LEGAL ASPECTS OF THE UTILIZATION OF HIGHWAY AIRSPACE

by

Thomas C. Daniel
Graduate Legal Assistant

Virginia Highway and Transportation Research Council
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I. INTRODUCTION

It is a well accepted fact that there are no insurmountable legal, technical, or engineering problems in using airspace over modern freeways. There are problems in these areas, certainly--especially the legal constraints--but they are by no means insoluble,[1] as is obvious from the many buildings which have been erected over interstate highways in recent years in urban areas. The difficult issue is one of public policy--that is, whether or not such use is considered desirable by the locality or state in which the airspace utilization is proposed. This is the principal problem encountered, assuming the economic feasibility of airspace usage. While the initial reaction of many Virginians doubtless would be that Virginia has not yet reached the stage of urbanization that renders such utilization practical, it seems clear that the requisite degree of urban concentration is in the foreseeable future. It should be pointed out, however, that while the broad policy aspect of the question is the primary problem, there are entailed certain legal questions regarding a state's ability to acquire land in excess of the basic right-of-way needs.[2] (This is a consideration only when additional land is acquired.) These questions will be elucidated in a later section of this report.

The central theme of this study--one which deserves continued emphasis--is that it is of paramount importance that planning be begun now. For while the legal problems involved are by no means overriding, the prevailing atmosphere here in Virginia as elsewhere could be rendered much more hospitable to airspace development. This statement also will be clarified in the text of this report.

Highway builders today are faced with the same basic dilemma that railroads were faced with years ago--that is, while they both simply must require the surface area to perform their basic function, they also must pay the carrying charges upon the potential earnings of the cubic space many feet up which will never be utilized for highways (or railroads).[3] And with the increased urbanization of today, these "carrying charges" are becoming ever more burdensome. Space above highways is an economic waste, "a sort of vacuum into which business is bound to press if it is given a chance," as railroad airspace was described in 1928.[4]

The basic premise of this study is that use of airspace is desirable. If highway airspace can be utilized without adversely affecting the traveling public, there are at least seven advantages to be gained from such use. Such use could:

1. Reduce right-of-way costs.
2. Restore to local tax rolls part of the tax base now lost to streets and highways.
3. Reduce the disruptions caused by construction of modern highways.
4. Help relieve the land shortage in densely-populated areas.
5. Help solve acquisition difficulties.
6. Relocate residents and businesses displaced within the right-of-way.
7. Provide unique locations for businesses.[5]

The first advantage--reduction of right-of-way costs--is perhaps the most significant; on some urban freeways today, right-of-way costs average 70-80% of the total cost of the freeway.[6]

Of course, certain economic considerations must be met before it is feasible to consider using freeway airspace. That is, if the decision to utilize airspace or not were governed strictly by economic considerations, land values surrounding a right-of-way usually should exceed $15 to $20 per square foot before the airspace is developed. This is true because site costs may exceed $15 per square foot by the time some type of long double span bridge to support the building from both sides is constructed.[7] If land is available for less, airspace will not be utilized if the decision is based solely on economic considerations. Only in highly urbanized areas do land prices approach such high levels, especially when it is remembered that highway planners usually place freeway facilities along downtown perimeters and try to avoid the areas of extremely high value anyway. However, the use of airspace has not been confined to large cities alone; Fall River, Massachusetts, Hartford, Connecticut, and Bethesda, Maryland, are three less populous locales in which airspace development has taken place.

The social and economic utility of airspace is apparent from the standpoint of strictly business needs and from general considerations of the public interest. "The inescapable conclusion, therefore, is that the utilization of airspace, even with its attendant problems, is something which is of substantial social and economic value under the appropriate circumstances and is a device deserving of protection and advancement by courts and legislative bodies."[8]

II. PURPOSE

The purpose of this report is to provide a general exposition of the legal implications of the utilization of the airspace above the highways of the Commonwealth. As a necessary corollary to this exposition, Virginia's present legislation in the area is examined and suggestions for improvement submitted in the form of the "Model Airspace Act" recently drawn up by an American Bar Association Subcommittee. The statutes of two other states pertaining to this field are also presented for comparison with Virginia's.

III. THEORETICAL BASIS

At common law, air rights were determined according to an old Latin maxim to the effect that whoever owns the soil has dominion over the land "up to the skies." The landowner, therefore, had the exclusive right to occupy the space above his lands and was entitled to legal recourse when anyone else intruded into his airspace.[9] Of course, this has been modified with the advent of air travel and the famous Causby decision,[10] which ratified the earlier repudiation by both state and federal courts of the early concept.[11] The doctrine of Causby is summed up by stating that a landowner owns at least as much space as he physically occupies plus as much as he can possibly make use of in connection with the land. Of course, the situations in which airspace is actually being sold will nearly always involve airspace beneath the "navigable" point. Regardless of the height of the structure, it is still connected with the surface, and the surface owners are those whose property rights are involved in such a case.[12]

As for the question of whether the ownership of unattached airspace was possible when a clear attempt was made to create such airspace, there was no clear answer in 1916. However, it did appear, from many mining cases, that terra firma could be divided by horizontal boundaries. This was only one of many incidental ways which, in the late nineteenth and early twentieth centuries, the horizontal subdivision of space was recognized in many states.[13] The earlier cases based on the "upper chamber" concept (and that concept's more recent embodiment in the statutory condominium) support the idea that separate ownership of space on a lateral plane above the surface is possible, as do the early aviation cases which implicitly recognize this idea when they refer to "trespass" to airspace.[14] One of the early cases which indicated a development of the ancient Latin maxim was that of Pearson v. Matheson (1915).[15] In that case, the court maintained that, based on the original deed and contract, the "aerial part of the lot lying above a line parallel to the earth and fourteen feet above the earth, was intended to be used for the construction of a hotel."[16] A dispute over an easement for a skylight complicated the picture, but the court adopted the "sound theory" that the grantor had retained a "corporeal freehold" in the air, which was servient to an easement of light in favor of the freehold below the fourteen foot line.[17]

It should be noted that the old maxim was not contradicted by this line of reasoning, but rather incorporated into it. There were two distinct lines of thought which could have been followed, given that he who owns the soil owns the space above it. That space was either alienable from the soil or it was not. That is, either (1) ownership of space could be regarded in the same manner as ownership of land surface, and all the things that are done with land surface could be done with air space (i.e., selling, renting, granting of easements, etc.) or (2) the surface owner could be regarded as having property rights in the space over his land "as a sort of appurtenance which is inextricably connected to surface ownership"--that is, the airspace is inseparable from the land surface.[18]

One of the first court opinions to support strongly the first interpretation above was Butler v. Frontier Telephone Company (1906),[19] which made the statement that "space above land is real estate the same as the land itself."[20] R.R. Wright III, one of the foremost authorities on the legal aspects of airspace utilization, saw in Butler "a clear adoption of the principle that the space above the surface can be owned and possessed in the same manner as the surface."[21] The reason that the case is so important is that it refuted the notion prevalent at the time that airspace was incapable of possession.[22] Stuart S. Ball, an earlier expert, saw in the Butler case an "unequivocal commitment to the view that the land-space above the surface is subject to possession and ownership in the same complete sense that the surface is."[23]

The clarifying effect of the reasoning in the Butler case and of such cases as Pearson, supra, was considerably lessened with the advent of widespread air travel. Many legal experts, in their zeal to provide for unimpeded airways, insisted that the old maxim must be modified; they not only denied that space ownership extended indefinitely upward, they denied all ownership of airspace rights. In fact, one leading case, Hinman v. Pacific Air Transport (1937),[24] stated that there was no such thing as airspace ownership, that only the space that was occupied was owned; this threw much doubt into the legality of airspace transactions. The Causby decision, supra, contained the statement that the old maxim "has no place in the modern world," which, taken alone, seems to refute the idea that a landowner has any rights whatever in the space above his land. However, an essential element to the conclusion of the Causby decision is "that a landowner does in fact have paramount rights of ownership in the superadjacent (sic) airspace up to a reasonable height."[25] Professor John Cobb Cooper, a leading aviation advocate in the legal profession, stated that the "primary importance of the whole (Causby) decision is its reaffirmance that certain exclusive rights of the surface owner in usable superjacent space are protected by the territorial sovereign power of the state."[26] Moreover, the cases which have followed in the years since Causby have, by their very nature, rejected the idea that a landowner possesses only the space which he actually occupies.

During the period of the rise of aviation, there were those who realized that more of the often encountered "balancing of interests" was necessary than that advocated by the most ardent aviation writers. Two very important articles of Laird Bell and Stuart Ball written in the depression years are either based on the presumption that, or conclude that,

space may be owned, divided and sold in horizontal layers.[27] While the theoretical conflict was still debated in the 1960's, the Causby decision seems to have begun to carry the day. Also, the most basic distinction between "air" and "space" is finally becoming understood. Of course, air cannot be leased or sold as is real estate. Space, however, is entirely different; it is positively identifiable in relationship to the land surface if it is correctly described. Thus, theoretically, "there is no need to view ownership of subjacent space as being essentially different from the ownership of an open field."[28]

More recently, Congress has expressly recognized the concept of the separate ownership of airspace. The Housing Act of 1964, P. L. 88-560, Sept. 2, 1964, contains an amendment which authorizes the acquisition of air rights.[29] But most importantly, all these points are merely arguments which will help any court substantiate, by analogy, its final conclusion. For, as one legal scholar has put it, "The whole history of the development of the common law as a living thing and responsive to the needs of the public can lead us...to but one conclusion, namely, that air space within the vertical limits of the ownership of the surface owner can be alienated in fee to another, who will obtain thereby the exclusive ownership, domain and use of the space conveyed."[30] As Ball wrote in 1930, "the trend of economic development, so often the presage of the legal future, leads to some degree of confidence" in the belief "that some day the stratification of landspace will be commonly accepted."[31] That that day is coming ever closer is evidenced by the fact that statements such as the following are found today in learned journals.

"The posture of the law today...is that 'real property' is simply three-dimensional space defined by two-dimensional border lines running from the center of the earth 'to the skies' (i.e., to just below the navigable air space) and the landowner may convey any part of his three-dimensional land whether contiguous to the surface of the soil or not."[32]

Moreover, the few cases which have dealt with some particular aspect of commercial transactions involving airspace seem to assume as a basic premise that such are manifestly legally acceptable; the New York cases give the impression that "the conveyance of interests in airspace seems so obviously legitimate as to not necessitate adjudication of the question."[33] In addition, many states have statutes (such as Virginia's §15.1-376.1, Code of Virginia, infra) which, while dealing with particular situations, recognize as an underlying presumption that airspace may be owned and transacted separately and apart from the surface.

The ongoing process of reexamining the many problems encountered in expanding air rights utilization is thus being conducted in the increasingly more prevalent new "context of the twin pressures of advancing technology and decreasing space."[34] There is no doubt of the eventual outcome of this reexamination.

Thus, "the key factor in an air rights arrangement is that each of two or more parties has separate and distinct ownership or control of real property located in different horizontal strata yet resting on the same two-dimensional plot of land, and each puts the

same plot of land to separate and legally independent uses at the particular strata at which ownership exists."[35] The true "land" in legal terms must be three-dimensional space, including therein the surface, air, and subsoil, regardless of what fills that space.[36]

"The inescapable conclusion...is that particularly within the last ten to fifteen years, the legal writing on this subject, the courts which have considered related matters, the legislatures which have been confronted with the economic and social needs and realities of the day, and individuals of responsibility in both government and private business have moved in a rather unified direction toward complete acceptance of this legal premise (that space may be owned separately from the land surface and that it may be subdivided, conveyed and dealt with in essentially the same manner as the surface) and toward an economic utilization of the commodity of airspace which has as its necessary corollary the acceptance of the private ownership concept."[37]

Methods of Conveying Airspace

There are four basic methods of conveying air rights which have been and are currently being used. First is the lease, whereby the surface owner leases the airspace to a superjacent user. The other three are all types of fee simple interests in the airspace itself. The difference between the second and third types of conveying is in the method of providing for support for the structure which occupies the airspace. The second type involves a support easement whereby an easement for the necessary supports is granted to the airspace owner by the subjacent owner. The apartment complexes on the Manhattan side of the George Washington Bridge utilized this method. The city there granted fee simple interests in six distinct volumes of space over the proposed roadways, along with the support easements below each of the volumes. In that particular case, the bridge authorities were left with freedom to relocate the roadways if construction necessitated, since the volumes were described with reference to the yet unbuilt (at the time) roadways. The third method entails the granting of a fee interest for the area required for support. This "fee support" method is the most complicated of the methods, since it requires the description and recordation of three-dimensional subdivisions covering each support column. Especially troublesome are the problems encountered when the supports shift with settling. This was utilized in 1927 in Chicago when the Chicago and North West Railroad granted Marshall Field such fee supports for construction of the Merchandise Mart. The fourth and last method, probably the simplest, is the "easement back." With this method, the air rights developer is granted the fee simple interest in the entire parcel, but the grantor reserves a permanent easement or a lease for a term of years in the subjacent space. With this plan, counter easements are excepted from the grantor's easement in favor of the developer for support and access to supporting structures. Such a method was utilized in the legal arrangements for the Chicago Post Office, which sits astride a modern freeway.[38]

The instrument conveying an airspace interest can be very complex. For example, it should contain a covenant which permits either party to relocate its support columns at its own expense, subject to the right of reasonable refusal by the other party and the right to compensation for damages caused by relocation. It should include provisions for an expert to investigate the safety of the supports, for "encroachment easements" (in case the supports shift slightly as they settle), and for ventilation shaft easements. Release covenants, releasing the subjacent owner from liability for damages caused by freeway use, should also be in the conveyance. Thus there is really no such thing as a simple air rights conveyance.[39]

Of course, there are many other legal problems inherent in airspace development which will not even be touched on in this report. To mention a few, there are problems involved in contract specifications, in the bidding and construction phases, in the leasing, maintenance, safety, and taxation of possessory interests, and in the management of buildings occupying the airspace.[40]

IV. PRESENT ENABLING LEGISLATION AND DIRECTIVES--CRITICISMS AND SUGGESTIONS

This section will examine the statutory enactments, on both the federal and state levels, which specifically authorize the utilization of airspace over highways, as well as the administrative directives which interpret these enactments. The situation is best summarized by stating that while airspace use is allowable under broad federal legislation and a combination of state statutes and common law, legislation will undoubtedly have to be more specific before extensive or numerous projects will or can be undertaken.[41]

At the federal level, the first significant legislation of import in this area was the 1956 Federal-Aid Highway Act, which instituted the National System of Interstate and Defense Highways. The Bureau of Public Roads, in its Cherry Memorandum Number 31 issued in 1957, interpreted Section III of the 1956 Act as restricting the utilization of airspace to parking leases to other public entities. In June 1961, an amendment was promulgated to Section III of Title 23 of the United States Code, authorizing a state or political subdivision thereof

> "to use or permit the use of the airspace above and below the established grade line of the highway pavement for such purposes as will not impair the full use and safety of the highway, as will not require or permit vehicular access to such space directly from such established grade line of the highway, or otherwise interfere in any way with the free flow of traffic on the Interstate System."

This legislation was subsequently implemented by the Bureau of Public Roads' instructional memorandum (IM) 21-3-62, dated May 4, 1962.[42] It has been said that this memorandum generally hampered the use of airspace and the development of the multiple use concept "because it was overly cautious and lacked flexibility." "Too much red tape, a lack of imagination, and a disregard of the realisms with respect to the financing of operations of this type by private and public developers have deterred airspace development."[43] This IM was superseded by the policy and procedure memorandum (PPM) 80-5, dated April 20, 1967, and December 27, 1967 (specifically, Attachment 3, "Airspace Requirements"), which is primarily a consolidation of then-existing issuances into the new series.

PPM 80-5 provides that, where state law permits, rights-of-way for all federal-aid highways shall be acquired in unlimited vertical dimensions, unless the Director approves a state's application to acquire rights-of-way of limited vertical dimensions where substantial savings in the overall cost of the highway project may be effected thereby. In fact, it is mandated that in congested areas, "full consideration should be given to the possibility of substantially decreasing right-of-way costs by acquiring rights-of-way limited to vertical dimensions." Also, if an acquired right-of-way includes airspace which can be applied to a non-highway use without impairing the full use and safety of the highway, the Director may approve such use. Application for such uses must be made in accordance with the provisions of Attachment Number 3, which contains twenty-two conditions formulated to protect the public interest. These conditions deal with items such as support locations, height limitations, ventilation, signs, insurance and disposition of income. Detailed procedures for making application to the Federal Highway Administration Regional Administrator are spelled out in PPM 80-10.1 (August 7, 1970).

Two other memoranda (both issued January 17, 1969) are even more resolute in their encouragement of airspace utilization. Interim Policy and Procedure Memorandum 21-19, on the subject of Joint Development of Highway Corridors and Multiple Use of Roadway Properties, states that "The utilization of freeway airspaces should be encouraged within the highway corridor development plan." Federal-aid funds may participate in construction costs of the platforms in airspace above a highway when:

> "(a) the use of such space is an integral part of the total corridor joint development plan,
>
> (b) the added cost for this type of air-rights development can be generally supported on the basis of the intensity of the land use in the corridor, the public use or tax benefits to the locality, or the advantages to the highway program of the selected route location over alternative locations; and
>
> (c) the proposed facility complies with the rules established in PPM 80-5 to protect the highway and its users."

"The use of Federal-aid highway funds may be justified when further participation in the costs of providing a platform is required to allow action by another entity in implementation of the corridor plan, and it is the Federal Highway Administrator's finding (a) that the proposed joint development project is necessary to conform the highway to the particular needs of the locality or (b) that a joint development project is the most reasonable means of minimizing the impact of the highway upon the environment."

Instructional Memorandum 21-2-69, also dated January 17, 1969, on the subject of "Federal Participation in the Development of Multiple Use Facilities on the Highway Right-of-Way," states that "every encouragement should be given to making maximum utilization of the highway rights-of-way for both public and private development, provided there is no impairment to the full use and safety of the highway." It also requires that an agreement be executed between the using party and the state highway department, in conformance with the PPM concerning air rights. The state highway department is delegated the responsibility for maintenance of multiple use facilities, though it may in turn contractually delegate this duty to the sponsor of the multiple use facility. Approval by the Regional Federal Highway Administrator or the Division Engineer is required for increased span lengths for structures or modification of highway cross sections "where such would promote and encourage desirable public and/or private uses of land areas...over...the highway." Both these memoranda are based upon the premise that "work needed to make the highway conform to its environment in a reasonable manner is a part of the basic highway cost."

Aggregating these several directives of the Bureau of Public Roads, the Bureau's airspace policy could be summarized in four short statements:

(1) It (airspace utilization) over federal-aid highways is officially encouraged,
(2) It could fit in with land-use planning generally,
(3) But the primary purpose of both the Bureau and the state highway departments is to provide safe, good highways, and
(4) As a result, such utilization must be carefully restricted to be certain that there is no interference with this primary purpose, or that such interference is practically negligible, or at least minimal.[44]

The general attitude of the Federal Highway Administration (as the Bureau is now known) towards the entire concept of airspace utilization appears to be one of passive acquiescence, rather than active encouragement. The basic conditions to such use are that it does not

(a) impair the full use and safety of the highway,

(b) require or permit vehicular access to such space directly from the established grade line of any controlled access highway, or

(c) otherwise interfere with the free flow of traffic on the Federal-aid highways.

(For an elaboration on these general standards, see PPM 80-102, dated August 7, 1970, which contains standards on minimum clearance, interference with visibility, location of structural supports, safety precautions, and other matters. These requirements are extended to all federal-aid systems by that PPM.)

State Laws

Before the pertinent Virginia Code section is examined, a word should be inserted about the restrictions under which a state finds itself in determining its stance on airspace ownership. Combining Causby, supra, with the case of Jankovich v. Indiana Toll Road Commission (1965),[45] upholding the Indiana court's invalidation of an airport zoning ordinance and approving implicitly the state's statute on airspace ownership, Wright has concluded that:

> "(1) States have a free hand, subject only to the statutes and regulations enacted under the commerce power, to determine the extent of ownership of airspace and to enforce their laws on the subject; and
>
> (2) The exercise of the federal power to regulate interstate air commerce and expressions of national sovereignty in that connection do not preclude the passage of nonconflicting state legislation or the exercise of state sovereignty consistent with the federal statutes."[46]

Left reasonably free to determine what constitutes property interests in airspace, the states have followed the concept of the old maxim, except for limitations necessitated by the development of aviation.[47] Wright has also stated, speaking in reference to the Civil Aeronautics Act, that "except for its establishment of a right of transit through navigable airspace, Congress never really got into the space ownership argument, apparently choosing quite appropriately to view that as a local property matter to be determined by state law."[48]

The only Virginia statute which deals specifically with the topic is Va. Code §15.1-376.1, which provides that certain cities and counties may sell or lease airspace over public streets under the following conditions:

(1) Cities must have a population of more than 5,000,

(2) Counties must have a population density of over 1,000 inhabitants per square mile,

(3) The structure over the street must allow a minimum clearance of 16 feet,

(4) The lessee (developer) is not immune from liability for his negligence,

(5) A public notice must be given and a public hearing must be held, following the provisions of §15.1-431,

(6) The highway commissioner's written consent must be given, and

(7) The cost of relocating any overhead public utility must be borne by the lessee (developer).

This statute fits well under the condemnation which the Subcommittee of the Committee on New Developments in Real Estate Practice of the Section of Real Property, Probate and Trust Law of the American Bar Association has bestowed upon the airspace laws of such states as New Jersey, California, Pennsylvania, Illinois, Wisconsin, Ohio, Colorado, Washington, and Massachusetts--i.e., even when specific legislation has been enacted on the state level, the authority vested is often inadequate. In fact, of all the states in the union, only Connecticut has legislation which actually encourages commercial development of street and highway airspace.[49] It should be noted here that §125 of the Virginia Constitution provides that no franchise or right of any kind or use of any public property in a city or town, or easement of any description, shall be granted in a manner permitted for a period longer than thirty years; this provision could arguably place a limitation on the broader language of the statute.[50]

At this juncture, many would doubtless argue that while it is to be admitted that the law of Virginia leaves much to be desired in its specificity, the common law has expanded, with its traditional flexibility, to meet new economic demands and to solve new problems in a manner consistent with commercial necessity.[51] That is, any gap left in the statutes will be filled by the judiciary, building on common law precedents. Thus, although it may be desirable to have enactments which specifically authorize airspace utilization, it should

not be inferred that without such legislation a state is without power to use the airspace over its highways.[52] For example, a leading law journal concluded that the Colorado act "added little to Colorado law, except possibly clarity," and that such estates could be created under the common law as well as by statute.[53]

Another criticism which has been leveled at legislation in other states (and which is a factor to be considered were Virginia to enact more extensive legislation in the area) is that it is too broad. In California, for instance, it has been charged that "present state legislation is so broad that it is probably insufficient for extensive practical application to complex and improved airspace developments." In short, "without a greater mandate for active development, including legislative determinations and enactments, it is unlikely that the orderly or efficient development of airspace can be achieved."[54] A happy medium must be struck between a statute that is too general and one that is too detailed.

Thus, the prevailing attitude towards airspace legislation on the state level is that it is inadequate. An American Bar Association subcommittee has stated categorically that "until clear enabling legislation is available (on the state level), the commercial use of such airspace is not likely to exceed parking motor vehicles or the construction of inexpensive structures compatible with short term occupancy."[55]

In a preliminary draft of a model state airspace statute prepared by the Bureau of Public Roads, the conveyance of lands--or interests therein (including airspace not needed for highway purposes)--and the separate taxation of airspace would be authorized.[56] More recently, the work of a project directed by R. R. Wright and sponsored by an American Bar Association subcommittee was published; it was entitled the Final Draft of the Model Airspace Act, and "meets the important needs not only of the states and local communities but also of private individual and corporate interests."[57] This act would fulfill five important ends:

"(1) It defines and locates airspace and provides for taxation separate from the surface.

(2) It applies real property laws and estates to airspace, both that owned by government and privately.

(3) It authorizes states, local communities and private interests to acquire, manage, and dispose of airspace.

(4) It permits states and local communities to cooperate with other governmental bodies, agencies, and private interests in developing and carrying out comprehensive plans for the joint development and multiple use of rights of way, adjoining real property and airspace.

(5) It provides for the development of airspace over easement rights of way."[58] (This act is reproduced in Section VIII below.)

If the common law will suffice, why is a statute on the subject needed? The great advantage of statutory law is its certainty.[59] Quite simply, attorneys prefer to rest their case upon a specifically applicable statute, rather than upon an argument by analogy from common law.[60] To render an investment in airspace attractive, a state must do everything possible to reduce the unknowns.[61] A statute specifically authorizing the use of airspace and resolving the inherent problems would do just that. In addition, if the past is any criterion, it would seem to be prudent to enact legislation specifically authorizing airspace utilization.[62] Such an enactment would protect the highway and the rights of the traveling public while at the same time render airspace usable to the greatest degree possible.[63]

There is complete agreement that the optimum time to develop airspace is at the very inception of the designing of a freeway. For a standard, ten-story building, structural costs will be three percent higher than if built on normal land; if constructed over operating freeways, the structure will cost five to six percent more than if built on normal land.[64] Planning is extremely important in this area. The problems of the future will be much easier to deal with if planning is started today. One important aspect of this planning is the promulgation of state airspace utilization legislation.

In short, it is recommended by some that a statute somewhat akin to the Ohio provision be passed. Ohio Revised Code Annotated, Section 5501.162 "provides the basis...for the acquisition, ownership, and use of separate parcels of airspace over the highways of Ohio, and thereby recognizes in statutory form that airspace is capable of separate ownership and may be carved up in approximately the same manner as other forms of real estate."[65] More specifically, that statute provides (among other things) that "the director of highways can convey the fee simple estate or any lesser estate or interest in, or permit the use of, any property determined as not needed for highway purposes."[66] Each such unit is said to be deemed real estate for all purposes and separately taxable. Thus, although the Ohio provision is criticized by some (above), it is definitely closer to what is needed than is Virginia's present enactment. The entire Ohio Code section is included in toto in the Appendix to this report.

Many other states have statutes attempting to deal with the question at hand, although almost all have their shortcomings. Minnesota, for example, requires the approval of the governor before the highway commissioner can permit the use of airspace, and allows a maximum lease of 99 years.[67] Massachusetts places similar limitations upon the power of the department of public works to lease airspace over state highways.[68] New Jersey restricts the sale or lease of such space to <u>any municipality</u>.[69] Illinois grants to

every municipality the power to lease airspace for a term of "reasonable certainty" to a person who owns the fee or a leasehold interest in property on both sides of the street; it also states that the power of eminent domain may be used to condemn the lessee's interest if the public interest requires that any building in leased space be removed.[70] Wisconsin allows only leasing of airspace to the person who owns the fee in the property on both sides of the street, although another subsection provides that a city may sell or lease space over a street if...(such action) is in the best public interest and states the reasons therefor. In the second instance, leases are required to specify the purposes for which the leased space is to be used.[71]

The one state which (statutorily, at least) comes closest to encouraging airspace development is Connecticut. The commissioner of transportation is empowered to sell, lease and convey, or otherwise dispose of, or enter into agreements concerning any interest the state may have on, above or below any state highway right-of-way. He is also empowered to "section off levels of space over or under the same location and sell or lease varying levels to different parties." The depositing of revenue from any such transaction into the transportation fund is dealt with, as are the tax ramifications. Most importantly, the commissioner is given the power to acquire by purchase or condemnation "such additional interests in...air space...as he shall find necessary or appropriate to make feasible or enhance the multiple use and joint development of highway rights-of-way and space over or under state highways under his control."[72] The statute is reproduced in Section VIII below. (For a more comprehensive treatment of present state airspace legislation, the reader is directed to the ABA subcommittee's article Final Draft of Model Airspace Act, supra.)

What, then, is the ideal statute? It is "the broad statute containing extensive powers which obviates the necessity for a new trip to the legislature every time some new need for airspace use arises."[73] The following principles should be incorporated.

(1) The legislature should grant broad power to the state highway authority, which should be able to sell, lease, permit the use of, or otherwise grant any type of interest over or under a highway right-of-way, provided that
   (a) such use does not obstruct travel, or
   (b) such space is not needed for travel.

(2) Similar powers should be vested in municipalities in regard to rights-of-way within their corporate limits.

(3) State and local authorities should be permitted to acquire land and airspace by condemnation or purchase, in order to achieve public benefits not directly related to travel.[74]

If a statute is drafted on these principles, the Commonwealth would find itself much better prepared to take advantage of its highway airspace as the opportunities present themselves. In this field, as in many others, legal planning now avoids subsequent complications.

V. TAX EFFECTS

The leasing or the granting of fee title to highway airspace will create interests in real property which are taxable by the local taxing entity.[75] This fact alone should provide sufficient impetus for serious consideration of airspace utilization.

Regarding the taxability of fee title interests in airspace, the U. S. Supreme Court held in 1914 that when an interest in land, whether freehold or leasehold, is severed from the public domain and put into private hands, it has the ordinary incidents of private property, and is therefore subject to being taxed.[76] That decision was cited recently for that proposition by the Virginia Court, in the case of Shaia v. City of Richmond (1967).[77]

That same Shaia decision elucidated the court's position on the question of the taxability by local entities of a tenant's leasehold in land owned by the state. The suit was a taxpayers' action against the City of Richmond to contest the city's assessment of the taxpayers' leasehold interest in property which was owned by the state. The court there deemed it manifest that, where the state, through one of its instrumentalities, leases real property to private parties, that leasehold is separately assessable. The court held that "because the tax with which we are concerned is levied on the Shaia's leasehold interest, and not on property owned by the Commonwealth, it does not violate §183(a) of the Constitution" of Virginia. That section exempted from taxation property owned directly or indirectly by the Commonwealth or any political subdivision thereof. An attempt to apply this type of reasoning to the airspace situation would certainly be forthcoming were the taxability of airspace leaseholds ever questioned in court.

A tack often taken by the taxpayer who is a lessee of state property, trying to argue the unconstitutionality of taxing his leasehold interest, is that the imposition of taxes might result in reduced rentals on properties leased by the state. Such an argument has been rejected repeatedly, on both the state and federal levels. Both U. S. v. City of Detriot (1958)[78] and Shaia v. City of Richmond (1967)[79] rejected the argument.

As for the appraisal problems, the Shaia court stated that "(l)easehold valuation is the most complex subject in the appraisal field." That court concluded that the leasehold interest of the taxpayers, regardless of whichever method is used, should be appraised in relation to the potential income which a buyer could derive from his right to use and

occupy the premises.[80] The complications involved in such a determination are evident. No matter what method of allocating the assessed value of the real property to subjacent and superjacent areas is used, "the main problem is one of determining the correct assessment of the total fee simple absolute, and then allocating that amount to the various estates in real property, including the air rights use, on the basis of ordinary principles of real estate valuation."[81]

Of course, the problem of valuation itself is complicated when the airspace use involves tax exempt property--which is exactly the situation here in the case of highways. Ordinarily, if the conveyance of airspace is by lease or the easement back method, then there remains but one landowner and therefore only one assessment. Even where there is tax exempt property, however, the same principles of allocation of value are required.[82]

As for the question of whether or not airspace itself is taxable, the Code of Virginia provides in §58-760 that "All real estate, except such as is exempted by law, shall be subject to such annual taxation as may be prescribed by law." Also, §58-758 states that "taxable real estate" includes "a leasehold interest in every case in which the land or improvements or both, as the case may be, are exempt from assessment for taxation to the owner." (Ordinarily, the entirety of the property is assessed against the owner of the fee. The concept of "fee" ownership includes the leasehold interest as well as the reversionary interest. The statutory exception permits a locality to assess a leasehold interest separately where the land or improvements thereon could not otherwise be assessed by the locality.) If the question of airspace taxability were to arise, an analogy would almost certainly be drawn to §58-774, which states that "If the surface of the land is held by one person, and the coal, iron and other minerals, mineral waters, gas or oil under the surface be held by another person, the estate therein of each and the relative fair market value of their respective interests shall be ascertained by the commissioner."

VI. DISPOSITION OF REVENUE DERIVED FROM AIRSPACE PROJECTS OVER INTERSTATE HIGHWAYS

The question of the disposition of revenue derived from airspace projects is an extremely important one. Great sagacity is not required to understand why--the entity which receives this revenue will most probably be the principal supporter of airspace development. The purpose of this section is to offer a short survey of the manner in which this question has been treated in the past, and a summary of the present policy of the Department of Transportation.

It is generally true that the Department of Transportation will not participate in any funding whatever beyond the normal cost of a freeway (see Attachment No. 3, Item 1, pg. 1, of PPM 80-5, supra). It follows that the DOT will not contribute to the development of airspace above the interstate highways. Partly because of this refusal to contribute, the position has been taken by the federal department that it will not request a share in the revenue from leasing airspace.[83]

Immediately after the amendment to §111 of Title 23 of the U.S. Code (mentioned above in III), the Bureau of Public Roads published IM 21-3-62 as a guide. Item 22 of this IM provided that "disposition of income received from the authorized use of airspace will be the responsibility of the states." This directive resulted from the Comptroller General's rejection on April 4, 1962[84] of the Bureau's argument of requiring all states to apply a pro rata share of the net proceeds from the use of airspace to highway projects on interstates without federal aid funds. The Comptroller General concluded that Congress, in enacting and amending §111, did not consider the question; he also doubted that the Secretary of Commerce could require a state to share the proceeds with the federal government.[85]

A further effort to resolve the question was made by the General Accounting Office which recommended, after having audited the California Interstate Program, that legislation be introduced in Congress which would explicitly deal with the matter.[86] Subsequently, H.R. 12143 was introduced on July 30, 1964, in the Second Session of the 88th Congress and referred to the Committee on Public Works, where it died upon the adjournment of Congress, without any hearings having been held on it. That bill provided that the federal government would be entitled to share in the net proceeds from the leasing, use, or disposition of airspace "in the same ratio in which it had participated in the cost of the right-of-way." A thorough search of the C.C.H. index to date (August 1974) revealed that there has been no attempt to introduce another bill of like nature.

The established policy of no federal share in the revenue when airspace is leased was reaffirmed in PPM 80-5, which superseded IM 21-3-62 (supra). In the former, item 21 as stated is nearly an exact repetition of item 22 (mentioned above) in the superseded issuance.

Harry Denton, an ardent proponent of the policy as it now stands, offered several arguments in favor of the present policy when the Congressional bill mentioned above was expected to have been reintroduced. He considered the basic question to be whether (a) the interstate highway program took the form of traditional federal aid to a state, or (b) did the federal government, by contribution of funds, maintain title in a right-of-way by participation in the funding of its purchase. On a more basic level, he asked whether a fee owner had the inherent right to own, possess, and dispose of income from his property. Some seven arguments were advanced to answer these questions.[87]

First, it was argued that the wording of federal-aid highway statutes, legislative history, and Congressional debates all indicate a legislative intent that the interstate program is one of assistance, not investment. Title 23, §101 of the U.S. Code makes it clear that among the most important objectives of the Act is the effecting of the prompt and early completion of the National System of Interstate and Defense Highways. No mention is made of providing a good investment for federal funds. Second, the revenue will enable the states to pursue a vigorous program of maintaining other streets. Third, if the federal government reneges on its statutorily promised contribution in the amount of ninety percent of the net airspace revenue, the states will be forced to provide more tax money to complete the interstates on schedule. (This assumes that all future contributions would be cut off immediately upon disposition of airspace.) Fourth, §116 of Title 23 of the U.S. Code states that it is the duty of the states to maintain federal aid highways. In addition, §110 requires a maintenance provision. Since part of the consideration of a project agreement is that the state assumes the duty of maintaining the highway, the state should have this revenue to offset the costs of maintenance. Fifth, the incentive to the state to promote utilization of airspace is greatly deterred if a scant ten percent of the net revenue accrues to it. Sixth, IM 21-3-62 directs that federal funds shall participate in no added costs. Since it is the state which often must take a chance in underwriting the added costs, it should reap the benefits. Finally, it is (was) the Bureau itself which requires that a state obtain fee title. Denton concludes that if any provision should be promulgated to restrict the use of airspace revenue, it should do no more than confine such revenue to highway purposes.[88]

The entire foregoing discussion is premised upon the assumption that airspace will be leased. If, on the other hand, airspace were sold, the federal government would claim a certain proportionate share of the proceeds, as detailed in IM 21-1-65, entitled "Right-of-Way Excess Takings."[89] This position is based (as the title of the IM indicates) on the grounds that the airspace on the state owned roads was disposed of as "excess" property.[90]

It is indeed worth noting, even if somewhat as a postscript, that the controls of the federal government are not applicable to every highway. They are to be applied only to those highways in which the federal government has a direct interest. It is apparent from this that there are many state highways over which the federal government has no control of the disposition of highway airspace and hence no legitimate claim to revenue from sale or lease.[91]

To sum up, as long as airspace is merely leased, the state has the requisite incentive to actively promote the utilization of airspace over interstate highways. If the airspace is sold, the incentive is apparently lacking on the state level. This causes a dilemma to arise, for while local governing bodies will advocate leasing, leaseholds--especially if they are

not long-term--are often difficult or impossible to finance.[92] Assuming that the utilization of airspace is desirable under certain conditions (a basic premise of this study), the wisdom of the present policy regarding the disposition of the revenue from the sale of airspace is questionable. Local support is a prerequisite--indeed, the principal stumbling block to airspace utilization is local opposition--and without concrete, readily visible benefits to those whose assent is necessary, such support is not likely to be forthcoming.

VII. RESTRICTIONS ON ACQUISITION, DISPOSITION AND UTILIZATION

There is a universally established rule that private property cannot, according to both the State and the Federal Constitutions, be taken by exercise of the power of eminent domain except for public use.[93] Moreover, a condemnor is generally permitted to acquire only such an estate as is reasonably necessary to effectuate the desired ends.[94] It is also well established that statutes which confer the power of eminent domain are to be strictly construed against the grant.[95] Before the utilization of airspace over highways, there was no problem in this respect. When a right-of-way was condemned and the fee simple taken, there was never any question that the pacel taken would be used entirely for highway purposes. Now, however, a problem arises. If, at the time of condemnation, the use of airspace for non-highway purposes is being considered, the issue will be raised as to whether it is proper to condemn the property in fee simple "to the sky." It may be argued that only as much as is needed for actual highway purposes can be constitutionally taken.

Is the acquisition of fee title for a highway right-of-way with the intent to lease the airspace to a private party the taking of property for a private use? This is the question--one which has not yet been answered conclusively.[96] In order to address this question, it is first necessary to understand the following. There are generally two meanings ascribed to the term "public use"--"use by the public" as opposed to "public advantage." According to the narrow view, "public use" means "use by the public," and "that consequently, to make a use public a duty must devolve upon the person or corporation seeking to take property by right of eminent domain to furnish the public with the use intended, and the public must be entitled, as of right, to use or enjoy the property taken."[97] On the other hand, the broad view--which is espoused by those courts that "go farthest in sustaining public rights at the expense of property rights"--holds that "public use" denotes "public advantage." Accordingly, "anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new resouces for the employment of capital and labor, manifestly contributes to the general welfare and the prosperity of the whole community, and, giving the constitution a broad and comprehensive interpretation, constitutes a public use."[98]

An example of the manner in which the Virginia Supreme Court has handled a similar problem is provided in the case of Rudee Inlet Authority v. Bastian (1966).[99] It was held that a statute authorizing condemnation for a public harbor development, but permitting the condemnor to sell or lease parcels of the condemned property, but which did not limit such sale or lease to the furtherance of the main purposes of the statute, was unconstitutional because it permitted condemnation for private purposes. The court stated that private property may not be taken for private uses under any conditions or stipulations. It is to be noted that the court quite pointedly implies that had the statute contained the limitation to which it refers ("only in furtherance of the main purposes of the statute"), the outcome of the case might have been quite different.

In another 1966 holding, Peck Iron and Metal Co. v. Colonial Pipeline Company,[100] the court listed three requirements imposed by constitutional limitations which must be met to delegate the power of eminent domain.

(1) The taking must be for public use.

(2) The use must be needful for the public.

(3) The rights of the public to use the facilities must be adequately protected.

From the third requirement, it is apparent that the court, at least in this case, espoused the "narrow view" on the meaning of "public use."

In Stanpark Realty Corp. v. City of Norfolk (1958),[101] the court noted that §58 of the Virginia Constitution stated that "public uses are to be defined by the General Assembly," and that the legislature defined the term in §15-702 of the Code "to embrace all uses which are necessary for public purposes." Also cited by the Stanpark Realty court was the case of Light v. City of Danville (1937),[102] which stated that "(t)he right of the public to receive and enjoy the benefit of the use is the determining factor whether the use is public or private."

Perhaps theoretically closest to the area with which this study concerns itself is the old case of Richmond v. Carneal(1921).[103] The portion of an act of the General Assembly which permitted a municipality to condemn more land than was necessary for opening and widening a street, and then to replat and dispose of the unused part, "making such limitations as to the uses thereof as it may see fit" was held to be unconstitutional. The court said, "What is here proposed is to condemn land not needed for the street, replat it and sell it to others, presumably at a profit.... Such a transaction may be good financing on the part of the city, and greatly to its benefit, but such use of private property is not a public use. 'Public use' and 'public benefit' are not synonymous terms."

To say this, however, is not to say that property which has been legally condemned previously cannot be disposed of when it is no longer needed for the public purpose for which it was originally taken, or when a lease or sale is "in furtherance of or incidental to" that public purpose.[104] It appears to be quite important, then, whether the "private" use was contemplated before the original condemnation or not. Apparently, if the "public use" is paramount (e.g., right-of-way acquisition for a highway), there is probably no problem; if, however, the non-highway use of airspace is the primary purpose in acquisition, a serious question is raised.[105]

The Pennsylvania Court has taken the stance that a taking is upheld if the public benefit is "predominant" and the private benefit is merely "incidental." The "primary axiom" in that court's rationale is that "if the need for the governmental action is clear, if the public purpose behind it is real, and if the action taken is appropriate to fulfill that need, then any private benefit from such activity, no matter how great, will be denominated as 'incidental'."[106]

Even broader than the Pennsylvania view is the doctrine of economic necessity, which takes into consideration the economic necessity of including revenue producing private uses in a public project. Perhaps as construction costs and right-of-way acquisition costs in urban areas become even more exorbitant, the public and the judiciary will realize that such thinking is almost necessary. In the leading case of this doctrine--Bush Terminal Co. v. City of New York (1940),[107] the Court determined that without the upper stories, it would have been economically unfeasible to construct the terminal building.[108]

It has been said that under prevailing California doctrine, the only possible controversy that the court could consider in the situation under discussion would be an allegation that the public body did not intend to use the air rights for a public purpose. To be successful, this allegation would probably require a demonstration that the public body intended to immediately use the air rights space for a private use. Such an attack will probably fail except in a case where the financing of the condemnation action was completely dependent upon the financial return from the use of the air rights.[109]

As land values continue to rise, and the air rights problems become correspondingly less forbidding, this issue will probably be raised more frequently. When the condemnation of air rights is alleged to constitute the taking of excess property, the problem will focus upon whether the air space is seen as a valuable portion of the property at the time of the condemnation proceeding. If there is a ready market for the air rights, the question of whether there is a proper public use for the air rights may be raised directly.[110] Thus, the condemnation action itself may place a limitation on the future use of the land. Suppose the question is raised as to the power of the Commonwealth to lease or sell the air space over a right-of-way for a purpose inconsistent with the public use for which it was originally condemned. The answer may depend on whether the issue is raised after the condemnation and the construction of the highway, or whether the issue is raised in a

specific challenge to the condemnation of the air rights in addition to the basic fee simple which underlies those air rights. In the first case, there is authority to support a "quasi-surplus" theory, which would permit the use of parts of the condemned right-of-way for purposes other than those which were brought forth in the original condemnation action.[111]

Of course, this line of reasoning places one in a quandary when considered in conjunction with the basic idea of planning for the future. These two notions are somewhat at odds with each other, since such planning ahead could dictate that the entire fee could not be condemned for the "public use." Perhaps the state will eventually even be restricted to condemning "tunnel fees" in certain areas, leaving the air rights to the original owner regardless of his wishes. In fact, it has been predicted that the state will eventually be forced to acquire less than a fee interest, or at least some type of limited right-of-way, excluding possibly valuable air rights. But regardless of the type or extent of ownership, the state will have to supervise whatever development of airspace does take place, since it is so closely related to the safety and operation of the freeway.[112]

Of course, all this speculation would be avoided if a broad interpretation of the "public use" is accepted, and the revenue production of the sale or lease of airspace (both from the initial sale or lease itself and the tax base regained) is considered for the "public use", i.e., benefit.

What are the arguments to substantiate such a broad interpretation of "public use"? Certainly, if there is no interference with travel or the primary purpose of the highway then the income alone would constitute a substantial public benefit.[113]

§33.1-89 of the Code of Virginia empowers the State Highway Commissioner to acquire "such lands, structures, rights-of-way, franchises, easements and other interests in lands...deemed to be necessary for the construction, reconstruction, alteration, maintenance and repair of the public highways of the State and for these purposes and all other purposes incidental thereto may condemn property in fee simple..." §33.1-92 of the Code states that "The acquisition of such residue parcels in addition to the lands necessary for the immediate use for highway rights-of-way or purposes incidental to the construction, reconstruction or improvement of public highways, is hereby declared to be in the public interest and constitutes a public use as the term public uses is used in Article I, §11 of the Constitution of Virginia." (Prior to 1971, Article I, §11 was denominated as §58.) Both these sections lend some weight to the outcome which the broad interpretation would effect in that it is evident that, under even the strictest reading of the Code, it is quite permissible to condemn more land than that required strictly for highway rights-of-way. However, this line of thought must always be tempered with the knowledge that the question of whether a particular use for which property is condemned is a public use is one for the courts, not the legislature; however, if the use is a public one, the necessity or expediency of exercising

the power is a legislative, not a judicial question.[114] For example, a condemnation statute is not invalid because it delegates the decision as to location to the State Highway Commission. If the use is public, and the statute does not submit it to the courts as a judicial question, the location is a legislative question, the decision of which has been delegated to a ministerial agent by a statute.[115] Another case held that the decision of the chairman of the highway commission as to the necessity for the condemnation of land for road purposes is conclusive and is not subject to review by the courts.[116]

Other arguments supporting the broad interpretation of "public use" rely on the notion that the private use of airspace is merely a "by-product" of the principal public use, i.e., as a right-of-way. The private use could also be designated a temporary one, since IM 21-3-62 provided in paragraph 17 that the authorized uses be limited to "a term basis; or revocable at will or revocable on a specified period of notice." This "temporary" argument is strengthened by the fact that the Code specifically provides for the Highway Commissioner to condemn real property for future needs and lease that property in the period before construction is begun (§33.1-90).[117] Along somewhat this same line of reasoning, Assistant General Counsel H.J. Morton (of the Federal Highway Administration) has said: "If for any reason a highway department determines that certain airspace is not essential for highway purposes, and the Federal Highway Administrator concurs, it may be disposed of as excess property."[118]

Yet another line of argument stems from §33.1-91 of the Code, which authorizes and empowers the Commissioner to acquire the entirety of a tract of land "whenever the remainder of such tract or part thereof can no longer be utilized for the purpose for which the entire tract is then being utilized..." This could quite possibly be utilized to bolster the argument than the entire fee, including air rights, is to be taken for a right-of-way if the condemnee is not going to utilize the air space for the same purpose that the property was being utilized for before condemnation. Of course, this statute was not directed at the air rights situation.

It seemed only appropriate to hold the following quote until after the reader had waded through the reasoning above on the arguments for the broad interpretation of "public uses." Addressing the subject of the manner in which courts decide on whether the power of eminent domain can be utilized when its use will bestow private benefit, it has been stated that

> ... (P)rivate benefit alone, however great, cannot invalidate an otherwise proper municipal function... Ultimately... the results in these cases depend on whether the particular judges are convinced that legitimate public purposes are being fulfilled by the governmental activities in question. If the judges determine that a particular governmental activity serves a public purpose, they will usually term the private benefit also conferred as

> "incidental". On the other hand, where the judges fail to find that a particular activity promotes a public need, they can justify their conclusion, by calling the activity's purpose "predominantly private."[119]

In addition to the restrictions on acquisition discussed above, there are also certain other restrictions on the disposition and utilization of airspace. Clearly air rights cannot be given as a disguised gift of public land to private interests. Although it has been stated that except for this clear case, "the restraints upon air rights utilization are more illusory than real,"[120] there remains the entire field of the conflicting rights of third parties; in particular, abutters. What will the consequences be when the construction of a building in airspace over a highway blocks an abutting owner's view of another prominent building or a river, for instance? The California Court held in Schnider v. State of California (1952)[121] that, in reference to abutters' rights of access, there is a marked difference between an ordinary road and a freeway. While with an ordinary road there may be an intent to serve abutting owners, with a freeway the intent is to serve through traffic. Because of this, merely a resolution of the highway commission creating a freeway gives notice that no new access rights will arise unless specifically granted. The central question still remains, however, as to whether the creation of a freeway gives adequate notice that no new abutters' rights of light, air and view will arise. To solve this problem, Fenton has suggested that it be specified in the freeway resolution itself that no abutters' rights at all will arise. Thus, in metropolitan areas where it is reasonably expected that air space over freeways will be utilized, the resolution should not limit itself to specifying abutters' access rights but should include specific reference to all types of abutters' rights. This, however, does not help in the situation when the development of air space takes place after the construction of the highway. In such a case, there is the possibility of an inverse condemnation action for the diminution in value of adjoining property in those states where there is liability for such damage.[122]

One last problem that is encountered in the disposition of airspace is the one precipitated by the federal civil rights laws. Under Title VI of the Civil Rights Act of 1964, racial discrimination in federally assisted programs was prohibited. Pursuant to this, a provision was enunciated in the Code of Federal Regulations which stated that in the case of a transfer of real property, the instrument effecting the transfer shall contain "a condition coupled with a right to be reserved to. . . revert title to the property in the event of breach of such nondiscrimination condition."[123] Following this instruction, the Bureau of Public Roads issued a letter which stated that certain assurances would be required for compliance.[124] These assurances stated that a specified clause (which effected the results called for in the C.F.R. provision) would be contained in all federal deeds to the state. "The sum total of these provisions is that when airspace is sold or leased by a state highway department over or under a federal-aid highway, unless the transferee requests and obtains forbearance of the 'right to revert title' in order to obtain financing, the title to the airspace will be subject to possible reversion or to re-entry for breach of condition by the grantor or lessor if there are racially discriminatory practices, and to a covenant against discrimination

which will run with the land and carry with it the condition or possibility of reverter."[125] It has been suggested that this reversion of title device is actually a form of overkill, and that it is not mentioned in the Civil Rights Act. If a covenant, the breach of which would lead to the imposition of damages or a monetary penalty, were used to fulfill the Act's requirements, the aim would be accomplished without hindering the development of airspace by clouding the title to such airspace.[126]

VIII. THREE EXEMPLARY AIRSPACE PROVISIONS

Since one of the principal thrusts of this study has been to encourage the enactment of a comprehensive airspace statute, it seems only proper to conclude it by offering a concrete suggestion as to the substance and format of such a statute. The following "Model Airspace Act" was prepared by R.R. Wright under the supervision and with the assistance of a subcommittee of the ABA Section of Real Property, Probate and Trust Law.[127]

Particular attention should be given section 11, which is the most important provision in the Act from the standpoint of multiple use and joint development of rights-of-way. The first sentence in option (c) of that section (all bracketed material is optional) may present constitutional problems, were it chosen, for the reasons elucidated above in Section VII.

For a detailed treatment of each section of the Act, and an explanation of why it was written in the way it was, the reader is directed to pages 544-553 of the law review article cited above.

Also offered for comparison are the Connecticut and Ohio provisions on this subject. Both of them are discussed in this report above.

Model Airspace Act

Section I. Title.

This Act shall be known as the Model Airspace Act.

Section 2. Definition of Airspace and Limitation on Application.

(A) Definition.

For purposes of this Act, airspace is defined as that space which extends from the surface of the earth upward and which is either occupied or utilized or is reasonably subject to being occupied or utilized or is otherwise necessary for the reasonable enjoyment and use of the land surface and any structures thereon by the surface owner or owners, his or their heirs, successors or assigns. The airspace owned by a surface owner or owners is that which lies within the vertical upward extension of his or their surface boundaries.

(B) Limitation.

For purposes of this Act, references to airspace as defined herein shall in no way be deemed to contravene, supersede, amend, modify or alter the existing powers, requirements, limitations or other provisions of statutory or common law pertaining to aviation or air transportation or commerce.

Section 3. Legal Nature of Airspace.

Airspace as defined herein is real property, and until title thereto or rights, interests or estates therein are separately transferred, airspace is the property of the person or persons holding title to the land surface beneath it.

Section 4. Purposes and Application of the Act.

(A) It is the purpose of this Act that airspace shall be subject to being acquired, held, enjoyed, possessed, alienated, granted, sold, conveyed, exchanged, transferred, partitioned, assigned, demised, leased, released, charged, mortgaged, encumbered, assessed, devised, condemned, zoned, platted, divided, subdivided, and otherwise utilized and manipulated in the same manner, upon the same conditions and for the same uses and purposes as other real property; and airspace shall be subject to the same statutes, rules of law, and common law as other real property.

(B) All of the rights, privileges, immunities, incidents, powers, remedies, burdens, servitudes, duties, liabilities, limitations and restrictions which apply to titles, estates, rights and interests in other real property shall apply to airspace.

(C) No power set forth herein, however, shall alter, amend, supersede, hinder, contravene, prevent or affect the exercise of the rights, privileges and immunities otherwise granted by statutory or common law to individuals, partnerships, corporations, business associations or governmental bodies engaged in aviation, air transportation or air commerce.

Section 5. Titles, Estates, Rights and Interests Which May be Created and Transferred.

All forms of titles, estates, rights and interests which may presently exist or which may hereafter be created by law or equity or under statutes pertaining to real property may be legally created, transferred and conveyed in airspace, whether or not such airspace is contiguous to the surface of the earth; and the same shall constitute titles, estates, rights and interests in real property under and subject to the laws pertaining thereto.

Section 6. Power of Governmental Bodies and Private Persons.

(A) The State and all of its departments, commissions, agencies, instrumentalities, divisions, subdivisions and authorities, including all counties, municipal corporations and governmental units of any kind, shall have the same powers, rights and duties with respect to airspace as are possessed with respect to other real property.

(B) All private individuals, partnerships, corporations, foundations, trustees, fiduciaries, and all other private persons whatever their legal status, shall have the same powers, rights and duties with respect to airspace as are possessed with respect to other real property.

Section 7. Apportionment or Division of Airspace.

Airspace may be divided or apportioned horizontally and vertically, and in any geometric shape or design, in the exercise of any of the powers, rights or duties by public bodies or private persons under this Act.

Section 8. Devolution upon Death.

The right, title, interest and estate of a decedent in and to airspace shall pass at his death by testamentary disposition, or in the event of intestacy, shall pass in the same manner as provided by the laws of this State for the descent of other real property.

[Section 9. Taxation of Airspace.

All titles, estates, rights and interests in airspace are subject to taxation to the same extent and in the same manner as other real property is taxed [except as otherwise provided by law]; and for purposes of taxation, titles, estates, rights and interests in airspace held by persons other than by the owner or owners of the land surface shall [unless otherwise provided by law] be taxed separately from the land surface and from other separately owned airspace, and the owner or owners of the land surface shall not be taxed for airspace which is not owned, nor to the extent that his or their rights therein have been diminished.]

Section 10. Limitations with Respect to Highways, Roads, Streets, Alleys and Bridges.

The powers granted under this Act shall in no way extend the power of State and local authorities having jurisdiction over highways, roads, streets, alleys, bridges or rights of way to the point that (a) federal regulations pertaining to federal-aid rights of way are violated, (b) constitutional limits on the power of such authorities are exceeded, or (c) the right of the public to full and unobstructed use of highways, roads, streets, alleys, bridges and rights of way is impaired.

Section 11. Cooperation of Authorities and Joint Exercise of Powers by Authorities.

[(A)] State and local highway, road and street authorities, port authorities [and _____] [shall, may] join, cooperate and contract with other agencies or instrumentalities of federal, state or local governments, or with private persons, corporations, partnerships, business associations, fiduciaries or personal representatives in the acquisition, condemnation, purchase, lease, sale, assignment, mortgage or use of title, rights, interests and estates in airspace. This power shall include, but shall not be limited to, the joint development and multiple use of rights of way and adjoining property or airspace. In furtherance of such functions, the aforementioned authorities shall have the following powers:

(a) To do all things necessary to develop and effectuate a joint development and multiple use plan for an area which is to be developed, including the coordination of such plan and cooperation with all other affected agencies of federal, state or local governments; to collect and distribute informational material pertaining thereto; to cooperate and coordinate activities and functions with interested or affected private persons, corporations, partnerships, business associations, fiduciaries, personal representatives or groups; to employ consultants, planners and professional or advisory personnel or services; to contract with federal, state, regional or local authorities or agencies, or with private persons, corporations, partnerships, business associations or other such organizations or associations for the preparation of transportation and land use studies; and to contract for services, labor, supplies, equipment or other items with governmental authorities or

private persons, corporations, partnerships, business associations, fiduciaries, personal representatives or other persons as may be necessary to effectuate the joint development and multiple use plan;

(b) To apply for, accept, receive, spend and account for such funds, grants, loans, gifts and services from federal, state, regional or local governments or their instrumentalities or from private persons or from other sources as may be needed to develop and effectuate the joint development and multiple use plan; and to provide and agree to such reasonable conditions and requirements as may be necessary in connection therewith; and,

(c) To perform such other acts and enter into such contracts or execute such other legal documents as may be necessary or appropriate to develop, effectuate or execute the joint development and multiple use plan.

[(B)] [In the development, effectuation and execution of the joint development and multiple use plan, state and local highway, road and street authorities, port authorities [and_____] shall coordinate [to the extent possible] the joint development and multiple use plan with the master plan, comprehensive plan or official map of the state, local or regional authority having jurisdiction over the planning, development and zoning of the area involved [and shall proceed with the joint development and multiple use plan only after approval of such plan has been obtained from the aforementioned state, local or regional authority having planning and development jurisdiction over the area involved].]

[(C)] [State and local highway, road and street authorities, port authorities [and _____] shall have the power to condemn land or airspace through the exercise of the power of eminent domain in excess of that necessary for highway, road or street right of way purposes, whenever such excess condemnation is necessary and appropriate to effectuate a joint development and multiple use plan. Such authorities named hereinabove may join with any other federal, state, regional or local governmental authority in the condemnation through exercise of the power of eminent domain of land or airspace in excess of that necessary for the highway, road or street right of way, whenever such excess condemnation is necessary and appropriate to effectuate a joint development and multiple use plan.]

Section 12. Disposition of Airspace.

Any governmental authority, agency or instrumentality which holds right, title, interest or estates in airspace or in other real property which is not needed for a public purpose or for public use may sell, convey or transfer the right, title, interest or estates owned by it, or any lesser right, title, interest or estates, to such persons as the laws of this State permit at public or private sale for not less than [75%] of the appraised value thereof, as established

by two or more disinterested, qualified appraisers. Along with transfers of unneeded airspace or real property, or rights, title, interest or estates therein, the transferor may also grant or transfer easements or other rights and interests in retained airspace and real property which may be required to provide access to or support of structures erected in the transferred airspace or property.

Section 13. Right of Way Easements -- Rights and Powers.

In situations in which a governmental authority or agency holds only an easement for use as a right of way over land on which is constructed a highway, street, road, alley or bridge:

(a) the governmental authority or agency shall possess for and on behalf of the public the right to use such easement for highway, street, road, alley or bridge purposes with full, free and unobstructed passage over such improvement as well as the right to construct, maintain, repair, alter and remove such improvement, subject to all other laws pertaining thereto; and,

(b) the owner or owners of the fee in and to the land on which said improvement exists shall possess all other rights, title, interests and estates in and to the airspace over, under or upon said right of way and may exercise all of the powers pertaining to such airspace which are contained in this Act, provided that the owner or owners of the fee do not in any manner interfere with, hinder or obstruct the full and free use of the right of way by the public.

[Alternative provision for (b): the owner or owners of the fee in and to the land on which said improvement exists shall possess only the residual right, title, interest and estate in and to the airspace over, under or upon said right of way and may not, without the express permission of the governmental authority or agency holding the right of way easement, exercise any of the powers pertaining to such airspace and contained in this Act.]

[Second alternative provision for (b): in addition thereto, the governmental authority and agency shall possess for and on behalf of the public the right to make full use of the airspace over, under or upon said right of way in the manner and subject to the provisions contained herein, provided that the residual right, title, interest and estate of the owner or owners of the fee in and to the land on which said improvement exists shall not in any way be encumbered, limited or additionally burdened without just compensation being paid to such owner or owners and with the determination of such just compensation to be made in the manner provided by law for additional takings under the power of eminent domain.]

Section 14. Eminent Domain and Condemnation.

This Act shall not alter, amend, repeal, modify or affect the laws of this State providing for the exercise of the power of eminent domain by public or quasi-public agencies, authorities and instrumentalities or by private persons, except as may be specifically provided herein and except that the power of eminent domain may be exercised to condemn and acquire airspace in the same manner as provided by law for the acquisition of other real property or for rights or interests in same. The procedure and rules provided by law for condemnation of real property by public or quasi-public agencies, authorities and instrumentalities and by private persons shall apply to the condemnation of airspace.

Whenever more than one procedure for condemnation is provided by law and whenever there is doubt as to which procedure applies in a particular condemnation proceeding, the condemnation procedure applicable to the state highway commission or agency shall be followed.

Section 15. Other Laws Unaffected.

Except as specifically provided herein, this Act shall not alter, amend, repeal, modify or affect the laws of this State which pertain to the powers, privileges, immunities, duties and liabilities of authorities, agencies, instrumentalities or other such divisions or departments of state and local governments, or to improvement districts or to private persons.

Section 16. Severability.

If any part of this Act is declared invalid or unconstitutional by any court of competent jurisdiction, the remainder of the Act and its application shall not be invalidated by such judgment; and if the application of any part of this Act to a particular person or persons, circumstance or circumstances, or factual situation or situations is declared invalid or unconstitutional by a court of competent jurisdiction, the Act shall continue to apply to persons, circumstances or factual situations unaffected by such decision or decisions.

Connecticut General Statutes
Annotated

§ 13a-80a. Sale or lease of air space

(a) The commissioner of transportation, with the advise and consent of the commissioner of finance and control, may, in the name of the state, sell, lease and convey, or otherwise dispose of, or enter into agreements concerning any interest the state may have on, above or below any state highway right-of-way. The commissioner of transportation may place such restrictions, conditions and qualifications on the use of any area as he determines to be necessary to provide for the safety and adequacy of highway facilities, and for the protection of abutting or adjacent land users. A committee composed of the commissioner of transportation, the commissioner of finance and control, and the chief executive officer of the municipality in which the sale, lease or other disposition of any interest in land on, above or below any state highway right-of-way is proposed may also place such restrictions, conditions and qualifications on the use of any area which they determine to be necessary to provide for the efficient, economical and socially beneficial use of the area.

(b) The commissioner of transportation shall have the power to section off levels of space over or under the same location and sell or lease varying levels to different parties.

(c) Revenues from any transaction concerning the sale, lease or use of space or multiple use or joint development of state highway rights-of-way shall be deposited in the transportation fund.

§ 13a-80b. Order of priority for disposition of air space

The commissioner of transportation shall give priority in the following order in the disposition or assignment of space or multiple use or joint development under sections 13a-80a to 13a-80f, inclusive, to the state, the municipality wherein the land is located, to the federal government and to the need for housing persons, businesses or other facilities displaced by state highway construction.

§ 13a-80c. Limitation on disposition of air space

The commissioner of transportation shall not exercise his authority under sections 13a-80a to 13a-80f, inclusive, if any loss of revenues granted or to be granted from any agency or department of the federal government for the state highway involved or any other state highway shall be incurred thereby.

§ 13a-80d. Conformation with local zoning regulations and ordinances

The use of any space on, over or below any state highway right-of-way leased by the commissioner of transportation to a lessee shall conform with zoning regulations and ordinances of the local government in which the land is located or as modified by a variance pursuant to legal process.

§ 13a-80e. Tax assessment

Any building, land or space sold, leased or used pursuant to any agreement under authority of sections 13a-80a to 13a-80f, inclusive, shall be set in the tax list of the town in which the land is located, provided no tax shall be assessed against any federal, state or municipal agency or eleemosynary institution usually exempt from taxation.

§ 13a-80f. Acquisition of air space

The commissioner of transportation may acquire by purchase or condemnation, in the same manner and with like powers as authorized and exercised by said commissioner in acquiring real property for state highway purposes, such additional interests in land or air space, and may accept gifts of interests in land or air space, as he shall find necessary or appropriate to make feasible or enhance the multiple use and joint development of highway rights-of-way and space over or under state highways under his control.

S 13a-80g. Disposition of interests in, above or below municipal highways

(a) Any municipality may sell, lease or otherwise transfer easements or other interests in, above or below any street, highway or other public right-of-way to the centerline thereof, other than the right-of-way of a state highway as defined in section 13a-1, in the same manner that it may dispose of any other interest in real property owned by such minicipality; provided adequate provision is made for the safe and convenient public use of the street, highway or other public right-of-way and for the protection of adjacent land users; and provided further, such sale, lease or transfer is made to or with the consent of the owner of the real property abutting that portion of the street, highway or other public right-of-way in, above or below which such easements or other interests are sold, leased or transferred. The sale, lease or transfer of easements or other interests in, above or below the portion of a street, highway or other public right-of-way lying to one side of the centerline thereof, shall not prevent the sale, lease or transfer of easements or other interests in, above or below the portion lying on the other side of such centerline, unless the terms of the initial sale, lease or transfer so provide.

(b) Nothing in this section shall be deemed to diminish or restrict in any way any authority concerning the sale, lease or transfer of any easements or other interests in, above or below any street, highway or other public right-of-way which any municipality or agency thereof may have by virtue of any special act or otherwise.

§ 12-64. Real estate liable to taxation. Easements in air space

All the following-mentioned property, not exempted, shall be set in the list of the town where it is situated and, except as otherwise provided by law, shall be liable to taxation at a uniform percentage of its present true and actual valuation, not exceeding one hundred per cent of such valuation, to be determined by the assessors: Dwelling houses, garages, barns, sheds, stores, shops, mills, buildings used for business, commercial, financial, manufacturing, mercantile and trading purposes, ice houses, warehouses, silos, all other buildings, house lots, all other building lots, agricultural lands, shellfish lands, all other lands, quarries, mines, ore beds, fisheries, property in fish pounds, machinery and easements to use air space whether or not contiguous to the surface of the ground. An easement to use air space shall be an interest in real estate and may be assessed separately from the surface of the ground below it. Any interest in real estate shall be set by the assessors in the list of the person in whose name the title to such interest stands on the land records and, if the interest in real estate consists of an easement to use air space, whether or not contiguous to the surface of the ground, which easement is in the form of a lease for a period of not less than fifty years, which lease is recorded in the land records of the town and provides that the lessee shall pay all taxes, said interest shall be deemed to be a separate parcel and shall be separately assessed in the name of the lessee. Land, buildings and easements to use air rights within highway rights-of-way leased by the state to nonexempt lessees shall be assessed and taxed on an ad valorem basis to the lessees.

Ohio Revised Code
Annotated

[§ 5501.162] § 5501.162 Conveyance of state owned lands by the director.

The director of highways may convey or transfer the fee simple estate or any lesser estate or interest in, or permit the use of, for such period as he shall determine, any lands owned by the state and acquired or used for the state highway system or for highways or in connection with highways or as incidental to the acquisition of land for highways, provided that he shall determine, and enter his determination on his journal, that the property or interest conveyed or made subject to a permit to use, is not needed by the state for highway purposes. Such conveyance, transfer, or permit to use may be to the grantee or permitee or to the grantee or permittee and his or its successors and assigns and shall be of such portion of such lands as the director shall determine, which shall be described in the deed, transfer, or other instrument or conveyance and in any permit to use, and may include or be limited to areas or space on, above, or below the surface, and may include the grant of easements or other interests in any such lands for use by the grantee for buildings or structures or for other uses and purposes, and for the support of buildings or structures constructed or to be constructed on or in the lands or areas or space conveyed or made subject to a permit to use.

Whenever pursuant to this section separate units of property are created in any lands, each unit shall for all purposes constitute real property and shall be deemed real estate within the meaning of all provisions of the Revised Code and shall be deemed to be a separate parcel for all purposes of taxation and assessment of real property and no other unit or other part of such lands shall be charged with the payment of such taxes and assessments.

With respect to any portion of the state highway system not owned in fee simple by the state, the director of highways may permit the use of any portion thereof in perpetuity or for such period of time as he shall specify, including areas or space on, above, or beneath the surface, together with rights for the support of buildings or structures constructed or to be constructed thereon or therein, provided that he shall determine, and enter his determination on his journal, that the portion made subject to a right to use is not needed by the state for highway purposes.

The director of highways shall require, as either a condition precedent or a condition subsequent to any conveyance, transfer, or grant or permit to use, that the plans and specifications for all such buildings or structures and the contemplated use thereof, be approved by him as not interfering with the use of the state highway system and not unduly endangering the public and may require such indemnity agreements in favor of the director and the public as shall be lawful and as shall be deemed necessary by the director. The director shall not unreasonably withhold approval of such plans, specifications, and contemplated use.

All such conveyances, transfers, grants, or permits to use, which are made to state institutions, agencies, commissions, instrumentalities, political subdivisions, or taxing districts of the state, and institutions receiving financial assistance from the state, shall be upon such consideration as shall be determined by the director to be fair and reasonable, without competitive bidding, and sections 155.01, 5301.13, and 5515.01 of the Revised Code, relating to the sale or use of public lands shall not apply to conveyances, grants, transfers, or permits to use made pursuant to this section. All such conveyances, grants, or permits to use, which are made to private persons, firms, or corporations shall be to the highest bidder at public auction in accordance with the procedure set forth in section 5501.111 [5501.11.1] of the Revised Code.

In any case where the director of highways has acquired or acquires, for the state highway system, easements in or permits to use areas or space on, above, or below the surface, he may extinguish them in whole or in part or subordinate them to uses by others, provided that he shall determine and enter his determination on his journal, that the easements or permit to use so extinguished or subordinated are not needed by the state for highway purposes.

No conveyance, transfer, easement, lease, permit, or other instrument executed pursuant to the authorization given by this section shall prejudice any right, title, or interest in any lands affected thereby which at the date thereof existed in any person, firm, or

corporation, other than the state and other than members of the general public having no specific rights in said lands, unless such right, title, or interest was expressly subject to the right of the state to make such conveyance or transfer, grant such right, or execute such instrument, and unless the state by such instrument expressly exercises such right, nor shall any public utility be required to move or relocate any of its facilities that may be located in or on the areas described in any such conveyance, transfer, easement, lease, permit, or other instrument.

FOOTNOTES

1. HIGHWAY RESEARCH BOARD, JOINT DEVELOPMENT AND MULTIPLE USE OF TRANSPORTATION RIGHTS-OF-WAY, SPECIAL REPORT 104, PREFACE IV (1969).

2. REAL ESTATE RESEARCH CORPORATION, AIR RIGHTS AND HIGHWAYS, URBAN LAND INSTITUTE, TECHNICAL BULLETIN 64, 7 (1969) [hereinafter cited as U. L. I, T. B.]

3. S. Ball, Division into Horizontal Strata of the Landspace Above the Surface, 39 YALE L.J. 616, 652 (1930).

4. L. Bell, Air Rights, 23 ILL. L. REV. 250, 252 (1928).

5. REAL ESTATE RESEARCH CORPORATION (PREPARED FOR CALIFORNIA DIVISION OF HIGHWAYS), a study of airspace utilization 16-18 (1968) [hereinafter cited as CAL. REPORT].

6. Subcommittee of Committee on New Developments in Real Estate Practice, Recent Developments in Airspace Utilization, 5 REAL PROPERTY, PROBATE AND TRUST J. 348, 356-357 (1970).

7. CAL. REPORT, supra note 5, at 25.

8. R. WRIGHT, THE LAW OF AIRSPACE 275-276 (1968).

9. E. Morris, Air Rights are "Fertile Soil," 1 THE URBAN LAWYER 247, 249 (1969).

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

11. R. WRIGHT, THE LAW OF AIRSPACE 199 (1968). It should be interjected here that, although the maxim has often been repudiated, it has really only been modified to allow the coexistence of the airplane and private ownership of airspace. Actually, the only part of the maxim that ever had any rationality or economic significance still remains. Id. at 209.

12. Id. at 205-206.

13. L. Bell, supra note 4, at 256.

14. R. WRIGHT, THE LAW OF AIRSPACE 84, 93, 131 (1968).

FOOTNOTES (cont'd)

15. 102 S.C. 377, 86 S.E. 1063 (1915).

16. Id. at 382, 86 S.E. at 1068.

17. Note, The Air Space as Corporeal Realty, 29 HARV. L. REV. 525, 526 (1916).

18. R. WRIGHT, THE LAW OF AIRSPACE 67-68 (1968).

19. 186 N.Y. 486, 79 N.E. 716 (1906).

20. Id. at 491, 79 N.E. at 721.

21. R. WRIGHT, THE LAW OF AIRSPACE 52 (1968).

22. Id. at 53.

23. S. Ball, The Vertical Extent of Ownership in Land, 76 U. PENN. L. REV. 631, 673 (1928).

24. 84 F.2d 755 (9th Cir. 1936), cert. denied, 300 U.S. 654 (1937).

25. R. WRIGHT, THE LAW OF AIRSPACE 131, 154, 213, 214, 219 (1968).

26. Id. at 214, citing Cooper, "Roman Law and the Maxim 'Cujus Est Solum' in International Air Law," 1952 U.S.Av. Rep. 600, 640 (1952).

27. Id. at 220.

28. Id. at 222.

29. Crawford, Some Legal Aspects of Air Rights and Land Use, 25 FED. B.J. 167, 171 (1965).

30. Id. at 170.

31. S. Ball, supra note 3, at 658.

32. E. Morris, supra note 9, at 261.

FOOTNOTES (cont'd)

33. R. WRIGHT, THE LAW OF AIRSPACE 211, 218-229 (1968).

34. D. Hodgman, Air Rights and Public Finance: Public Use in a New Guise, 42 S. CAL. L. REV. 625 (1969).

35. E. Morris, supra note 9, at 248.

36. Id. at 251-253.

37. R. WRIGHT, THE LAW OF AIRSPACE 259 (1968).

38. Conveyance and Taxation of Air Rights, 64 COLUM L. REV. 358 (1964); E. Morris, supra note 9, at 261.

39. Conveyance and Taxation of Air Rights, 64 COLUM. L. REV. 338 (1964).

40. H. Fenton, Legal Aspects of the Utilization and Development of Airspace Over and Under Freeways, 78 HIGHWAY RESEARCH RECORD 52, 64 (1963-64).

41. U. L. I., T. B., supra note 2, at 8.

42. Id. at 15.

43. HIGHWAY RESEARCH BOARD, JOINT DEVELOPMENT AND MULTIPLE USE OF TRANSPORTATION RIGHTS-OF-WAY, SPECIAL REPORT 104, 142 (1969).

44. R. WRIGHT, THE LAW OF AIRSPACE 392-393 (1968).

45. 379 U.S. 487 (1965).

46. R. WRIGHT, THE LAW OF AIRSPACE 202 (1968).

47. Id. at 203.

48. Id. at 116.

49. Recent Developments in Airspace Utilization, supra note 6, at 355.

50. Subcommittee on Airspace Utilization and Multiple Use, Committee on New Developments in Real Estate Practice, Final Draft of Model Airspace Act, 7 REAL PROPERTY, PROBATE AND TRUST J. 353, 367 (Summer 1972).

FOOTNOTES (cont'd)

51. R. WRIGHT, THE LAW OF AIRSPACE 83 (1968).

52. Id. at 59; H. Fenton, supra note 40, at 59.

53. Note, The Creation of Estates in Airspace, 25 ROCKY MT. L. REV. 354, 363 (1953).

54. U. L. I., T. B., supra note 2, at 8.

55. Recent Developments in Airspace Utilization, supra note 6, at 357.

56. Id. at 361.

57. Final Draft of Model Airspace Act, supra note 50, at 353.

58. Id. at 354.

59. R. Wright, Airspace Utilization on Highway Rights of Way, 55 IOWA L. REV. 761, 806 (1970).

60. R. WRIGHT, THE LAW OF AIRSPACE 21 (1968).

61. CAL. REPORT, supra note 5, at 28.

62. H. Fenton, supra note 40, at 59.

63. HIGHWAY RESEARCH BOARD, supra note 43, at 140.

64. CAL. REPORT, supra note 5, at 2.

65. HIGHWAY RESEARCH BOARD, supra note 43, at 140.

66. Id. at 139.

67. MINN. STAT. ANN. 161.433(1) (Supp. 1974).

68. MASS. GEN. LAWS ANN. ch. 81, §7L (Supp. 1974).

69. N.J. STAT. ANN. §27:12-7 (1966).

FOOTNOTES (cont'd)

70. ILL. ANN. STAT. ch. 24, §11-75-1, §11-75-5 (1962).

71. WIS. STAT. §66.048(3) and (4) (1967).

72. CONN. GEN. STAT. ANN. §§ 13a-80a, 13a-80e, 13a-80f, 12-64 (Supp. 1974).

73. R. Wright, Airspace Utilization on Highway Rights of Way, supra note 59, at 805.

74. Id. at 805.

75. U. L. I., T. B., supra note 2, at 67.

76. Trimble v. City of Seattle, 231 U. S. 683, 690 (1914).

77. 207 Va. 885, 153 S. E. 2d 257 (1967).

78. 355 U. S. 466, 472 (1958).

79. 207 Va. 885, 153 S. E. 2d 257 (1967).

80. Conveyance and Taxation of Air Rights, supra note 38, at 338.

81. E. Morris, supra note 9, at 264.

82. Id.

83. U. L. I., T. B., supra note 2, at 24.

84. 41 Comp. Gen. 652 (1962), cited by H. Fenton, supra note 40, at 59.

85. H. Fenton, supra note 40, at 59-63.

86. Id.

87. Id.

88. Id.

89. CAL. REPORT, supra note 5, at 19, 35; R. WRIGHT, THE LAW OF AIRSPACE 402 (1968); U. L. I., T. B. supra note 2, at 24.

FOOTNOTES (cont'd)

90. CAL. REPORT, supra note 5, at 58.

91. Id. at 58-59.

92. Id. at 28.

93. 2 NICHOLS, LAW OF EMINENT DOMAIN 614 (2d ed. 1917), cited by H. Fenton, supra note 40, at 55.

94. 3 NICHOLS, LAW OF EMINENT DOMAIN 164-165 (3d ed. 1950), cited by R. WRIGHT, THE LAW OF AIRSPACE 292 (1968).

95. Plummer v. Director, Dept. of Conservation and Economic Development, 209 Va. 616, 166 S.E. 2d 281 (1969).

96. H. Fenton, supra note 40, at 55.

97. Id. at 56 citing 2 NICHOLS, LAW OF EMINENT DOMAIN 629, 639 (2d ed. 1917).

98. H. Fenton, supra note 40, at 56 citing 2 NICHOLS, LAW OF EMINENT DOMAIN 632, 633 (2d. ed. 1917).

99. 206 Va. 906, 147 S.E. 2d 131 (1966).

100. 206 Va. 711, 146 S.E. 2d 169 (1966).

101. 199 Va. 716, 719, 101 S.E. 2d 527, 530 (1958).

102. 168 Va. 181, 209, 190 S.E. 276, 287 (1937).

103. 129 Va. 388, 106 S.E. 403 (1921).

104. Rudee Inlet Authority v. Bastian, 206 Va. 906, 911, 147 S.E. 2d 131, 135 (1966).

105. CAL. REPORT, supra note 5, at 60.

FOOTNOTES (cont'd)

106. E. Lawrence, Jr., Leasing of Air Space Above Public Buildings - The Public Use Doctrine and Other Problems, 28 U. PITT. L. REV. 661, 668 (1967).

107. 282 N.Y. 306, 26 N.E. 2d 269 (1940).

108. D. Hodgman, supra note 34, at 632.

109. Id. at 638.

110. Id. at 640.

111. Id. at 644.

112. U. L. I., T.B., supra note 2, at 8; CAL. REPORT, supra note 5, at 41.

113. R. Wright, Airspace Utilization on Highway Rights of Way, supra note 59, at 798.

114. Miller v. Pulaski, 109 Va. 137, 63 S.E. 880 (1909).

115. Wilburn v. Raines, 111 Va. 334, 68 S.E. 993 (1910); Lake Bowling Alley v. Richmond, 116 Va. 429, 82 S.E. 97 (1914).

116. State Highway Commissioner v. Yorktown Ice and Storage Corporation, 152 Va. 559, 147 S.E. 239 (1929).

117. H. Fenton, supra note 40, at 58-59.

118. Address by H.J. Morton to Fifth Workshop in Highway Law, Univ. of Colorado, Boulder, Col., July 14, 1966, cited by E. Lawrence, Jr., supra note 106, at 672.

119. E. Lawrence, Jr., supra note 106, at 672.

120. D. Hodgman, supra note 34, at 658.

121. 38 C. 2d 439, 241 P. 2d 1 (1952).

122. H. Fenton, supra note 40, at 55.

FOOTNOTES (cont'd)

123. 15 C.F.R. §8.5(b)(5), Subtitle A, Part 8, Subpart A (1965), cited by R. WRIGHT, THE LAW OF AIRSPACE 407-409 (1968). Now contained in 15 C.F.R. §8.5(b)(5) (1974).

124. Letter of April 14, 1965, by R.M. Whitton, Federal Highway Administrator, cited by R. WRIGHT, THE LAW OF AIRSPACE 408 (1968).

125. R. WRIGHT, THE LAW OF AIRSPACE 406-410 (1968).

126. Id. at 410-411.

127. R.R. WRIGHT, Model airspace act: old and new law for contemporary land use problems, 1972 LAW AND THE SOCIAL ORDER 529, 554 (1972).

OTHER REFERENCE

For an extensive treatment of many of the topics dealt with in this report, the reader is directed to Report 142, "Valuation of Air Space," published in 1973 by the National Cooperative Highway Research Program.