

#65.40

8/5/69

Memorandum 69-97

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

Attached to this memorandum is a draft statute (Exhibit I, pink sheets) which attempts as faithfully as possible to implement the tentative policy decisions made at the June, 1969 meeting regarding inverse condemnation liability for aircraft noise damage. As with the initial attempts with water and land stability damage, the draft sections are intended primarily to serve as a starting point and focus for further discussion. Accordingly, the comments to the sections are not drafted as though the statute was already enacted but rather suggest starting points for further discussion and revision of the statute itself.

At the September meeting, we hope to be able to resolve enough of the obvious problems to enable the staff to draft a preliminary statute suitable for distribution to those involved in airport operations, to obtain their views, opinions, and suggestions regarding the draft proposals, as well as possible alternative solutions. We hope that we can get some "airport-noise experts" to attend the October Commission meeting and we would like to provide these experts with some framework for discussion at that meeting.

We have also attached a copy of Assembly Bill No. 2266 (Exhibit II, yellow sheets), relating to problems and attempted solutions to these problems arising out of the operations of the Los Angeles International Airport, which we believed you would be interested in examining.

Respectfully submitted,

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Associate Counsel

Memorandum 69-97

EXHIBIT I

DRAFT STATUTE

(Provisions to Be Added to Part 2 of Division 3.6 of Title 1  
of the Government Code)

Section 1. [reserved for definitions]

Sec. 2. (a) An airport operator is liable to the owner of real property located adjacent to or in the vicinity of the airport for any diminution in the fair market value of such property occurring during the period of his ownership caused by aircraft noise, and accompanying vibrations, fumes, and lights of such frequency and magnitude as to interfere materially and substantially with the owner's use and enjoyment of such property.

(b) In any action under this section, any person with an interest in the property in question shall be made a party plaintiff if personal service of process can be had upon such person within this state.

Comment. Subdivision (a) of Section 2 states the basic conditions of liability for aircraft noise. It should be noted that the party held liable is the airport operator. This will generally be a public entity--an airport district, city, or county--; however, the section, indeed the entire chapter, would be equally applicable to a private individual, corporation, or association. The airport operator is selected as the identifiable, responsible party best able to minimize the damage and to distribute the cost arising from the airport and aircraft operations.

Subdivision (a) provides relief for the owner of property for damage incurred during the period of his ownership. Only by implication does the subdivision make this a personal right. To insure such a construction, the section could be amended to specifically provide that the right or cause of action is nonassignable. Subdivision (b) makes any person with an interest in the property a necessary party to the action if personal service can be had upon such person within the state. This should insure

that a lienholder or any other affected person will be represented and his rights protected in the litigation.

Substantively, Section 2 provides liability for any diminution in the fair market value of property caused by aircraft noise, and accompanying vibrations, fumes, and lights. Note any overflight requirement is eliminated. On the other hand, since recovery is limited to a diminution in the fair market value of the property, damages based on personal fears or annoyance or specialized, individual uses are precluded, except as reflected in the market place. Similarly, although property is rendered totally unsuitable for residential use, if its value for commercial or industrial purposes is unaffected and these latter uses constitute the highest and best use for the property, no recovery will be allowed. This feature becomes particularly important if, under Section 8, the defendant is able to secure a zoning change to reduce potential damage.

Section 2 further provides that the airport operations must interfere materially and substantially with the owner's use and enjoyment of his property. This requirement is given specific content in Section 3, but the expression here is intended to reenforce the idea that personal fears, petty annoyance, and minimal intrusion and interference do not provide a basis for recovery.

Sec. 3. (a) Any diminution of property value claimed to have resulted from aircraft operations shall be presumed not to have been caused thereby unless the claimant establishes to the satisfaction of the court that, during the six-month period of time immediately preceding trial, or such other period of time as may be fixed by the court in light of the circumstances of the case: (1) separate

incidents of imposition of noise from aircraft operations averaged 20 or more per day; (2) peak aircraft noise pressure levels during such incidents averaged more than 90 PNdB, and (3) during at least one-third of such incidents, peak aircraft noise pressure levels exceeded 100 PNdB for a period of ten seconds or more.

(b) Any diminution of property value claimed to have resulted from aircraft operations shall be presumed to have been caused thereby if the claimant establishes to the satisfaction of the court that, during the six-month period of time immediately preceding trial, or such other period of time as may be fixed by the court in light of the circumstances of the case: (1) separate incidents of imposition of noise from aircraft operations averaged 20 or more per day; (2) peak aircraft noise pressure levels during such incidents averaged more than 90 PNdB, and (3) during at least one-third of such incidents, peak aircraft noise pressure levels exceeded 100 PNdB for a period of ten seconds or more.

(c) The presumptions provided in subdivisions (a) and (b) of this section shall be presumptions affecting the burden of proof.

Comment. As indicated in the Comment to Section 2, Section 3 attempts to provide specific content for the general directive of Section 2 and some assurance that the diminution in market value of the property in question is related to the impact of aircraft operations. However, the following problems are noted.

Subdivisions (a) and (b) state rebuttable presumptions affecting the burden of proof based on specific frequencies and levels of noise imposition. However, as presently stated, it would appear that only subdivision (b) would have any practical impact. Presumably the claimant in every case

initially would have the burden of proof. If the facts brought the case within the ambit of subdivision (a), the only effect would be that both Evidence Code Section 500 (party who has the burden of proof) and this specific statute would place the burden of proof on plaintiff; accordingly, the presumption itself would have no effect on the case. See Comment to Evidence Code Section 606 (effect of presumption affecting burden of proof). (If, on the other hand, the facts were such that subdivision (b) would be applicable, there would, of course, be a shifting of the burden of proof from plaintiff to defendant.) At least two suggestions could be offered to give subdivision (a) meaning. First, the presumption could be made conclusive. This, however, would seem to be an unwarranted invasion of the fact-finding process, and needless to say would require great care in the setting of standards of quantity and quality of noise. Second, the section could provide that these presumptions be overcome only by clear and convincing proof. "When such a presumption is relied on, the party against whom the presumption operates will have a heavier burden of proof and will be required to persuade the trier of fact of the nonexistence of the presumed fact by proof 'sufficiently strong to command the unhesitating assent of every reasonable mind.'" Comment, Assembly Committee on Judiciary, Evidence Code § 606 (West 1966). It could be argued that the latter solution is more theoretical than real, but it does seem to offer the possibility of greater judicial control.

The Commission will, of course, need assistance in setting the standards provided in Section 3. How much noise is "noisy" the staff cannot begin to guess. The requirement of 20 incidents of imposition a day does, however, seem high. Certainly if residential property is so situated that the occupants will be startled out of sleep more than once or

twice a night, one would expect its market value to suffer. The applicable test period also presents problems. If the period is fixed with reference to trial (as suggested by Professor Van Alstyne), the claimant can only guess when he files his action whether the condition will continue. On the other hand, fixing the period with reference to the date of filing suit would be inconsistent with the rule that often requires valuation to be determined as of the date of trial and with subsequent sections herein which permit reduction of damages by defendant's post-trial actions. Moreover, it could cause the defendant significant problems in checking the accuracy of the basic facts, particularly where operations have been altered after the date of filing. The duration of the test period raises the problem of seasonal or other variations in operations. Where, for example, a certain runway is used only one month or three months out of the year, average figures may not reflect the impact of such use on the surrounding property.

Sec. 4. No recovery shall be permitted under this [chapter, article] for:

(a) Damages based on personal annoyance, loss of pleasure, or unjustified fear and apprehension of physical injury from objects falling from the aircraft or from crash landings of aircraft;

(b) Any diminution in the value of real property attributed principally to reduction or elimination of speculative future developmental prospects for use of the affected land.

Comment. Subdivision (a) of Section 4 provides a specific statutory statement of the rule implicit under Section 2 and discussed in the Comment to that section. It is included here because that seemed to be the desire of the Commission expressed at the June, 1969 meeting. It

could be considered excess baggage but it does offer an unequivocal statement of the rule and could form the basis for a helpful jury instruction. A danger, however, exists in its misinterpretation as a limitation on the recovery of any diminution in market value. This subdivision should merely preclude recovery of damages directly for personal annoyance and loss of pleasure; it should not affect recovery for a diminution in market value based on the personal annoyance and inconvenience of anyone occupying the property.

Subdivision (b) is perhaps too all-encompassing. Assume, for example, that land held in some marginal use has an increased fair market value based on developmental prospects before any airport even exists nearby. If the property is then taken by direct condemnation for an airport, the full fair market value must be paid. Similarly, under existing rules, if by reason of persistent and harmful overflights, the property is "taken" by inverse condemnation, full value must be paid. It seems inconsistent therefore (and perhaps even unconstitutional) to artificially limit recovery under subdivision (b) where the "taking" is not caused by overflights but the imposition of noise. It seems preferable to omit (b), and rely on the usual rules of valuation controlling speculative uses and offsetting special benefits (and eventually perhaps general benefits).

Sec. 5.1. When any airport operator determines that the public interest and convenience require a change in operations which might subject the operator to liability under Section 2, it may adopt a resolution declaring its intention to establish such change. Such resolution shall contain:

(a) The determination referred to above.

(b) A description of the changes proposed, the real property affected by such changes, and the effect of such change, including the quantity and quality of aircraft noise anticipated on each parcel of real property described.

(c) A general statement of the source or sources of moneys proposed to be used to pay damages, if any, allowed or awarded to any property owner by reason of the changes proposed.

(d) A day, hour and place for the hearing by the airport operator of protests and objections to the establishment of the proposed changes, and a statement that any and all persons having any objection to the establishment of the proposed changes may file a written protest with the clerk of the legislative body at any time not later than the hour so fixed for the hearing.

(e) A statement that any person owning or having any legal or equitable interest in any real property which might suffer legal damage by reason of the establishment of the proposed changes may file a written claim of damages with the clerk of the legislative body at any time not later than the hour so fixed for hearing; that such written claim must describe the real property as to which the claim is made, must state the exact nature of the claimant's interest therein, must state the nature of the claimed damage thereto, and must state the amount of damages claimed; that failure to file such written claim within the time provided shall be deemed a waiver of any claim for damages or compensation and shall operate as a bar to any subsequent action seeking to recover damages on account

of such establishment; and that the filing of such a claim shall operate as a bar in any subsequent action to the recovery of any damages or compensation in excess of the amount stated in such claim.

Comment. Sections 5.1 through 5.4 are based on the "holler if you're hurt" provisions of the Pedestrian Mall Law of 1960. Sts. & Hwys. Code §§ 11200, 11300, 11302, 11304. Sections 5.2 and 5.3 merely prescribe the manner of giving notice: 5.2 (publication); 5.3 (mailing to owners and others). These sections will not be discussed further.

In essence, Sections 5.1 and 5.4 permit an airport operator to give notice of potentially damage-producing operations, to wait 180 days and then determine the number and size of the claims which these operations will produce and based on such information proceed accordingly. The difficulties are obvious. The operator will have to determine the quantity and quality of noise on each parcel of property affected by the change in operations. (That is, every parcel that the operator wishes to bind under this procedure.) One would guess that this would require test flights at least and a fairly extensive (and expensive?) survey of noise levels. The operator's problems seem insignificant, however, in comparison to the owner's. Assuming that he receives a copy of the resolution under Section 5.3, the owner, prior to the actual initiation of any operations, based on the information supplied in the resolution (e.g., so many incidents of so much noise per day, week, etc.) must estimate the effect of these operations on the fair market value of his property and submit a claim therefor within 180 days at the risk of being barred forever from recovery. It is at least questionable whether this procedure is realistic. One way to

resolve the owner's difficulties is to eliminate the claim as a prerequisite to suit; however, it seems this would simply emasculate the procedure.

Sec. 5.2. The resolution of intention shall be published pursuant to Section 6065 of the Government Code [once a week for eight consecutive weeks] in a newspaper of general circulation published within the county, city, or city and county, as the case may be, where the airport is located. The first publication shall be not less than 180 days prior to the date fixed therein for hearing. In a city where no such newspaper is published, the resolution shall instead be so published in a newspaper of general circulation published in the county in which the city is located.

Sec. 5.3. A copy of the resolution shall be mailed, by certified mail with return receipt requested, not less than 180 days prior to the hearing to each person to whom any of the following described lands is assessed as shown on the last equalized assessment roll, at his address as shown upon such roll, and to any person, whether owner in fee or having a lien upon, or legal or equitable interest in, any of such lands whose name and address and a designation of the land in which he is interested is on file in the office of the city clerk or county clerk, as the case may be. Such lands are as follows:

(a) All parcels of land described in the resolution pursuant to subdivision (b) of Section 5.1.

(b) If assessments are to be levied to pay for any of the changes made or damages incurred, then all parcels of land within the assessment district.

The airport operator may determine that such resolution shall also be mailed to such other person as it may specify.

Sec. 5.4. (a) Not later than the hour set for hearing any person owning, or having any legal or equitable interest in, any real property which might suffer legal damage by reason of the establishment of the proposed changes in operations may file with the airport operator a written claim of damages. Such written claim must describe the real property as to which the claim is made, must state the exact nature of the claimant's interest therein, must state the nature of the claimed damage thereto, and must state the amount of damages claimed. The failure to file such written claim within the time provided shall be deemed a waiver of any claim for damages or compensation and shall operate as a bar to subsequent action seeking to recover damages on account of such establishment. Except as provided in subdivision (b) of this section, the filing of such claim shall operate as a bar in any subsequent action to the recovery of any damages or compensation in excess of the amount stated in such claim.

(b) Notwithstanding subdivision (a) of Section 5.4, no claim for damages pursuant to Section 2 shall be barred, where the claimant establishes either that his property was not included in the description set forth in the resolution of intention or that the quality or quantity of aircraft noise affecting his property is greater than that described in the resolution of intention.

Sec. 6. Any airport operator subject to liability under Section 2 may undertake reasonable steps, including physical improvements to the property affected, to minimize or prevent damage caused or imminently threatened by aircraft operations.

Comment. Section 6 simply authorizes the airport operator to undertake "physical solutions" to the problems caused by the operations of the airport. As a general proposition it seems sound; but: (1) should the operator be permitted to enter property over the protest of the owner? (2) if not, does the protest operate as a bar to recovery? (3) should the authorization cover only prejudgment steps? See Section 7. If so, the operator is compelled to guess whether he will be held liable without mitigation. On the other hand, if he may wait until after judgment, is the procedure provided by Section 7 adequate to cover the situation? At the very least, it seems to require a tremendous amount of guesswork as to the effect of the mitigating steps upon the fair market value of the property.

Sec. 7. In determining any damages recoverable under Section 2, the trier of fact shall consider the effect as though completed of any mitigating steps undertaken or proposed by the airport operator pursuant to Section 6. Where such steps have not been completed, the court is authorized to render a conditional judgment subject to final completion of the steps as proposed.

Sec. 8. (a) In determining any damages recoverable under Section 2, the trier of fact shall consider the value of the property at its highest and best use in accordance with zoning restrictions applicable at the time of trial.

(b) Notwithstanding subdivision (a), the court is authorized to render a conditional judgment based upon a change of zoning and allow the airport operator a reasonable period of time to secure such zoning change where the change would permit the use of the property affected for a purpose that would significantly reduce the damages otherwise recoverable.

Comment. Subdivision (a) states the rule that would presumably apply in the absence of a specific provision. It is subject to the implied exception that the trier of fact shall consider the effect of future zoning where there is a reasonable probability of zoning change.

Subdivision (b) permits the court to render a conditional judgment in the stated circumstances. To implement this procedure, as early as pretrial, the possibility of a zoning change should be thoroughly explored. Evidence could be introduced (appraisal testimony) showing the value of the property with and without a zoning change, and a special verdict reflecting these alternatives rendered by the trier of fact. The chief advantage of this procedure is that it permits post-trial changes to be made based on greater knowledge of the consequences of change. On the other hand, the procedure does introduce an added source of confusion into what already promises to be a difficult case to litigate.