

AVIATION NOISE ABATEMENT: FEDERAL CONTROL BUT LOCAL LIABILITY?

Courts traditionally recognize that loud or objectionable noises may constitute a nuisance.¹ Aviation noise has been a plentiful source of such nuisances, creating a seemingly endless flow of litigation.² While federal laws³ preempt⁴ several aspects of aviation noise control, local and state authorities have nevertheless tried to enact ordinances and regulations designed to abate aircraft noise.⁵ In addition, individuals adversely affected by aircraft noise have turned to the courts for relief.⁶ The extent of federal preemption in the field of

1. *E.g.*, *Hooks v. International Speedways, Inc.*, 263 N.C. 686, 140 S.E.2d 387 (1965) (drag racing); *Kramer v. Sweet*, 179 Or. 324, 169 P.2d 892 (1946) (slaughterhouse); *Seastream v. N.J. Exhibition Co.*, 67 N.J. Eq. 178, 58 A.532 (1904) (Sunday baseball). *See generally*, W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 583-84 (4th ed. 1971); Lloyd, *Noise as a Nuisance*, 82 U. PA. L. REV. 567 (1934); Spater, *Noise and the Law*, 63 MICH. L. REV. 1373 (1965).

2. The first reported aircraft nuisance case is *Smith v. New Eng. Aircraft Co.*, 270 Mass. 511, 170 N.E. 385 (1930) (refusing to enjoin flights over plaintiff's property absent showing of damages). For a survey of the early cases, see Lesser, *The Aircraft Noise Problem: Federal Power but Local Liability*, 3 URB. LAW. 175 (1971); Munro, *Aircraft Noise as a Taking of Property*, 13 N.Y.L.F. 476 (1967).

3. The Federal Aviation Act, 49 U.S.C. §§ 1301-1542 (1976); The Noise Control Act of 1972, 49 U.S.C. § 1431 (1976). For further discussion, see notes 15-21 and accompanying text *infra*.

4. For a general discussion of the concept and application of the preemption doctrine, see Note, *The Preemption Doctrine: Shifting Perspectives*, 75 COLUM. L. REV. 623 (1975); Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959).

5. *See, e.g.*, MINN. STAT. 473.216 (1976) (empowering the metropolitan council to determine and establish acceptable noise levels for the operation of aircraft and to create aircraft noise zones to assure compatible land use in the vicinity of airports); WASH. REV. CODE § 53.54.010 (1979) (authorizing the port commission to adopt a program of noise impact abatement through land management, mortgage insurance provisions, and soundproofing of structures within the area surrounding the airport). Other common actions include night-time operating restrictions, the establishment of noise preferential runway systems, and the exclusion of particular types of aircraft. For a summary of the types of actions taken by state and local authorities, see U.S. DEPT OF TRANSPORTATION, *AVIATION NOISE ABATEMENT POLICY* 21 (November 18, 1976).

6. Plaintiffs most often base their claims on a taking theory. They contend that

aviation noise abatement, as well as the range of remedial devices available to injured litigants, remains unclear, however.⁷ Significantly, the California Supreme Court in *Greater Westchester Homeowner's Ass'n v. City of Los Angeles*,⁸ recently held that federal preemption does not bar a nuisance action against a city-owned airport for personal injuries sustained as a result of noise from aircraft using the facility.⁹

the airport owner, by invading the plaintiff's airspace, has taken that property for public use. *See, e.g.*, *Griggs v. County of Allegheny*, Pa., 369 U.S. 84 (1962) (airport operator liable to property owner when direct overflights rendered the property undesirable for residential use); *United States v. Causby*, 328 U.S. 256 (1946) (U.S., as lessee of airport and operator of low flying military planes over plaintiff's property, liable for invasion of that property); *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962) (no taking of property in the absence of a direct overflight). *But cf.* *Thornburg v. Port of Portland*, 233 Or. 178, 376 P.2d 100 (1962) (no need to show direct overflight when evidence indicates substantial interference with the use and enjoyment of land); *Martin v. Port of Seattle*, 64 Wash. 2d 309, 391 P.2d 540 (1964) (plaintiff not required to show substantial interference with use of property if market value has sharply declined).

Plaintiffs basing their claims on a nuisance theory generally have been less successful. The doctrine of "legalized nuisance" usually precludes recovery. *E.g.*, *City of Newark v. Eastern Air Lines, Inc.*, 159 F. Supp. 750 (D.N.J. 1958) (suit to enjoin flights and recover damages for nuisance dismissed because of exclusive federal control of air commerce); *Loma Portal Civic Club v. American Airlines, Inc.*, 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964) (injunction not available to restrict aircraft operations that comply with federal and state laws and in furtherance of the public interest). *But cf.* *Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 A.2d 692 (1969) (injunction issued limiting the hours of operation of a private airport that did not accommodate public flights). For further discussion, see Note, *Airplane Noise: Problem in Tort Law and Federalism*, 74 HARV. L. REV. 1581 (1961).

7. *Compare* *City of Blue Ash v. McLucas*, 596 F.2d 709 (6th Cir. 1979) (airport proprietor has power to establish permissible noise levels at municipal airport), with *Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975) (federal legislation has occupied the field of aircraft noise control). For further discussion, see notes 41-58 and accompanying text *infra*. *See generally*, HILDEBRAND, *NOISE POLLUTION AND THE LAW* (1970); Fadem and Berger, *A Noisy Airport is a Damned Nuisance*, 3 S.W. UNIV. L. REV. 39 (1971); Muss, *Aircraft Noise: Federal Pre-emption of Local Control, Concorde and Other Recent Cases*, 43 J. AIR. L. & COM. 753 (1977); Note, *Aircraft Noise Abatement: Is There Room for Local Regulation?*, 60 CORNELL L. REV. 269 (1975); Comment, *Noise Pollution: Attempted Federal Control of Airplane Noise*, 18 NAT. RESOURCES J. 621 (1978); Note, *Shifting Aircraft Noise Liability to the Federal Government*, 61 VA. L. REV. 1299 (1975).

8. 26 Cal. 3d 86, 603 P.2d 1329, 160 Cal. Rptr. 733 (1979), *cert. denied*, 446 U.S. 933 (1980).

9. *Id.* In addition to sustaining the plaintiffs' nuisance action, the court permitted the recovery of damages for a taking of their property. *See* note 6, *supra*. The inverse condemnation remedy is well established in aviation noise cases and was not even discussed in the opinion. Therefore, this comment will not analyze inverse condemna-

In *Greater Westchester*, a group of owners and occupants of homes located near municipally owned Los Angeles International Airport (LAX) sued the city on a nuisance theory.¹⁰ Plaintiffs sought to recover damages for personal injuries¹¹ emanating from the arrivals and departures of jet aircraft at LAX. The city contended that federal legislation occupied the field of aviation noise reduction and thus rendered the city powerless to control such noise.¹² Relying on the proprietor exception to federal preemption provided by the United States Supreme Court in *City of Burbank v. Lockheed Air Terminal, Inc.*,¹³ the court analyzed the city's duties and powers as proprietor of LAX and ruled in favor of the plaintiffs.¹⁴

tion. See cases cited in note 6 *supra*; Russell, *Recent Developments in Inverse Condemnation of Airspace*, 39 J. AIR. L. & COM. 81 (1973); Stoebeck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. 207 (1967); Van Alstyne, *Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California*, 16 U.C.L.A. L. REV. 491 (1969).

10. In this context, the court defined nuisance as anything injurious to health, annoying to the senses, or detrimental to the use of property, "so as to interfere with the comfortable enjoyment of life or property." *Greater Westchester Homeowner's Ass'n v. City of Los Angeles*, 26 Cal. 3d 86, 98, 603 P.2d 1329, 1335, 160 Cal. Rptr. 733, 738 (1979), *cert. denied*, 446 U.S. 933 (1980).

11. *Id.* at 91, 603 P.2d at 1330, 160 Cal. Rptr. at 734. The California Supreme Court accepted the trial court's factual findings regarding the effects of the noise created by jet aircraft using LAX. The noise disrupted personal communication in the home, as well as telephone conversations and television reception; impeded the plaintiffs' ability to utilize the outside portions of their property; frequently prevented sleep; and interfered with the ability of students to study in their homes. *Id.* at 92, 603 P.2d at 1331, 160 Cal. Rptr. at 734.

12. *Id.* at 93, 603 P.2d at 1331, 160 Cal. Rptr. at 735. This comment focuses on the federal preemption argument raised by the city. The city also raised a state law defense, however. The city claimed that CAL. CIVIL CODE § 3482 (Deering), providing that an act expressly authorized by statute cannot constitute a nuisance, rendered the city immune from nuisance liability. The court rejected the city's argument, reasoning that statutes that broadly authorize and regulate airports and aircraft flights do not necessarily endorse their maintenance as a nuisance. *Id.* at 101, 603 P.2d 1329 at 1337, 160 Cal. Rptr. 733 at 740.

13. 411 U.S. 624 (1973). See notes 28-34 and accompanying text *infra*.

14. 26 Cal. 3d 86, 100, 603 P.2d 1329, 1336, 160 Cal. Rptr. 733, 739 (1979). The court awarded damages in the aggregate amount of \$86,000 for personal injuries. It did, however, reverse the court of appeals' postjudgment order awarding prejudgment interest. Acknowledging the speculative nature of any award for emotional and mental distress, the court asserted that granting retrospective interest to such an award would combine conjecture with speculation. The court also reversed the lower court's assessment of attorney's fees and remanded the case on that issue. *Id.* at 102-04, 603 P.2d at 1337-38, 160 Cal. Rptr. at 741-42.

The Federal Aviation Act¹⁵ is the foundation of an extensive federal scheme regulating air commerce and transportation. The Act declares that the United States has full and exclusive dominion over the nation's airspace.¹⁶ Although the original Act did not refer to noise control,¹⁷ Congress added an aircraft noise abatement amendment in 1968.¹⁸ Partly out of dissatisfaction with the Federal Aviation Administration's implementation of that enactment,¹⁹ Congress passed the Noise Control Act of 1972.²⁰ The Act provided for joint FAA and Environmental Protection Agency regulation of aircraft noise and sonic boom.²¹

The legislative histories of the 1968 and 1972 enactments reveal the scope of federal preemption intended by Congress.²² The Senate Commerce Committee Report endorsing the 1968 amendment indicated that the amendment preempted state and local governments

15. 49 U.S.C. §§ 1301-1542 (1976).

16. *Id.* at § 1508. The Act broadly empowers the Federal Aviation Administrator to develop and promulgate regulations to insure the efficient utilization of that airspace. *Id.* at § 1348(a). Specifically, the Administrator has the authority to control aircraft takeoffs, landings, navigation, and air traffic rules. *Id.* at § 1348.

17. This omission did not prevent the Administrator from issuing noise abatement regulations. Occasionally, as part of his responsibility to protect persons and property on the ground, he prescribed noise reduction regulations. *Id.* at § 1348(c). *See, e.g.*, 28 FED. REG. 15,422 (1967); 14 C.F.R. 60 (1963); 25 FED. REG. 1767 (1960).

18. Act of July 21, 1968, Pub. L. No. 90-411, 82 Stat. 395 (codified at 49 U.S.C. § 1431(b) (1976)). The amendment expressly directs the Administrator to promulgate standards for the measurement and control of aircraft noise and sonic boom, so as to afford present and future relief from such noise. The amendment enumerates several considerations designed to guide the Administrator. Among these are the technological and economic feasibility of attaining a proposed standard, the need to assure a high degree of safety, and the broad goal of promoting the public interest. *Id.* § 1431(d).

19. *See, e.g.*, Muss, *Aircraft Noise: Federal Preemption of Local Control, Concorde and Other Recent Cases*, 43 J. AIR L. & COM. 753, 773 (1977); Note, *Shifting Aircraft Noise Liability to the Federal Government*, 61 VA. L. REV. 1299, 1319 (1975). The FAA acknowledged that congressional dissatisfaction with its "methodical regulatory practice" led to the passage of the 1972 Act. U.S. DEP'T OF TRANSPORTATION, AVIATION NOISE ABATEMENT POLICY 30 (November 18, 1976).

20. Noise Control Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234 (codified at 49 U.S.C. § 1431 (1976)).

21. *Id.* at § 1431(c)(1). The Act authorized the Administrator of the EPA to conduct a study of the adequacy of FAA noise controls and standards. Upon completion of that study, the EPA had to submit proposed regulations to the FAA. After consideration of those regulations and further consultation with the EPA, the FAA could finally prescribe and amend noise reduction regulations. *Id.*

22. *See* notes 23-27 and accompanying text *infra*.

from exercising their police powers to abate aircraft noise.²³ Similarly, the report of the Senate Committee on Public Works, the committee that directed the passage of the Noise Control Act of 1972, provided that the Act would not alter the relationship between the federal, state, and local governments.²⁴

The scope of federal preemption, however, is not as absolute as it may first appear. The Committee Reports for both the 1968 and 1972 enactments suggest that Congress did not intend to limit the power of a state or municipal airport proprietor to control or regulate aircraft noise.²⁵ Thus, although Congress preempted the exercise of state and local police power in the field of aircraft noise regulation,²⁶ it did not restrict the powers of a governmental airport proprietor.²⁷

In *City of Burbank v. Lockheed Air Terminal, Inc.*,²⁸ the Supreme Court examined the amended federal legislation.²⁹ Plaintiffs challenged the validity of a municipal ordinance that placed an 11 p.m. to 7 a.m. moratorium on flight operations at the privately owned

23. The committee report declared that the amendment would merely expand federal power in an area already occupied by the federal government. According to the report, federal legislation would continue to preempt state and local governments from exercising their police powers to control aircraft noise by regulating aircraft in flight. S. REP. No. 1353, 90th Cong., 2d Sess. 6 (1968), *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2688, 2694.

24. The report expressly provided that the Act preserved the status quo regarding the relationship between federal, state, and local governmental authority. S. REP. No. 92-1160, 92d Cong., 2d Sess. 11 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4655, 4663.

25. The Senate Report that accompanied the 1968 noise abatement amendment quoted approvingly a letter from Secretary of Transportation Alan Boyd. The letter specifically stated that Congress did not design the legislation to curtail the powers of state or local governmental airport proprietors. The rights of an airport proprietor to promulgate regulations establishing permissible noise levels, and to exclude aircraft which fail to meet those levels, remained intact. The report concluded that Congress did not intend to substitute its judgment for that of the state or local airport proprietor. S. REP. No. 1353, 90th Cong., 2d Sess. 6-7 (1968), *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS, 2688, 2694.

The Senate Report endorsing the 1972 Noise Control Act expressly declared that its provisions in no way limited the responsibilities and powers of airport proprietors. S. REP. No. 92-1160, 92d Cong., 2d Sess. 11 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS. 4655, 4663.

26. *See* notes 23-24 and accompanying text *supra*.

27. *See* note 25 and accompanying text *supra*.

28. 411 U.S. 624 (1973).

29. *See* notes 15-21 and accompanying text *supra*.

Hollywood-Burbank Airport.³⁰ Invoking the standards for preemption articulated in *Rice v. Santa Fe Elevator Corp.*,³¹ Justice Douglas, writing for the Court, emphasized the comprehensiveness of both the Federal Aviation Act and the amendments provided by the Noise Control Act of 1972.³² He concluded that the pervasive federal scheme preempted the field of aircraft noise regulation.³³ The Court, however, specifically limited its holding to those attempts by state and local governments to control aircraft noise by exercising their police power. The Court did not address the limitations, if any, that apply to a municipality in its capacity as airport proprietor.³⁴

30. 411 U.S. at 625-26. Although the Hollywood-Burbank Airport accommodates public flights, it is privately owned. Significantly, *Burbank* did not involve a regulation imposed by a governmental airport proprietor.

31. 331 U.S. 218 (1947). In *Rice*, the Supreme Court asserted that the intent to preempt exists when: 1) the scheme of federal regulation so fully occupies the field as to reasonably establish an inference that Congress intended to leave no room for supplementary state action; or 2) the legislation regulates a subject matter in which the federal stake is so dominant, compared to state interests, that the federal scheme is assumed to bar state action on the same subject; or 3) the state legislation is directly inconsistent with the goals of the federal legislation. *Id.* at 230.

32. 411 U.S. at 632-33. Justice Douglas acknowledged the significance of the temporal sequence involved. He noted that the parties filed their complaint and the district court entered its judgment before the enactment of the Noise Control Act of 1972. The Court avoided charges of retrospective application of the Act, however, by concluding that the 1972 Act merely "reaffirmed" and "reinforced" existing federal control over aircraft noise. *Id.* at 633.

33. *Id.* The Court concluded that the FAA, in concert with the EPA, has exclusive control over aircraft noise, preempting state and local regulation.

34. *Id.* at 635-36. In a highly influential footnote, Justice Douglas quoted segments from the letter written by Secretary of Transportation Boyd. The excerpts stated that the amendment to the Federal Aviation Act did not curtail the powers of airport proprietors. *See* note 25 and accompanying text *supra*.

Justice Douglas then observed,

. . . [W]e are concerned here not with an ordinance imposed by the City of Burbank as 'proprietor' of the airport, but with the exercise of police power . . . [A]uthority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor.

Id. at 635-36, n.14.

In dissent, Justice Rehnquist criticized the police power/proprietary power distinction. He noted that the Hollywood-Burbank Airport is one of the few airports in the country that services federally certified air carriers but which is not owned by a governmental unit. "It simply strains credulity," he concluded, "[that] . . . Congress intended that all airports save the Hollywood-Burbank Airport could enact curfews." *Id.* at 652-53 (Rehnquist, J., dissenting).

Although the result in *Burbank* was not novel,³⁵ the Court's reasoning is significant. The Supreme Court based its decision totally on preemption of state police power. By failing to address other strong arguments,³⁶ the Court left a host of issues unanswered. The curfew in *Burbank* affected only one scheduled flight per week, which incidentally was intrastate.³⁷ The district court found the curfew violated the interstate commerce clause,³⁸ the Supreme Court skirted this issue.³⁹ Also, *Burbank's* language and rationale suggest that federal legislation has completely preempted the field of aircraft noise abatement. In fact, the decision only precludes actions by a municipality that does not own or operate its airport.⁴⁰

35. *Burbank* was not the first decision invalidating a local ordinance which attempted to control aircraft noise. In *American Airlines v. Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969) and *Allegheny Airlines v. Village of Cedarhurst*, 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd* 238 F.2d 812 (2d Cir. 1956), the Second Circuit struck down attempts by residents of communities adjoining what is now Kennedy Airport to regulate flights through their respective communities. In *Hempstead*, the court concluded that the ordinance and federal law were in direct conflict. *Cedarhurst* invalidated a minimum altitude ordinance, reasoning that federal preemption was essential to promote safety. *American Airlines, Inc. v. City of Audubon Park*, 297 F. Supp. 207 (W.D. Ky. 1968), *aff'd*, 407 F.2d 1306 (6th Cir. 1969), advanced a third rationale. The court invalidated the city's minimum altitude ordinance as an intolerable and undue burden on interstate commerce. *Id.*

36. See cases discussed at note 35 *supra*.

37. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. at 626. The only regularly scheduled commercial flight affected by the curfew was a Hollywood-Burbank stopover on a Pacific Southwest Airlines run from Oakland to San Diego every Sunday night.

38. *Lockheed Air Terminal, Inc. v. City of Burbank*, 318 F. Supp. 914, 927 (C.D. Cal. 1970). The district court feared the effect similar curfews would have if enacted by many municipalities. The court predicted national proliferation of such ordinances, and opined that "a serious loss of efficiency to the use of airspace" would result. In addition, scheduling difficulties would abound along with the disruption of passengers and goods. *Id.*

39. It is unclear whether the Supreme Court would have invalidated the ordinance on commerce clause grounds. The fact that the ordinance only eliminated an intrastate flight does not insulate that flight from congressional regulation. The "affectation" doctrine allows Congress to regulate intrastate activity that directly affects interstate commerce. See, e.g., *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Four dissenting justices discussed the issue. They agreed, however, that the impact of the Burbank ordinance was not an unreasonable burden on interstate commerce. 411 U.S. at 654 (Rehnquist, J., dissenting).

40. See note 34 and accompanying text *supra*.

The 6th Circuit recently noted that 475 airports are currently certified by the FAA to serve the United States and its possessions. Of that total, only two are not main-

In the aftermath of *Burbank*, courts have disagreed on the scope of the proprietor exception and its impact on the tort liability of airports.⁴¹ Some courts⁴² have virtually ignored the exception, giving no substance to the proprietor's power and responsibility.⁴³ The District Court of Northern California took a more moderate position in *Air Transport Ass'n of America v. Crotti*.⁴⁴ That case tested the validity of California regulations⁴⁵ requiring airport proprietors to meet specified noise standards.⁴⁶ The court held that proprietors may regulate and control ground noise but may not regulate aircraft in direct flight.⁴⁷

Several courts⁴⁸ have seized upon the *Burbank* Court's specific refusal to limit the authority of a governmental airport proprietor,⁴⁹

tained by governmental units, the Hollywood-Burbank Airport and the heliport atop the Pan American Building in New York City. *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1038 (6th Cir. 1979). The *Burbank* Court's failure to address the proprietor exception suggests that its holding applies only to those two privately owned airports.

41. *Greater Westchester Homeowner's Ass'n v. City of Los Angeles*, 26 Cal. 3d 86, 96, 603 P.2d 1329, 1333-34, 160 Cal. Rptr. 733, 737 (1979), *cert. denied*, 446 U.S. 933 (1980).

42. *See, e.g., County of Cook v. Priester*, 22 Ill. App. 3d 965, 318 N.E.2d 327 (1974) (county's attempts to impose weight restrictions at airport held invalid).

43. *See, e.g., Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975) (county operating airport held immune from liability for noise emanating from the airport provided it complied with federal laws; federal control in this area deemed exclusive). Although the court relied on *Burbank*, it completely disregarded the proprietor exception.

44. 389 F. Supp. 58 (N.D. Cal. 1975).

45. CAL. PUB. UTIL. CODE §§ 21669-69.4 (1970).

46. 389 F. Supp. at 62. The standards fell into two categories. One established maximum levels of airport noise to which communities could be exposed. The other established maximum noise levels for aircraft directly engaged in flight. *Id.*

47. *Id.* at 65. The court found the ground noise measures innocuous to aircraft traffic and in no way offensive to the federal regulation of air commerce. It rejected the provisions regulating noise levels of aircraft in flight, however, as unlawful intrusions into an area exclusively governed by federal law. *Id. Accord, San Diego Unified Port Dist. v. Superior Court*, 67 Cal. App. 3d 361, 136 Cal. Rptr. 557 (1977) (airport proprietor may properly regulate ground and facilities use but federal preemption precludes proprietary regulation of aircraft in flight).

48. *See, e.g., City of Blue Ash v. McLucas*, 596 F.2d 709 (6th Cir. 1979) (federal preemption does not preclude right of airport proprietors to set permissible noise standards); *Parker v. City of Los Angeles*, 44 Cal. App. 3d 556, 118 Cal. Rptr. 687 (1975) (preemption argument rejected as defense in inverse condemnation proceedings against municipal proprietor).

49. *See* notes 28-34 and accompanying text *supra*.

and the reasoning articulated in *Griggs v. County of Allegheny, Pa.*⁵⁰ These courts have expressed a broader interpretation of proprietary power. Decisions upholding the Port Authority of New York's power to ban flights of the Concorde supersonic transport⁵¹ illustrate this approach. The Second Circuit noted that traditional inverse condemnation law makes the proprietor liable for having insufficient air easements.⁵² As a corollary to this principle, the court concluded that a proprietor may limit its liability by restricting the use of its airport.⁵³

A similarly broad view of proprietary power surfaced in *National Aviation v. City of Hayward*.⁵⁴ The facts were essentially identical to those in *Burbank*,⁵⁵ except that the city that enacted the curfew owned the airport. The district court focused on the legislative histories of the 1968 and 1972 noise-related enactments,⁵⁶ emphasizing Justice Douglas' deference to them in *Burbank*.⁵⁷ It concluded that the federal legislation did not preempt noise reduction measures by

50. 369 U.S. 84 (1962) (successful inverse condemnation action against airport proprietor when noise from aircraft overflights rendered plaintiff's property undesirable for residential use). See note 6 *supra*. *Griggs* is especially significant because it clarified the reasons for imposing liability upon the proprietor. The Court noted that the proprietor had promoted and designed the airport including the location and runway direction. The Court observed that it was the proprietor's responsibility to obtain the land necessary for the airport's operation. It ultimately found that the proprietor had not acquired sufficient easements. 369 U.S. at 89. For a scholarly discussion of *Griggs*, see Hill, *Liability for Aircraft Noise: The Aftermath of Causby and Griggs*, 19 U. MIAMI L. REV. 1 (1964).

51. *British Airways Bd. v. Port Auth. of N.Y.*, 431 F. Supp. 1216 (S.D.N.Y. 1977), *rev'd*, 558 F.2d 75 (2d Cir. 1977), *on remand*, 437 F. Supp. 804 (S.D.N.Y. 1977), *modified*, 564 F.2d 1002 (2d Cir. 1977).

52. *Griggs v. County of Allegheny*, 369 U.S. 84 (1962) and progeny support this proposition. See notes 6 and 50, *supra*.

53. 558 F.2d at 83. The court required only that the Port Authority's regulations be reasonable, nonarbitrary, and nondiscriminatory. It thus deferred to the Port Authority's knowledge of the surrounding community. This intimate knowledge of local conditions qualified the proprietor to effectively confront the problem of noise reduction. *Id.* at 83, 564 F.2d at 1011.

54. 418 F. Supp. 417 (N.D. Cal. 1976).

55. See notes 28-34 and accompanying text *supra*.

56. See notes 15-27 and accompanying text *supra*. The court reprinted the much-quoted letter from Secretary of Transportation Boyd. See notes 25-27 and 34 and accompanying text *supra*. The *Hayward* court accurately described the letter as a critical item of legislative history upon which the Supreme Court based its opinion in *Burbank*. 418 F. Supp. at 420-21.

57. See notes 31-34 and accompanying text *supra*.

municipal proprietors.⁵⁸

While courts were struggling to define the scope of proprietary power, the FAA and Department of Transportation released a joint monograph⁵⁹ endorsing a broad role for airport operators in noise control.⁶⁰ The FAA expressly rejected exclusive federal control of aviation noise abatement.⁶¹ Instead, it imposed upon the airport proprietor the primary responsibility for reducing the effect of noise on surrounding residents.⁶² The FAA reaffirmed this position in 1978.⁶³

In *Greater Westchester*, the California Supreme Court adopted an

58. 418 F. Supp. at 424-25. Chief Judge Peckham, writing for the court, acknowledged that the court found itself "caught on the horns of a sharp dilemma." The dilemma involved a resolution of the conflicting positions presented by the *Burbank* Court. Judge Peckham reasoned:

If on one hand, we follow the dicta in footnote 14 of the *Burbank* opinion, which is intended to comport with the Court's holding in *Griggs*, we will severely undercut the rationale of *Burbank's* finding of preemption. If on the other hand, we disregard the proprietor exception as dicta in order to fully effectuate the *Burbank* rationale, we impose upon airport proprietors the responsibility under *Griggs* for obtaining the requisite noise easements, yet deny them the authority to control the level of noise produced at their airports.

Id.

The court finally resolved the issue on the basis of "[a] clear Congressional statement" that the federal legislation did not prevent airport proprietors from restricting use of their airports due to noise considerations. *Id.*

59. U.S. DEP'T OF TRANSPORTATION, AVIATION NOISE ABATEMENT POLICY (November 18, 1976).

60. *Id.* at 5. The FAA emphasized that cooperation among federal, state and local governments, and airport proprietors would be necessary to combat the aviation noise problem. *Id.*

61. *Id.* at 34, 49. The FAA acknowledged that it had refused to undertake full and exclusive control of aviation noise regulation. Citing the wide variety of airports and the communities they serve, and declaring that solutions to the noise problem must meet the needs of a particular airport environment, the FAA declined to establish a completely generalized policy. *Id.*

62. *Id.* at 50. Proprietors were saddled with this responsibility on the basis of their proximity to the noise problem and intimacy with local conditions and requirements. The FAA noted that many airport proprietors are public agencies with access to the machinery of local government. They are thus in an ideal position to implement their decisions. *Id.*

The FAA policy statement enumerated specific actions available to the airport proprietor. These included, but by implication were not restricted to: optimal site location, innovations in airport design, ground noise reduction measures, property acquisition, and restrictions on airport use that are non-discriminatory and neither obstruct the federal interests in air safety nor unreasonably interfere with interstate commerce. *Id.* at 5.

63. When the FAA established its rules governing SST's, the agency reiterated its position. The FAA stressed that proprietors had the legal authority to restrict the use

expansive interpretation of the proprietor's role, consistent with the FAA policy. Unlike other tribunals that have adjudicated similar disputes,⁶⁴ the *Greater Westchester* court focused on the planning and operation of the airport in question.⁶⁵ The court established a two-pronged analytical framework for assessing a municipal proprietor's power and liability.⁶⁶ The two prongs are: 1) the depth and nature of the city's involvement in the planning and operation of the airport, and 2) the means available to the city to minimize or alleviate noise damages.⁶⁷

As to the first factor, the court related that it was the city's decision to build, and later expand, the airport in the immediate vicinity of a residential area.⁶⁸ Furthermore, the city chose the location and direction of the runways and agreed to their usage by jet aircraft.⁶⁹ Although some of these plans involved federal cooperation, the city initiated implementation of the plans.⁷⁰ Turning to the second factor,⁷¹ the court noted that the airport possessed the statutory power to condemn aircraft noise easements,⁷² a power openly acknowledged

of their airports, provided their actions were non-discriminatory and not violative of the commerce clause. 43 Fed. Reg. 28406 (1978).

Congress reaffirmed its approval of this position when it enacted the Airline Deregulation Act of 1978, Pub. L. 95-504, 92 Stat. 1708 (pertinent portions codified at 49 U.S.C. § 1305 (1980)). Congress preempted state and local agencies from establishing or enforcing regulations regarding rates, routes, and services of federally certified carriers. However, the Act expressly provided that it did not affect the powers of local governments to act in their capacity as airport proprietors. 49 U.S.C. § 1305(b) (1980).

64. *E.g.*, *Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975) (*see* note 43 and accompanying text *supra*); *San Diego Unified Port District v. Superior Court*, 67 Cal. App. 3d 361, 136 Cal. Rptr. 557 (1977) (*see* note 47 *supra*).

65. The cases cited at note 64 *supra*, for example, do not refer to the planning, development, and operation of the specific airports in question. They rely solely on an analysis of case law. The *Greater Westchester* court emphasized the particular policy questions before it based on its analysis of the planning and operation of LAX.

66. *Greater Westchester Homeowner's Ass'n v. City of Los Angeles*, 26 Cal. 3d 86, 98-99, 603 P.2d 1329, 1335, 160 Cal. Rptr. 733, 738-39.

67. *Id.*

68. *Id.* at 98, 603 P.2d at 1335, 160 Cal. Rptr. at 738.

69. *Id.*

70. *Id.*

71. *See* note 67 and accompanying text *supra*.

72. 26 Cal. 3d at 99, 603 P.2d at 1335, 160 Cal. Rptr. at 739. California law specifically grants airports the power to acquire easements through eminent domain. CAL. CODE CIVIL PRO. § 1240.110(a) (Deering).

by airport management.⁷³ The court also found that additional noise reduction alternatives were available to the city.⁷⁴ Since the city met this twofold test, the court rejected the city's argument that federal law had divested it of all authority to reduce aircraft noise.⁷⁵

Having established that federal preemption did not render the city powerless in the battle against aviation noise, the court turned to the plaintiffs' nuisance claim. Finding that the Federal Aviation Act expressly preserves common law remedies⁷⁶ and is not designed to settle disputes between property owners and airport proprietors,⁷⁷ the court ruled that preemption did not bar the plaintiffs' claim.⁷⁸ The court opined that recognition of a nuisance cause of action would impose no greater burden on commerce and airport operations than that already generated by existing inverse condemnation remedies.⁷⁹

The *Greater Westchester* court referred only once to the condition giving rise to the plaintiffs' nuisance claim, namely, the arrivals and departures of jet aircraft at LAX.⁸⁰ By not using the term "aircraft in flight"⁸¹ to describe the nuisance condition, the court may have been

73. 26 Cal. 3d at 99, 603 P.2d at 1335, 160 Cal. Rptr. at 739. The city expanded its airport by opening the north runway complex in 1968. In a contemporaneous letter to the FAA, the General Manager of the Department of Airports expressly admitted that it was the city's responsibility to acquire sufficient air easements to reduce the noise problem. *City of Los Angeles v. Japan Air Lines Co., Ltd.*, 41 Cal. App. 3d 416, 423-24, 116 Cal. Rptr. 69, 74 (1974).

74. 26 Cal. 3d at 99, 603 P.2d at 1335, 160 Cal. Rptr. at 739. The court cited the construction of ground barriers which deflect aircraft noise, and the soundproofing of neighboring structures.

75. *Id.*

76. *Id.* at 100, 603 P.2d at 1336, 160 Cal. Rptr. at 739. The Federal Aviation Act explicitly provides that it neither abridges nor alters common law and statutory remedies. 49 U.S.C. § 1506 (1958). *See, e.g., Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976) (common law action for tort damages held not barred by federal preemption of the field of aviation).

77. The court's examination of the Act revealed nothing to suggest that the FAA has the power to adjudicate disputes between airport proprietors and neighboring property holders. 26 Cal. 3d at 100, 603 P.2d at 1336, 160 Cal. Rptr. at 739. Moreover, the FAA policy statement strongly intimates that injured property holders should direct their complaints to the airport proprietor. *See* notes 59-62 and accompanying text *supra*.

78. 26 Cal. 3d at 100, 603 P.2d at 1336, 160 Cal. Rptr. at 739.

79. *Id.* *See* notes 6 and 9, and accompanying text *supra*.

80. 26 Cal. 3d at 91, 603 P.2d at 1330, 160 Cal. Rptr. at 734.

81. Courts commonly use the phrase "aircraft in flight" to define the area over which federal control is exclusive. *See, e.g., British Airways Bd. v. Port Auth. of N.Y.*, 564 F.2d 1002, 1010 (2d Cir. 1977); *Air. Transport Ass'n. of America v. Crotti*,

trying to distinguish the *Crotti* case.⁸² Nevertheless, *Greater Westchester* tacitly overrules *Crotti* and its progeny⁸³ by holding that noise generated by the arrivals and departures of jet aircraft at LAX may constitute a nuisance.

The ruling in *Greater Westchester* will not settle the debate regarding the extent of proprietary power. By granting recovery for personal injuries in addition to property damage,⁸⁴ the decision will no doubt increase the volume of litigation in this area. *Greater Westchester's* holding also suggests that the *Burbank* exception has enveloped the rule.⁸⁵ Perhaps all but two airports in the United States may be subject to liability for failing to adopt noise control regulations.⁸⁶ *Greater Westchester's* two-pronged standard⁸⁷ and clearly articulated method of analysis should, however, provide substantial guidance to courts faced with such disputes in the future.

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389 F. Supp. 58, 65 (N.D. Cal. 1975); *San Diego Unified Port District v. Superior Court*, 67 Cal. App. 3d 361, 373, 136 Cal. Rptr. 557, 564 (1977).

82. See notes 44-47 and accompanying text *supra*. The distinction, presumably, is that arriving and departing airplanes are not "aircraft in flight". Such a limited view of the word "flight" seems illogical and impractical. The fact that aircraft in these stages are subject to orders from federally regulated control towers underscores the strained nature of this view. See *Northwest Airlines v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring).

83. See note 47 and accompanying text *supra*.

84. It may appear that permitting the plaintiffs to recover for personal injuries as well as for property damage constitutes double recovery. The law in California is settled, however, that damages recoverable for an invasion of property include not only diminution in market value, but also damages for resulting annoyance, inconvenience and discomfort. See *City of San Jose v. Superior Court*, 12 Cal. 3d 447, 525 P.2d 701, 115 Cal. Rptr. 797 (1974); *Kornoff v. Kingsburg Cotton Oil Co.*, 45 Cal. 2d 265, 288 P.2d 507 (1955). The Restatement of Torts accepts this position. It provides that a recovery for property damage may include diminution in market value of the property, compensation for loss of use of the land, and damages for discomfort and annoyance. RESTATEMENT OF TORTS § 929(1) (1977).

85. See notes 28-34 and accompanying text *supra*.

86. See note 40.

87. See notes 64-75 and accompanying text *supra*.

RECENT DEVELOPMENTS

