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Air Law -- Navigable Airspace -- State Jurisdiction -- Complaints of Landowners Adjacent to Airports

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NOTES

Air Law

NAVIGABLE AIRSPACE — STATE JURISDICTION — COMPLAINTS OF LANDOWNERS ADJACENT TO AIRPORTS

Introduction

Major airlines have recently announced the placement of orders for jet-powered commercial aircraft for use in the air transport service. With these announcements, federal agencies and commissions, municipal governments, and airline companies more actively considered the multiple problems which the introduction of jet aircraft would bring to the air transportation industry. One major concern has been the anticipated effect of the noise emitted by the jet engine, not only upon the passengers and crew, but upon the landowners in the suburban communities adjacent to an airport.[1] Many nuisance cases have arisen in the past wherein neighboring property owners and communities have alleged the noise and low flights of propeller-driven aircraft in using a nearby airport were an unreasonable interference with the use and enjoyment of their land. Numerous similar complaints are expected when jet transports commence to use these same airports.

The amplified and higher pitched sound emitted by the jet engines of these airliners is expected to be objectionable to property owners notwithstanding manufacturers' assurances that Noise-supressing devices will be perfected before the airliners are delivered. The problem has reached such proportions that in 1951 the New York Port Authority barred aircraft driven by jet engines from all terminals under its jurisdiction until the noise occasioned by the aircraft can be demonstrated not to have a deleterious effect upon surrounding communities.[2]

A second prominent concern is the knowledge that jet transports must fly longer and shallower flight patterns when landing or taking off than propeller-driven aircraft.[3] What will be the effect upon an adjacent land owner of such flights? Cases are legion in which the allegation was made that low flights by propeller-driven airplanes as they used an adjoining airfield constituted a trespass to the landowner's property. Since these high-speed jet transports will follow longer and shallower glide patterns when approaching or leaving airports, bordering landowners who were not previously affected can now be expected to take up the cry of trespass.

Inasmuch as these complaints will be brought, for the most part, in the state courts, it is the primary purpose of this Note to discuss the power of these forums to afford relief to property owners affected by the noise and low flight of a jet transport. But the federal government plays the principal role in regulating commercial aviation; consequently,

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1 Fraleigh & Goddard, *Airport Planning and Management*, 23 J. AIR L. & COM. 160 (1956).

2 Goldstein, *The Over-all Problem*, 24 J. AIR L. & COM. 172 (1957).

3 Ireland, *Airport Problems of the Airlines*, 23 J. AIR. L. & COM. 12 (1956).

the authority of state courts to grant appropriate relief must be viewed against this background. Federal regulation in this area has been both broad and sweeping, the result of which has been to sharpen the age-old jurisdictional conflict between the state, which seeks to protect the citizen in the full use and enjoyment of his property, and the federal government, which recognizes the policy that public interest in commercial aviation can best be served by a single regulating authority.

Federal Regulation of Air Commerce

Congress has the authority to legislate in matters of commerce extending over and through state boundaries as derived from the commerce clause of the Constitution which provides that "The Congress shall have Power. . .to regulate Commerce with foreign Nations, and among the several States. . . ."[4] Clearly the air transport service involves interstate commerce which Congress could regulate if it so desired. Pursuant to this constitutional power, Congress delegated to the Civil Aeronautics Board, by the Air Commerce Act of 1926,[5] amended by the Civil Aeronautics Act of 1938,[6] the authority to regulate air commerce. The exclusive authority to rule the airspace above the United States is declared to be in the public domain.[7] Furthermore, any citizen of the United States is recognized as having a public right of freedom of transit through the navigable airspace.[8] Additional provisions define air commerce as encompassing all operations of aircraft flying in interstate or foreign commerce,[9] and that " 'Navigable air space' means air space above the minimum altitudes of flight prescribed by regulations. . . ."[10]

To assist the Civil Aeronautics Board in providing for the safety and protection of those engaged in air commerce, Congress specifically granted the Board authority to provide rules and regulations for minimum altitudes of flight so as to prevent collisions of aircraft either with the ground or other aircraft.[11] Under these provisions, the Board has prescribed general flight rules for persons and aircraft employed in air commerce. Foremost in importance is section 60.17 of the Civil Air Regulations which establishes minimum safe altitudes of flight for all airplanes when

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4 U. S. CONST. art. I, § 8, cl. 3.

5 44 STAT. 568 (1926), 49 U.S.C. § 171-246 (1952).

6 52 STAT. 973 (1938), 49 U.S.C. § 401-722 (1952).

7 52 STAT. 1028 (1938), 49 U.S.C. § 176 (a) (1952).

8 52 STAT. 980 (1938), 49 U.S.C. § 403 (1952).

9 52 STAT. 977 (1938), 49 U.S.C. § 401 (3) (1952).
" 'Air Commerce' means interstate, overseas, or foreign air comerce or the transportation of mail by aircraft or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce."

10 52 STAT. 979 (1938), 49 U.S.C. § 401 (24) (1952).

11 52 STAT. 1008 (1938), 49 U.S.C. § 551 (a) (1952).
"The Board is empowered, and it shall be its duty to promote safety of flight in air commerce by prescribing and revising from time to time—"
". . . .
"(7) Air traffic rules governing the flight of, and for the navigation, protection, and identification of, aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between aircraft, and between aircraft and land or water vehicles."

flying over land or water.[12] This regulation serves a dual purpose. It is obviously intended as a safety measure for pilot, crew, and passengers, and for all beneath the air highway. However, for this discussion, its importance lies in defining the downward extent of navigable airspace over which the federal government has exclusive control since, by definition, the floor of the navigable airspace is contingent upon the determination of the minimum safe altitudes of flight. While this regulation specifically defines, in terms of "feet," the altitude an airplane must maintain when over congested areas, sparsely settled areas, or water, it does not similarly define in terms of "feet" the altitude an airplane must observe when landing or taking off.[13] Thus the question arises as to the status of an airplane engaged in these operations—is it within or without the navigable airspace?

Minimum Safe Altitudes Regulation and Navigable Airspace

There exists a division of authority as to whether an airplane is operating within the navigable airspace during the time it is making a landing or taking off. When confronted with such a determination, a state court will find it necessary to interpret the clause "Except when necessary for take-off or landing," as used in section 60.17 of the Civil Air Regulations; as indicated above, this regulation determines the downward extent of the navigable airspace.

The Civil Aeronautics Board, which promulgated the regulation, has interpreted it to mean that an airplane would be operating *within* the navigable airspace when flying a normal and necessary path as it approaches or leaves the airport.[14] When the regulation was issued, the Board also stated its reasons for not establishing minimum safe altitudes of flight to govern an airplane while landing or taking off. It was pointed out that the angles of climb and descent will vary depending upon the weather, the type of aircraft, and the nature of the terrain below. The

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12 14 C.F.R. § 60.17 (1956). "*Minimum safe altitudes.* Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes:
". . . .
"(b) *Over congested areas.* Over the congested areas of cities, towns, or settlements, or over an open-air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet from the aircraft. . . .
"(c) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In such event, the aircraft shall not be operated closer than 500 feet to any person, vessel, vehicle or structure. . . ."

13 See note 12 *supra.* Note the exclusion clause of this provision: "Except when necessary for take-off or landing . . . ."

14 Civil Air Regs. Interpretation 1. 19 FED. REG. 4602-03 (1954).
"[T]he Board construes the words 'Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes' where such words appear in § 60.17 of the Civil Air Regulations, as establishing a minimum altitude rule of specific applicability to aircraft taking off and landing. It is a rule based on the standard of necessity, and applies during every instant that the airplane climbs after take-off and throughout its approach to land. Since this provision does prescribe a series of minimum altitudes within the meaning of the act, it follows, through the application of section 3 [Civil Aeronautics Act of 1938], that an aircraft pursuing a normal and necessary flight path in climb after take-off or in approaching to land is operating in the navigable airspace."

Board was aided in its interpretation by the legislative history of the Air Commerce Act of 1926 which clearly indicates Congress intended the navigable airspace to extend downward to the ground surface at airports.[15]

However, the Supreme Court has interpreted the language in the regulation to mean that an airplane would *not* be operating *within* the navigable airspace when landing or taking off.[16] The Court reasoned that the express wording of the regulation meant that the navigable airspace extends downward only to the safe minimum altitudes of flight, and since no minimum altitudes for landing or taking off were imposed by any regulation of the Civil Aeronautics Board, an airplane must be considered to be outside the navigable airspace at those times.[17]

Conceivably, whether or not the court will afford the landowner relief from low flights of jet transports may well depend upon which interpretation of the regulation — that of the Supreme Court or that of the Civil Aeronautics Board—the court adopts. As an example, assume a state court found jet transports flew so low over adjoining land directly beneath the pattern which the planes must follow when arriving or departing from the airport that the flights ordinarily would have resulted in a trespass or constituted a nuisance. If the court adopted the interpretation of the Civil Aeronautics Board, *i.e.*, that the jet transports would have been operating within the navigable airspace during the time of landing or take-off, provided they were pursuing a "normal and necessary flight pattern," could the state court grant relief by enjoining similar flights at the presently dangerous altitude over the land in the future? Apparently, yes. But the answer is not without difficulty, for prior to consideration of the substantive question, the court must first dispose of the express statutory provision granting the federal government exclusive control of the navigable airspace.[18]

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15 H. R. REP. No. 1162, 69th Cong., 1st Sess. 14 (1926).
"11. Navigable Airspace.—The House Bill provides a public right of freedom of interstate and foreign air navigation in the navigable airspace similar to the public right of such navigation upon navigable waters. Such navigable airspace comprises the airspace above the minimum safe altitudes of flight prescribed by the Secretary of Commerce. These altitudes would vary with the terrene [*sic*] and location of cities *and would coincide with the surface of the land or water at airports.* The power to fix various altitudes was, therefore, left to the discretion of the Secretary of Commerce, having regard to the above-mentioned and other relevant factors. . . ." (Emphasis added.)

16 United States v. Causby, 328 U.S. 256 (1946).

17 "The path of glide governs the method of operating—of landing or taking off. The altitude required for that operation is not the minimum safe altitude of flight which is the downward reach of the navigable airspace. . . . [I]t is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the statute. The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules. But Congress has defined navigable airspace only in terms of one of them—the minimum safe altitudes of flight." *Id.* at 263-64.

18 44 STAT. 574 (1926), 49 U.S.C. § 180 (1952). "[T]he term 'navigable airspace' means airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority, and such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation. . . ."

However, assuming the identical situation, if the court subscribed to the interpretation of the Supreme Court, *i.e.*, that the jet transports would be operating without the navigable airspace during the time of these flights, no such obstacle would be encountered inasmuch as the transports would be traveling in airspace over which the federal government clearly had not pre-empted regulation.[19]

The remainder of this Note will be devoted to an examination of the cases wherein the court was confronted with the decision whether relief should be granted to property owners who sustained irreparable injury occasioned by the repeated low flights of propeller-driven aircraft while using an adjoining airport. The objective will be to determine the manner in which the court treated the two opposing interpretations concerning navigable airspace when confronted with allegations of nuisance, trespass, or "taking."

Nuisance

Under the nuisance theory the landowner may allege generally that his use and enjoyment of the land is interfered with to such a marked degree, as a direct result of the repeated low flights over his land by airplanes as they arrive or leave an adjoining airport, that the flights constitute a nuisance at common law. He may ask either for damages or an injunction restraining any future flights along the same glide pattern or both. To support his allegation of interference with his use and enjoyment of the land, he may attempt to show any or all of the following conditions: that he suffers from the noise and vibration of low-flying aircraft; that he suffers from the glare of landing lights at night; that he is harassed by sleepless nights and nerve-shattering days; that normal conversations within his house or over the telephone are impaired; that his family lives in constant fear that the planes will crash into their home.

In *Gardner v. County of Allegheny*,[20] a landowner asked the Supreme Court of Pennsylvania to find that the court below had power to enjoin the repeated low flights of propeller-driven aircraft using an adjoining airfield. After discussing the relative powers of the federal and state governments, the true definition of navigable airspace and the minimum safe altitudes of flight, the court held that a court of equity had the power to enjoin prospective flights at the dangerously low altitude. The court based its decision not on any interpretation of navigable airspace, but on the basis that the repeated low flights constituted a real and present danger to the landowner's life and property. However, the court admitted that if it had accepted the view of the Civil Aeronautics Board—that the airplanes would be operating within the navigable airspace—it would not have to decide whether a state court could enjoin such a flight because the pleadings did not indicate that the aircraft *necessarily* were occupying the airspace so close to the ground.[21] Through this deficiency in pleading the court avoided the question whether a state court could enjoin the

19 *Ibid.*

20 382 Pa. 88, 114 A.2d 491 (1955).

21 *Id.* at 501.

flight of an airplane expressly found to be operating within the navigable airspace, but which was interfering with the landowner's use and enjoyment of his property.

The language of other state courts would imply and infer that if repeated low flights of aircraft result in an unreasonable interference with the use of the land or constitute a dangerous condition to the well-being of those beneath the aircraft, the courts would have the power to issue restraining orders prohibiting future flights along present flight patterns nothwithstanding that the aircraft may be operating within the navigable airspace.[22] Reason indicates the wisdom of this tendency since the landowner's interests in the safety of his family, himself, and his property should not be made contingent upon a judicial determination as to the downward extent of the navigable airspace. To these courts the extent of the boundaries of the navigable airspace apparently would make little difference.

The Civil Aeronautics Board has stated that a flight which is dangerous to a property owner would be an unlawful violation of its regulations even though the airplane was operating within navigable airspace. This applies even during take-off or landing.[23] Further, it has been stated that it is not controlling that the federal government has exclusive control in the navigable airspace for this policy was not meant to abridge the lawful rights incident to ownership of land.[24] Other courts have suggested that to interpret the minimum safe altitudes regulation of the federal government in such a manner as to allow interference with recognized property rights would be to give the regulation a strained and unnatural construction.[25]

Apparently all of the authorities seem to agree the safety of the landowner is paramount, and if repeated low flights of an airplane constitute a nuisance rather than a mere inconvenience, relief will be given regardless of the position of the airplane relative to navigable airspace.

Trespass

The landowner may couple with his complaint of nuisance a general allegation of trespass which also results from the repeated low flight of an aircraft over his property. Various theories have arisen as to whether

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22 Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949); Reynolds v. Wilson, 67 Pa. D. & C. 286 (1949); Brandes v. Mitterling, 67 Ariz. 349, 196 P.2d 464 (1948); Hyde v. Somerset Air Service, 1 N.J. Super. 346, 61 A.2d 645 (1948); Dlugas v. United Air Lines, 53 Pa. D. & C. 402 (1944); Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d 245 (1942); Vanderslice v. Shawn, 26 Del. Ch. 225, 27 A.2d 87 (1942).

23 Gardner v. County of Allegheny, 382 Pa. 88, 114 A.2d 491, 502 (1955). The applicable general flight rule is: "§ 60.12 *Careless or reckless operation.* No person shall operate an aircraft in a careless or reckless manner so as to endanger the life or property of others." An explanatory note specifies examples of operations which could endanger the lives or property of others: "Any person who 'buzzes', dives on, or flies in close proximity to a farm, home, any structure, vehicle, vessel, or group of persons on the ground." 14 C.F.R. § 60.12 (1956).

24 Anderson v. Souza, 38 Cal.2d 825, 243 P.2d 497, 506 (1952).

25 Gay v. Taylor, 19 Pa. D. & C. 31, 36 (1932); Smith v. New England Aircraft Co., 270 Mass. 511, 170 N.E. 385, 392 (1930); *cf.* Warren Twp. School Dist. No. 7 v. Detroit, 308 Mich. 460, 14 N.W.2d 134 (1944).

an airplane is trespassing over the lands of adjacent property owners when landing or taking off at an airport.[26] It is beyond the scope of this Note to discuss the merits of these theories. It should not make any difference to a state court subscribing to any one of these several views which interpretation of the minimum safe altitudes regulation it will follow when confronted with an allegation of trespass. If the landowner does not allege in his complaint that the flight of the airplane is so low as to constitute an actual interference with his possession or beneficial use of the soil, but merely brings a general allegation that the very presence of the airplane in the airspace above his property constitutes a trespass per se, adherence by the court to either interpretation of the regulation defining the downward extent of the navigable airspace will have the same effect.

If the state court accepts the Civil Aeronautics Board's interpretation, that the navigable airspace extends downward along the angle of travel of the airplane as it lands or takes off, then neither the aviator nor his passengers would be trespassers since every citizen of the United States is recognized as having a public right of transit through the navigable airspace.[27] If the court follows the interpretation of the Supreme Court—that the airplane would be without the navigable airspace during such operations—it would be difficult to understand how the aviator or his passengers could be classified as trespassers. Inasmuch as the airplane necessarily must fly through non-navigable airspace—under the Supreme Court's interpretation, the first 1,000 feet of airspace above the airport would be non-navigable—such a finding appears unreasonable, although it has been pointed out that the passage of the airplane in this non-navigable airspace may constitute a *technical* trespass.[28]

But adjoining landowners will not merely allege a general complaint of trespass. They will specifically complain the flights are so low as to result in an actual interference or invasion of their soil and either demand damages or an order restraining future flights over their property along the present glide pattern. Again, in the face of such a complaint, it apparently makes little difference which interpretation of the minimum safe altitudes regulation regarding the boundaries of the navigable airspace a state court accepts. Once a court determines that the repeated flights would be so low as to invade the airspace necessary for the beneficial use or possession of the soil, thereby constituting a trespass, relief will be granted the injured property owner. Although the courts do not expressly say so, it is inferred this result would be reached whether or not the airplane is operating within the navigable airspace.[29]

Just as in the nuisance situations, the courts do not buttress their decisions with a determination of the downward extent of navigable

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26 RHYNE, AIRPORTS AND THE COURTS 154-63 (1944).

27 52 STAT. 980 (1938), 49 U.S.C. § 403 (1952). "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States."

28 Burnham v. Beverly Airways, Inc., 311 Mass. 628, 42 N.E.2d 575, 579 (1942).

29 Gardner v. County of Allegheny, 382 Pa. 88, 114 A.2d 491 (1955); Burnham v. Beverly Airways, Inc., 311 Mass. 628, 42 N.E.2d 575 (1942); *cf.* Warren Twp. School Dist. No. 7 v. Detroit, 308 Mich. 460, 14 N.W.2d 134 (1944).

airspace, but wisely observe the effects of the frequent low flights on the landowner and his property. When the aircraft is considered to be trespassing and the landowner is confronted with a condition fraught with imminent peril, the courts will enjoin the repetition of similar flights regardless of the altitude and airspace involved.[30]

"Taking"

There is yet another action available to the landowner whose interests in the use and enjoyment of property are impaired by low-flying military aircraft. Previously he was limited to such actions as negligence, nuisance, and trespass. But these have been extended to include "taking" which entitles the landowner to compensation from the federal government for a servitude imposed upon his land through the low flights of military airplanes over his property under the provisions of the fifth amendment.

Relief for a "taking" was first sought in *United States v. Causby*,[31] where the landowner brought suit against the United States for an alleged "taking" by the government of his home and chicken farm which were located next to a government airfield. His contention was that the frequent low flights of the military aircraft in using the airfield constituted the "taking" of his property. The Supreme Court held the government had taken an easement of airspace because the flights were "so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."[32]

The question now arises whether a landowner, suffering the same invasion of his rights as the property owner in *Causby*, could maintain an action for a "taking" not against the federal government, but against one of the political sub-divisions of a state. An increasing number of airports are owned by either municipal or county governments and are operated as commercial air terminals through leases of facilities to airline companies; therefore, the municipal or county government would be a proper defendant in the action. The *Causby* case would not be controlling because it concerned military aircraft and a military operated airport; furthermore, there is an express prohibition against the taking of private property for public use without just compensation contained in the fifth amendment which is intended solely as a limitation on the federal government.[33] However, today all states either by a specific provision in their constitutions,[34] by statutes,[35] or by decisions of their highest

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30 *Ibid.*

31 328 U.S. 256 (1946).

32 *Id.* at 266.

33 Barron v. Baltimore, 32 U.S. (7 Pet.) 242, 250-51 (1833). "We are of opinion, that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use, without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the . . . states."

34 Forty-five states have such provisions, See *e.g.*, CAL. CONST. art. I, § 14; N.Y. CONST. art. I, § 7; PA. CONST. art I, § 10; OKLA. CONST. art. II, § 24.

35 Although the constitution in Kansas is silent with respect to this right which appears in the United States Constitution, Kansas affords the same protection to private landowners by statute. KAN. GEN. STAT. ANN. § 26-202 (1949).

court[36] provide that private property cannot be taken for public use without just compensation. Thus it would appear that a property owner suffering from the identical conditions imposed upon his land by commercial aircraft, rather than military, which operate from a county or municipally owned airport, rather than from a military airfield, as those imposed on the landowner in *Causby* would be able to maintain an action for a "taking" against a county or a municipality although, to date, no such result has been reached by the courts.

In an action for a "taking" should it make any difference whether the airplanes are operating within or without the navigable airspace at the time of the alleged taking? In *Causby* the Court rejected the government's interpretation of the minimum flight regulations defining the downward extent of the navigable airspace and formulated its own interpretation which has been alluded to throughout this Note.[37] As a result the Court found the planes were not operating within the navigable airspace and awarded damages for a "taking" of private property. One can only speculate whether the same decision would have been rendered if the Court, instead of formulating its own interpretation of the minimum safe altitudes regulation prescribing the boundaries of the navigable airspace, had adopted the interpretation of the government which placed the offending aircraft within the navigable airspace. The Court would then have to decide whether there could be a "taking" of private property by low-flying aircraft operating within airspace over which control is vested in the federal government.

However, *Gardner v. County of Allegheny*,[38] in holding that a court of equity could not assess damages for a "taking," does not foreclose the possibility of recovering damages when the flights are so low and so frequent as to be a direct and immediate interference with the use and enjoyment of the land notwithstanding the flights may have been within the navigable airspace.[39] Even the government on oral argument in the *Causby* case conceded that flights so low and so frequent so as to render property uninhabitable would be a "taking." The Court agreed that under these conditions this conclusion would follow.[40] These latter two statements, when viewed in the background of the government's main contention that the military aircraft were operating within the navigable airspace, are extremely noteworthy. They indicate that a determination of the boundaries of the navigable airspace is unimportant and subordinate to a determination that the low flight of an airplane interferes unreasonably with the use of the landowner's soil. For once

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36 The Supreme Courts of North Carolina and New Hampshire have held that private property cannot be taken for public use without reasonable compensation. Yancey v. North Carolina St. Highway & Pub. Wks. Comm'n, 222 N.C. 106, 22 S.E. 2d 256 (1942); Goodrich Falls Elec. Co. v. Howard, 86 N.H. 512, 171 A. 761 (1934).

37 See note 17 *supra*.

38 382 Pa. 88, 114 A.2d 491 (1955).

39 114 A.2d at 505.

40 328 U.S. 256, 261 (1946). However, the Court stated that the use and enjoyment does not have to be completely destroyed before there can be a "taking." It will be sufficient if the use of the airspace immediately above the land limits the utility of the land or causes a diminution in its value. *Id.* at 262.

it appears to the court's satisfaction that the interference has been so substantial as to impose a servitude upon the landowner, compensation can be awarded for a "taking" regardless of the status of the airplane as to navigable airspace.

State and Municipal Regulation of Air Commerce

Undoubtedly, the importance of the two theories defining the boundaries of navigable airspace becomes most significant when regulations controlling the flight of ariplanes, which are in direct conflict with those issued by the federal government through the Civil Aeronautics Board, are promulgated by a state or one of its political sub-divisions. Whether or not the state courts will give effect to these regulations may well depend upon which airspace—navigable or non-navigable—is being regulated by the state or municipal governments. For example, in *Allegheny Airlines v. Village of Cedarhurst,*[41] a village board enacted an ordinance which prohibited flights below 1,000 feet within the village boundaries. The ordinance was aimed specifically at those aircraft using Idlewild field since the village was located within one mile of that airport. Because enforcement of the ordinance would seriously impair the operation of the airport (the approach to one of its major runways is directly over the village), interested parties brought suit to have the ordinance declared invalid. The court struck down the ordinance and supported its decision by a determination that Congress has pre-empted the power of regulation and control of aircraft; therefore, municipal governments, including states, are precluded from enacting contrary or conflicting legislation.[42] It should be noted that the case did not concern the rights of adjoining landowners;[43] thus the questions of nuisance, trespass, or "taking" were not in issue. The court accepted as controlling the Civil Aeronautics Board's interpretation that the airplanes were operating within navigable airspace as they flew over the village, and concluded that since the federal government had regulated air traffic in this airspace to such a marked degree, it barred through pre-emption any further regulation of this airspace by the state or municipal governments.

The question arises as to whether the court would have invalidated the ordinance if it had accepted the Supreme Court's interpretation of the downward extent of navigable airspace instead of the Civil Aeronautics Board's. The court could not turn to the Civil Aeronautics Act of 1938 for its authority to strike down the ordinance because the act only provides for regulation of air traffic in the navigable airspace[44] and, under the interpretation of the Supreme Court, the airplanes would be operating without the navigable airspace. However, another element which the court might consider is that the airplanes *must of necessity* fly through

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41 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd,* 238 F.2d 812 (2d Cir. 1956).

42 *Id.* at 881.

43 "No claim is now made by the defendant that those flights interfered with the enjoyment of the land beneath." *Id.* at 879.

44 "It is apparent that Congress, by the enactment of the 1938 Aeronautics Act, adopted a comprehensive plan for the regulation of air traffic in the navigable airspace." *Id.* at 881.

non-navigable airspace as they move between the surface and the navigable airspace, a result reached under the interpretation of the Supreme Court; it may be troublesome to have one set of rules regulating altitude in the navigable airspace as provided by the Civil Air Regulations and another set regulating altitude in non-navigable airspace as provided by ordinances similar to that in the *Village of Cedarhurst* case.

Conclusion

The foregoing decisions and materials illustrate the need for further clarification of the minimum safe altitudes regulation if the conflict presently existing as to the downward extent of the navigable airspace is to be resolved. Perhaps in the not too distant future the dispute will be determined since the President's Airport Commission has recommended that section 60.17 of the Civil Air Regulations, governing the use of airspace, should be clarified in view of the diverse interpretations now imparted to the scope of the phrase "Except when necessary for take-off or landing."[45] Another possible solution would be to change the language of the Civil Aeronautics Act of 1938 so that the statute specifies what the status of an airplane would be relative to navigable airspace when landing or taking off.

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45 *Hearings Before the Committee on Interstate and Foreign Commerce of the Senate*, 83d Cong., 2d Sess. 818 (1954).