Legal Aspects of the Utilization And Development of Airspace Over and Under Freeways

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•IT has been often said that "history repeats itself." The use and development of air rights has turned full circle in the last 50 years. It was not so long ago that the attorneys for the Public Service Commission of the State of New York were engulfed with a myriad of legal problems attendant upon the utilization of street airspace by the elevated train system. Most of the elevated train structures in New York have since been torn down. Today we have similar legal problems concerning the use of airspace above our highways in a new setting.

Some states—and even some foreign countries, for example Japan, in the last five years have moved far ahead in the actual use of airspace. One of the most prominent recent examples of the use of airspace over a highway is the development of four 32-story apartment buildings over the approach to the George Washington Bridge in New York, and in addition a $14 million bus station straddling the same Interstate expressway.[1]

In Chicago the U.S. Post Office Building not only bridges the Congress Street superhighway, but surrounds it. In Hartford, Conn., a public library has been built over an expressway. In many places in the nation, there are Fred Harvey restaurants and stores located on structures over the highway. The new Pan American Building in New York was constructed over two levels of railroad tracks just next to Grand Central Terminal.

The potential for the use and development of airspace on the nation's highways looms as high as our cities' tallest skyscrapers. The legal problem will undoubtedly equal them in stature.

RIGHTS IN AIRSPACE

At common law, the private owner's rights in his land extended downward to the core of the earth and upward to the periphery of the universe ("Cujus est solum, ejus est usque ad coelum et ad inferos")[2]. This historic concept was hardly suited to the present needs of air navigation, so the law of ownership of air rights has been modified accordingly.[3] Rights in airspace are not materially different when the landowner is a governmental body. No authority has been found on the extent of the state's rights in airspace when it has the legal authority to acquire the right of way in fee simple. Presumably the state has at least the same rights to use and dispose of its airspace as does a private owner, subject of course to statutory limits on its authority to dispose of public property.

Where the state's title to the right-of-way consists of an easement or where the statutory authority is limited to the acquisition of easements, there is no ownership by

[1] Abrahams "Vertical Easements and the Use of Airspace," Third Workshop on Highway Law, L.S.U. 1964.
[2] Black, Law Dictionary, 3d Ed., page 487.
[3] U.S. v. Causby, 328 U.S. 256 (1946), 66 S.Ct. 1062; 49 U.S.C.A., Sec. 1508.

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the state of airspace as such. However, the state may be able to control the use of airspace above the right-of-way by its power to limit or control encroachments in the highway. The owner of the underlying fee, subject to the limited control in the state to regulate encroachments, is the owner of the airspace, to the extent that it does not interfere with the highway itself or the traffic thereon.

HRB Special Report 32 lists ten states where only an easement may be acquired by the state highway department and nine states where the law is silent on the subject. The Special Report 32 stated:

> Various and important consequences are contingent upon whether a fee simple or an easement is acquired. ...[If] the property is held in fee simple the department would be in a position to sell the land or lease it and regain its acquisition costs.
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> To insure the highest degree of control possible over the right-of-way and approaches, it is advisable to permit the acquisition of a fee title. ...[It] is safe to predict that an absolute title may aid in the furtherance of the desired control. The acquisition of a fee title may prevent difficulties in the future.[4]

Thus statutory authority to acquire fee title and actual fee title is essential to the full utilization and development of air rights on our highways.

It has been stated many times that the payment for an easement is about the same as the payment for fee titles.[5] This may not be true in metropolitan areas where air rights can be utilized and are valuable. The state highway department may be confronted with the problem of whether to acquire a fee simple title or a limited horizontal and vertical dimension easement or so-called "tunnel easement." Since the state highway department would have no interest in the airspace above the uppermost boundary of a "tunnel easement," the owner will have the right to develop and utilize the airspace.

Section 109 of Title 23 U.S.C. manifests a congressional intent that the states acquire fee title and control of rights-of-way. Section 1.23 of the Federal-Aid Regulations requires that the states acquire rights-of-way of such nature and extent as are adequate for the construction, maintenance and operation of a project.

Paragraph 5u of PPM 21-4.1 provides:

> Right-of-way for all Federal-aid highways shall be unlimited in vertical dimension, subject to the enjoyment by others of rights beneath the surface of the earth that will not impair the highway or interfere with the free and safe flow of traffic thereon, and except as shown in the approved construction plans or as may otherwise be approved by the Commission in particular instances. In cases where a considerable savings in right-of-way costs can be made a right-of-way of limited vertical dimension with private or public facilities occupying the space above or below such right-of-way may be acquired under conditions determined by a State subject to approval of Public Roads in each case.

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[4] HRB Special Report 32, p. 9-10.

[5] 4 Nichols, Eminent Domain, p. 277 and 279; Schmuntz, Condemnation Appraisers Handbook, p. 207; Jahr, Eminent Domain Valuation and Procedure, p. 252.

In other words, the right-of-way for Federal-aid highways may be limited to the space reasonably necessary for construction and maintenance, subject of course to certain conditions and controls. The Assistant General Counsel for the U.S. Bureau of Public Roads has stated that:

> Such special circumstances might include cases where the cost of acquiring urban property is extremely high, or where the normal type of acquisition might have an adverse effect on or conflict with current land use, local zoning, development trends, or overall urban planning. In such cases, if it is in the public interest, consistent with the highway purposes, and feasible to do so, improvements may be left in place, or provision may be made to permit the continued use or development of surfaces areas or airspace for nonhighway purposes, by an acquisition in limited vertical dimension.[6]

Some flexibility is thus allowed by the U.S. Bureau of Public Roads in the nature of the title acquired for the right-of-way, either to let the owner develop his air rights or for the state to lease and develop the airspace. This flexibility in type of title obtained can be achieved by a statute that authorizes a state to acquire a fee title or such lesser estate or interest considered necessary for state highway purposes.[7]

ABUTTER'S RIGHTS IN AIRSPACE

While on the subject of property rights in airspace, consideration must include the rights of abutting owners in the airspace above the highway. All property owners are subject to the maxim "sic utere tuo ut non alienum laedas"—one person must not so use his property as to deprive others of the equal right to the use and enjoyment of their property.[8] More specifically, owners of property abutting on streets or highways have the right to light, air, view and access. In Williams v. Los Angeles Railway Co., 150 Cal. 592, 89 Pac. 330 (1907), the defendant railway company erected a tower and platform in front of plaintiff's store for the purpose of giving signals to its trains and operating the switches at the intersection. The court said, at page 594:

> Every lot fronting upon a street has, as appurtenances thereto, certain private easements in the street, in front of and adjacent to the lot, which easements are a part of the lot, and are private property as fully as the lot itself, though exercised in the street and extending into and over the street. Any obstruction to the use of the street which impairs or destroys these easements is a private injury, special and peculiar to the owner of the lot, and different and distinct from the injury to the general public and from that which such owner suffers as a part of the general public. As one of the public he has the right to travel from place to place on the street, in front of his lot or elsewhere. Any injury to this public right gives him no right to maintain an action for damages, or for an injunction. As an abutting owner, he has the right to the private easements in question, and for an injury thereto he may sue for damages or to enjoin the continuance of the injury, regardless of the fact that the same obstruction also constitutes an injury to his public right of travel, and regardless of the number of persons who may suffer a similar injury to similar private easements appurtenant to other lots fronting on the street.

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[6] Morton, "Air Rights", AASHO 1962.
[7] See California Streets and Highways Code, Section 104.
[8] 42 Am. Jur., Property, Sec. 49, p. 224.

> These private easements are,--1. The right of ingress and egress to and from the lot over and by means of the adjacent portion of the street....; 2. The right to receive light from the space occupied by the street, and to the circulation of air therefrom....; and 3. The right to have the street space kept open so that signs or goods displayed in and upon the lot may be seen by the passersby, in order that they may be attracted as customers to patronize the business carried on thereon....

A commercial building located in the airspace on our highways can very well be placed in the same category as the tower and platform in the Williams case, if there is a legal interference with abutter's rights.

The New York elevated railroad cases shed some legal light on this problem. The New York appellate courts held that if the elevated structures were consistent with the proper use of public streets, the resulting inconvenience of access and interference with light and air was not compensable; if, however, the elevated railroad is not a legitimate use of public streets, compensation might be claimed.[9] These cases held the abutting owner was entitled to recovery for interference with light, air and impairment of access. Thus the New York elevated railroad cases decided during the last century may set precedent control on abutter's rights in airspace law as it did the law on abutter's rights in freeway access law. The Williams case and the New York elevated railroad cases will certainly be applicable to situations where airspace is developed on conventional highways.

Where airspace is developed on freeways a more complex legal question comes into focus. In Schnider v. State of California (38 Cal. 2d 439, 443, 241 P. 2d 1) it was held that where an ordinary or conventional road is built there may be an intent to serve abutting owners, but when a freeway is established the intent is just the opposite, and a resolution of the highway commission creating a freeway gives adequate notice that no new abutter's rights of access will arise unless they are specifically granted. The question remains as to whether the creation of a freeway gives adequate notice that no new abutter's rights of light, air and view will arise. One means of giving this notice is by a specification in the freeway resolution that no abutter's rights at all will arise. Therefore, in metropolitan areas where it is anticipated that airspace over freeways will be developed the resolution should not limit the specification of abutter's rights merely to access but should specifically refer to abutter's rights.

Freeways on new alignment or freeways that occupy full city blocks and are separated from abutting private property by city streets should not pose a problem of liability for damage for the development of air rights where the freeway resolution specifies that all abutter's rights are being acquired.[10]

The difficult factual situations occur when a freeway or conventional highway is constructed and there is a partial taking of the abutting property. Here there can be a claim of taking or damage to the adjoining owners' rights of light, view and air as well as access if the proposed construction contemplates the development of air rights. Where the development of air rights occurs after the freeway construction there is the possibility of an inverse condemnation action for any diminution in value of the adjoining property in those states where there is liability for such damage.[11]

AIRSPACE AS A PUBLIC USE

Is the acquisition of fee title for a highway right-of-way with the intent to lease the airspace to private parties the taking of property for a private use? This particular question has not been satisfactorily answered for the highway lawyer.

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[9] Netherton, Control of Highway Access, p. 41.

[10] McDonald v. State, 130 Cal.App.2d 793; 279 P.2d 777; People v. Lipari, 213 Cal.App.2d 485; 28 Cal.Rptr. 808.

[11] Goycoolea v. City of Los Angeles, 207 Cal.App.2d 729, 24 Cal.Rptr. 719.

It is the universally established rule that private property cannot constitutionally be taken by eminent domain except for public use.[12]

There are two schools of thought on the legal definition of the term "public use"—the so-called narrow view and the broad view. In 2 Nichols on Eminent Domain, page 629, it is said of the narrow view:

> The supporters of one school insist that "public use" means "use by the public," that is, public service or employment, 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. The term implies the "use of many" or "by the public."

On pages 632 and 633 of the same volume the broad view is stated as follows:

> On the other hand the courts that are inclined to go furthest in sustaining public rights at the expense of property rights contend that "public use" means "public advantage," and that 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 resources 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.

The generally accepted requirements for public use are set forth in 2 Nichols on Eminent Domain, 639, as follows:

> (1) That it effect a community as distinguished from an individual;
> (2) That the law control the use to be made of the property;
> (3) That the title so taken be not invested in a person or corporation as a private property to be used and controlled as private property; and
> (4) That the public reap the benefit of public possession and use, and that no one exercise control except the public.

If the use for which land is taken by eminent domain is public, the taking is not invalid merely because an incidental benefit will inure to private individuals. There is authority that the "by-product" of a public use may be sold or leased to a private developer. It is stated in 2 Nichols on Eminent Domain, 658:

> When a taking is made for a public use, it is no objection that a by-product of the property taken is to be sold for private profit, even, it has been held, if the public improvement would not have been made had it not been for the expected profit from the by-product.

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[12] 2 Nichols, Eminent Domain, 614.

Figure 1. Cobo Hall and Lodge Expressway, Detroit Michigan—air rights.

Figure 2. U.S. Post Office and Congress Expressway (I-98), Chicago, Illinois—use of air space.

Figure 3. University of Alabama Medical Center, Birmingham—air rights.

Figure 4. Allen Bradley, Co., Milwaukee, Wisconsin—air rights.

Figure 5. Santa Monica Freeway, California—parking.

Figure 6. Expressway, Tokyo, Japan.

It can be argued that the private use of airspace is merely a "by-product" of the highway public use.

When there is commingling of public and private uses the general law is set forth in 2 Nichols on Eminent Domain, 659, which states on pages 659 and 660:

> When, however, a statute authorizes a single taking for uses both public and private and does not limit the extent of the taking to the necessities of the public use, and the uses are so commingled that they cannot be separated and the taking for private use disregarded, the whole statute is unconstitutional.
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> The use for which the property is acquired by eminent domain must be the use of the condemnor. An acquisition which is primarily for private benefit is not for a public use. However, an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. Where, despite the commingling of private and public uses, the taking will aid in the establishment of a public project, the courts are disposed to ignore the private element as purely incidental; ...

There is another argument that the leasing of highway airspace can be considered as the utilization of public property not presently needed for highway purposes. In 2 Nichols on Eminent Domain, page 663, it is stated:

> It is not, however, objectionable that a statute which authorizes a taking provides that the municipal authorities may sell lands taken whenever they determine that such property is no longer needed for public use. Such a power is latent in every taking, and is very different from a taking of land with a contemporaneous knowledge and purpose that a definite and separable part is not necessary for the public use.

In California the question of whether the condemnation of property to construct a viaduct section of freeway with the intent to lease the area beneath the structure for parking purposes was a public or private use has been before the appellate court in the recent case of People v. Nahabedian (171 Cal. App. 2d 302, 340 P. 2d 1063). In that case it was claimed that the area under a freeway was going to be leased to "Walt's Auto Park" and to be used for a private purpose without any relation to the freeway project. The court in the foregoing case, at page 307, stated the following:

> To us, it is manifest that the trial court confused "necessity" with "public use." Respondent concedes that"...the mere declaration by the legislature of a purpose for which property may be taken for a public use is not conclusive and does not preclude a person whose land is being condemned from showing upon the trial that, as a matter of fact, the use sought to be subserved is a private one, or from assailing the complaint on the ground that it so appears therefrom. The character of the use and not its extent, determines the question of public use." [Emphasis added.] (Stratford Irr. Dist. v. Empire Water Co., 44 Cal.App.2d 61, 67, 111 P.2d 957). Yet, in the case at bar, the court announced, "...so we will know where we stand, I will sustain any objection to the introduction of evidence tending to show ... the true purpose of the condemnation proceedings." This was error. There can be no doubt that both the court and counsel for respondent clearly understood that appellant's contention was that the "real purpose" of the condemnor was to take part of appellant's property not for freeway purposes, but to lease it to Walt's Auto Park for private purposes, without any relation to the freeway project.

> Certainly, if such contentions could be proved, respondent could not acquire the portion of the property in question, because the latter is without authority in law to acquire the property of a citizen for private use (U.S. Const., Fifth and Fourteenth Amendments; Cal. Const., art I, Sec. 14; People v. Chevalier, Cal. App., 331 P.2d 237; City & County of San Francisco v. Ross, 44 Cal.2d 52, 59, 279 P.2d 529).
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> Respondent argues that the instant action is a taking for the Santa Monica Freeway, which is being built on "stilts" or piers so that it is an elevated freeway. That therefore, the need for a clearance of the surface of the land under the bridge and the approaches to it will serve the public interest. As respondent puts it, "Not only will it be of "public utility" to have complete control of the property during construction but it is also obvious that the State must have access to the understructure of the bridge at all times for necessary repairs, maintenance and possible remodeling." [Emphasis added.] (Crockett L. & C. Co. v. American T. B. Co., 211 Cal. 361, 365, 295 Pac. 328.) Respondent also contends that appellant's argument of the lack of public use due to a future lease for private parking lacks substantiality because of the need for the property during construction, even though the property is later leased or sold to private parties (Redevelopment Agency v. Hayes, 122 Cal.App.2d 777, 803, 266 P.2d 105). However, the holding in the case just cited was contingent upon the determination that the taking initially is for a public purpose. In the case at bar, all efforts of appellant to establish that the taking was not for a public purpose were excluded by the trial court. Here, the court seemingly concluded that the question whether the proposed taking is for a public purpose, was committed to the conclusive determination of an administrative agency of the condemning body. Such is not the law (People v. Lagiss, 160 Cal.App.2d 28, 35, 324 P.2d 926).

Later when the case was again appealed by the property owner in People v. Mascotti, 206 Cal. App. 2d 772, 23 Cal. Rptr. 846, the court affirmed the finding of the trial court that the private parking use underneath the freeway was a necessary public use.

In conclusion it would appear that as far as the airspace below a highway is concerned, at least in California, it can be condemned if it is necessary for highway purposes, and the original intention of the condemning party controls.[13]

Since Bureau of Public Roads Instructional Memorandum 21-3-62 provides in paragraph 17 that the authorized uses will be limited to "a term basis; or revocable at will or revocable on a specified period of notice," it can be argued that the private use of the airspace is temporary. This argument is bolstered by the decisions which uphold the right of a public agency to condemn for future needs and lease in the interim period before actual construction, and the authority to lease any public property not presently needed for highway purposes.[14]

The launching of an extensive program of leasing of air rights is actually a new and different kind of activity for most state highway departments. If the past is any criterion, it would seem to be wise to have the legislature specifically authorize this activity.[15] Although it may be desirable to have legislation specifically authorizing the leasing of highway airspace, it should not be inferred that without such legislation the state is powerless to make use of airspace on its highways.

REVENUE FROM USE OF AIRSPACE

A legislative answer to the question—"What to do with the income to the state from the leasing of highway airspace to private interests?"—will be before the 89th Congress.

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[13] People v. Lagiss, 223 A.C.A. 24; 35 Cal.Rptr. 34.
[14] HRB Special Report 27, "Acquisition of Land for Future Highway Use."
[15] See California Streets and Highways Code, Sections 104.6 and 104.12.

In order to understand the present conflict in viewpoint on what to do with the revenue derived from airspace, a knowledge of the history of the Federal-Aid Highway Act of 1956, and in particular Section 111, is essential.

The Federal-Aid Highway Act of 1956, which established the National System of Interstate and Defense Highways, provided in Section 111 that the only allowable non-highway use of airspace above and below the interstate highway was for the public parking of motor vehicles. This statute was interpreted by the Bureau of Public Roads in Cherry Memorandum No. 31 to be restricted to parking leases to other public entities. Several states considered this interpretation to be too restrictive. Sensing that a potentially large amount of income would be denied the states, the American Association of State Highway Officials, through its Legal Affairs Committee successfully urged Congress to broaden the permissable uses of highway airspace. Section 111 of Title 23 of the United States Code was amended and now authorizes the state to use or permit the use of airspace whenever it will not impair the full use and safety of the highway. Immediately after enactment of the 1961 amendment, the Bureau published its guide for leasing airspace above and below the Interstate System in Instructional Memorandum 21-3-62.

In the interim the Bureau, through the Assistant Secretary of Commerce, requested the U.S. Comptroller General for his opinion on the authority of the Bureau of Public Roads to require all states to apply a pro rata share of the net proceeds from the use of airspace to highway projects on the interstate system without matching Federal-aid funds. The Department of Commerce wished to make such a requirement a condition precedent to allowing the state to use or permit the use of airspace on Interstate Highways.

The Comptroller General, in an opinion dated April 6, 1962, rejected this argument.[16] The Comptroller General found that Congress did not consider the question of income in enacting or amending Section 111 and concluded that there was considerable doubt that the Secretary of Commerce has authority to require a state to share with the Federal Government the net proceeds from Interstate airspace. As a result of this decision the Bureau of Public Roads in its Instructional Memorandum 21-3-62, provided as follows: "Disposition of income received from the authorized use of airspace will be the responsibility of the State." This instructional memorandum did not end the matter. The General Accounting Office filed a report to the Congress concerning their audit of the California Interstate program. One of the recommendations of the GAO was that legislation should be introduced in Congress to allow the Federal Government to participate in revenue from the lease of airspace on Interstate highways. In March of last year the Bureau of Public Roads, in their comment on the General Accounting Office report, indicated that recommended legislation was drafted by Public Roads and submitted to the Bureau of the Budget. On June 30, the draft bill was forwarded by the Department of Commerce to both the Speaker of the House of Representatives and the President Pro Tempore of the Senate as part of the department's legislative program.

On July 30, the bill was introduced in the House of Representatives as H.R. 12143. The bill (H.R. 12143) provides as follows:

> When a State leases, permits the use of or otherwise disposes of the airspace on any of the Federal-aid highway systems, including the airspace on the Interstate System pursuant to section 111 of this title, in the cost of which the United States has participated under this title, the Federal Government shall be entitled to share in the net proceeds from such leasing, use, or disposition, after deduction of the costs to the State thereof, in the same ratio in which it participated in the cost of the right-of-way. An amount equivalent to the Federal share of such net proceeds shall be deducted from sums due the State covering the Federal pro rata share of the cost of construction of any projects on any of the Federal-aid highway systems.

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[16] 41 Compt. Gen. 652.

This bill would have entitled the Federal Government to share in the net proceeds from leases of airspace in the same ratio in which it participated in the cost of the right-of-way. The Federal share of such net proceeds is to be deducted from the cost of construction of projects on any Federal-aid highway system. H.R. 12143 died when the 88th Congress adjourned. Since it constitutes part of the Department of Commerce's legislative program it will undoubtedly be reintroduced at the first session of the 89th Congress. For this reason the House bill deserves comment from a policy and legal standpoint.

Another alternative on the disposition of revenue was mentioned in the Comptroller General's report to the Congress on the legislative policy requirements governing federal participation in the Federal-aid highway program in California. According to this plan, the benefit to the Federal Government would "take the form of a credit to participating project costs in the amount of the estimated value of the airspace for nonhighway purposes." Although this was not the plan which the Department of Commerce chose to send to Congress, it did receive some attention from Clifton W. Enfield, Minority Counsel of the House Committee on Public Works. In an address to the Workshop on Highway Law at Louisiana State University, April 17, 1964, Mr. Enfield raised several interesting questions:

> A number of unanswered questions exist, such as, should the Federal Government share in the net rentals as they are collected over future years, without end, or should projects be closed out by crediting the Federal Government with the present worth of its share of estimated future net rentals? If the latter procedure is followed, over what period of time should future rentals be estimated? Should it be in perpetuity, or for some arbitrary number of years, or for the estimated economic or functional life of some portion of, or the entire, highway facility as constructed, or would some other measure of time be more equitable? Also, how should the amounts of future rentals be estimated, and how should their present worth be computed?

What are the arguments and policies against the Federal Government sharing the revenue from airspace?

H.R. 12143 is more than a mere revenue measure. It goes to the very heart of the philosophy behind the Federal-aid highway program. The basic question involved here is whether or not the Interstate Highway program takes the form of the traditional Federal-aid to a state or whether by the contribution of Federal funds the Federal Government maintains title in the right-of-way by participation in its income. In more basic legal terms, the question is whether the fee owner of the highway and its airspace has the inherent right to own, possess and dispose of the income from the property.

The present wording of the Federal-aid highway statutes, the legislative history and the Congressional debate, indicate a legislative intent that the Interstate and other Federal road programs is one of Federal assistance, by which the states retain all the normal property rights in the highways, rather than one of Federal investment. An examination of the debates which have covered a half century of legislation in the field of Federal aid to highways shows that the underlying principle upon which the system is built is one of aiding and assisting the states in building their highways.

If the states are left free to spend highway-airspace revenue on the highway projects of their choosing without being forced to forfeit Federal contributions to their Federal-aid highways, they will be able to pursue a vigorous program of updating and maintaining other streets and highways in their states.

If the Federal Government cuts off its statutory-promised contribution in the amount of 90 percent of the net airspace revenue, the states will be required to provide additional tax money for the completion of the Interstate Highway System on schedule.

In Section 116 of Title 23, U.S.C., it is stated that it is the duty of the states to maintain or cause to be maintained the Federal-aid highways and Section 110 requires

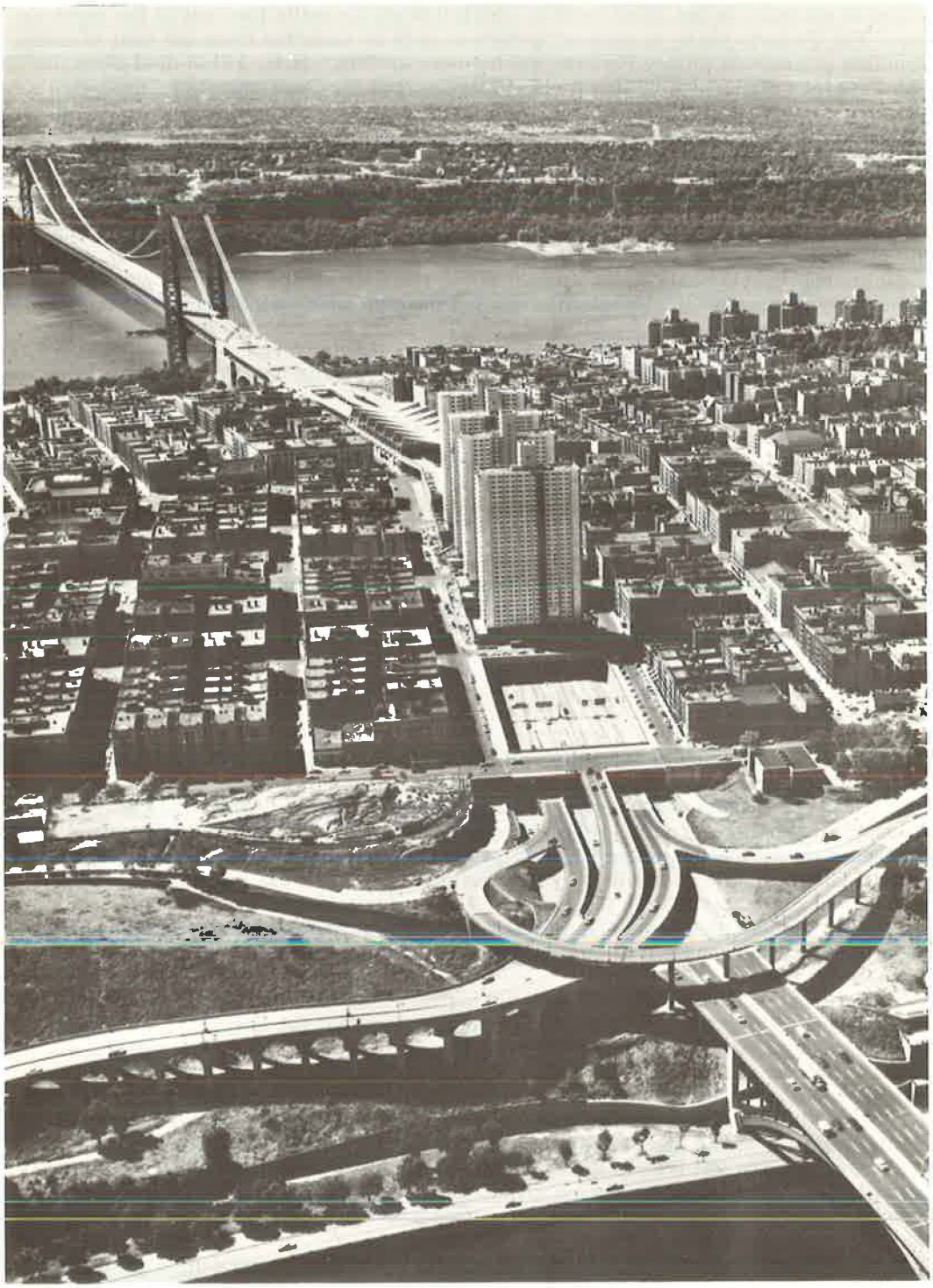

Figure 7. Approaches to George Washington Bridge, New York, N.Y.—use of airspace.

that project agreements include a provision for maintenance by the state after completion of construction. The project agreement states:

> 12. Maintenance. The State highway department will maintain, or by formal agreement with appropriate officials of a county or municipal government cause to be maintained, the project covered by this agreement, in accordance with 23 U.S.C. 116.

Since part of the consideration of the project agreement is the state's duty to maintain the highway, it should be entitled to this revenue to offset the maintenance expenditures.

No one would deny that the use of airspace over or under freeways is very often desirable to gain the most beneficial use possible of the highway right-of-way in urban areas, to relieve the land shortage in densely populated areas and to place on the tax rolls additional valuable property. Under the proposed legislation, however, the incentive for a state to utilize airspace on its highways and to shoulder the burden of the many planning, construction, right-of-way and legal and maintenance problems incident thereto would be hampered, if not completely deterred, if the state received only 10 percent or less of the net revenue.

In addition, under Bureau of Public Roads Instructional Memorandum 21-3-62, "Federal funds will not participate in any added costs whatsoever of construction of the highway project required by [nonhighway] use; i.e., for additional right-of-way, increased clearance for depressed highways, structural columns, ventilation, lighting, signing, etc.; or other changes in design, construction methods, or materials." And as pointed out earlier the bureau requires the states to obtain fee title.

If any provision is to be made in the Federal-aid highway law for the disposition of revenue from the lease of highway airspace, it is suggested that it be confined to a requirement that the funds so received must be used for highway purposes. A nondiversion requirement would conform to the original idea back of the Hayden-Cartright provision that has been in the Federal law for so many years.

LEGAL PLANNING FOR DEVELOPMENT OF AIRSPACE

From this review of selected legal problems in the development and utilization of highway airspace, it can be seen that the field is complex and sometimes frustrating to the highway lawyer. The lawyer must reconcile as best he can a mass of judicial precedents, beginning with the New York elevated railroad cases, his state law, the Federal laws and regulations, to be able to advise his state of the ramifications of merging the present right-of-way methods into a successful program for the utilization and development of air rights. Careful legal review is essential from the beginning. Legal planning will avoid subsequent complications and protect the integrity of highway airspace.

One phase of the legal planning involves an evaluation of state laws to determine their effectiveness to meet the need to utilize highway airspace in metropolitan areas. Several questions on state laws should be asked:

1. Does the state have statutory authority to acquire a fee simple interest for highway right-of-way?
2. Does the state freeway law allow the acquisition of abutters' rights or is it limited to access rights?
3. Does the state law authorize the highway department to lease areas above or below highways or authorize the state highway department to lease areas of right-of-way not presently needed for highway purposes?

These basic questions illustrate the need for legislative planning. They also suggest to the author the need for a special study and report by the Highway Research Board on this subject. Such a report could provide each state with a basis for evaluating the effectiveness of its law on air rights and airspace in relation to the laws of other states.

A comprehensive model statute on highway airspace could be drafted and included in the report.

There are many other legal problems inherent in the development of airspace which could not be covered in this paper. These problems range from those involved in the contract specifications, bidding and construction phases in the development of highway airspace uses to the complex legal problems concerned with the leasing, maintenance, safety and taxation of possessory interests in the management of buildings occupying the highway airspace.

It is hoped that the trail blazed by this short review of selected legal problems will aid those who will research further and deeper into the many unanswered questions created by the growing need for space in metropolitan areas.