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AIRPORT ZONING: A GROWING NEED IN SOUTH CAROLINA

Julian L. Stoudemire*

The twentieth century population explosion has necessitated an expansion of business, industrial and residential complexes in cities across the country. It became increasingly apparent to city planners that future expansion needs could best be met by restricting the use of certain lands, that is by zoning laws. Zoning in the form with which we are familiar first appeared in Germany about 1880 and has grown in use until today almost all cities with a population of over ten thousand have some form of zoning. Inevitably, the question of constitutionality would arise since zoning ordinances restrict the private landowner's use of his land. However, the landmark case of Village of Euclid v. Ambler Realty Co. held that reasonable zoning ordinances did not constitute a taking of property without due process but rather were a proper exercise of police power.

With the constitutionality question put to rest, the door was opened for the idea of airport zoning as a protective device for airport approaches to become a reality. The first airport zoning ordinance was enacted in 1928 by Alameda County, California, and it prohibited the building or maintaining of structures over fifty feet high within one thousand feet of any airport boundary. Little additional progress was made in establishing airport zoning until 1939 when the National Institute of Municipal Law Officers (hereinafter designated as NIMLO) published a model airport zoning act and ordinance. During World War II and thereafter, the airplane became more important, many more airports were built and interest in aviation became more enthusiastic. The natural corollary to this growth in aviation was an increase in the numbers and complexity of airport zoning problems and changes in the methods used to solve these problems. Since solutions have generally taken the form of legislation, an

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2. 272 U.S. 365 (1926).
4. Revisions in the act and ordinance were made in 1941, 1944 and 1964. See Rhyne, AIRPORTS AND THE COURTS 171 (1944).
5. See Yokeley, ZONING LAW AND PRACTICE § 202 (1953).

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examination of airport zoning enabling acts and ordinances will lead to a better understanding of the developments in airport zoning.8

A. Airport Zoning Legislation

There are three generally recognized methods to prevent overcrowding around an airport: condemnation, avigation easement and zoning ordinance.7 The first two methods generally prove costly, as under condemnation the governmental unit must condemn fourteen times more land than it needs for the airport in order to adequately protect the glide paths.8 Since this condemnation would constitute a taking of private property for public use, just compensation would have to be paid to the landowners.9 On the other hand, zoning acts are designed to regulate airport hazards and are based on the police power rather than eminent domain.10

Most state enabling acts have followed the model act formulated by NIMLO and the Civil Aeronautics Administration.21 This model act defines an airport hazard as "any structure or tree or use of land which obstructs the airspace required for the flight of aircraft in landing and taking off at an airport or is otherwise hazardous to such landing or taking off of aircraft."22

8. Wolf, Airport Approach Zoning—A Present Need, 17 U. Cinc. L. Rev. 327 (1948). Since this estimate was made in 1948, it has probably fluctuated somewhat since then.
9. See, e.g., S.C. Const. art. 1, § 17.
10. See 19 Tenn. L. Rev. 858 (1947). This basis was established in the 1944 model act, and in 1960 about thirty-five states had a statute based on this model. See also Note, 48 Ky. L.J. 273 (1960).
11. [A]irport zoning acts of one type or another have been adopted in all but eight states. These acts are usually denominated Airport Zonings Acts or Municipal Airport Approach Protection Acts and provide for the promulgation and administration of airport approach zoning regulations by subordinate units of government. Many cities have adopted airport zoning ordinances pursuant to the statutes, and the ordinances are apparently working well. Most of the enabling acts have been written or amended so as to be substantially similar to the 1944 model act formulated by NIMLO and Civil Aeronautics Administration.
AIRPORT OPERATORS COUNCIL, HANDBOOK OF LEGAL PRINCIPLES FOR AIRPORT OPERATORS 14 (Feb. 1963).
In 1964 the scope of the model act was broadened to include "incompatible land uses." Such a hazard is treated as a public nuisance which in the interest of public safety and general welfare may be regulated and prevented through the state’s police power. The model act is thorough in its handling of airport zoning problems. It sets forth definitions, regulations, a procedure for adopting ordinances, a provision for acquisition of avigation easements, and it establishes a zoning commission and a board of adjustment. Methods for removing non-conforming uses are also provided. However, the most important phase of the act is that it stresses reasonableness in all regulations and in their application, giving it a great deal of flexibility.

Airport zoning enabling acts are necessary in order to give to cities and communities the power to pass restrictive ordinances. After the enabling act has been passed by the state, the local governmental unit may adopt a zoning ordinance suitable for the needs and purposes of the airports in its area. Such ordinances generally can be divided into two categories. One category regulates the type of use, requiring that any use be compatible with the airport. Such an ordinance would prohibit, for example, large residential complexes, churches and schools. Since this category regulates the use of land, it falls into the general zoning provisions held constitutional in Village of Euclid as a proper exercise of the police power. The other kind of ordinance restricts the height of structures in accordance with a set glide path ratio. That is, it is not concerned with the type of structure or its use but merely with its height. This height ordinance was upheld in Welch v. Swasey wherein the court stated that "in the exercise of the police power the legislature may regulate and limit personal rights of property in the interest of the public health, public morals and public safety. . . ."

B. Case History of Airport Zoning Laws

Airport zoning basically serves two purposes. First, it removes physical hazards, such as trees, towers, smokestacks and buildings from the airport approaches. Also, it serves to decrease the number of suits brought against airports for damages due to

13. Id. § 3.
15. See AIRPORT OPERATORS COUNCIL HANDBOOK (May, 1965).
noise, vibration and related nuisances. In serving these purposes the laws seek to remove four general types of hazards: structural hazards such as smokestacks and trees; visibility hazards which create dust, smoke, glare and gas; communications hazards which interfere with the communications equipment on the aircraft; and traffic hazards which must be removed for the complete safety of the surrounding area.\textsuperscript{18} Despite these lofty purposes, airport zoning suffered early defeats before the state courts. In 1939 the Maryland airport zoning statute was held to be unconstitutional because this zoning amounted to a condemnation and thus could not proceed under the guise of the police power.\textsuperscript{19} Later, a height and use restriction was struck down by the New Jersey court as "an interference with the rights of property ownership, which is not within the contemplation or purpose of the zoning law."\textsuperscript{20} The advent of enabling legislation, not present earlier, seemed to be the answer in establishing the validity of airport zoning. However, the Kentucky Court of Appeals held that even with the enabling act, zoning would be unreasonable, arbitrary and capricious unless the purpose of such zoning is the elimination of airport hazards.\textsuperscript{21}

Airport zoning had not fared well in its early encounters with the courts, but it seemed to undergo a period of reappraisal and some liberalization in the courts' view. As time passed states began to enact enabling legislation adding a more solid basis to zoning ordinances. This turn in events can be seen in Florida where a height restriction ordinance was enacted pursuant to the state's enabling statute.\textsuperscript{22} The Sarasota-Mantee Airport Authority, which enacted the ordinance, sought to enjoin the erection of an ornamental tower in excess of the height limit.\textsuperscript{23} The defendant contended that the ordinance constituted a taking of private

\textsuperscript{19} Mutual Chem. Co. v. Mayor of Baltimore, 1 Av. Cas. 804 (1939).
\textsuperscript{20} Yara Eg'r Corp. v. City of Newark, 132 N.J.L. 370, 373, 40 A.2d 559, 561 (Sup. Ct. 1945). (The ordinance covered a two mile area, and the height restrictions ranged from ten to three hundred and seventy feet. The plaintiff's expert witness testified that the land would be worth considerably less if the zoning ordinance were upheld.) This decision was affirmed in Rice v. City of Newark, 132 N.J.L. 387, 40 A.2d 561 (Sup. Ct. 1945).
\textsuperscript{21} Banks v. Fayette County Bd. of Airport Zoning Appeals, 313 S.W.2d 416 (Ky. 1958). (Banks was refused permission to construct a motel on farmland one mile from the Blue Grass Airport. The circuit court upheld the board, and Banks appealed on the ground that the effect of the restrictions was not to eliminate congestion but to eliminate commercial use.)
\textsuperscript{22} FLA. STAT. ANN. § 333.03 (1958).
\textsuperscript{23} The building was 13.36 feet in excess of the ordinance maximum at that point.
property without just compensation, but the Florida Supreme Court upheld the ordinance.\textsuperscript{24} The court stated that ordinances of this type were presumed valid, and the burden of proof was on the person challenging it. "[C]ourts will not substitute their judgment as to the reasonableness of a particular rule or regulation where such has been duly adopted pursuant to lawful authority when such reasonableness is \textit{fairly debatable}."\textsuperscript{25} This decision was a step in a liberal direction but was a rather narrow ruling. The court enunciated the "fairly debatable" standard thus not really ruling on the constitutionality of the statute. Further, the structure was intended as ornamentation, not as an important part of the landowner's business, and thus there was no real property loss. In a subsequent Florida Court of Appeals decision the airport zoning ordinance was upheld as constitutional, and the patent need for airport zoning was recognized.\textsuperscript{26} The court stated that the present use of the property was agricultural, and the ordinance did not affect this use of the land. However, it should be noted that this case presented a general attack upon the statute's validity, and the court warned that a special attack based on the height limitation would present a different question. Thus, should a future case specifically challenge the validity of a height requirement, the Florida court could very well find a taking of property without just compensation.

When the Alabama court was presented with this precise question, it held that the state's enabling act\textsuperscript{27} empowered the city "to adopt an ordinance containing as it did a blanket restriction as to height . . . and also limit as it did the types of structures that could be erected. . . ."\textsuperscript{28} The court implied that if the re-

\textsuperscript{24} Harrel's Candy Kitchen, Inc. v. Sarasota-Mantee Airport Authority, 111 So. 2d 439 (Fla. 1959).

\textsuperscript{25} Id. at 443 (emphasis added).

\textsuperscript{26} Waring v. Peterson, 137 So. 2d 268 (Fla. Ct. App. 1962).

\textsuperscript{27} Pertinent provisions of the 1961 ordinance for the city of Montgomery are:

(b) Within an agricultural 'A' or 'B' District, no structure or tree shall exceed two and one-half stories or thirty-five (35) feet in height, except as hereinafter modified.

c) Within a Heavy Industrial District no structure or tree shall exceed three stories or forty-five (45) feet in height, except as hereinafter modified.

These are the height restrictions cited in Baggett v. City of Montgomery, 276 Ala. 166, 160 So. 2d 6 (1963).

\textsuperscript{28} Baggett v. City of Montgomery, 276 Ala. 166, 169, 160 So. 2d 6, 8 (1963).
restrictions were unreasonable, they could be struck down as an "unreasonable usurpation of the police power."\(^{29}\)

Whether an ordinance can be struck down as an unconstitutional taking of airspace without just compensation was dealt with by the Indiana Supreme Court in *Indiana Toll Rd. Comm'n v. Jankovich*.\(^{30}\) The city of Gary passed a zoning ordinance pursuant to authority vested in it by the state's enabling act. The ordinance provided that no structure could be erected for a distance of six thousand feet from the end of the runway that would interfere with the forty-to-one glide path ratio.\(^{31}\) Jankovich leased the airport for twenty years and spent a considerable amount of money to improve the facilities. The Road Commission, however, constructed a road seven hundred forty-three (743) feet from the end of the runway and at a vertical height of twenty-five (25) feet. Based on the forty-to-one glide path ratio, the maximum height at a distance of seven hundred forty-three feet would be eighteen and one-half (18.5) feet, or six and one-half (6.5) feet lower than the road in question. The lower court's decision in favor of Jankovich was reversed by the state supreme court. In reply to the question of who owned the airspace above the land the court cited *United States v. Causby*\(^{32}\) to the effect that the individual owns "at least as much of the space above the ground as he can occupy and use in connection with the land. . . . The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material."\(^{33}\) Further, the court found that the ordinance constituted a taking of the airspace surrounding the airport without just compensation. Although *Causby* held that a man owned as much airspace above his land as he could reasonably use, one authority has recently suggested that a proper zoning ordinance could "take" some of this airspace "so long as some reasonable use of the land is left to the owner."\(^{34}\)

\(^{29}\) Ibid.

\(^{30}\) 244 Ind. 574, 193 N.E.2d 237 (1963).

\(^{31}\) The forty-to-one glide path ratio means that at a distance of forty feet from the end of the runway, a structure of one foot in height can be maintained, at eighty feet from the end of the runway a structure of two feet can be maintained, and so forth. Any structure over one foot at the forty foot point would violate the ratio.

\(^{32}\) 328 U.S. 256 (1946).

\(^{33}\) *United States v. Causby*, 328 U.S. 256, 264 (1946). This case was affirmed by *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

\(^{34}\) Note, 31 J. Air L. & Com. 365, 370 (1965).
When presented with the constitutional question, the Idaho court relied on *Jankovich* to conclude that if the landowner's airspace is "taken" for public use, it must be with compensation for if the ordinance were enforced, the land values would greatly depreciate.\(^3\) The court distinguished the Florida case because therein there had been no depreciation in value. A new twist was given to the *Jankovich* case when the Supreme Court dismissed certiorari as being improvidently granted.\(^4\) The Court based its decision on the "settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other is non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment."\(^5\) The grounds in *Jankovich* had been the state constitution\(^6\) and the due process clause of the fourteenth amendment, and the Supreme Court found that these were separate grounds. In almost all cases that question the constitutionality of airport zoning ordinances which restrict building heights, the challenge has been based on both the state and the federal constitutions. Not only did the Supreme Court fail to pass on the federal constitutionality of height restrictions, but also, it cut off its review of such restrictions when their validity or invalidity is based on independent state constitutional grounds.

In *Jankovich* the petitioners claimed that the Indiana decision conflicted with the Federal Airport Act, which provided that land use in the area surrounding an airport must be compatible with the airport, and that the best way to insure compatibility was through airport zoning.\(^7\) Congress realized that all spon-

\(^3\) Roark v. City of Caldwell, 87 Idaho 559, 394 P.2d 641 (1964). In 1954 the plaintiffs bought two hundred and fifty-four (254) acres of land of which twenty acres were within the city of Caldwell and next to the airport. The plaintiffs proceeded to plat the twenty acres for residential purposes and had held four lots before 1961, when the ordinance in question was enacted. This ordinance placed property into zones restricted to uses in accordance with certain heights. The stated purposes were "to protect the airport and to prevent improper concentration of population subject to airport hazards." If the ordinance were enforced, the plaintiffs could use their land only for agriculture with certain height restrictions.


\(^5\) *Id.* at 489, citing Fox Film Corp. v. Miller, 296 U.S. 207, 210 (1935).

\(^6\) Ind. Const. art. 1, § 21 : "No man's particular services shall be demanded, without just compensation. No man's property shall be taken by law, without just compensation; nor, except in case of the State, without just compensation first assessed and tendered."

\(^7\) As a condition precedent to his approval of a project under this chapter, the Administrator shall receive assurances in writing, satisfactory to him, that . . .
sors of airport projects do not have zoning authority, and the
 provision in the act for airport zoning was not intended to re-
 quire that airport sponsors undertake action which would be
 neither possible nor practical—such as requiring a sponsor to
 purchase land adjacent to an airport where the sponsor cannot
 control its use by zoning. The purpose of the act, as expressed in
 its legislative history, was to discourage the building of schools
 or the development of residential housing in areas where noise
 levels would make such development unwise. Airport zoning is
 a reasonable method by which to achieve such compatible land
 use. 40

 The amendments to the Federal Airport Act in 1964 have
 enabled the federal government to again express its interest in
 airport zoning. The federal government should be able to take
 control of our airports and of zoning problems. In order to pro-
 hibit prostitution the federal police power was called upon to
 justify zoning around army camps during World War I. The
 Supreme Court held that zoning was a reasonable scheme for the
 protection of the armed forces which Congress must raise and
 support under the war powers. 41 Removal of high structures
 around airports to further public welfare and to promote air
 safety by zoning would seem to be an analogous situation, even
 if it does interfere with the owner's rights under state law. 42
 With the establishment of the Department of Transportation and
 its power over air commerce, it seems that the federal government
 will be able to effectively control the nation's airports. Further,
 some type of federal airport zoning appears inevitable.

 The existence of federal power can be found in the commerce,
 war and postal clauses. 43 At first glance it may seem that Con-
 gress does not have the power to pass federal zoning legislation
 under the postal clause. However, Congress has the power to
 regulate the mail and the method of its transportation, and since

(4) appropriate action, including the adoption of zoning laws, has
 been or will be taken, to the extent reasonable, to restrict the use of
 land adjacent to or in the immediate vicinity of the airport to activities
 and purposes compatible with normal airport operations including landing
 and take-off of aircraft. . . .

41. See McKinley v. United States, 249 U.S. 397 (1919).
43. U.S. Const. art. I, § 8, para. 3 (commerce); para. 7 (postal); para. 14
 (war). See Smylie, Constitutionality of Federal Airport Zoning, 12 Geo.
 Wash. L. Rev. 1 (1943).
one method is by air and airports are needed for planes carrying
the mail, Congress would be able to establish airport zoning.
Further, Congress has declared that airspace needed to take off
and land is part of the “navigable airspace.”

The cases which have arisen in the several states have decided
very little. Airport zoning has been held a valid exercise of the
police power only where the ordinance is reasonable, and the
purpose is related to the public safety or general welfare. The
ordinance must not be capricious or arbitrary. The Jankovich
case is the hardest one to align with the other cases. There is no
reason why airport zoning ordinances should not be interpreted
as comprehensive ordinances, and the distinction between height
restrictions made by the court is questionable. If progress is to
be made in airport zoning, the courts must take a more progres-
sive attitude and distinguish between the valid exercise of police
power and eminent domain at a point established by the reason-
ablness test. If the federal government chooses to regulate air-
ports and airport zoning, it has the power to do so and may make
use of this power in the future.

space’ means airspace above the minimum altitudes of flight prescribed by
regulations issued under this chapter, and shall include airspace needed to
insure safety in take-off and landing of aircraft.” Further, it should be kept
in mind that federal aid to airports is an important facet of the airport finance,
and in order to qualify for federal aid, the Federal Aviation Agency requires
a fifty to one glide path ratio.

Zoning has been recommended by the Doolittle Commission, appointed by
President Truman in 1951 to investigate a series of serious airplane crashes
in the Newark, New Jersey area. After several months of intensive study, this
commission made several recommendations, among which were:

4. Incorporate cleared runway extension areas into airports. The domi-
nant runways of new airport projects should be protected by cleared
extensions at each end of at least one-half mile in length and 1,000 feet
wide. This area should be completely free from housing or any other
form of obstruction. Such extensions should be considered as an integral
part of the airport.

5. Establish effective zoning laws. A fan shaped zone beyond the half-
mile cleared extension described in Recommendation 4, at least two miles
long and 6,000 feet wide at its outer limits should be established at new
airports by zoning law, air easement or land purchase at the end of
dominant runways. In this area, the height of buildings and also the use
of the land should be controlled to eliminate the erection of places of
public assembly, churches, hospitals, schools, etc., and to restrict resi-
dences to the more distant locations within the zone.”


45. Baggett v. City of Montgomery, 276 Ala. 166, 160 So. 2d 6 (1963); War-
ing v. Peterson, 137 So. 2d 268 (Fla. 1962); Harrel’s Candy Kitchen, Inc. v.
Sarasota-Manatee Airport Authority, 111 So. 2d 439 (Fla. 1959).
O. Airport Zoning in South Carolina

While South Carolina stands at the threshold of what could be a period of progressive airport zoning, great strides must be made. For example, there is no specific statewide enabling act, such as the model act, which empowers the enactment of municipal or county ordinances. The only zoning ordinance in South Carolina at present is the one establishing zoning for Shaw Air Force Base. This statute was enacted in 1945, and although the need for it has ceased, it has remained a law of record and has never been contested.

The only general zoning legislation for the state is limited to counties containing a city with a population of over twenty-three thousand, a rather impractical requirement for airport zoning purposes since very few South Carolina cities are that large. The section of the code known as the County Planning Act seems to allow the enactment of an airport zoning ordinance which the county governing body would have the authority to adopt. In 1962 the General Assembly enacted enumerated powers and duties for the Richland-Lexington Airport Commission and included therein was the power to establish a zoning ordinance or regulation. This enactment is of particular significance to the Columbia Municipal Airport. Before such a regulation can be adopted, a public hearing must be held and proper notice given. This section also gives the Commission the authority to use a fifty-to-one glide path ratio in restricting the height of structures extending ten thousand feet laterally from the center of the runway increasing in width from one thousand feet to an outer limit of ten thousand feet. On all adjacent land the commission has the power to restrict the structure height by using a fifteen-to-one glide path ratio for a distance of two thousand five hundred feet. This section does not establish an airport zoning ordinance but only gives the commission power to promulgate one, a power they have not exercised thus far.

Without a clear mandate for zoning, as through an enabling act, the question whether South Carolina will allow airport zoning is left open. There is always the possibility that a local ordi-

46. S.C. CODE ANN. § 2-435 (1962). This is a height restriction, and it uses a forty to one glide path ratio.
nance would be declared invalid as occurred in Maryland and New Jersey many years ago.\textsuperscript{51} By reading several code sections together, it is possible to infer that South Carolina would permit airport zoning. Clearly this is not an adequate answer, and even if accepted only a handful of counties would be affected. Thus, a zoning act, preferably patterned after the model act, is sorely needed in this state in order to establish a firm legal basis for local zoning ordinances. If South Carolina enacted the model act and a zoning ordinance were passed,\textsuperscript{52} the question then would be whether a height restriction was valid or rather constituted a "taking" of private property. The code provides that a zoning ordinance may "regulate and restrict the height . . . of buildings and other structures. . . ."\textsuperscript{53} There does not seem to be any difference between height restrictions in cities, held constitutional in \textit{Welch v. Swasey},\textsuperscript{54} and height restrictions in airport ordinances. Even so, the courts in various states insist on drawing this distinction, and it can only be hoped that future cases will not find it necessary to draw such flimsy distinctions.

The South Carolina Constitution has a due process clause similar to the fifth amendment, providing that no person can be deprived of property without due process of law.\textsuperscript{55} Ownership of airspace is by statute vested in the several owners of the surface beneath,\textsuperscript{56} but this ownership has been restricted by the \textit{Causby} doctrine to such airspace which is usable in connection with the land. In order to determine whether a height restriction would constitute a "taking" of private property and deny due process of law, several cases have interpreted the due process clauses of the state constitution.\textsuperscript{57}

The leading case in this area is \textit{Gasque v. Town of Conway},\textsuperscript{58} wherein the court stated that an actual taking of the land was

\textsuperscript{51} Yaner \textit{Eng'r Corp. v. City of Newark}, 132 N.J.L. 370, 40 A.2d 559 (Sup. Ct. 1945) (\textit{supra} note 20 and accompanying text); Mutual Chem. Co. \textit{v. Mayor of Baltimore}, 1 Av. Cas. 804 (1939) (\textit{supra} note 19 and accompanying text).

\textsuperscript{52} Under the authority of S.C. Code Ann. § 2-390.16(7) (1962).


\textsuperscript{54} 214 U.S. 91 (1909).

\textsuperscript{55} S.C. Const. art. 1, § 5. The constitution also provides that "private property shall not be taken for private use without consent of the owner, nor for public use without just compensation being first made therefor." S.C. Const. art. 1, § 17.


\textsuperscript{57} S.C. Const. art. 1, § 17.

\textsuperscript{58} 194 S.C. 15, 8 S.E.2d 871 (1940).
not necessary. To deprive the owner of the "ordinary beneficial use and enjoyment of his property is, in law, equivalent to the taking of it, and is as much a 'taking' as though the property itself were actually appropriated."69 Admitting that what amounts to a taking is not always clear, the court put forth a general rule that "there is a taking where the act involves the actual interference with, or the disturbance of, property rights, resulting in injuries which are not merely consequential or incidental. . . ."680 Thus, where an ordinance restricts the use, enjoyment or disposal of property, due process has been violated, and the proper route for the governmental unit may well be condemnation rather than zoning.61

The South Carolina cases have consistently followed the Gasque concept of what constitutes a taking of property. Under the Gausby doctrine and Section 2-4 of the South Carolina Code, the private landowner owns such airspace above his land as he might possibly use in connection with his land. This enunciation, combined with the prior airport zoning decisions in other states which have held that height restrictions constitute a taking of property, leads to the conclusion that any restriction of the airspace in South Carolina will constitute a taking of private property, and just compensation will have to be paid. The untenable distinction that these prior cases have drawn between height restrictions for buildings in cities as a valid exercise of the police power, and airport height zoning ordinances as a taking of private property, has had and will continue to have an adverse effect. In Mutual Chem. Co. v. Mayor of Baltimore62 the court stated that airport zoning was for the benefit of those who chose aerial transportation and who owned airplanes and not for the general public. This is no longer the case because the public bene-

59. Gasque v. Town of Conway, 194 S.C. 15, 17, 8 S.E.2d 871, 873 (1940). (Conway refused to grant the plaintiff a building permit to build a filling station after he had arranged to buy the land. The plaintiff maintained that this refusal amounted to a "taking" of his property. The court held that there has been no "taking"). See also James v. City of Greenville, 227 S.C. 565, 38 S.E.2d 661 (1955).


61. In Painter v. Town of Forest Acres, 231 S.C. 56, 97 S.E.2d 71 (1957) it was contended that the town ordinance, requiring the plaintiff's business to be closed from midnight to six in the morning, violated S.C. Const. art. 1, §§ 5, 17. The ordinance was held void as it restricted the right to use, enjoy and dispose of property in direct contravention of the state constitution. See also Sease v. City of Spartanburg, 242 S.C. 520, 131 S.E.2d 633 (1963).

62. 1 Av. Cas. 804 (1939) (supra note 19 and accompanying text).
fit in air travel and airports has become almost overwhelming, and as the needs and conditions change, so should the law.

Once accepting that the need for airport zoning exists, the question arises as to what constitutes a valid exercise of police power. It has been suggested that an ordinance must satisfy several tests in order to be a valid exercise. First, the purpose must be to promote the public health, safety, morals or general welfare. Second, it must be reasonably necessary and related to furthering the purpose. Third, it cannot deprive the owner of every beneficial use of his property. Fourth, "it must confer upon the public a benefit which is on balance commensurate with the burden imposed on private property." It has also been urged that the distinction between height restrictions in comprehensive city zoning ordinances and height restrictions in airport zoning ordinances be set aside. If this is not done, airports will be burdened with the eminent domain requirement.

South Carolina does not have a statewide enabling act. Further, the County Planning Act applies to only a few counties and even if the act applied to all, it would not be adequate to meet the state's needs. Future growth in South Carolina will require both more and larger airports, and the advent of jet service increases these needs. Thus, an enabling act is needed in order to create the necessary basis for local ordinances, and administrative functions could be established at the same time. There is some chance that the constitutionality of an ordinance would be questioned, but it would be held unconstitutional only when unreasonable in its purpose and application. For our court to find that a reasonable airport zoning ordinance is in the general welfare and a proper exercise of the police power would be in line with reason and the prior decisions of two sister states. Since Jankovitch did not pass on the constitutionality of airport zoning ordinances in South Carolina, it will be necessary to find that the South Carolina Constitution requires the same protection as that accorded the people of the United States by the Fourteenth Amendment. In the absence of a federal constitutional basis for the regulation, the wording and application of such an ordinance must fulfill the requirements of the state constitution.


65. Id. at 793. Approximately fourteen times more land than is needed would have to be bought by the airport. See Wolf, Airport Approach Zoning — A Present Need, U. CINC. L. REV. 327, 330 (1948).

height restrictions, South Carolina would not be bound by that case and would be free to reach the better reasoned position by ignoring the flimsy distinction drawn in Jankovich between city and airport height ordinances. Further, the problems incident to airport growth and safety will be lessened if zoning steps are taken in advance of the need.

In determining what is a proper exercise of the police power there must be a balancing of interests, and it has been stated that the public interest in having an airport, its value to the community, its safety for passengers in airplanes, and the safe utili-

67 See Billyou, AIR LAW (1963).
69 Ibid. (Emphasis added.)
70 The outline for an airport ordinance which might be reasonable is:
First: The area within one mile of the runway is restricted to existing farm uses only, except for an airport terminal.
Second: The next mile radius is restricted to farm uses only, and the only buildings must be in accordance with a fifty to one glide path ratio. No dwelling houses are permitted.
Third: The third mile radius is restricted to industry that does not have electrical equipment which would (a) interfere with the airplane, or with the airport communications, (b) create glare, haze, fog, smoke, or any other hazard which would interfere with the safe landing and takeoff of aircraft, and (c) be in accordance with the fifty to one glide path ratio. No residences, apartments, churches, or other public places are permitted.
Fourth: At either end of the runway a zone extends for three miles from the runway, growing in width from 3,000 feet at the runway to 6,000 feet at the end of the three miles. No buildings are permitted in these zones.
present and without enabling legislation, it is impossible to tell where the line will be drawn in South Carolina. Some feel that the absence of clear precedents in South Carolina is a disadvantage. This need not be the case, for while there is nothing on which to base a prediction of future developments, there is also nothing to act as a hindrance. Most of our airports are still in rural areas so that the need for zoning is just beginning to present itself. Now, before the land becomes too developed, is the best time to create and implement a thorough zoning plan.

Mr. Justice Cardozo aptly perceived the developing situation by the statement in 1928 that aviation was an established mode of transportation and that the future would only increase its use.

The city that is without the foresight to build the ports for the new air traffic may soon be left behind in the race of competition. Chalcedon was called the city of the blind, because its founders rejected the noble site of Byzantium lying at their feet. The need for the vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness.

It must be kept in mind that this is a rough suggestion, based in part on 48 Ky. L.J. 273 (1960), and any effective ordinance must meet the needs of the community and take into consideration for example, present existing uses, available land, future needs and developments. Most important of all, the ordinance must be practical.

71. The South Carolina Supreme Court has indicated its progressive tendencies in other areas such as in extending products liability in Salladin v. Tellis, 247 S.C. 267, 146 S.E.2d 875 (1966), and in discovery in Ex parte Goodyear Tire & Rubber Co., S.C., 150 S.E.2d 525 (1966), and in Proctor v. Corley, 246 S.C. 478, 144 S.E.2d 285 (1965). Since we have a broadminded court, susceptible to new ideas, the argument that a reasonable airport ordinance is a proper exercise of police power is likely to fall on fertile soil.