the Federal Aviation Administration are the ones who assign the use of the various runways to the specific aircraft landing and taking off from the Airport; that no aircraft owner or operator determines which of the three runways shall be used. It is thus the contention of the Airlines that the responsibility for the use, operation and effects of the north runway rests solely upon the City because of its decision to construct and operate the Airport and to open the north runway in June of 1967 for jet aircraft use.

The City, however, disputes this contention that it made the sole decision to construct the north runway and that it made the sole decision to open this runway for jet aircraft use in June of 1967. The affidavits submitted on the part of the City state that all decisions relative to the opening of the north runway and its hours of use and its method of use by jet aircraft were cooperative decisions made by and between the City, the Airlines and the Federal Aviation Administration.

The findings which the Airlines request the court to make from the stipulation of facts and affidavits submitted by the Airlines are to the effect that the City was free in June of 1967 to

open, or not to open, the north runway to jet aircraft traffic; that the City has been free at all times to make decisions regarding what types of aircraft shall be permitted to use the north runway and at what hours and under what conditions. In light of the stipulation of facts and the affidavits submitted by the respective parties, we need to consider pertinent questions such as these: Does the City have the authority and power to restrict the use of the north runway of the Los Angeles International Airport to jet aircraft with an Effective Perceived Noise Level rating in decibels considerably lower than that of current jet aircraft? Does the City possess the authority and power to impose on all jet aircraft presently certified by the Federal Aviation Administration a maximum Effective Perceived Noise Level rating in decibels lower than that now in use? According to the Basnight affidavit, the Federal Aviation Administration is at present studying the feasibility and economics of imposing retrofit noise standards for jet aircraft types currently certified. Does the City have the authority and power to impose maximum noise levels for all jet aircraft using the north runway? Does the City have the authority and power to restrict each cross-defendant Airline to a specified number of jet aircraft landings and takeoffs per day?

According to the Moore affidavit on behalf of the City, the City has nothing to do with establishing the specifications or the design of jet aircraft, nor does the City control the flight of any aircraft which operates to and from the Airport upon approval and certification by the Federal Aviation Administration. According to the Lockwood affidavit submitted on behalf of the City, the four-runway complex of the Los Angeles International Airport, consisting of the two south runways and two north runways, has been planned since 1946, a date long before the advent of jet aircraft, and planned as a part of the National Airport Plan; that the federal monetary grants made since 1949 to aid in completing the runways and

related facilities included the north Runway 24L/6R. According to the Lockwood affidavit, the commercial airlines operating jet aircraft at the Los Angeles International Airport increased from six in 1959 to twenty-two in the year 1967 and now stand at twenty-six, as a result of the airlines having been awarded routes to Los Angeles International Airport by the Civil Aeronautics Board. Mr. Sherman, in his affidavit on behalf of the City, adds that the City has been under contractual obligation to allow use of the north Runway 24L/6R since 1959, and that the City must allow commercial jet aircraft to operate on all runways of the Airport, including the north Runway 24L/6R.

The Court takes judicial notice that there is now present on the scene a new jet aircraft type, the jumbo jet Boeing 747. The question may be asked: At whose request was this aircraft developed, the Manufactuer, the City of Los Angeles, the Airlines or the Federal Aviation Administration? There is no evidence before the Court as to the Effective Perceived Noise Level rating of this new jet aircraft or how it compares with other jet aircraft in terms of fumes or vibrations claimed by plaintiffs for jet aircraft being used at the time of the filing of this lawsuit. Could the City have refused permission for the Airlines to operate the Boeing 747 jet aircraft on the north runway? It is the City's position, stated in the affidavits submitted by it in opposition to the affidavits submitted by the Airlines, that it had no choice in any of these matters, and that if there is damage to plaintiffs' properties as a result of jet aircraft noise, fumes and vibrations, then such damage is being committed by the Manufacturers of such aircraft and the Airlines which actually use and fly such aircraft.

Exhibit F attached to the stipulation of facts, which is an amendment to the lease and operating agreement between the City and Western Air Lines and typical of the lease agreements between the City and the other Airlines, recites that the major capital

expansion program, including enlargement and development of the Los Angeles International Airport, is necessary because of the introduction of new and larger aircraft by the Airlines and the increase in the use of air transportation by the traveling public. Exhibit F requires the Airlines to render to the City each month a true statement of all revenue aircraft trips arriving at the Airport during the month. Do the provisions of Exhibit F lead to an inference that the Airlines determine the introduction of jet aircraft types and the number of trips of jet aircraft flown into the Airport each day or month without any concurrence required on behalf of the City? There is no dispute regarding the fact that an Airline must maintain adequate service on the routes authorized by the Civil Aeronautics Board. But neither the stipulation of facts nor any affidavits submitted by the parties indicate how the determination is made regarding the number of flights required on a designated route to constitute adequate service, and yet it is clear that the total number of jet flights per day using the north runway at the Los Angeles International Airport may have a material bearing upon the issues raised by plaintiffs' complaint of whether there has been property damage and personal injury to residents resulting from noise, fumes and vibrations emanating from jet aircraft using this one runway.

The stipulation of facts and the opposing affidavits indicate that the questions regarding the authority of the City in opening the north Runway 24L/6R and controlling its use by jet aircraft are highly disputed issues. Both the City and the cross-defendant Airlines, through the conflicting affidavits submitted, rely in large measure upon the provisions of the Grant Agreements executed by and between the City and the Federal Aviation Administration for a determination of the powers of the City with respect to the Airport. A typical Grant Agreement is attached to the stipulation of facts as Exhibit G. The Grant Agreements provide that the

City must operate the Airport for the use and benefit of the public, and must keep it open to all types, kinds and classes of aeronautical use without discrimination between types, kinds and classes. There is the proviso that the City may establish fair conditions to be met by all users of the Airport "as may be necessary for the safe and efficient operation of the airport." There is the further proviso that the City may prohibit or limit any given type, kind or class of aeronautical use of the Airport if such action is necessary for the safe operation of the Airport or necessary to serve the civil aviation needs of the public.

Do these provisos authorize the City to place limits on the noise, vibrations or fumes emitted by jet aircraft using the Airport? According to Mr. Lockwood, when in 1960 the Airport attempted to implement an operational regulation designed to reduce the noise volumes for east takeoffs, the Federal Aviation Administration claimed federal preemption which prevented the implementation of the proposed regulation. Would the Federal Aviation Administration take the position that the 1968 amendment to the Federal Aviation Act, giving the Federal Aviation Administration the right to impose noise standards on both new aircraft and existing aircraft, creates a federal preemption of noise regulation? The stipulation of facts sets forth that in 1963 the City's Board of Airport Commissioners passed a resolution stating that the Board would place operating restrictions on supersonic aircraft operations at the Airport to control the noise levels from such aircraft unless certain operating sound levels were achieved in the aircraft design; that in 1969 the Board adopted a resolution to the effect that any new aircraft would be denied the use of the Airport facilities in the event such aircraft imposed noise levels upon adjacent communities which would exceed those currently in existence. These two resolutions adopted by the City's Board of Airport Commissioners indicate a belief by the City that it does have some authority under

the Grant Agreements to establish rules and regulations which have a bearing on curbing or lessening noise levels of jet aircraft.

The Basnight affidavit speaks of the vital interest of the Federal Aviation Administration in the alleviation of unnecessary noise disturbances to the residents of communities adjoining airports and lists the various committees and agencies of the government which have embarked on extensive research programs seeking means of advancing the art of aviation noise control. Mr. Basnight states that the sum of $43,000,000 has been allocated under the various noise-related programs, and that the Administration on December 1, 1969 adopted regulations prescribing noise standards which must be met as a condition of type certification for all new subsonic turbojet-powered aircraft. The affidavit does not state, however, what the new noise standards are, whether they are less than the Effective Perceived Noise Level rating of presently certified jet aircraft, or, if the maximum noise level standard is less, how much less. Nor does Mr. Basnight tell us what success has been achieved in jet aircraft noise abatement by the expenditure of the $43,000,000.

The question involved is not so much how interested every government agency may be in the alleviation of jet aircraft noise, but rather, what success has been achieved and is being achieved in the lessening of jet aircraft noise. Regardless of the amount of money expended to curb jet aircraft noise, fumes and vibrations, and regardless of the great need of the public for jet-powered aircraft, the fact remains that under constitutional, statutory and common law principles, if the plaintiffs are able to prove their allegations that the noise, fumes and vibrations from jet aircraft using the north runway of the Los Angeles International Airport have resulted in substantial damage to plaintiffs, there will be liability on the part of the City of Los Angeles for such damage. Although Mr. Basnight states that in prescribing noise standards for new

aircraft the Federal Aviation Administration does not intend to impose such standards on the airport proprietor, in this case the City of Los Angeles, and although he states that the Airport proprietor is free to impose limitations on the use of its Airport, he limits the Airport proprietor's freedom with the cautious words that this freedom is subject to the contractual limitations contained in the Grant Agreements executed by and between the Airport proprietor, in this case the City of Los Angeles, and the Federal Aviation Administration, and that the Airport proprietor must make a determination as to what limitations will best serve both the local desire for quiet and the local need for the benefits of air commerce. The Basnight affidavit points out a realistic and practical, if not legal, limitation on the City's authority over the Airport by stating that the "Los Angeles International Airport is a vital and integral part of the nationwide system of public airports. It is the major air terminal for scheduled foreign and domestic flights located on the west coast of the United States. Any restrictions on its use or operation would directly affect the overall national airport system." (Emphasis added.)

The affidavits submitted by the City and the cross-defendant Airlines are too conflicting and insufficient to warrant a fair interpretation at this time of the provisions of the Grant Agreements between the defendant City and the Federal Aviation Administration to determine how extensive or how circumscribed is the regulatory power of the City with respect to establishing rules and regulations governing jet aircraft use of the north runway. The affidavits and the provisions of the Grant Agreements establish that the question of what restrictions the City may impose on the use by the Airlines of the Los Angeles International Airport and its three runways, including the north Runway 24L/6R, is a highly contested issue. Such an issue can only be resolved by a trial on the merits.

Even in the absence of the City's Assurances contained in

the Grant Agreements with the Federal Aviation Administration, the City would be precluded from adopting some types of Airport regulations affecting the interstate airlines as an unconstitutional burden upon interstate commerce. A challenge by interstate truck carriers to an Illinois highway safety statute, requiring all trucks and trailers to have their rear wheels equipped with contour rather than straight mudguards, was sustained by the United States Supreme Court on the ground that the statute placed an unconstitutional burden on interstate commerce. (Bibb v. Navajo Freight Lines, 359 U.S. 520 [1959].) On the other hand, many state highway safety statutes applicable alike to interstate and intrastate commerce have been upheld, despite the fact that they may have an impact on interstate commerce. See Southern Pacific Co. v. Arizona, 325 U.S. 761, 783 (1944).

Would a jet aircraft noise-limitation regulation imposed by the City on jet aircraft using the Los Angeles International Airport fall within the burden-on-interstate commerce ban? In the event such a regulation conflicted with more stringent or less stringent regulations imposed by governmental owners of public airports in other states in an effort to curb or minimize jet aircraft noise, fumes or vibrations, could such regulations be successfully challenged as undue burdens on interstate commerce? Certainly the City does not possess unlimited power to impose whatever restrictions it desires on jet aircraft using the Airport in order to lessen jet aircraft noise, fumes or vibrations. However, the extent to which the Commerce Clause constitutes a limitation on the City's power to control the use of its Airport, including the north runway, need not be considered or determined at this stage of the proceedings in the case at bench.

The City claims a right of indemnity against the Aircraft Manufacturers and the Airlines under the principles of implied or equitable indemnity arising from the relationship of the parties and

the circumstances involved. In addition, the City claims a right of indemnity against the Airlines by virtue of the written contractual agreement of indemnity in the leases between the City as lessor and the Airlines as lessees. So far as the written indemnity agreements between the City and the Airlines are concerned on these motions for summary judgment, no evidence has been tendered regarding the intention of the parties to these agreements. Hence, the principle found in Markley v. Beagle, 66 Cal.2d 951, 962 (1967), would appear applicable. There the court points out that "in the absence of conflicting extrinsic evidence the interpretation of the contract is a question for the court."

The cross-defendant Airlines assert that the City's theory of implied indemnity is precluded because of the presence of the written contracts of indemnity between the City and the Airlines. Thus, in Markley, at page 961, the court said, "Since the parties expressly contracted with respect to the contractors' duty to indemnify the owners, the extent of that duty must be determined from the contract and not from the independent doctrine of equitable indemnity."

The indemnity provisions of the lease between the City and Western Air Lines and some of the other cross-defendant Airlines state that the "Lessee agrees to indemnify and hold Lessor harmless from and against all loss and damage to which Lessor may be subject by reason of any act or negligence of Lessee causing damage to persons or property, or both, in connection with Lessee's use and occupancy of and operation at said Airport; provided, however, that Lessee shall not be liable for any damage, injury or loss occasioned by the negligence of Lessor, its agents or employees, ... "

The indemnity provisions of the City's lease with cross-defendant Airlines Continental Air Lines, Inc., Delta Air Lines, Inc., National Airlines, Inc., Pacific Southwest Airlines, Aeronaves de Mexico, S.A., Compagnie Nationale Air France, Scandinavian Airlines

System, Union de Transport Aeriens and Varig Airlines state that the "Airline shall keep and hold City herein . . . . harmless from any and all costs, liability, damage or expense . . . . claimed by any one by reason of injury or damage to person or property sustained in, on or about the demised premises, or arising out of Airline's operations in or on the demised premises, as a proximate result of the acts or omissions of Airline, its agents, servants or employees, or arising out of any condition occasioned by the acts or omission of Airline in its demised premises, or arising out of the operations of Airline upon or about the demised premises, excepting such liability as may be the result of the direct and proximate negligence, acts or omissions of the City . . . . "

There is nothing in the stipulation of facts or the affidavits to indicate any intention of the parties or reasons for the adoption of different language in the two types of written indemnity contracts. A question arises as to whether the language used in the indemnity agreements is broad enough to cover the claimed injuries to property and persons of the plaintiffs occurring outside of and away from the Airport itself. Are such injuries caused "in connection with Lessee's use and occupancy and operation at said Airport," as provided in one type of lease, or sustained "in, on or about the demised premises," as provided in the second type of lease? The above language would appear to cover injury or damage sustained in close proximity to the Airport itself and not be limited to injury sustained within the four corners of the Airport property. If such a limitation were intended, the natural inference would be that the parties would have written into the agreements that indemnity would be limited to injury sustained <u>on</u> the Airport property and not just in connection with the lessee's use and occupancy of the demised premises or on or about the demised premises. The actual language used, however, would not seem to cover injuries sustained a considerable distance from the Airport.

There is no indication from plaintiffs' complaint of how far from the Airport in terms of feet, yards or miles the various properties are located which plaintiffs assert have been damaged by jet aircraft flights or where plaintiffs received personal injuries. In the absence of evidence, and none has been presented for purposes of these motions for summary judgment, the Court is unable to determine whether the plaintiffs are living, and their real properties are located, sufficiently close to the demised premises to bring the case within the confines of the indemnity agreement. In the absence of evidence, the Court cannot rule that the distance is so great that it makes inoperable the written indemnity coverage. It could well be that evidence at the trial will demonstrate that some of the plaintiffs are located close enough to the Airport to come within the ambit of the indemnity agreements, while others are so far distant as to be excluded. If some of the plaintiffs are located at such a distance to be excluded under such language, we then have the further question of whether the written indemnity clause would necessarily preclude implied indemnity with respect to the loss or damage incurred as to these plaintiffs.

Although the indemnity agreements do not provide specifically for the Airlines to be liable only for their negligent acts which cause damage, the Airlines urge that this should be the interpretation of the language used. There is authority for this interpretation. The language used in the indemnity agreements is not unlike that used in the Massachusetts case of Massachusetts Turnpike Authority v. Perini Corp., 208 N.E.2d 807 (1965). Here the Turnpike Authority had contracted with the defendant contractor to construct a tunnel as a public project. In the construction process, private property owners had their property damaged, brought suit against the Authority and recovered judgment. There was no proof of any negligence of the defendant contractor or its employees in the construction of the tunnel. The Turnpike Authority sued the contractor for

indemnity. The Turnpike Authority had a written indemnity agreement with the defendant contractor which required the defendant to be responsible for all claims against the plaintiff Turnpike Authority arising out of, or in consequence of, the "acts" of the defendant in the performance of the work. The Massachusetts court held that the parties intended that the word "acts" should mean negligent acts of defendant and not that the contractor was to be responsible for damages occurring from plaintiff's "taking" of property for public use or for damages which were "unavoidable" as a result of the construction of the public project.

The doctrine of Massachusetts Turnpike Authority is similar to the cases which hold that if a contractor carries out the construction of a public agency project according to the plans and specifications and without any negligence on his part, the only liability with respect to damage caused third persons by the construction of the project is on the public agency and cannot be shifted to the contractor. An example of such a case is Steiger v. City of San Diego, 163 Cal.App.2d 110 (1958), cited supra, in which a public improvement caused water to be dumped on the plaintiffs' lands which resulted in soil erosion and a diminution in market value. The injured landowners sued both the contractors and the City which constructed the improvement. The contractors were dismissed on motions for nonsuits on the theory that they carried out the construction work in accordance with the plans and specifications without negligence, and, in such a case, only the governmental entity is liable in inverse condemnation. Lombardy v. Peter Kiewit Sons' Co., 266 Cal.App.2d 599 (1968), cited supra, is a similar holding with respect to a freeway construction.

The City urges, however, that the role of the Airlines and the Aircraft Manufacturers is more akin to the role of the Southern Pacific Company in Breidert v. Southern Pacific Co., 61 Cal.2d 599 (1964). Here the plaintiffs brought an action in inverse

condemnation against the City of Los Angeles and the Southern Pacific Company for damages to their real properties resulting from the impairment of an easement of access to the system of public streets following the closing of a railroad crossing. The trial court granted a judgment of dismissal after demurrers to the amended complaint were sustained without leave to amend. This ruling was reversed on appeal. The defendant railroad contended that it was not a proper party defendant to this action for inverse condemnation. However, the Supreme Court answered that since the defendant railroad was "an active joint participant in closing the crossing, it is a proper party to the present litigation." Relying upon this case, it is the City's contention that the Airlines and Aircraft Manufacturers are not simply an "active joint participant" in causing any damage which plaintiffs are asserting, but that they constitute the only active parties which caused such damage.

To be compared with the public project construction cases, such as Massachusetts Turnpike Authority, Steiger and Lombardy, are the public project construction cases which hold that if a contractor is negligent in the designing or construction of a public project and such negligence is the proximate cause of damage to third persons, the doctrine of sole responsibility on the public entity has no application. An example of this factual and legal situation is found in the case of Alisal Sanitary Dist. v. Kennedy, 180 Cal.App.2d 69 (1960). Here the plaintiff public entity contracted with defendants to design and construct improvements to a sewage disposal plant, including new manholes. There was a flood of sewage from a manhole which destroyed the celery crop of landowners nearby. The landowners brought suit against the public entity on theories of inverse condemnation and nuisance and recovered a judgment based on both theories. In the present suit, the public entity sought indemnity from the defendant contractors. Defendant contractors interposed the defense that the landowners' recovery

against the plaintiff public entity was in inverse condemnation, and that such liability could not be shifted to the contractors who constructed the improvement. The court rejected this contention because the landowner's recovery against the public entity was on the dual theory of inverse condemnation and nuisance. Under the circumstances involved, the court said that the public entity had a right to sue the contractors under the principles of implied indemnity.

It is significant that in Alisal the public entity's complaint for indemnity alleged that the defendants had negligently planned and constructed the sewer line so as to permit its flooding. It is the allegation and proof of negligence on the part of the contractor which takes Alisal out of the doctrine that a contractor who constructs a public project in accordance with plans and specifications and without negligence cannot be held liable for any damage to private persons resulting from the construction and operation of the public project.

Do the stipulation of facts and affidavits submitted by the Airlines incontrovertibly place the relationship between the City and the Airlines to be substantially similar to the relationship between the public entity and a contractor exemplified by the cases of Steiger, Lombardy and Massachusetts Turnpike Authority, or do the stipulation of facts and affidavits submitted by the City indicate that the relationship between the City and the Airlines is substantially similar to the relationship between the public entity and a contractor exemplified by such cases as Alisal Sanitary Dist. v. Kennedy and Breidert v. Southern Pacific Co.? If there is doubt on this, then a triable issue has been raised between the City as cross-complainant and the Airlines as cross-defendants. It is the Court's conclusion that the stipulation of facts and the opposing affidavits set forth contrary inferences of facts as to the relationship between the City and the Airlines, as posed supra, and hence a triable

issue is presented with respect to the nature of this relationship.

The cross-defendant Aircraft Manufacturers argue that, as manufacturers of jet aircraft, their relationship with the Airport is similar to that of the contractors in Steiger and Lombardy, performing according to the plans and specifications laid down for the Airport by the City. This argument can have no validity on a demurrer in the face of contrary allegations of the cross-complaint.

The City's allegations in the cross-complaint that the jet aircraft used by the Airlines were negligently designed and manufactured by the cross-defendant Aircraft Manufacturers, and that any jet aircraft noise, fumes and vibrations which caused damage alleged by plaintiffs were the result of the negligent design and manufacture of jet aircraft and jet aircraft engines by the cross-defendant Aircraft Manufacturers clearly state a cause of action for indemnity against the Aircraft Manufacturers under the doctrine of the Alisal Sanitary District case.

The Airlines contend that both under the written indemnity agreements and under the principles of implied indemnity there can be no right of recovery by the City against the Airlines because the City would be an active participant with the Airlines on any theory of the City's liability to plaintiffs. Similarly, the Aircraft Manufacturers assert in support of their demurrers that the City's cross-complaint on its face fails to show a right of indemnity because there is a failure of the cross-complaint to allege a difference in the character of negligence allegedly committed by the City as contrasted with that claimed to have been committed by the demurring cross-defendant Aircraft Manufacturers. It is contended that the cross-complaint merely alleges a difference in the degree of negligence between the cross-complainant City and the cross-defendant Aircraft Manufacturers, and hence there is a failure to state a cause of action under accepted principles of implied indemnity.

The written contracts of indemnity between the City and the Airlines state quite clearly that the City cannot be indemnified for loss or damage caused by the City's own negligence. If the plaintiffs recover from the City on a theory of negligence, the City is precluded from shifting such liability to the Airlines by virtue of this provision of the written indemnity agreement. It would be immaterial also, as to the type of negligence on the part of the City found to exist by the trier of fact, whether the negligence consists of acts of omission or acts of commission. Indemnity would be precluded, although the City's negligence concurred with negligence on the part of the Airlines in causing damage to plaintiffs, because the written agreements do not bar indemnity only in the event of the "sole" negligence of the City.

The written contracts of indemnity between the City and the Airlines are thus to be distinguished from that involved in the case of John E. Branagh & Sons v. Witcosky, 242 Cal.App.2d 835 (1966). Here a subcontractor's contract with the contractor contained an indemnity clause in which the subcontractor agreed to indemnify and save harmless the contractor for all loss and liability in connection with the work to be performed "excepting only such injury or harm as may be caused solely and exclusively by the fault or negligence of the contractor." An employee of another subcontractor was hurt as a result of the active negligence of the defendant subcontractor and of the plaintiff contractor concurring in proximately causing the injury. The court held that the plaintiff contractor was entitled to a right of indemnity from the subcontractor because the subcontractor had agreed to indemnify the contractor for the contractor's own negligence, and such an agreement is not against public policy. In having excluded only the sole negligence of the contractor-indemnitee, the agreement thus expressly provided for indemnity where the loss was occasioned by the concurrent negligence of the indemnitee and indemnitor. The court rejected

the contention of the subcontractor that the agreement should be interpreted to bar indemnity for concurrent active negligence of the indemnitee, and concluded that there was no language in the agreement to justify making a distinction between active and passive negligence, which are concepts used in cases of implied indemnity.

In the indemnity agreements involved in the case at bench, the language bars indemnity by the City for its own negligence, but the term "sole or exclusive" negligence is not present. However, the John E. Branagh & Sons case would indicate that the concept of a differentiation between active and passive negligence does not apply in indemnity agreements in the absence of some language indicating that the concept was intended to be applicable. It would appear, therefore, that the City has waived any right to indemnity if a loss or liability to the plaintiffs is based on either active or passive negligence of the City, even though such negligence concurs with negligence of the Airlines in causing damage to plaintiffs. The language of the indemnity agreement between the City and the Airlines is such that a reasonable interpretation leads to the conclusion that the City simply did not provide for indemnity against its own negligence, whether such negligence is the sole cause of injury or is concurrent with that of the Airlines, since words such as "solely," "exclusively" or some like term do not appear in the agreement.

In dealing with implied indemnity, the cases make a distinction between the kinds of negligence by an indemnitee which will bar his recovery from an indemnitor. The doctrine has developed that one who has helped bring about the damage should not be allowed to shift his responsibility to another. Thus, in San Francisco Unified Sch. Dist. v. Cal. Bldg. Maintenance Co., 162 Cal.App.2d 434 (1958), the court held that the doctrine of implied indemnity necessarily arose in favor of the public entity from a contract it had with the defendant maintenance company which provided that the

maintenance company was to be held "responsible for payment of any and all damages resulting from his operations." Here the plaintiff had to pay damages to defendant's employee who was injured while washing windows of a school building owned by plaintiff, and then plaintiff sought indemnity from defendant. In reaching its conclusion, the court used this language: "Whether the school district should be precluded from recovery by reason of its conduct, that is, whether the conduct of the district helped to bring about the damage, is at least a question of fact and should have been left to the jury. Under such circumstances it was error to grant the nonsuit." (San Francisco Unified Sch. Dist., supra, at p. 449.)

The distinction usually made by the cases is between "passive" and "active" negligence, with the latter being necessary to preclude recovery in implied indemnity. Other contrasting terms used are "nonfeasance" and "misfeasance." "An indemnity clause in general terms will not be interpreted, however, to provide indemnity for consequences resulting from the indemnitee's own actively negligent acts." (Markley v. Beagle, 66 Cal.2d 951, 962 [1967].) (Emphasis added.) "Mere nonfeasance, however, such as a negligent failure to discover a dangerous condition arising from the work will not preclude indemnity under a general clause such as the one in this case." (Markley, supra, at p. 962.)

In considering the question of what acts of a cross-complainant in helping to bring about the loss will bar indemnity against a cross-defendant, we find some assistance in the case of Atchison T. & S. F. Ry. Co. v. Lan Franco, 267 Cal.App.2d 881 (1968). Here a passenger on a railroad sued the railroad and a truck driver and truck owner for personal injuries arising out of a truck-train collision. The railroad filed a cross-complaint for indemnity against its codefendants, the truck driver and truck owner, on the theory that the railroad's liability would be predicated on passive negligence and the truck driver's and owner's liability would be

predicated on active negligence, and hence the railroad would be entitled to indemnity against the defendants committing the active negligence. The truck owner demurred to the railroad's cross-complaint. The appellate court upheld the trial court in sustaining the demurrer. The reasoning of the court was that if the railroad were to be held liable it would, of necessity, be based upon active negligence in a truck-train collision, and therefore no legal ground for indemnity could possibly be stated by the railroad. This case is an example of the principle that if a complaint for indemnity and declaration of rights makes no showing for recovery as a matter of law, or if the alleged controversy is purely illusory and hypothetical, a demurrer should be sustained. See also Wilson v. Transit Authority, 199 Cal.App.2d 716 (1962); Silver v. City of Los Angeles, 217 Cal.App.2d 134 (1963).

However, in Jefferson Incorporated v. City of Torrance, 266 Cal.App.2d 300 (1968), we have a cross-complaint by one defendant in a property damage action against a second defendant, seeking declaratory relief that the cross-complaining defendant is entitled to indemnity from the second defendant if the plaintiffs recover a judgment against the cross-complaining defendant. The trial court sustained the cross-defendant's demurrer on the ground that the cross-complaint failed to show grounds for a declaration of indemnity in the cross-complainant's favor. This ruling of the trial court was reversed by the appellate court. The basis of the decision is that a complaint for declaratory relief is to be construed liberally as against demurrer, and a complaint for declaratory relief need not establish that plaintiff is entitled to a favorable declaration, and hence a demurrer may not be sustained on this ground. The court's view was that where the plaintiff's right to recover has not been tried and adjudicated and it is impossible to tell on what theory plaintiff may recover, and where the question of indemnity may well depend on the facts established by plaintiff and the theory

of the plaintiff's recovery, the validity of a declaratory relief cross-complaint for indemnity must be determined by the triable issues presented by the complaint and the cross-complaint.

Both the cross-defendant Airlines and the cross-defendant Aircraft Manufacturers consider that the case at bench falls within the principles of the San Francisco School District and the Lan Franco cases. However, for the Court to sustain a demurrer to the City's cross-complaint or to grant a summary judgment in favor of cross-defendants under the principle of these two cases, the Court would have to conclude that under no hypothesis of recovery by plaintiffs against the City would the City have a right to indemnity because the City's conduct of necessity would amount to active negligence. Plaintiffs have alleged a wide variety of negligent acts and omissions on the part of the City as the proximate cause of alleged injury to the properties and persons of plaintiffs. Some of the negligence alleged falls into the category of nonfeasance or passive negligence. Others fall into the category of misfeasance or active negligence. Only recovery by plaintiffs for active acts of negligence on the part of the City will bar the City from a right of indemnity under the Lan Franco case.

In the San Francisco Unified School District case, the court held that it becomes a question of fact for the trier of fact as to whether the indemnitee has helped to bring about the damage for which he seeks indemnity from the indemnitor. The stipulation of facts and affidavits submitted by the cross-defendant Airlines in the case at bench do not establish as a matter of law that the acts done by the City are of the character which would preclude indemnity under this principle which bars indemnity to one who helps bring about the damage. Whether the conduct of the City helped to bring about the damage to plaintiffs is a disputed question of fact. It is thus a triable issue, and cannot be disposed of on a motion for summary judgment. This result is supported by the case of Alisal

Sanitary Dist. v. Kennedy, supra. There the defendant contractors raised the defense that the plaintiff governmental entity was negligent along with the defendant contractors, and that such concurring negligence would preclude indemnity recovery. However, the court said that the complaint on its face did not show that plaintiff was actively negligent with the defendants so as to preclude indemnity.

Alisal would seem to be persuasive in the demurrer situation presented in the case at bench. It cannot be said that the City's cross-complaint against the Aircraft Manufacturers on its face establishes that the City was actively negligent with respect to any alleged liability of the City to plaintiffs so as to preclude a claim of indemnity from the cross-defendant Aircraft Manufacturers.

In the event plaintiffs in the case at bench are able to establish a right of recovery against the City on a theory of nuisance, without proof of any negligence on the part of the City, the problem of indemnity will involve a consideration of different principles from those involved in recovery on a negligence theory. The question of indemnity for nonnegligent nuisance will revolve around whether acts and operations of the cross-defendant Airlines and Aircraft Manufacturers come within the principle that their operations at the Airport are simply carrying out the functions of the Airport as a public project in accordance with its plan and purpose, and hence liability would be limited to the City as the operator of the Airport, or whether the nuisance created is such that the operation of jet aircraft at the Airport is analogous to the principle of a contractor who has defectively designed and constructed the public project which caused damage, so that the City may point the finger of responsibility to the cross-defendant Airlines and Aircraft Manufacturers. A determination of which situation exists in the case at bench can only be made by a full-scale

trial on the merits.

The cross-defendant Airlines assert, in support of their position regarding the relationship of the Airlines to the Airport, that in opening the Airport and the north runway, the City was well aware of the use to be made of the Airport by the Airlines with their jet aircraft, and that the operations of jet aircraft to and from and at the Airport, therefore, are strictly in accordance with the plans and specifications of the Airport as a public project, all of which was with the full knowledge, consent and expectation of the City. The City, on the other hand, asserts in support of its theory of the relationship between the Airport and the Airlines that at the time of the planning and building of the Airport and the north runway the City was unaware of the implications involved in the use of jet aircraft and the possible damaging effects of jet aircraft emitting noise, fumes and vibrations. The affidavits submitted on both sides point out to some extent the limitations on decision making imposed on the City in the year 1967, when the north runway was opened to unimpeded use by jet aircraft. Thus, Mr. Donald J. Haugen, Chief of the Los Angeles Tower-Terminal Radar Control of the Federal Aviation Administration, states in his affidavit that the current level of traffic requires the use of all three runways under the circumstances in which those runways are presently being assigned, and that if one or more of these runways were unavailable, congestion and delays would inevitably result.

It appears clear, therefore, that one question to be decided on the trial is whether, when the City made its initial decision to locate the Los Angeles International Airport where it is now located, and to continue to expand it within the blueprint for the National Airport System, that decision created a sole responsibility and liability for all aircraft uses and developments of the Airport for the future. This decision was finalized, for all intents and purposes, in 1946, when a four-runway complex was planned.

This was before the advent of jet aircraft. As conditions developed and changed since 1946, to what extent did the City appreciate its responsibilities under the Grant Agreements through which it received substantial assistance from the federal government in the development of the Airport? To what extent did the City realize or foresee that jet aircraft were on the horizon, and that property owners in the immediate vicinity of the Airport would contend that jet aircraft on their takeoff and landing patterns would produce such noise, fumes and vibrations as to cause substantial damage to persons and property?

All of these matters must be developed by evidence subjected to the test of cross-examination to determine the true facts. At this stage of the case, it cannot be determined which allegations, if any, may be proved by the plaintiffs upon trial or on what theory, if any, plaintiffs may recover a judgment against the City. By the same token, it cannot be determined except by evidence at a trial whether the City is able to bring itself within some of the legal principles discussed herein to entitle it to a declaration of rights and indemnity against the cross-defendant Airlines and Aircraft Manufacturers.

The special demurrer of the Flying Tiger Line, Inc., is directed to the point that from the City's cross-complaint it cannot be determined what lease or leases the second cause of action refers to or what are the essential terms of such leases which are alleged to contain the contractual indemnity rights asserted by the City. In the City's memorandum of points and authorities in opposition to the demurrer of Flying Tiber Line, Inc., there is attached a copy of the Lease and Operating Agreement relied upon by the City, and the City requests the Court to take judicial notice of this document. This the Court will do.

In light of the views expressed herein, there is no necessity to discuss the problem of indemnity in the event plaintiffs

recover a judgment against the City on theories advanced other than those of inverse condemnation, nuisance or negligence.

The motions for summary judgment made by the cross-defendant Airlines are denied. The demurrers of Flying Tiger Line, Inc., The Boeing Company, McDonnell Douglas Corporation, General Electric Company and United Aircraft Corporation are overruled, and each demurring cross-defendant is given twenty days within which to file an answer to the City's first amended cross-complaint.

DATED this 17th day of April, 1970.

BERNARD S. JEFFERSON

Bernard S. Jefferson
Judge of the Superior Court