Airport Noise and Intergovernmental Conflict: A Case Study in Land Use Parochialism

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INTRODUCTION

At this writing the first few of a possible five thousand or more new high-income single-family homes are under construction on 900 acres of vacant land in Alameda, California. Within sight of those homes is the Metropolitan Oakland International Airport, operated by the Port of Oakland. Nearly all of the proposed homesites are presently exposed to intolerable noise levels due to aircraft operations, and these noise levels are expected to increase in the future.

Conflicts between airports and their neighbors are amply documented in the literature and abound in the courts. It is rare and perhaps unique to the Oakland Airport, however, that vacant land surrounding a major regional airport has been planned for noise-sensitive residential development with full advance knowledge of the hazards and costs such development will bring. The fact that this conflict exists, in the late 1970's, is sad reflection of the failures of our legislators and planners at all levels to effectively deal with a land use problem that has been considered, debated, and endured for more than a generation.

This particular conflict, as described in the following pages, is now moving ponderously toward solution in several legal disputes between the City of Alameda, the proposed residential developer, and the Port of Oakland. The purpose of this paper is to describe the nature of the conflict at Oakland, to examine the institutional setting which compelled it, and to present what little wisdom has emerged from recent legislative and judicial efforts at solution.¹

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¹. Glossary of acronyms used in this Comment:

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POLITICAL/ENVIRONMENTAL BACKGROUND OF THE PROBLEM

A. History of the Oakland Airport

Oakland Municipal Airport was opened for passenger operations in 1927. The site of this original airport is now North Airport, a general aviation facility serving private and corporate aircraft; air carrier (passenger) operations are now accommodated at South Airport, opened in 1962. The entire airport is now called the Metropolitan Oakland International Airport (hereafter the Airport) and is operated by the Board of Port Commissioners of the City of Oakland (hereafter Port) pursuant to provisions of the Oakland City Charter. Both original and new facilities were developed on "reclaimed land," a euphemism for the Bay fill process that took place on a massive scale prior to the establishment of a regional Bay fill review process in 1965.

ALUC
Airport Land Use Commission
ABAG
Association of Bay Area Governments
ALI
American Law Institute
BASAR
Bay Area Study of Aviation Requirements
BCDC
Bay Conservation and Development Commission
BFI
Bay Farm Island
CNEL
Community Noise Equivalent Level
CNELdB
A decibel (measure of sound) under CNEL measure
EIR
Environmental Impact Report
EPA
Environmental Protection Agency
FAA
Federal Aviation Administration
FAR
Federal Aviation Regulation
HBI
Harbor Bay Isle
MTC
Metropolitan Transportation Commission
MAP
Millions of Annual Passengers
OMB
Office of Management and Budget
RASS
Regional Airport Systems Study
RASSC
Regional Airport Systems Study Committee
RAPC
Regional Airport Planning Committee
RTP
Regional Transportation Plan
SAM
Sound Absorbent Material
SENEL
Single Event Noise Exposure Level
SFO
San Francisco International Airport
SJC
San Jose Municipal Airport

2. For a full description and maps of the entire land mass of the Airport, see PORT OF OAKLAND, 1 AIRPORT MASTER PLAN, DRAFT ENVIRONMENTAL IMPACT REPORT 5-54 (1974) [hereinafter cited as PORT OF OAKLAND EIR].

3. CHARTER OF THE CITY OF OAKLAND, art. XXV §§ 206 et seq.

4. Though the environmental problems of Bay fill are not specifically considered in this paper, special mention should be made of the contribution by the Airport to the regional phenomenon of public agency destruction of San Francisco Bay. Between 1920 and 1970 more than four square miles, representing one per cent of the original Bay surface, were diked and filled for airport purposes in Oakland alone. As recently as 1968 the Port of Oakland planned to continue the expansion of airport facilities into the Bay with as much as five square miles of additional fill. Wilsey and Ham, Port of Oakland Preliminary Master Development Plan (Shoreline Plan) (Feb. 1, 1968) (planning consultants, San Mateo, Cal.). For a discussion of the legislation which cre-
In the early days of Oakland Municipal Airport there were few complaints against airport operations, probably because there were few residences located nearby. In fact, except for one area to the west, the City of Alameda's Bay Farm Island, the airport was located virtually on the tip of a peninsula; landings and departures occurred mostly over water, tidelands, and the marshland at the edge of San Francisco Bay. In the early days, Bay Farm Island supported a truck farming operation that was quite compatible with airport activities. Fewer than one hundred homes were constructed on Bay Farm Island prior to 1945.

In 1953 the Port contracted for the preparation of a master plan for airport expansion. By that time there were more than 200 homes on Bay Farm Island and the first complaints against aircraft noise were being heard from residents. The plan, released in 1954, proposed that a new jet runway should be constructed on new Bay fill more than a mile south of the existing runway. While increasing the capacity of the Airport, this site would also have the advantage of obviating future noise complaints by establishing overwater approaches and departures for most Oakland operations. The present main jet runway at the Airport was constructed in accordance with the consultants' recommendations, and the new passenger terminal facility was opened in 1962.

During the dike and fill process for the new runway, work was begun on a 908-acre fill project surrounding the original Bay Farm Island and extending nearly as far south into the Bay as the new runway. Submerged land area for the project, wholly within the City of Alameda, was owned by Utah Construction Company (now Utah International, Inc., hereafter Utah). The Appendix attached hereto is a recent aerial photograph depicting the North and South Airports, the City of Oakland/Alameda boundary line, the "highlands" (the original, natural

<table>
<thead>
<tr>
<th>Period</th>
<th>Houses Built</th>
<th>Cumulative Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before 1927</td>
<td>90</td>
<td>90</td>
</tr>
<tr>
<td>1928-1945</td>
<td>7</td>
<td>97</td>
</tr>
<tr>
<td>1946-1949</td>
<td>15</td>
<td>112</td>
</tr>
<tr>
<td>1950-1955</td>
<td>83</td>
<td>195</td>
</tr>
<tr>
<td>1956-1960</td>
<td>94</td>
<td>289</td>
</tr>
<tr>
<td>1961-1965</td>
<td>109</td>
<td>398</td>
</tr>
<tr>
<td>1966-1968</td>
<td>381</td>
<td>779</td>
</tr>
<tr>
<td>1969-1973</td>
<td>603</td>
<td>1382</td>
</tr>
</tbody>
</table>

Source: 2 PORT OF OAKLAND EIR, supra note 2, at D-30.


8. Id. at 57.

9. Id. at 57, 72.
Bay Farm Island), and the newly-filled Utah property. The City of Alameda zoned the Utah property, then largely under water, for predominantly residential use in 1965. Port representatives protested the zoning to no avail. Failing to convince Alameda that certain areas of Bay Farm Island should be zoned for airport-compatible uses (such as commercial or industrial park development), the Port instituted a condemnation action against Utah and acquired noise easements over a narrow strip of property along the shoreline of the Utah fill. An additional 150 acres of property was acquired from Utah by negotiated exchange. These early, tentative steps taken by the Port to avoid future noise complaints would prove to be inadequate.

The 1968 General Plan of the City of Alameda perpetuated the residential zoning for Bay Farm Island and contemplated the completion of the controversial Southern Crossing of San Francisco Bay with connecting bridges to both Bay Farm Island and the main body of Alameda. The Plan contained virtually no mention of the adjacent airport. Without a Southern Crossing, however, transportation and traffic problems would be enormous, for Bay Farm Island has limited accessibility by way of existing streets and highways. The failure to consider the adjacent airport and the later elimination of the Southern Crossing as a politically viable project seriously compromised the integrity of the General Plan as it related to Bay Farm Island.

The Port thus entered the “boom” years of air travel—the middle and late 1960’s—lacking the necessary cooperation of a neighboring city. Alameda showed no inclination to abandon its historical plans for continued residential development, and the Port took no significant steps to force land use compatibility. Years of litigation were to result from this bilateral failure to resolve competing land uses.

11. Daniel, Mann, Johnson, Mendenhall, Comprehensive General Plan—1990 for Alameda, California (Nov. 1968) (planning consultants, Redwood City, Cal.).
12. Id. at 27, 33. The “Southern Crossing” was a pet project of many state and local planners which began in the 1950’s and was advanced by many agencies as recently as the early 1970’s. It was described by some as a necessary second main bridge crossing to connect the East Bay Area with the San Francisco peninsula, and the project actually reached advanced planning stages before it was rejected by the Bay Area electorate in 1972.
13. In the Port of Oakland’s later lawsuit against the City of Alameda [discussed in section I(D) infra] which successfully challenged the validity of the Alameda General Plan as to areas near the airport, one basis for the court’s intended invalidation of the General Plan was that it “does not consider the transportation and traffic problems that development of Bay Farm Island will create” and that there was “in no review or updating after the 1972 negative southern crossing vote.” City of Oakland v. City of Alameda, Alameda Cty. Sup. Ct. No. 450083-0, at 3 (Aug. 11, 1975) (memorandum opinion and announcement of intended decision).
B. State and Regional Planning for Airports

1. The Regional Airport Systems Study

With the opening of the South Airport main jet runway in 1962 Oakland Airport began to share in the phenomenal nationwide boom in commercial air travel. The growing demand for aviation services throughout the region presented problems which demanded intergovernmental cooperation in the planning of airport facilities. Accordingly, the City and County of San Francisco, the Port of Oakland, and the City of San Jose, as owners of the three major regional airports, entered into a joint exercise of powers agreement in 1967 to study the need for future facilities in the region. The result of the accord was the Bay Area Study of Aviation Requirements (BASAR).

The Association of Bay Area Governments (ABAG), itself the product of a joint powers agreement among 84 member cities and all 9 counties of the Bay Area, joined with the BASAR participants in 1969 to form the Regional Airport Systems Study Committee (RASSC) as part of the ABAG planning program. RASSC consisted of an elected official from each of the nine Bay Area counties plus one representative from each of the three major airports. The Committee was given responsibility for setting the goals and policies of the study and making the final recommendations. More than two and a half years of study, including several public hearings and a number of technical studies (regarding such matters as passenger forecasts, environmental considerations, noise, and ground access) went into the preparation of the Regional Airport Systems Study (RASS) Final Plan, adopted in November 1972 as the Aviation Element of the ABAG Regional Plan.

The Final Plan allocated to the Airport a major share of the projected future regional air travel demand. The thrust of the Final Plan was to rely primarily on existing commercial airports (at San Francisco, San Jose, and Oakland) to accommodate the huge projected increases, and thereby to avoid the serious regional impacts which, it found, would result from the construction of a fourth major regional air carrier facility.

14. The Airport experienced an increase in passenger activity from 0.3 to 2.3 million annual passengers (MAP) between 1962 and 1972. By comparison, the Bay Area as a whole grew from 5 to 20 MAP between 1960 and 1970. Ass’n of Bay Area Gov’ts, Regional Airport Systems Study—Final Plan (June 1972) [hereinafter cited as RASS].
16. RASS, supra note 14.
18. Allocation of a projected 1985 regional demand of 72 million annual passengers (MAP): San Francisco, 31 MAP; Oakland, 24 MAP; San Jose, 10 MAP; North Bay, 7 MAP. RASS, supra note 14, at I-10.
19. Id. at I-23.
The Final Plan made forecasts of air travel demand which are now recognized as exaggerated. More recent forecasts of regional demand have been prepared by the Regional Airport Planning Committee (RAPC), a joint committee of ABAG and the Metropolitan Transportation Commission (MTC) formed as a successor to the RASS Committee. RAPC forecasts were adopted by MTC along with other amendments to MTC's Regional Transportation Plan (RTP), in March of 1975. While projections of the total number of passengers have been lowered considerably since the RASS Final Plan, the projected long range distribution of passengers among the various regional airports remains unchanged. Even conservative estimates contemplate at least a doubling of passengers at the Oakland Airport by 1985.

In March of 1973, shortly after ABAG adoption of the RASS Final Plan, the voters of the City of Alameda passed an initiative City Charter amendment, Measure A, prohibiting the construction of multiple-family residential units in Alameda. The effect of Measure A on Bay Farm Island was to limit residential development to single family dwellings, by far the most difficult and expensive type of housing to insulate against noise. Given the growth in air travel anticipated for

20. See note 22 infra.
21. The following are Metropolitan Transp. Comm'n projections for 1985:

<table>
<thead>
<tr>
<th>Airport</th>
<th>Passengers</th>
</tr>
</thead>
<tbody>
<tr>
<td>San Francisco International (SFO)</td>
<td>24-27 MAP*</td>
</tr>
<tr>
<td>Oakland International (OAK)</td>
<td>7-8 MAP</td>
</tr>
<tr>
<td>San Jose Municipal (SJC)</td>
<td>6-7 MAP</td>
</tr>
<tr>
<td>North Bay</td>
<td>0-1 MAP</td>
</tr>
<tr>
<td><strong>Regional Total</strong></td>
<td><strong>37-43 MAP</strong></td>
</tr>
</tbody>
</table>

RAPC staff also prepared the following projections for 1995 which were not adopted by the MTC:

<table>
<thead>
<tr>
<th>Airport</th>
<th>Passengers</th>
</tr>
</thead>
<tbody>
<tr>
<td>SFO</td>
<td>31 MAP</td>
</tr>
<tr>
<td>OAK</td>
<td>19-24 MAP</td>
</tr>
<tr>
<td>SJC</td>
<td>10 MAP</td>
</tr>
<tr>
<td>North Bay</td>
<td>0-3 MAP</td>
</tr>
<tr>
<td><strong>Regional Total</strong></td>
<td><strong>60-68 MAP</strong></td>
</tr>
</tbody>
</table>

* Million Annual Passengers

Metropolitan Transp. Comm'n, Regional Transportation Plan for the San Francisco Bay Area (adopted June 27, 1973) [hereinafter cited as MTC].

22. The Air Transport Association, S.F. Hub Report (Oct. 1975) estimates that Oakland's present 2.2 million annual passengers (MAP) will increase to 4.25 MAP by 1984; RAPC projects 7-8 MAP for Oakland by 1985; the Division of Aeronautics, California State Master Plan of Aviation Current Forecasts, places the load at 9.1 MAP in 1985; Port of Oakland, Summary of Forecasts of Air Carrier Activity (1975).


24. Planning consultant Maurice A. Garbell, in a letter to the City Council, City of Alameda, dated Sept. 6, 1972, outlined some of these noise control difficulties as follows:

Dwellings constructed in compliance with [single-family dwelling] zoning have a large exposed exterior surface for a given dwelling volume. Protection from aircraft noise is difficult and costly.
the Airport, the passage of Measure A increased the need for compatible-use rezoning of portions of Bay Farm Island which would be affected by airport noise. Arguably, industrial or commercial uses would be reasonable and feasible on Bay Farm Island and would not conflict with airport operations. The City of Alameda nonetheless rezoned the bulk of Utah's 908-acre project site for single family residential use in late 1973.

ABAG and RAPC have consistently criticized the proposed residential development of Bay Farm Island. ABAG prepared a thorough critique of the proposal pointing out the inconsistency of regional housing and transportation policies. RAPC recommended disapproval of the project on the basis of its conflict with, inter alia, the ABAG Regional Plan and with the Regional Transportation Plan of the MTC.

ABAG's power derives from its role as the designated metropolitan clearinghouse for review of applications for state or federal funds. This review power assures that all applications for airport development funds (primarily under the Airport and Airways Development Act of 1970) will be consistent with regional policies. However, ABAG review of the Bay Farm Island project can only occur if there is some federal involvement, such as by a developer's application for federal home loan insurance. The following section describes the basis and scope of ABAG's review power, and its potential impact on the present land use conflict.

2. The "A-95" Review Process

The Demonstration Cities and Metropolitan Development Act (The Model Cities Act) of 1966 provides inter alia that all applications for federal assistance for certain projects (including airports, highways, and other types of projects) must be reviewed by "any areawide agency which is designated to perform metropolitan or regional planning for the area within which the assistance [under the Act] is to be provided.

Moreover, such dwellings are spaced relatively closely together. Aircraft noise bounces back and forth between the individual units because of the lack of open space and the inadequacy of landscaping. In many instances the bounceback noise causes rear windows and doors to vibrate and rattle, even when the direct noise impingement from an airport is modest.

Lastly, [single-family dwelling] buildings are so low in height and so short in length that slant aircraft noise and even horizontal reflected noise diffuses around and over them; thus [they] afford little or no noise shielding for exterior play areas.

26. Regional Airport Planning Committee, Resolution No. 74-1 (February 1, 1974).
This legislation provided a federal stimulus to the establishment of regional councils of governments by providing that such agencies be "to the greatest practicable extent, composed of or responsible to the elected officials of a unit of areawide government or of the units of general local government within whose jurisdiction such agency is authorized to engage in such planning."30

The Intergovernmental Cooperation Act of 1964 as amended in 196831 provided further regional emphasis to review processes of federally funded projects by authorizing the President32 and the Office of Management and Budget33 to establish rules and regulations governing the formulation, evaluation, and review of Federal programs and projects having a significant impact on area and community development, including programs providing Federal assistance to the States and localities . . . [which regulations] shall provide for full consideration of the concurrent achievement of the following specific objectives and, to the extent authorized by law, reasoned choices shall be made between such objectives when they conflict:

(1) Appropriate land uses for housing, commercial, industrial, governmental, institutional, and other purposes;

(3) Balanced transportation systems, including highway, air, water, pedestrian, mass transit, and other modes for the movement of people and goods . . . .34

The most significant regulation promulgated under this Act to date has been Office of Management and Budget Circular A-95, which requires an applicant for federal funds to submit the application for review by a state, metropolitan, or regional "clearinghouse" (usually a comprehensive planning agency).35 The review must determine the relationship of the proposed project to comprehensive plans for the area and identify possible interjurisdictional problems. Any comments made by the clearinghouse accompany the application when it is submitted to the federal agency for evaluation. Because of the elaborate step-by-step process established by the OMB, the A-95 process tends to act as a system for early consideration of regional concerns in the development of plans for federally assisted projects.36

Any major development at the Oakland Airport would involve

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29. Id. § 3334(a)(1) (1973).
30. Id.
31. Id. §§ 4201 et seq. (1973).
32. Id. § 4231(a) (1973).
33. Id. § 4233 (1973).
34. Id. § 4231(a) (1973).
36. Id.
federal funds. ABAG would oversee such development through the A-95 process, so that in theory the Port could not build airport facilities inconsistent with regional policies. However, the A-95 process may be inapplicable to the Bay Farm Island development if there is no federal involvement in that project; if that is the case, there will be no opportunity for ABAG to include development on Bay Farm Island within its regional review process.

3. The Alameda County Airport Land Use Commission

Both the Airport and Bay Farm Island are located within Alameda County. The Alameda County Airport Land Use Commission (ALUC) is an agency created under the State Aeronautics Act for the purpose of establishing compatible land uses in the vicinity of the Airport to the extent that such land is not already devoted to incompatible uses. However, the extent of ALUC's authority to accomplish its purposes is far from clear. The Utah property remains as yet undeveloped and thus provides a rare opportunity for a land use planning solution to airport-neighbor incompatibility; unfortunately, thus far ALUC has been powerless to do so.

Pursuant to the ALUC legislation, both the Port of Oakland (as operator of the Airport) and the City of Alameda (as an adjacent city) are represented on the Alameda County ALUC. Hayward Municipal Airport, operated by the City of Hayward, and Livermore Municipal Airport, operated by the City of Livermore, are also within Alameda County, but nearly all of the Commission's deliberations concerning land use compatibility have concerned the conflict between the Port and the City of Alameda. The ALUC is required to prepare a comprehensive land use plan providing for the orderly growth of each public airport and its surrounding area within the jurisdiction of the Commis-
The County Planning Department staff and County Counsel are available to the Commission for planning services and legal consultation.

In the several months following passage of Measure A and Alameda's rezoning of the Utah project site, the Alameda County ALUC conducted a number of public hearings with respect to the impending conflict between single-family residential development and future growth at the Airport. A number of experts on aircraft noise testified at the hearings on behalf of the Port of Oakland and Harbor Bay Isle Associates (hereafter Harbor Bay), the developer for Utah's 908 acres on Bay Farm Island. ALUC thereafter produced the Interim Bay Farm Island Portion of the Land Use Plan for the Airport which included a "line of demarcation" below which it recommended no residential development should take place.

ALUC then made a determination, based on its Plan and hearings, that Alameda's actions in rezoning the Utah property for residential use and approving a preliminary development plan were "harmful" and "inconsistent" with the best interests of the Airport and surrounding area. Under the California Aeronautics Act, however, a local agency may overrule the ALUC by a four-fifths vote. Alameda overruled the ALUC determination and thereby revived its single-family zoning for the Utah property.

It is curious that the U.S. Environmental Protection Agency has hailed the California approach to airport noise regulation as a "comprehensive procedure to obtain compatible land use;" other commentators have criticized the powerlessness of an agency like the ALUC to solve the inevitable problems of intergovernmental cooperation associated with airports in urban areas. ALUC's powers are certainly no more than advisory as to both land use planning and standards for

42. Id. § 21675(a) (West Supp. 1976).
43. See text accompanying note 23 supra.
44. Under Cal. Public Util. Code § 21675(a) (West Supp. 1976), an ALUC is required to produce a "comprehensive land use plan" for an area within planning boundaries to be established pursuant to § 21675(c). The Alameda County ALUC has produced only an "Interim Bay Farm Island" portion of its plan, and even that portion has been invalidated because, among other reasons, no environmental impact report was prepared prior to its adoption. City of Oakland v. City of Alameda, infra note 92.
45. Airport Land Use Commission, Resolution No. 14 (June 12, 1974).
47. EPA, Legal and Institutional Analysis of Aircraft and Airport Noise and Apportionment of Authority Between Federal, State, and Local Governments at 2-50 (1973) [hereinafter cited as EPA Analysis].
During hearings on airport zoning before the Assembly Committee on Commerce and Public Utilities in 1969, prior to the enactment of the present ALUC legislation, a number of witnesses testified in favor of mandatory supra-local zoning controls. Others, including Alameda’s Planning Director, testified that the inherent conflicts between airports and their neighbors could not be solved by removing land use controls from the local agencies. The weakness of ALUC as a planning body, as established by legislation resulting in part from those hearings, reflects a failure on the part of legislators to recognize the inevitably self-centered approach of any municipality faced with a conflict between its own and regional concerns.

There has been subsequent legislative activity concerning the functions of ALUCs. An ALUC Legislative Project Committee held a hearing in Sacramento on February 3, 1976, to discuss its final draft of proposed amendments to the ALUC statutes. The proposed amendments would not fundamentally alter the structure or powers of the ALUC except that, as to adoption or amendment of a General Plan, the four-fifths override provision would be eliminated where an ALUC has found incompatible land uses. Such a provision could provide a regionally sound solution in the case of the City of Alameda in its preparation of a new General Plan.

50. Presentation of J.R. Crotti before the Assembly Committee on Commerce and Public Utilities, Sacramento, Cal., Nov. 20, 1969.
51. Presentation of D. Johnson, then City Planning Director of Alameda, before the Assembly Committee on Commerce and Public Utilities, San Diego, Cal., Oct. 8, 1969.
52. See note 209 infra.
54. The proposed amendments would indirectly establish a form of zoning power to rest with each ALUC. Each ALUC would develop an “airport compatibility plan that [would] coordinate the orderly growth of each public airport and the uses of land within the jurisdiction of the commission.” CAL. PUBLIC UTIL. CODE § 21675(a), as amended (West Supp. 1976). Such jurisdiction would be established by the ALUC with the approval of the State Office of Planning and Research. Id. § 21675(b), as amended. Thereafter, each agency which proposes to adopt or amend its general plan or any element thereof, applicable to the area within the ALUC’s jurisdiction, must file the proposal with the ALUC for its approval as consistent with the ALUC “airport compatibility plan”. The local agency’s proposal “shall not be effective until approved.” Id. § 21676. Provisions for local agency override of an ALUC determination of inconsistency of a proposal with the ALUC plan (which have heretofore emasculated the power of
4. The California Airport Noise Standards

California’s regulatory scheme for the protection of airports and their neighbors includes not only the State Aeronautics Act, discussed above, but also includes the California Airport Noise Standards. Community Noise Equivalent Level (CNEL) standards are set forth for use in defining noise impact boundaries, and certain land uses are described as incompatible within noise impact areas. The standards establish limits for noise levels which may be created in established residential areas, subject to variance procedures. However, they fail to address the issue of compliance in land areas which have been zoned but not yet developed for residential uses. The Standards thus have doubtful utility in solving the problem at the Oakland Airport.

This aspect of the California approach to airport noise is made even more doubtful by the decision in Air Transport Association of America v. Crotti, discussed more fully in Section II.B. infra. The Crotti court held portions of the California Airport Noise Standards unconstitutional as “a per se unlawful exercise of police power into the exclusive federal domain of control over aircraft flights and operation, and air space management and utilization in interstate and foreign commerce.”

5. The Metropolitan Transportation Commission

The Metropolitan Transportation Commission (MTC), discussed above in connection with its role in RAPC, has the primary duty to prepare, adopt, and maintain a Regional Transportation Plan (RTP) for the San Francisco Bay Region. MTC assumed the functions of the Bay Area Transportation Study Commission and its successor the Regional Transportation Study Committee of ABAG. Trans-Bay bridges, multi-county transit systems, the state highway system, and any application for state or federal funds for projects containing a transportation element must conform to the RTP and must be approved by the

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an ALUC) expressly exclude any General Plan proposals. The present requirement that a city’s zoning must be in compliance with its General Plan [CAL. GOVT CODE § 65860 (West 1966)] thus gives the ALUC an implicit veto power over zoning decisions where a General Plan enactment or amendment is involved.

55. CAL. PUBLIC UTIL. CODE §§ 21001 et seq. (West 1965).
57. Id. § 5012 (Nov. 28, 1970).
58. Id. §§ 5075 et seq. (Nov. 28, 1970).
60. Id. at 65.
61. The MTC is established, and its duties and responsibilities are prescribed, in
CAL. GOVT CODE §§ 66500 et seq. (West 1966).
63. Id. § 66507 (West Supp. 1976).
MTC. Revisions to the RTP adopted in 1975 included the 1974 RAPC's recommended 1985 forecasts of aviation demand as well as adoption of the RASS Final Plan as the basic RTP policy document respecting airports. Each annual revision of the RTP is expected to include updated ten-year forecasts of aviation demand and transportation facility requirements to meet that demand, consistent with RAPC's continuing work as the regional planning body for Bay Area airports.

The MTC is not likely to have a substantial role in any resolution of the Bay Farm Island conflict because the project does not require MTC approval. Indeed, policies of the MTC which may favor ground access improvements to the Airport would inadvertently result in favoring access improvements to Bay Farm Island, simply because of the proximity of the two. Problems of access to Bay Farm Island, as recognized by the City of Alameda in its Environmental Impact Report for the Harbor Bay Isle project, are serious:

Harbor Bay Isle traffic demands for connecting routes to the main island and Oakland are such that, without major improvements, complete breakdown of traffic service will occur by 1990.

In summary, construction by 1990 of all the improvements necessitated by HBI is considered unlikely and severe congestion can be anticipated.

Problems of ground access may ultimately limit both airport expansion and the Bay Farm Island project. MTC plays an important role in the resolution of serious conflicts once they have arisen, but apparently cannot supply a solution which would favor one project over the other.

6. The Bay Conservation and Development Commission

The Bay Conservation and Development Commission (BCDC) was first established in 1965 to undertake studies of ecological and economic characteristics of the Bay and its shoreline and to prepare a comprehensive and enforceable plan for the conservation of the water of the Bay and the development of its shoreline. BCDC has the power to grant or deny permits for placing fill, extracting materials, or making any substantial change in use of any water, land, or structure within the area

65. \textit{Supra} note 19.
66. MTC, \textit{supra} note 21, at 18(a).
67. \textit{See} text accompanying note 27 \textit{supra}.
68. \textit{HARBOR BAY EIR, supra} note 25.
69. \textit{PORT OF OAKLAND EIR, supra} note 2, at 84.
70. \textit{McAteer-Petris Act, CAL. GOV'T CODE} §§ 66600 \textit{et seq.} (West 1966).
of the Commission’s jurisdiction, which extends 100 feet landward from the shoreline of the Bay. BCDC’s powers are enforced under detailed cease-and-desist order provisions.

BCDC has prepared the San Francisco Bay Plan which includes a series of policy statements pertaining to airports. Airports are identified as “water-oriented land uses” for which provision should be made in the Bay Plan. Because the RASS Final Plan calls for the construction of a second main runway at the Oakland Airport involving substantial additional Bay fill, BCDC may in the future become directly involved in the airport expansion process. Perhaps ironically, the tremendous environmental disruption occasioned by the construction of a new runway in the Bay would be the cost of alleviating the airport noise conflict by moving the noise source farther from the noise impact area.

Because of uncertainties in passenger projections and the high economic and environmental costs associated with such a project, it is far from certain that a second runway will ever be constructed. BCDC has indicated that it considers airport fill an unlikely and unrealistic means for reducing noise. These factors, together with the limited jurisdiction exercised by BCDC over land areas of both projects, indicate that BCDC will not play a substantial role in the resolution of land use conflicts at the Oakland Airport.

71. Id. § 66604 as amended (West Supp. 1976).
72. Id. § 66610(b) (West Supp. 1976).
73. Id. §§ 66637-42 (West Supp. 1976).
75. Id. at 21.
77. PORT OF OAKLAND EIR, supra note 2, at 43-44.
78. Takeoffs could be scheduled only from the runway more distant from Bay Farm Island. Id. Figure A-5 at page 17.
79. Id. at D-79.
80. Early in 1976 BCDC considered an application from Harbor Bay Isle Associates for improvements to drainage control structures on the project site, within the 100-foot strip of land area along the shoreline and within BCDC jurisdiction. The Port of Oakland appeared before BCDC to argue that the structures were integral to the interior lagoon system, a fundamental component of the entire residential development proposal, and that BCDC could not act until such time as an environmental impact report is prepared for the entire project. BCDC took a middle ground and determined that only those portions of the proposal which are necessary for present drainage purposes, and not the pumping facilities which would be required for the lagoon system for the residential development, could be approved without an environmental impact report on the entire planned residential development. Discussion with Thomas D. Clark, Deputy Port Attorney, Port of Oakland, in June 1976. See generally PORT OF OAKLAND EIR, supra note 2, vol. I.
C. The Noise Impacts of Airport Expansion

The proposed expansion of the Airport to an ultimate capacity of 24 million annual passengers would threaten air and water quality, deplete energy resources, eliminate wildlife habitat, and create noise impacts on present and future residents of Bay Farm Island. It could also require the use of massive quantities of Bay fill to create a second main runway on an island a mile out into the Bay from the present main jet runway. While any one of these acknowledged environmental impacts may limit future growth at the Airport, the noise problem must be resolved now, if it is to be resolved through land use planning, even though significant expansion of the Airport may be years away. Although most of the Bay Farm Island noise impact area is presently vacant and adaptable to a variety of airport-compatible uses, construction has actually begun on the first of a possible total of 5000 residential units.

While long-range impacts of noise have not been definitively established, numerous studies have related noise to hearing loss and impairment, interference with speech, sleep disturbance, irritability, anxiety, and other physiological and psychological disorders. Airports are particularly problematical in that impact areas are huge and airports, located near urban centers, tend to encourage residential subdivision. Single-family subdivisions are often built on the same type of cheap, flat, urban fringe land as airports.

The California Airport Noise Standards establish a Community Noise Equivalent Level (CNEL) as a formula for measuring the impact of airport noise and determining the compatibility of certain land uses with respect thereto. The CNEL description of noise impact combines uniform individual aircraft noise characteristics with data indicating the frequency of flights, day-evening-night mix, runway and flight track

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81. Note 79 supra.
83. It has been projected that by 1978, 1800 square miles of land area in the United States containing more than 24 million people will be exposed to undesirable levels of aircraft noise. Nat’l Bureau of Standards, The Economic Impact of Noise (Dec. 31, 1971) (prepared for the EPA, PB-206 726) [hereinafter cited as Economic Impact].
85. Supra note 56.
usage, assumptions of noise-suppressive engine retrofit, and aircraft fleet composition. CNEL "contours" may be computed for existing conditions or for projected future conditions. The California Airport Noise Standards provide a mechanism for validating contours for the dates on which airport noise criteria become effective (the first day of Jan. 1976, 1981, and 1986);\(^7\) a field monitoring program must be established for this purpose for each airport determined to have a "noise problem."

As discussed more fully infra, portions of the California Airport Noise Standards dealing with single-event noise have been declared unconstitutional. Subject to that limitation, the Standards remain effective as to monitoring and CNEL provisions.

A number of methods for controlling and reducing a noise problem are set forth in the Standards, including physical and operational measures to be employed by the airport operator.\(^8\) Subject to variance procedures\(^9\) the Standards limit the noise which may be caused in residential areas. Adjacent to the Oakland Airport are already close to 1400 existing homes\(^8\) and perhaps 4000 inhabitants. Bay Farm Island may be developed for as many as 5000 new homes, housing an additional population of 12,000 persons or more, within noise impact areas.

A number of different contour lines, representing existing and proposed noise exposure at Bay Farm Island, have been computed by consultants to the Port of Oakland and Harbor Bay Isle Associates. All the various contour lines were produced by the same noise consultant. The substantial variations among them result from differing assumptions regarding daily allocations of flights, aircraft engine retrofit for noise suppression, runway use, and other operational considerations which are part of any CNEL computation of future noise impacts. The City of Alameda has prepared a draft Noise Element to its General Plan

\(^{87}\) Id. § 5012 (Nov. 28, 1970).

\(^{88}\) Id. § 5011:

**Methodology for Controlling and Reducing Noise Problems.** The methods whereby the impact of airport noise shall be controlled and reduced include but are not limited to the following: (a) encouraging use of the airport by aircraft classes with lower noise characteristics and discouraging use by higher noise level aircraft classes; (b) encouraging approach and departure flight paths and procedures to minimize the noise in residential areas; (c) planning runway utilization schedules to take into account adjacent residential areas, noise characteristics of aircraft and noise sensitive time periods; (d) reduction of the flight frequency, particularly in the most sensitive time periods and by the noisier aircraft; (e) employing shielding for advantage, using natural terrain, buildings, et cetera; and (f) development of a compatible land use within the noise impact boundary. Preference shall be given to actions which reduce the impact of airport noise on existing communities. Land use conversion involving existing residential communities shall normally be considered the least desirable action for achieving compliance with these regulations.

\(^{89}\) Id. § 5075 (Nov. 28, 1970).

\(^{90}\) Note 6 supra.
which includes yet another set of CNEL contour lines based on a number of differing assumptions regarding Oakland Airport's future operations. Thus, it remains uncertain where the line depicting the limits of compatible residential development on Bay Farm Island will finally be drawn.

The imprecision of the assumptions normally used in noise forecasting, coupled with the extreme variations in the effects of noise on particular individuals are the reasons for this uncertainty. The Noise Standards themselves provide for a considerable margin of error in the validation of computed CNEL contour lines, in addition to a tolerance applicable to instruments used in validation monitoring. Thus while the State Standards purport to provide a rational framework for land use planning in the vicinity of airports, they cannot assure that the actual community noise exposure, even when State standards are met, will not lead to serious disruption of individual, community, and/or airport activities.

D. Present Litigation

The conflict between the Port of Oakland and the City of Alameda has, predictably, ripened into litigation on several fronts. The four most significant lawsuits between these parties are discussed briefly in this subsection.

In City of Oakland v. City of Alameda the Port of Oakland challenged the action of the Alameda City Council in its override of the ALUC findings against the Harbor Bay Isle project. A motion for summary judgment was granted in the action in favor of defendant City of Alameda and real parties in interest Harbor Bay Isle Associates, based on the affirmative defenses that the ALUC land use plan was inadequate and, further, that there was no environmental impact report prepared in connection with the ALUC Plan.

In City of Oakland v. City of Alameda the approval of Village I of the Harbor Bay Isle project, the rezoning of Harbor Bay Isle property to single-family residential dwellings, the adequacy of the environmental impact report for the HBI project, and the adequacy of the Alameda General Plan were challenged by the Port of Oakland. Trial of the action consumed six weeks and resulted in 2400 pages of trial transcript plus about 170 exhibits. Expert witnesses appeared on behalf of both parties on the subjects of noise and proper city planning practice under applicable state legislation.

91. Noise Effects, supra note 82.
93. See text accompanying note 46 supra.
In a Memorandum Opinion and Announcement of Intended Decision, Judge Guy M. Young concluded (1) that Alameda's General Plan was inadequate, (2) that the environmental impact report for the challenged rezoning and planned development was inadequate, and (3) that approval by its City Planning Board for Harbor Bay's planned development was void. The court's conclusions were based on failure of the Alameda General Plan to comply with California statutory requirements respecting general plans, on its failure to comply with the General Plan Guidelines, and in general on the failure of the Land Use, Open Space and Circulation elements to consider the effect of the Oakland Airport.

The intended judgment indicates that the court felt that the Alameda General Plan should have considered the Oakland Airport and its noise impacts on Alameda as a matter of good planning practice whether or not such consideration was mandatory at the time the General Plan document was prepared. "Neither as part of a specific element nor in general does the Alameda General Plan consider areas outside of the general plan area which this court believes should be considered. The Alameda General Plan certainly should consider the Oakland Airport. . . ." This kind of judicial attention to sound planning practice is the same as that evidenced in the Indian Wells case, considered infra; such attention may be necessary if municipalities are to look beyond their own parochial interests in land use planning.

In City of Alameda v. City of Oakland Alameda and Harbor Bay Isle Associates challenged the adequacy of the Port's Airport Master Plan Environmental Impact Report and its Terminal Expansion Program Environmental Impact Report. The court found that the Terminal Expansion Program EIR, considered apart from the Master Plan EIR, met the requirements of CEQA, but that the Master Plan EIR did not.

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97. Id.
99. Id. at 3-4.
101. PORT OF OAKLAND EIR, supra note 2.
103. City of Alameda v. City of Oakland, supra note 100, at 6 (findings of material facts and conclusions of law).
The Terminal Expansion EIR considered a specific construction project, but the Master Plan EIR was to include the broad impacts of possible long-range developments under the Plan. CEQA Guidelines require a different level of specificity for adoptions of or amendments to General Plans; they do not, however, include any reference to special purpose but equally general plans such as the Airport Master Plan. The Port is presently preparing a more particularized Airport Master Plan together with a highly-detailed EIR to satisfy the court's requirements. In the meantime, all expansion-related construction at the Airport is enjoined. As the Airport's present capacity is nearly double current passenger demands, little effect is expected from compliance with the court's order.

In City of Alameda v. City of Oakland, Alameda and Harbor Bay Isle Associates alleged that the Port was intentionally and willfully operating the Oakland Airport in a manner resulting in unreasonable noise levels at Bay Farm Island, and that the Port was intentionally and willfully misleading others concerning present and future operations and noise levels at the airport. Plaintiffs asked the court to restrain the Port from continuing these activities and for imposition of certain specific restrictions. They also requested $10,000,000 punitive damages and a declaratory judgment of the Port's obligations under the California Airport Noise Standards.

The Port's demurrer to the complaint was sustained on two of the three causes of action. The court held that no cause of action had been stated for a nuisance and that, due to federal preemption, it had no authority to restrain the Port or impose restrictions as to aircraft and airport operations. It also held that punitive damages may not be recovered against a public entity such as the Port. As to the cause of action for declaratory relief, the court held that the Port must answer the complaint because a declaratory judgment action may not generally be attacked by demurrer.

104. The Airport Master Plan and its EIR were prepared pursuant to a Planning Grant Agreement between the Port and the FAA. There is no state statutory requirement that an airport master plan be prepared by airport operators. The Port's planning process for the airport was begun during the "boom" years of air travel growth, and was required under the planning grant agreement to consider a level of airport development called for in the then-current RASS Final Plan. Of course, such a plan would be far out of date in terms of identifying years at which given passenger levels would be achieved, but it would provide a guide to rational land use decision-making as each increase in passenger levels was realized, much in the same way a city's general plan provides broad guidelines to future growth. The court made no mention of the level of specificity required for an EIR for such a plan, however, and so provided little guidance to the Port for compliance with the order.

106. Id. (order on defendants' demurrer) (dated April 12, 1976).
II
EXISTING AND PROSPECTIVE GOVERNMENTAL SOLUTIONS

A. Federal v. Local Control: Existing Responsibilities for Airport Noise

There are many ways in which governmental agencies under existing authority can seek to assure the compatibility of land uses surrounding airports. Ideally and most economically, of course, land area for the new airport should be acquired with prospective aircraft noise as a principal determinant of the size and configuration of the airport site. Unfortunately, the advent of the jet age in commercial air transportation and the resulting boom in airport construction were not accompanied by the necessary planning sophistication to ensure airport-neighbor compatibility. The enormous federal subsidization of airport facilities during this period did not suffice to cover the necessary land acquisition costs. In fact, even where foresight was practiced and large land areas were acquired (as in the case of the new Dallas-Ft. Worth airport), new airports were located many miles from urban centers. To compound the problem, plans to phase out older facilities have not been executed.

The present means used to deal with airport noise include: (1) soundproofing, (2) aircraft hardware and operational changes and, most importantly, (3) zoning and eminent domain. This section shall detail these mechanisms.

1. Soundproofing

The soundproofing of buildings and the development of physical barriers to sound are not practical ways to protect people from aircraft noise. The added cost of soundproofing an existing house near an airport to achieve a satisfactory interior noise level was reported at about

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107. Dworkin, Planning for Airports in Urban Environments, 5 Urban Lawyer 472 at 492 (1973) [hereinafter cited as DWORKIN].
108. The introduction of large four-engine commercial jet transports is generally credited with the boom in commercial aviation during the middle 1960's. Air carrier traffic grew at an annual rate in excess of 15% during this period. Fry, From Capitol Hill: Airports, 3 Urban Lawyer 277 at 279 (1971) [hereinafter cited as FRY].
110. An estimated 1.2 billion dollars in 50% matching federal grants was provided for the construction and expansion of airports nationally between 1946 and 1969, in addition to 1.6 billion dollars' worth of surplus military airport facilities and real estate for commercial and general aviation facilities. FRY, supra note 108, at 278-79.
$6000 in 1970.\textsuperscript{112} It is considerably cheaper to insulate single-family homes during construction, but even so, the typical California single-family subdivision attracts families who have lifestyles focused on outdoor activities incompatible with the sealed-in, humidity and temperature-controlled environment that follows from soundproofing.\textsuperscript{113}

California has recognized the distinction in lifestyles between residents of multiple and single-family structures in its complex statutory scheme discussed in sections I.B.3 and I.B.4., supra. The State Standards provide that "noise impact areas" are not suitable for single-family residential use but may be compatible with "high rise apartments in which adequate protection against exterior noise has been included in the design and construction, together with a central air conditioning system."\textsuperscript{114} A number of municipalities have established ordinances designed to provide building standards for adequate soundproofing of new structures in areas of noise impact; but such ordinances are criticized as being either too costly, ineffective, or both.\textsuperscript{115}

Because of soundproofing's general failure to effectively deal with the problem of aircraft noise, little attention has been paid to issues of jurisdictional responsibility in that regard. The federal government has conducted a number of studies of soundproofing\textsuperscript{116} and has established policies and funded programs involving soundproofing of homes near airports.\textsuperscript{117} However, either as a preventive or remedial measure, commentators are in agreement that soundproofing is generally not the answer.\textsuperscript{118}

2. Aircraft Hardware and Operational Changes: Control at the Source

At the Oakland Airport the principal noise problem results from takeoffs using flight paths near Harbor Bay Isle, located just off the western end of the runway. The control of aircraft engine noise is far more difficult during takeoff than during landing. Landing noise has

\textsuperscript{112} Keeping the Jet's Roar Outside the Door, \textit{HOUSE AND HOME} 10 (Sept. 1970).
\textsuperscript{113} BERGER, supra note 48, at 748-50.
\textsuperscript{114} Noise Standards, \textit{CAL. ADM. CODE} § 5014 (Nov. 28, 1970).
\textsuperscript{115} See, e.g., \textit{NOISE ABATEMENT}, supra note 84, at 142; \textit{DWORKIN}, supra note 107, at 491; \textit{ECONOMIC IMPACT}, supra note 83, at 26-31; \textit{EPA, NOISE FACTS DIGEST} 91-95 (1972).
\textsuperscript{116} See \textit{EPA, A SUMMARY OF NOISE PROGRAMS IN THE FEDERAL GOVERNMENT} (1971).
\textsuperscript{117} See, e.g., \textit{HUD CIRCULAR} 1390.2 § 1 (1971), establishing policies to be applied in the approval or disapproval of all HUD projects in noise impact areas.
\textsuperscript{118} Gottlieb, \textit{Land-Use Controls for Airport Planning}, 3 \textit{URBAN LAWYER} 266 at 273 (1971). Also, note that there is no compelling reason why a homeowner should submit to the disruption of his home and family life during the period of time necessary to perform soundproofing modifications.
been reduced by operational and hardware changes unlikely to be matched in the takeoff mode. Source noise control is emphasized at the federal level, however, and may provide some additional relief from noisy aircraft in the future.

The control of aircraft noise at its source, the aircraft engine, may be accomplished in two ways: (a) modification of the engine itself so that it will generate less noise, and (b) aircraft operational and scheduling changes to reduce the impact of noise on the ground. The following discussion will describe the statutory basis for the authority of the federal government to control airport noise by these two techniques.

The Noise Control Act of 1972119 (hereafter 1972 Act) directs the federal Environmental Protection Agency (EPA) to study the adequacy of noise emission standards for new and existing aircraft, and the adequacy of existing Federal Aviation Administration (FAA) flight and operational noise controls.120 The FAA derives its basic authority to regulate and control the operation of aircraft from provisions of the Federal Aviation Act of 1958121 (hereafter 1958 Act), granting the FAA authority to promulgate Aviation Regulations (FARs).122

Pursuant to the 1958 Act as amended by the 1972 Act the FAA has the statutory authority to certify both aircraft and airports based on noise standards as recommended by the EPA.123 At the minimum, this means that the FAA could permit only "quiet" civil aircraft to fly in U.S. airspace; arguably, the FAA is also authorized to exercise its certification power based upon noise levels in areas surrounding airports (hence, federal land use planning exercised indirectly).124

The FAA has exercised its authority to control airport noise under provisions of the amended 1958 Act only once, in the promulgation of
FAR Part 36. That regulation sets noise emission limits for type certification of new aircraft only, and has no application to retrofit or phaseout programs for older aircraft. The three mainstays of the new generation of quiet jet transport aircraft (the Boeing 747, Lockheed L-1011, and Douglas DC-10) are the only aircraft certificated under Part 36 now in service in the United States.

Under a recent Notice of Proposed Rulemaking, compliance with FAR Part 36 would be required by 1978 for specified aircraft including older commercial jet transports presently in operation. The proposed rule would thus require some kind of retrofit program, probably either a sound-absorbent material (SAM) retrofit, involving treatment of the engine housing (nacelle) or "refanning" of older engines; this reduces the whine but not the exhaust noise and is even more costly than SAM treatment. Studies have shown that retrofit is generally not sufficient to meet FAR Part 36 without also introducing unusual approach and departure procedures. It is generally predicted that such a retrofit program will not be effectuated as proposed because of economic infeasibility.

An EPA report suggests that FAA tower clearance and flow control authority could be used to reduce noise by restricting the use of certain runways during sensitive time periods or by altering takeoff and landing flight paths. Such procedures have been implemented by the FAA at certain eastern airports and are recognized as effective noise reduction measures in certain circumstances. Other operational changes such as high or low airspeed, steep or shallow climb, turns after takeoff, and specific thrust settings often affect only the location of the

126. Vittek, supra note 111, at 475. This new quietness has been achieved by hardware changes resulting in a much higher ratio of air which passes through the engine without being combined with fuel and ignited to air which is used in the combustion process. This "high-bypass" engine reduces exhaust speed and exhaust sound, but is a fundamentally different engine from that which remains in use on the bulk of commercial airliners.
128. The cost of a "SAM" retrofit for the entire fleet of U.S. airliners has been estimated at between 0.8 and 2.5 billion dollars. Vittek, supra note 111, at 477.
129. The concept of retrofit of older aircraft has been criticized because of the huge capital cost requirement at present levels of technology. The retrofit concept is fundamentally different from a type certification rule such as FAR Part 36 because under Part 36 the manufacturer can build in noise reduction features from the start. The application of Part-36 type noise limits to older aircraft, it is argued, will serve to divert airline industry capital from investment in newer, quieter jets and thus could ultimately prolong the economic life of older, less efficient aircraft. Danforth, Mercury's Children in the Urban Trap: Community Planning and Federal Regulation of the Jet Noise Source, 3 Urban Lawyer 206 at 223 (1971).
130. EPA Analysis, supra note 47, at 2-15.
131. Id.
noise impact rather than its magnitude, and FAA actions in these respects have probably achieved greatest possible effectiveness at most airports.\textsuperscript{132} Oakland Airport has already modified its departure flight track and has assumed for purposes of noise forecasting that by 1985 all its aircraft will comply with FAR Part 36 by using a power cutback procedure on takeoff.\textsuperscript{133}

The question whether a municipality has the authority under its police power to limit the operating hours of an airport within its boundaries in order to reduce its noise impact was answered by the U.S. Supreme Court in \textit{Burbank v. Lockheed Air Terminal, Inc.}\textsuperscript{134} \textit{Burbank} established that no state or subdivision thereof may constitutionally use its police power to impose a curfew limiting the hours of operation of certain aircraft for the purpose of protecting its citizens against noise. The Court, in an opinion by Justice Douglas, relied upon the "pervasive nature of the scheme of federal regulation of aircraft noise"\textsuperscript{135} to conclude that there is federal preemption of state and local control over aircraft noise. It rejected a city ordinance purporting to limit the hours of takeoff for "pure jet" aircraft from Hollywood-Burbank Airport, based upon the argument that such curfews, if enacted on a widespread basis, would result in a bunching of flights which would be inconsistent with the federal regulatory scheme.\textsuperscript{136} In a footnote, however, the Court noted that a municipality's authority as an airport proprietor is not necessarily congruent with its police power, and explicitly did not consider what limits, if any, apply to a municipality in its proprietary capacity as an airport operator.\textsuperscript{137}

The Court's distinction between police power and proprietary control of airway flight procedures appears inconsistent with the line of reasoning that a bunching of flights would result in conflict with the federal regulatory scheme. The great majority of airport operators, at least in California,\textsuperscript{138} are also public entities, so that \textit{Burbank} has very limited effect if indeed its holding applies only to the very few private operators of commercial aviation facilities.\textsuperscript{139} The \textit{Burbank} holding is further clouded by language in \textit{Air Transport Association of America v.}

\textsuperscript{132} BERGER, \textit{supra} note 48, at 745.
\textsuperscript{133} Aircraft may satisfy the requirements of FAR Part 36 by type certification or by operating limitations. Procedures such as power cut-back on takeoff are acceptable under Part 36. \textit{See generally} 34 Fed. Reg. 11302 (1969), 40 Fed. Reg. 1029 (1975).
\textsuperscript{134} 411 U.S. 624 (1973).
\textsuperscript{135} \textit{Id.} at 633.
\textsuperscript{136} \textit{Id.} at 627, 639-40.
\textsuperscript{137} \textit{Id.} at 635 n.14.
\textsuperscript{138} RASS, \textit{supra} note 16, at III-105.
\textsuperscript{139} EPA \textit{ANALYSIS}, \textit{supra} note 47, at 2-46.
Crotti, supra,140 as follows:

It is now firmly established that the airport proprietor is responsible for the consequences which attend his operation of a public airport; his right to control the use of the airport is a necessary concomitant, whether it be directed by state police power or his own initiative [citations omitted]. That correlating right of proprietorship control is recognized and exempted from judicially declared federal pre-emption by footnote 14 of Burbank.141

The Crotti decision voided as unconstitutional the SENEL (Single Event Noise Exposure Level) provisions of the California Airport Noise Standards, granting partial summary judgment for plaintiffs in their challenge to all of the Standards. The court indicated doubt as to the validity of portions of the Standards dealing with CNEL provisions on conflict and burden rather than preemption grounds; thus the CNEL provisions were not subject to summary disposition “and must await a future day of judgment.”142

The CNEL provisions of the Standards, still valid even under Crotti, prescribe methods for airports to reduce noise impacts. These include changing approach and departure flight paths and procedures to minimize noise in residential areas, and reducing flight frequency during sensitive time periods by noisier aircraft.148 Because of the questions remaining in the aftermath of Burbank and Crotti concerning the extent to which an airport may regulate aircraft operations to reduce noise, it is instructive to review earlier cases in order to understand the traditional scope of discretion vested in the airport operator in this area.

Loma Portal Civic Club v. American Airlines144 recognized that the right of property owners to maintain an action for damages against an airport does not conflict with federal law.145 And Stagg v. Municipal Court148 upheld a municipal ordinance limiting the hours of operation of jet aircraft for the purpose of alleviating noise. Although Burbank, supra, casts doubt on the validity of Stagg, which found not only that the ordinance was within the municipality’s statutory power to regulate the airport but also that it was a valid exercise of the police power, Stagg read together with Burbank supports the proposition that the airport’s proprietary capacity to deal with aircraft noise is not so limited.

Municipal ordinances regulating the flight paths and altitudes of aircraft have frequently been upheld where there was no conflict with

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141. 389 F. Supp. at 63-64.
142. 389 F. Supp. at 65.
143. Noise Standards, CAL. ADM. CODE § 5011(b) (Nov. 28, 1970).
144. 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964).
145. Id. at 592, 394 P.2d at 554, 39 Cal. Rptr. at 714.
federal regulation. In Louisiana, a municipal ordinance prohibiting the landing of any seaplane, or operation of any aircraft within 1000 feet of the surface of a body of water used as a municipal water supply was upheld in Shreveport v. Conrad.\textsuperscript{147} And in People v. Altman\textsuperscript{148} a New York court expressly rejected the argument of federal preemption in upholding an ordinance which prohibited the landing of seaplanes on the city's channel system. The court said that while an ordinance must fail when the area has been preempted by the federal government, as where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it, local legislation survives when its conflict with federal law is indirect and not wholly repugnant to the federal statute.\textsuperscript{149} It should be noted that both cases were decided before Burbank and dealt with noncommercial aircraft operations.

A similar view was taken in a 1970 opinion of the California Attorney General, also preceding the Burbank decision, on the question of the respective authorities and responsibilities of the federal, state, and local governments to control aircraft-produced community noise. The Attorney General concluded that:

(1) The Federal Government has occupied a portion of but has not preempted the entire field of aircraft noise regulation.
(2) State and local governments may legislate in that field if there is no conflict with federal statutes or regulations.
(3) State and local governments which are airport proprietors may regulate aircraft noise in their capacity as proprietors despite federal statutes or regulations covering the field.
(4) State and local governments may regulate aircraft noise by land-use controls such as airport siting and zoning without restriction by the Federal Government.\textsuperscript{150}

Clearly contrary cases (i.e., those invalidating municipal regulation of aircraft operating procedures) such as Allegheny Airlines, Inc. v. The Village of Cedarhurst\textsuperscript{151} have focused on the impossibility of complying with both the local ordinance and the federal regulations. Cedarhurst involved minimum-altitude zoning which conflicted with certain FAA regulations.\textsuperscript{152}

\textsuperscript{147} 212 La. 737, 33 So. 2d 503 (1947).
\textsuperscript{149} See generally Annot., Validity of Municipal Regulation of Aircraft Flight Paths or Altitudes, 36 A.L.R.3d 1314 (1971).
\textsuperscript{150} 53 CAL. ATT'Y GEN. OP. 75 at 76 (1970).
\textsuperscript{151} 238 F.2d 812 (2d Cir. 1956).
The present state of the law in this area is unsettled. While an airport operator has the authority to completely close its airport to any and all aircraft, the extent of the operator's capacity to prescribe hours of operation, operating procedures, type of aircraft, flight track utilization, etc., or to take other steps to reduce noise impacts on the ground, is far from clear. In California, lawsuits have been filed challenging airport noise regulations in the City of Hayward (restrictions applicable to aircraft with certain noise characteristics at certain times of day) and Los Angeles (fleet noise regulation, limiting aircraft which may use the airport based on noise characteristics). At the Oakland Airport, the Port of Oakland has established a preferential runway use procedure to reduce noise but has not taken any action to limit night flights from the main jet runway.

3. Inverse Condemnation, Eminent Domain and Airport Zoning

This subsection will describe legal problems and possibilities respecting the regulation of land uses surrounding the Oakland Airport.

If Bay Farm Island is developed in residential uses as planned, and if noise levels due to airport operations remain the same or increase, Oakland may be liable in inverse condemnation for resulting damages to property. Further, there may be separate and continuing claims based on demonstrated adverse health effects of aircraft noise.

Expenses of litigation, huge governmental expenditures to buy and demolish housing, and community disruption are historical fact where such egregious planning decisions have been made by other cities and housing has been constructed near airports. At Bay Farm Island, however, the land is now vacant and construction could be halted. Two principal alternatives would effectively prevent construction of the residences: (a) the Port could acquire the vacant land in question through eminent domain proceedings and adapt it to airport uses; or (b) Alameda could rezone affected areas to airport-compatible uses. The latter solution has been urged by the Port of Oakland and may in fact be the result of the judicially-compelled attention Alameda is finally giving to airport impacts in its general planning process.


155. Ii PORT OF OAKLAND EIR, supra note 2, at D-76.

156. See text accompanying notes 90-95 supra.
a. Inverse condemnation

Airport inverse condemnation decisions are abundant, many of them following the reasoning of the U.S. Supreme Court in *U.S. v. Causby* and in *Griggs v. Allegheny County*. The Court in *Causby* found that the claimant, a North Carolina chicken farmer whose land was located adjacent to an airport used by military aircraft during World War II, was entitled to compensation where the use and value of his land were substantially impaired both for chicken raising and for residential purposes. The Court, while rejecting the ancient common law doctrine that ownership of the land extends to the periphery of the universe, nonetheless held that flights at altitudes and of a frequency that interfere with the use and enjoyment of land constitute a taking of property and must be compensated. In *Griggs*, airplanes landing at an adjacent airport flew within 12 feet of plaintiff's chimney, causing him to become nervous and distraught, interfering with his sleep, and damaging his home. The Court held that the airport owner and operator had the responsibility to compensate for a taking occasioned by aircraft overflights.

Federal courts have generally adhered to the restricted view of *Causby* announced in *Batten v. United States*, which limited recovery by adjacent land owners injured by airplane noise to only those instances where the planes flew directly over the land in question. In *Batten*, plaintiffs' land value decreased considerably due to the din of military planes using a nearby base airport, but they were denied compensation because, the Court held, no direct physical invasion of their land had occurred. Airport noise, of course, affects land on either side of aircraft flight paths and the *Batten* decision has been criticized accordingly. California state courts have not followed the *Batten* rule. The California Court of Appeals held, in *Aaron v. Los Angeles*, that the municipal operator of an airport was liable in inverse condemnation to owners of...

158. 369 U.S. 84 (1962).
159. 328 U.S. 256 at 261 (1946).
160. *Cuius est solum ejus est usque ad coelum*.
161. 328 U.S. 256 at 266 (1946).
residential property diminished in market value by noise from jet aircraft. The court found the operator liable where the owner of property in the vicinity of an airport, not necessarily directly beneath the aircraft flight paths, can show a "measurable reduction in market value resulting from the operation of the airport in such a manner that the noise from the aircraft using the airport causes a substantial interference with the use and enjoyment of the property. . . ."166

The Aaron case thus establishes that in California, contrary to Batten, a cause of action will lie in inverse condemnation based upon noise impact alone, and that despite federal preemption of state and local control over aircraft noise it is the airport operator who is liable for such takings.167

Noise from aircraft taking off from the main jet runway at Oakland Airport affects large areas of Bay Farm Island even though the actual flight track is over San Francisco Bay. At Bay Farm Island, buyers of homes yet to be built may therefore be able to hold the Port liable in the future for noise impacts resulting from Oakland Airport operations. Any action to reduce the impact of such possible future claims must be taken before construction is completed and land uses are committed, to assure the compatibility of any new development with airport operations.

b. Eminent domain

There is no serious disagreement with the proposition that airport purposes constitute a public use; the exercise of eminent domain is thus allowed in furtherance of airport development.168 The Port of Oakland actually pursued a condemnation action during the 1960's and acquired from Utah noise rights in about 95 acres of submerged land.169

The present value of undeveloped property on Bay Farm Island is in the tens of millions of dollars,170 however, making eminent domain acquisition with just compensation prohibitively expensive. The City of Alameda has no reason to buy the property171 and apparently there are no federal or state funds available to the Port of Oakland for land acquisition on such a scale.172 Thus, absent new sources of money for

166. Id. at 484, 115 Cal. Rptr. at 170.
167. Id. at 483-84, Cal. Rptr. at 170.
168. See also Lesser, The Dilemma of Airport Zoning—The Constitutionality of Police Power Regulation v. The Necessity of Eminent Domain Acquisition, 1973 INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN 117 at 118 [hereinafter cited as LESSER].
170. If PORT OF OAKLAND EIR, supra note 2, at D-77.
171. See text accompanying notes 10-13 infra.
172. The absence of money for this purpose is a matter of priority of funding rather than inherent limitations on permitted uses of funds. The Port is in fact actively pur-
this purpose, the possibility that the land will be acquired through eminent domain proceedings is doubtful at best.

c. Airport zoning

Zoning out incompatible uses on land surrounding airports is accomplished through two general types of ordinances: (a) ordinances limiting the height to which structures may be erected or natural objects permitted to grow, so that airport approaches will be free of obstructions (airport hazard zoning), and (b) ordinances designed to alleviate noise disturbances caused by aircraft landing and departing from airports (airport noise zoning). To a surprising degree, airport hazard zoning (though not an issue at the Oakland Airport) remains questionable as a valid exercise of the police power. Airport noise zoning, on the other hand, was expressly upheld in Smith v. County of Santa Barbara. The court in that case held that a noise zoning ordinance was justified for the purpose of preventing damage claims that might be

suing the alternative of finding federal or other money for the purpose of land acquisition, but has indicated that even a small matching share would be difficult for the Port to justify. Interview with Donald C. Flynn, Director of Airport Planning, Port of Oakland, June 7, 1976.

173. Lesser, supra note 168, at 118.
174. In Roark v. Caldwell, 87 Idaho 557, 394 P.2d 641 (1964), the Idaho Supreme Court held unconstitutional a municipal zoning ordinance restricting both the height of structures and the uses of land adjacent to an airport. The court held that the height restrictions alone resulted in a loss of value of the plaintiff's property and thus found a taking.

In Indiana Toll Road Commission v. Jankovich, 244 Ind. 574, 193 N.E. 237 (1963), cert. denied 379 U.S. 487 (1965), cited with approval in Roark, a municipal ordinance dealing solely with height restrictions was invalidated as an unconstitutional exercise of the police power, where the landowner would have been prevented under the ordinance from making "reasonable and ordinary use of his property." Id. at 576.

On the other hand, airport hazard zoning was upheld in Village of Willoughby Hills v. Corrigan, 29 Ohio 2d 39, 278 N.E.2d 658, cert. denied 409 U.S. 919 (1972), where there was in fact no impairment of use or diminution in value of property under an ordinance limiting the height of buildings or structures to 70 feet. And in Sarasota-Manatee Airport Authority v. Harrell's Candy Kitchen, 111 So. 2d 439 (Fla. S.Ct. 1959), an ordinance which prohibited an ornamental roof structure (extending to a height of 41 feet in an area limited by the ordinance to 28 feet) was upheld as a reasonable restriction. The court indicated that the "nub of this case is . . . whether the regulation restricting the height of this building is reasonable [and] as in other zoning cases, each issue must be decided as it arises." Id. at 445.


Smith was cited and followed in Morse v. County of San Luis Obispo, 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (1967), which upheld a down-zoning from one unit per acre to one unit for each five acres applied to property located near an airport. The court rejected the plaintiff's argument that such down-zoning should be presumed to be compensation for an air easement, citing McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 264 P.2d 932 (1953) as authority for the presumptive validity of such zoning regulations. 247 Cal. App. 2d at 603, 55 Cal. Rptr. at 712.
brought by future residents of property adjoining an airport if it were developed for residential use.  

Zoning generally is justified as an exercise of the police power where it bears any substantial relation to the public health, safety, morals, and general welfare. The relationship of a zoning ordinance to comprehensive planning (as reflected in a city's General Plan) is an important factor in determining its validity. The California requirement that every city and county shall adopt a Noise Element as part of its General Plan puts considerable legislative weight behind the proposition that comprehensive planning, and therefore zoning, should reflect existing and anticipated noise impacts.

A Noise Element has been required as a part of all city and county general plans in California since Sept. 20, 1974. Effective Jan. 1, 1976, guidelines adopted by the Office of Noise Control, California Department of Health must be recognized in the preparation or amendment of such Noise Elements. The statute requires, among other things, that Noise Elements "consider both near and long-term levels of growth and traffic activity." Sources of noise to be considered include "commercial, general aviation, heliport, helistop, and military airport operations, aircraft overflights, jet engine test stands, and all other ground facilities and maintenance functions related to airport operation." Further, "[i]t shall be the responsibility of the local agency preparing the general plan to specify the manner in which the noise element will be integrated into the city or county's zoning plan and tied to the land use and circulation element and to the local noise ordinance." The noise exposure information required in a Noise Element "shall become a guideline for use in development of the land use

176. Id. at 128, 52 Cal. Rptr. at 294.
177. HAGMAN, CALIFORNIA ZONING PRACTICE § 2.29 (1969).
178. CAL. GOV'T CODE § 65302(g) (West Supp. 1976).
181. Office of Noise Control, California Dep't of Health Guidelines for the Preparation and Content of Noise Elements of the General Plan (Feb. 1976) [hereinafter cited as STATE NOISE GUIDELINES].
182. Senate Bill 860 (Bielenson 1975) amended CAL. GOV'T CODE § 65302(g) (West Supp. 1976) to provide inter alia for mandatory recognition of the State Noise Guidelines in the preparation of Noise Elements. The amendment was effective Jan. 1, 1976, more than a year following the date on which all cities and counties were required to have an adopted Noise Element. See note 25 and accompanying text, supra. Many cities, however, including Alameda, did not meet the statutory deadline for adoption of a Noise Element and accordingly must recognize the new Guidelines. See STATE NOISE GUIDELINES, supra note 181, at 2.
183. CAL. GOV'T CODE § 65302(g) (West Supp. 1976).
184. Id.
185. Id.
element to achieve noise compatible land use. . . ."\(^{186}\)

The State Noise Guidelines provide for careful consideration of noise exposure information developed in the Noise Element in preparation of the required Land Use, Housing, Circulation, and Open Space Elements of the General Plan.\(^{187}\) Special attention is paid to land use compatibility where the noise source is aircraft.\(^{188}\) The State Noise Guidelines adopt the 65 dB CNEL criterion as the upper limit of "conditionally acceptable" single family residential construction,\(^{189}\) consistent with the State Aeronautics Act limitations on airport noise limits to be effective Jan. 1, 1986.\(^{190}\)

A proposed Noise Element\(^ {191}\) prepared in May 1976 for the City of Alameda outlined present noise levels due to operations at Oakland Airport and prospective noise levels under various assumptions of future airport operations.\(^ {192}\) Substantial portions of the presently undeveloped Harbor Bay Isle property planned for single-family residential development are identified as being within areas deemed "normally unacceptable" for such use based on present noise levels.\(^ {193}\) The Proposed Noise Element also points out that future noise levels may be even greater if passenger levels significantly increase.\(^ {194}\) The statutory requirement that Alameda's zoning be consistent with its General Plan\(^ {195}\) may yet force compatible-use zoning at Bay Farm Island.

As to whether a rezoning of Utah property for compatible uses would itself constitute inverse condemnation, case law in California is nearly unanimous in limiting inverse condemnation actions to cases involving physical harm to property, non-regulatory governmental activity, or bad faith.\(^ {196}\) The California Supreme Court held in HFH Ltd. v. Superior Court\(^ {197}\) that wrongful zoning cannot amount to a taking or damaging of real property because its effect on the property is provisional and reversible.

Although it has been argued that the most equitable adjustment of the rights and interests of the landowners and municipalities is to hold

\(^{186}\) STATE NOISE GUIDELINES, supra note 26, at 19-20. Id.
\(^{187}\) Id. at 26.
\(^{188}\) Id.
\(^{189}\) Id.
\(^{190}\) CAL. PUBLIC UTIL. CODE §§ 21001 et seq. (West 1965).
\(^{191}\) Williams & Mocine, Proposed Noise Element for the City of Alameda (May 1976) (planning consultants San Francisco, Cal.) [hereinafter cited as PROPOSED NOISE ELEMENT].
\(^{192}\) Id. at 29.
\(^{193}\) PROPOSED NOISE ELEMENT, supra note 191, at 19.
\(^{194}\) Id. at 34.
\(^{195}\) CAL. GOV'T CODE § 65860 (West Supp. 1976).
\(^{197}\) HFH Ltd. v. Superior Court, 125 Cal. Rptr. 365 at 372 (1975).
that all airport zoning ordinances are an unconstitutional taking,\textsuperscript{198} it is equally plausible to argue that any municipal regulation, including building setbacks and density limitations, is also a taking.\textsuperscript{199} Every instance of zoning affects property values, yet zoning has long been recognized as a constitutional and effective mechanism for guiding the direction and character of urban growth. Single family homes should be separated from many objectionable urban uses, including airports, and there is no compelling reason for considering airports any different from the factories and rendering plants now routinely separated from residential areas through zoning.

B. Land Use Regionalism

I. Duty to Consider Regional Needs

There is no institutional incentive forcing California municipalities to consider incompatible uses of land in neighboring jurisdictions when preparing their own zoning ordinances and general plans.\textsuperscript{200} In fact, to the extent that an airport fosters residential development, there is a powerful economic incentive for neighboring cities to zone for residential uses based on demand generated by the airport itself.\textsuperscript{201} Further incentive is provided by the hope that substantial revenues may thereby


\textsuperscript{199} LESSER, supra note 168, at 149.

\textsuperscript{200} In California, every city and county (including charter cities) must adopt a general plan containing certain required elements, to be “adopted by the legislative body for all or part of the territory of the county or city and such other territory outside its boundaries which in its judgment bears relation to its planning.” \textsc{Cal. Gov't Code} § 65301 (West 1966). Other sections of the Government Code direct but do not mandate that a planning agency shall consult with other public agencies for the purpose of maximum coordination of plans, \textsc{Cal. Gov't Code} § 65304 (West 1966), and shall refer any general plan or part thereof to abutting cities for comment. \textsc{Cal. Gov't Code} § 65305 (West 1966), \textit{as amended}, (West Supp. 1976). The “Guidelines for Local General Plans, State of California” published in September 1973 by the Council on Intergovernmental Relations pursuant to § 34211.1 \textsc{Cal. Gov't Code} (repealed by stats. 1975) provide \textit{inter alia} that “[l]ocal agencies should be familiar with regional planning programs and maintain close contact while a local plan is in the preparation stage.” \textit{Id.} at II-8. The Guidelines are, of course, advisory only. \textit{Id.} at I-1. The Alameda General Plan (see note 11 and accompanying text \textit{supra}) totally ignores the existence of the Oakland Airport, failing even to identify the airport as such on any maps or plans on which it appears or to identify regional plans or policies respecting airports.

\textsuperscript{201} See, e.g., Wilsey & Ham, The Effect of Aviation on Physical Environment and Land Uses (1971) (prepared for the Ass'n of Bay Area Gov'ts); Goldner \textit{et al.}, Economic and Social Impacts of Alternative Airport Sites and Locations in the San Francisco Bay Region (1971) (prepared for the Ass'n of Bay Area Gov'ts); BERGER, supra note 48, at 665-681.
accrue to the municipality in the form of increased property taxes. Scott v. Indian Wells articulated a developing doctrine of "regional responsibility" in municipal land use decisions. The City of Indian Wells had issued a conditional use permit to allow the construction of a major condominium development just inside the city limits. Buildings constructed under the proposal would have blocked adjacent non-city residents' views. The California Supreme Court, in supporting the right of neighboring landowners to oppose issuance of the permit, stated "We are satisfied that the City of Indian Wells owes adjoining landowners who are not city residents a duty of notice to the extent given similarly situated city residents, a duty to hear their views, and a duty to consider the proposed development with respect to its effect on all neighboring property owners." Indian Wells has been described as merely a revival of the principles enunciated in Euclid v. Ambler Realty, in which the U.S. Supreme Court stated that the interest of a municipality in zoning may be transcended by the general public interest. Thus the Massachusetts Supreme Court, relying on Euclid, has invalidated a zoning ordinance imposing minimum lot sizes and thereby limiting the number of citizens who might live within the city.

202. For a description of the substantial projected revenue benefits to the City of Alameda from the Bay Farm Island project, see Harbor Bay EIR, supra note 25, at IV-29 et seq.
203. 6 Cal. 3d 541, 99 Cal. Rptr. 745, 492 P.2d 1137 (1972).
204. Id. at 545, 99 Cal. Rptr. at 750, 492 P.2d at 1142 (emphasis in original).
205. 272 U.S. 365 (1926).
207. Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516 (1942). Numerous cases have dealt with "exclusionary zoning," wherein ordinances establish maximum density limitations on housing, involving policy considerations and legal principles similar to those in Indian Wells. See PAROCHIALISM, supra note 206, at 756; Comment, The General Public Interest v. The Presumption of Zoning Ordinance Validity: A Debatable Question, 50 J. Urban L. 129 at 129, 135 (1972). See also S. Burlington Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 336 A.2d 713 (1975): The misuse of the municipal zoning power [includes] the use of the zoning power by municipalities to take advantage of the benefits of regional development without having to bear the burdens of such development. 336 A.2d at 736.

Every developing municipality has at least a duty to consider regional housing needs in all its planning activities, both formal and informal, including its formulation of the comprehensive plan underlying its zoning ordinance (citation), its adoption of a master plan (citation), and its consideration of applications for zoning variances (citation). In addition, since effective planning for regional needs is virtually impossible without some degree of regional cooperation, all developing municipalities have an affirmative obligation to cooperate, for example, with regional planning boards established pursuant to [New Jersey statute] and in area review procedures established under the Intergovern-
Courts have commented with dismay that they, rather than the municipalities, have been ceded the responsibility for assuring that regional interests be considered by local planners.\(^{208}\) Despite the encouragement of such cases as *Indian Wells*, municipalities are not likely to abandon their selfish interests in favor of more regional concerns.\(^{209}\) Prospects for a solution in the Bay area in the form of a new regional planning agency vary from year to year; in 1974 hopes were high, but in 1975 the California Senate rejected a bill passed by the Assembly which would have established a Bay region “super-agency.”\(^{210}\)

2. *The Model Land Development Code*

Articles 7 and 8 of the Model Land Development Code of the American Law Institute\(^{211}\) provide detailed machinery for state planning, regulation, and administrative review of local land use decisions involving state concerns. Three principal features are: (a) provision

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\(^{209}\) Id. at 746.

\(^{210}\) Regional Bay Rule Predicted, Oakland Tribune, Dec. 5, 1974, at 21: The staff director of the Assembly Local Government Committee has predicted the passage of legislation establishing a strong regional government in the nine Bay Area counties during the 1975 session of the state legislature. In his opinion the new entity “would have veto power over the actions of cities, counties, and special districts which affect open space planning, transportation, air and water pollution and other aspects of regional planning.”

\(^{211}\) ALI MODEL LAND DEVELOPMENT CODE (1975 Proposed Official Draft No. 1).
for a State Land Planning Agency\(^{212}\) with power to designate geographical areas of critical concern to the state and to subject local regulation in such areas to state review and approval\(^{213}\) (b) the identification of four types of development of special state or regional significance requiring local agencies to approve such developments even where inconsistent with local plans;\(^{214}\) and (c) provision for special review processes for large scale developments presenting issues of regional or state significance. One illustration in the Code uses an airport site as an example of an Area of Critical State Concern, for state involvement in land use decisions where noise is a factor.\(^{215}\)

This kind of mandatory consideration of state and regional concerns for projects of far-reaching significance may be necessary to overcome the self-interest of local approval agencies. The Model Code, of course, does not have the authority of law in California and has not been adopted wholesale in any state as of this writing. A number of states have, however, adopted its critical area designation approach to regional planning.\(^{216}\)

**CONCLUSION**

Despite considerable legislative and administrative attention to the problems of airport noise at both federal and state levels, there is still no effective governmental mechanism for solving the airport noise problem at the Oakland Airport through land use planning. The most progressive attacks against land use parochialism have been judicial. It appears that if the noise problem is to be solved, it will only be through judicially-compelled attention to sound policies and regional interests.

The massive public investments in airport facilities alone should command legislative attention to the waste and expense of protracted litigation which appears inevitable in these situations under present law. Federal, state, and local agency authority to plan for commercial aviation facilities is still uncertain after 50 years of scheduled passenger operations. The judiciary is not a repository of planning expertise and should not be forced to correct the unfortunate results of legislative inaction. The present draft of the Model Land Development Code indicates that planning expertise does exist and that legislative solutions are 

\(^{212}\) *Id.* at § 8-101.

\(^{213}\) *Id.* at § 7-201.

\(^{214}\) *Id.* at § 7-301(4)(a-d).

\(^{215}\) *Id.* at § 7-201 [note 3, illustration (a) at 299].

\(^{216}\) For a further discussion of the Model Code, including reference to state adoptions of the "critical area" concept in land use regulation, see Mendelker, *Critical Area Controls: A New Dimension in American Land Development Regulation*, 41 J. OF THE AM. INST. OF PLANNERS 21 (1975).
available, at least in the abstract, to solve problems of airport land use planning.

At Oakland Airport it is possible that rational decisions will be made by the neighboring city of Alameda to prevent the incursion of thousands of new homes into intolerably noisy areas. It is more likely, based on the sad history of experiences at other airports, that Alameda's own parochial interests will guide her decisions and that residential uses will prevail. The costs of Alameda's decisions will accrue to the region and will provide a late footnote to a long history of inattention to regional land use concerns.