#65.40 6/23/71

Memorandum 71-46

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

The adoption by the California Department of Aeronautics of noise standards for airports apparently will create some question as to the standard for determining whether there is a "taking" or "damaging" for inverse condemnation. See the attached letter from Dr. Garbell, who has been serving as our consultant on this problem.

The State Director of Aeronautics has arranged for the managers and attorneys from the San Francisco, Los Angeles, and Oakland airports to attend our meeting when this subject is discussed. In addition, the attorney for the State Department of Aeronautics will also attend the meeting. Dr. Garbell will be present. We are also advising other persons interested in this subject that the Commission will be considering the subject at the July meeting.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 71-46

EXHIBIT I

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June 17, 1971.

Mr. John H. DeMoully,
Executive Secretary,
California Law Revision Commission,
School of Law, Stanford University,
Stanford, California 94365

Dear Mr. DeMoully:

Confirming my telephone calls to you yesterday and this morning, I should like to suggest that the subject of the legal presumption of a compensable aircraft-noise damage based on physically measurable time-integrated noise-exposure data alone be reviewed again by the California Law Revision Commission, to meet what I believe to be an urgent need.

During 1970, the CLRC examined the possibility of establishing a rebuttable presumption of compensable aircraft-noise damage on the basis of certain objective physical criteria. The Commission heard several advisers and witnesses including the writer. The criterion proposed by me was the "Total Noise Exposure" first set forth by us in 1969 for the quantitative definition of the noise easement at the Oakland Airport, namely, a noise-exposure number based on a time integration of observed noise levels and a criterial threshold value therefor. I understand that the consensus of the Commission at that time was (using my own terminology):

1. That there was no adequate preponderance or acceptance of scientific opinion to support any purely acoustic criterion that – by itself – could serve as a basis for a legal presumption of compensable damage.

2. That there was no adequate case law that could reveal a reasonably reliable trend of correlation between integrated noise-exposure values alone and damages finally adjudicated by the courts.

The Commission then decided in 1970 not to recommend legislation on this subject at that time.

Now, about a year later, the aircraft-noise problem has reappeared on the legislative and regulatory scene in California in a somewhat different, but potentially extremely embarrassing form, as follows:

On November 10, 1970, the California Department of Aeronautics adopted - and filed on November 25, 1970, with the Secretary of State - a new Subchapter 6 in Title 4, California Administrative Code entitled "Noise Standards." In the absence of legislative action, the adopted noise standards will automatically take effect on December 1, 1971. The noise standards are based on time-integrated noise-exposure levels, substantially similar to those developed by the writer for the Oakland Airport noise easement in 1969.

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During the past few days I have become aware of an apparent growing concern by airport operators, and more especially the Los Angeles International Airport, that the mere existence of the California Noise Standards, even if altered temporarily by approved variances, might suggest to triers and finders of fact the existence of a legal presumption of compensable damage based solely or predominantly on the time-integrated noise-exposure criteria recitated in the Noise Standards, Subchapter 6, Title 4, of the California Administrative Code.

It is true that the second paragraph of Section 5004 of the Noise Standards, which paragraph is entitled "Applicability," states as follows:

> " The regulations established by this subchapter are not intended to set noise levels applicable in litigation arising out of claims for damages occasioned by noise. Nothing herein contained in these regulations shall be construed to prescribe a duty of care in favor of, or to create any evidentiary presumption for use by, any person or entity other than the State of California, the counties and airport proprietors in the enforcement of these regulations."

In the opinion of legal counsel, this provision might not be adequate to preclude the use of the noise-exposure criteria stated in California Noise Standards as an instrument to create a prima-facie presumption of compensable damage. It is my understanding that some airport authorities appear to regard the possibility of lawsuits encouraged by such an interpretation so serious and potentially so costly, that they may decide to curtail aircraft operations to a level sufficiently low to satisfy the nominal criteria of the California Noise Standards strictly and rigorously; in one instance I have heard of contemplated cutbacks to the extent of seventy-five percent. In order to verify my understanding, I have asked for copies of position papers and a copy of the transcript of an aircraft noise conference recently held in Washington, D.C., for accuracy in future comments to the CLRC. I do believe, however, that my understanding is substantially correct.

In essence, it is my opinion that early legislative action is necessary to prevent a collapse of the entire concept embodied in the California Noise Standards. While the California Noise Standards, as adopted, may not be a panacea, they do constitute, in my opinion, a very real step forward - a step that should encourage technical progress toward effective noise abatement both through improved powerplant design and through improved aircraft and airport operations.

The decision by the CLRC in 1970 not to recommend affirmative legislation that would have created a presumption of compensable damage based on time-integrated noise-exposure levels alone, contains within itself, in my opinion, an implied finding by the CLRC that such a presumption is not viable at this time and, hence, surely should not be permitted to appear in foro through the back door, unless and until technical progress and the decisions of the courts produce sufficient proof of reliability and equitability to justify explicit legislative codification of such a presumption.

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Hence, I believe, it is important and urgent that the CLRC consider the possibility of recommending appropriate and speedy legislative action to render possible the implementation of the California Noise Standards without inviting a possibly enormous flood of lawsuits based solely or predominantly on the theory of an implied presumption of compensable damage attributed to the Noise Standards. The need for such action appears to be urgent because, while some lawsuits may subsequently be found by the courts not to be meritorious on the basis of the actual facts, they could, meanwhile, inflict disastrous costs on litigating parties and, in effect, damage the cause of sensible aircraft noise abatement in California for years to come.

If the Commission is favorably disposed to take a look at the problem, I would suggest an initial brief presentation in which I could provide a technical summary of the situation and which the California Department of Aeronautics and the most directly affected airports, such as the Los Angeles International Airport, the San Francisco International Airport, the Oakland International Airport, and others, may be heard on the specifics of the problem as it affects them and hear their proposals. I am confident that the Attorney General of the State of California and counsel for plaintiffs in significant recent noise-damage litigations will also be interested in expressing their views.

In the telephone conversation between us this morning, it appeared that a time period during the CLRC meeting in San Francisco between July 15th and 17th, next, might offer an opportunity for such a presentation. I have suggested the hoped-for time period in July to Mr. Joseph Crotti, California Director of Aeronautics, and I understand that, following a telephonic consultation with you, Mr. Crotti would confer with the airports managements and others interested in the subject to ascertain their convenience.

I look forward with interest to hearing from you further after the scheduling of arrangements are finalized, and shall endeavor to do all I can to facilitate the early resolution of the present apparent impasse. I do appreciate very much your helpfulness in this matter.

Very truly yours,

Maurice A. Garbell
President

MAG:ef

copy to: Mr. Joseph Crotti, Director, California Department of Aeronautics.
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Michael N. Sherman, Esq., Assistant City Attorney, City of Los Angeles.
Mr. James F. Carr, Director of Airports, San Francisco Airports Comm.
Mr. Christopher C. Knapp, Director of Aviation, Port of Oakland.
J. Kerwin Rooney, Esq., General Counsel, Port of Oakland.
Nicholas C. Yost, Esq., Deputy Attorney General, State of California.
Mr. John Shaffer, Administrator, FAA, Washington, D.C.
Mr. Arvin O. Basnight, Regional Director, FAA, Los Angeles.
Mr. E. Hoy, Deputy Director, Western Regional Office, ATA, Los Angeles.