Legal Considerations

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WHAT we are involved in when we consider the multiple use of highway rights-of-way from a legal standpoint is, in fact, new conditions and new circumstances. And while the law will surely change in every jurisdiction to accommodate and permit such uses, it will move slower in some than in others, it will change by case interpretation in some jurisdictions but only by statutory enactments in other jurisdictions, and in some states constitutional amendments may be necessary.

So, you first have to carefully research the law of your own individual state to find out what you can do and to find out how the law deals with certain situations in your particular jurisdiction. In this regard, before we move into a consideration of enabling legislation of a type that would permit the use of airspace over and under rights-of-way, I want to approach the subject from the standpoint of the common law, keeping in mind that most states do not have any enabling legislation and that most state courts, if confronted with this subject, would consider it in the light of common law concepts or rather standard existing statutes that do not pertain specifically to the problem at hand.

The Common Law

The first thing you have to determine in any state is whether the title in the particular highway or right-of-way in question rests in the state or municipality in fee simple or whether the governing authority only has an easement.

If they have only an easement, it is important to discover what kind of an easement they possess. In a minority of American jurisdictions, an easement is all that a state highway commission has the power to acquire. Highway Research Board Special Report 32 (1958) listed around 10 states in which an easement was all that could be acquired by the state highway authority, and nine other states were listed in which the statutes did not contain a specific provision on the subject. The majority of states can acquire rights-of-way both in fee and through easements, although acquisition in fee seems to be the most common method of acquiring highway rights-of-way today.

I would suggest to you, however, that as the years go by it may become more common in densely populated urban areas to acquire limited dimension easements in order to save on acquisition costs. Although the Highway Research Board report stated that it was advisable to permit the acquisition of a fee title in order to insure the highest possible degree of control over the right-of-way, and although I think this policy would normally be correct, I would suggest that there may be a plus factor in acquiring only an easement in situations in which the governing authority is acting in concert with other governmental agencies for the joint development and multiple use of a given right-of-way.

In such a situation, you might have the joint activity of the highway commission or similar authority and the local urban renewal agency or slum clearance or housing agency; and it would be contemplated in advance of the acquisition of any land that the highway or freeway involved would simply be a limited dimension type of structure with apartment houses and other facilities constructed over it, or over part of it, or possibly below it. In this joint effort, there would be a sharing of the expenses of land costs, while at the same time permanent displacement of large numbers of individuals could be partially avoided, and the diminution of property values in areas surrounding the highway or freeway in question for residential purposes could be minimized. Moreover, there would be a maximal use of the land space involved.

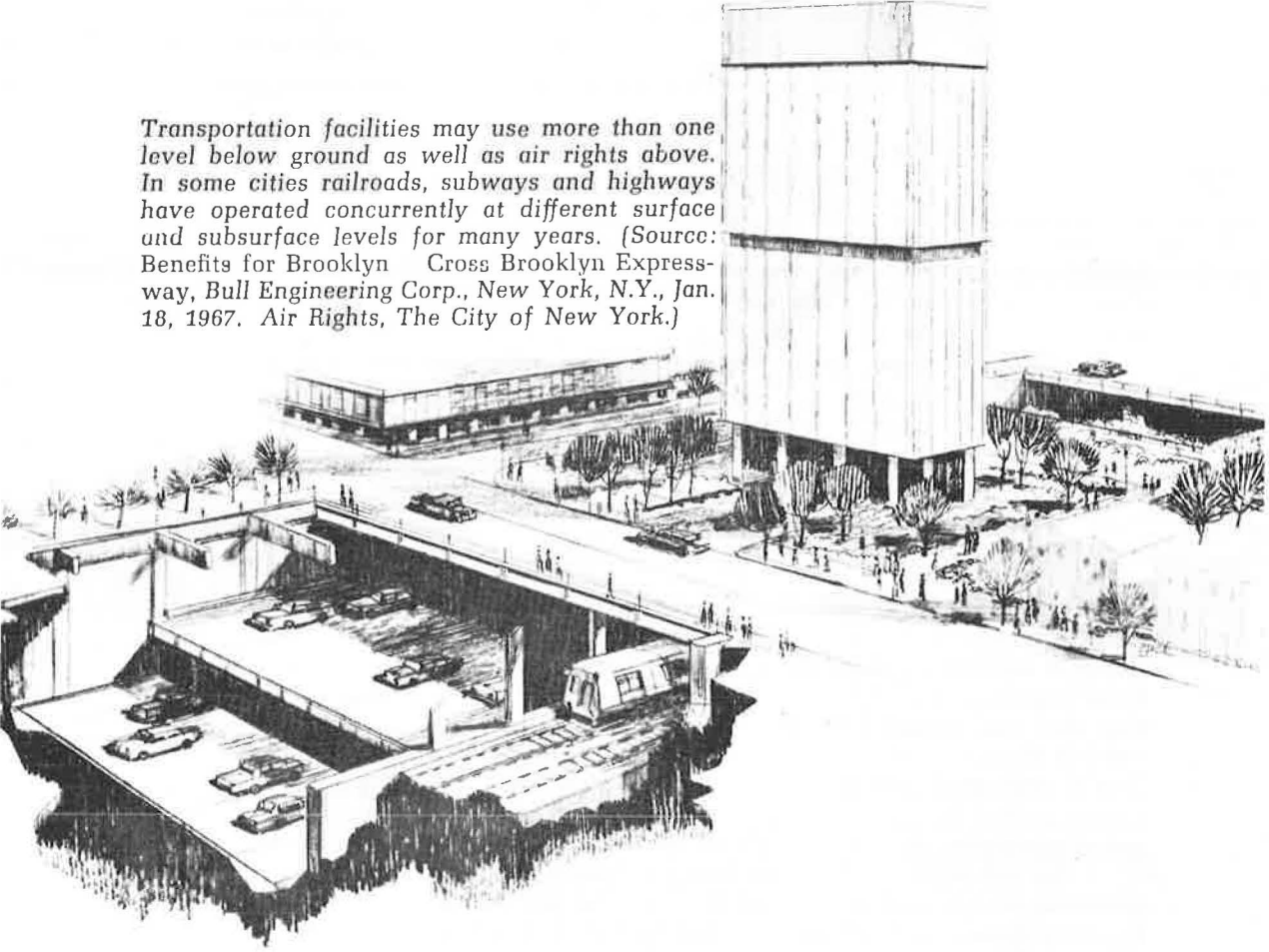
Getting back, however, to the original question of the acquisition of an easement as opposed to a fee simple absolute, if a state or other condemning authority acquires a fee simple absolute, then from the standpoint of the law of airspace, it has acquired the use of the airspace over the freeway upward to a reasonably usable height. In other words, Lord Coke's old maxim that the individual who owned the land surface owned the airspace above it indefinitely up to the heavens, although it has theoretically been limited due to the rise of aviation, has in actuality not been limited in terms of usable airspace. The upward reaches of airspace never was worth anything to surface owners because no one could use it. The only airspace which was ever worth anything was the airspace which lay relatively close to the surface. The land-

owner still owns that, and he owns it as high up in the sky as he can now or in the future make use of it. Consequently, when the highway department acquires a fee simple absolute for use as a highway right-of-way, it acquires the space over it as well. Whereas if it acquires a limited dimension easement, that is not the case.

If the highway department only acquires a so-called "tunnel easement," as it is known, the adjacent landowners will still be able to utilize, lease, or sell the overhead airspace, subject of course to limitations of Federal or state law, because these adjoining landowners still own the overhead space. This also means that in those states in which the right-of-way represents only an easement of any height, the airspace cannot be dealt with on a commercial basis because the adjacent landowners own the fee to the center of the right-of-way. This is unfortunate, since airspace in a highly concentrated urban area may be worth as much or more than the land surface. It is a very valuable commodity from the standpoint of the highway authority, and if the highway department is able to sell the airspace over a right-of-way that was acquired 15 or 20 years ago in a large city, it may find itself in the enviable position of receiving more money for the airspace than it ever paid for the right-of-way. The other side of the coin, of course, is that by joining with other agencies in the acquisition of land and space today, the cost of right-of-way may be substantially reduced.

I do not wish to dwell on this problem of the acquisition of an easement as opposed to a fee simple absolute, but I would add that if a highway department or street authority has acquired an easement of unlimited vertical dimension, you have a much more difficult situation presented from the standpoint of common law theory as far as the adjoining landowners are concerned. It can be asserted by these adjoining landowners that even in that situation they may make use of the airspace at a certain height, so long as it does not interfere with the use of the street or highway. After all, the nature of an easement is such that all you really acquire is the right to do some act upon, or make some use of, a specific piece of land. In the case of a highway, street, or expressway, it simply involves a passage across the land, and as far as the adjoining landowners are concerned they have the right to make use of the land over which the easement runs to the extent that it does not interfere with the easement.

This rather common rule was stated in *Elmhurst National Bank* v. *City of Chicago,* 157 N.E.2d 781, 782 (1959) in this way: "It is well established law that where an owner of property abutting the street is the owner of the fee to the street and the municipality has only an easement over the property for use as a street the owner has the right to make any reasonable use of the land, including the subsurface, which is not inconsistent with the easement and does not interfere with the paramount rights of the public."



Transportation facilities may use more than one level below ground as well as air rights above. In some cities railroads, subways and highways have operated concurrently at different surface and subsurface levels for many years. (Source: Benefits for Brooklyn Cross Brooklyn Expressway, *Bull Engineering Corp., New York, N.Y., Jan. 18, 1967. Air Rights, The City of New York.)*

A similar Texas case is *City of Fort Worth* v. *Citizens Hotel Co.*, 380 S.W.2d 60 (1964), and there are many such cases that say this. Consequently, when a highway department acquires an easement, it can control the right-of-way to the extent of preventing overhead encroachments or obstructions that might tend to limit or interfere with the use of the right-of-way for highway or street purposes, but other than that, under the common law, the owners of the fee (these being the adjoining landowners) can theoretically utilize, sell, or lease the space above it or under it in the absence of any prohibition under state law. Now, this latter qualification is important because some states have such prohibitions in the case of streets and highways.

I think it is obvious, even in the absence of local legal prohibitions, that unless a right-of-way is specifically limited to a certain height, as in the case of a "tunnel easement," most anyone contemplating the use of the airspace over the right-of-way is going to be reluctant to construct anything of any substance overhead without first seeking and

obtaining the permission of the governing authority having such responsibility, assuming such an instrument is permitted under state law. Otherwise, the question of encroachment in the airspace might be presented.

You run into another situation in connection with this, which I have briefly mentioned and which is that there is a substantial body of authority in the United States which holds that *in the absence of statutory authorization,* a municipality *does not have the power* to allow private encroachments to be erected over public streets. In *Sloan* v. *City of Greenville,* 111 S.E.2d 573, a 1959 South Carolina decision, the state supreme court denied the power of the city to permit private individuals to erect an overhang into two public streets. These were streets that had been dedicated to the public, and the court stated that an obstruction that was placed anywhere within the limits of the streets, even though not on the part of the street ordinarily used for travel, or that was placed in the space above a street, might constitute a nuisance. The court said that the public right goes to the full width of the street and extends indefinitely upward and downward at least as far as to prohibit any encroachment on such limits by anyone in any way, since the enjoyment of the public right might be hindered or obstructed or made inconvenient or dangerous.

The court quoted a previous South Carolina decision to sustain the proposition that if a municipality does not own the fee title to its streets, it is without authority to permit other uses, and such other uses amount to a nuisance and a purpresture. On this you might also see *People* v. *Amdur,* 267 P.2d 445 (Calif., 1954); *McGowan* v. *City of Burns,* 137 P.2d 994 (Ore., 1943).

To the contrary, even in the easement situation, some cases have held that a city possesses the inherent power to allow overhead encroachments, although such power might be considered to stem from general statutes pertaining to municipalities. You can find citations to cases of this type in 76 A.L.R.2d 896, 901-902 (1961).

I think you may conclude, in the usual situation, that the importance of ownership by the municipality or other governing authority of a fee title to the streets and highways is that it would seem that its power to control and regulate them would be unhampered and unlimited in most jurisdictions, so long as its power were exercised in such a way as to protect the free and unimpaired use of the streets by the public. Even in that situation, there are a few states that appear to make no differentiation between the municipality's ownership of a fee title and the possession of an easement, and seem to indicate that an enabling act would have to be passed before the municipality could approve any private use, even if it held the fee simple title. This would seem to be the minority view, and it would certainly not be the preferred view.

In summary, I would say that the majority of states, in the absence of specific constitutional or statutory sanctions to the contrary, would

permit a city or highway department that owned the fee simple title to its streets and highways to permit overhead encroachment into the airspace so long as there was no interference with the use of the highways or streets. However, as I have stated, you have to look at the law of the individual jurisdiction in order to make this determination and in order to arrive at an evaluation. In any situation in which you are dealing with this problem, once you have determined whether the city or state holds the fee simple title as opposed to an easement, you have only begun to arrive at an answer, since you must then consider the constitutional, statutory, and common-law restrictions, if any, that obtain in that particular jurisdiction.

Specific Enabling Legislation

Some forward-looking jurisdictions in the United States have passed specific statutes that pertain to this problem, and I might say that this is by far the better way to deal with the situation in that it eliminates the uncertainty involved. Even in such situations, however, you must make an initial analysis and determination with respect to whether the statute offends any state constitutional provision that may be in force in that particular jurisdiction and that may limit the power of the state or municipality to deal with rights-of-way. If an enactment pertains to rights-of-way at all, keep in mind that it pertains to the airspace because the airspace is no more than an upward extension of the property rights in the land surface itself.

Returning to some of these statutes, I should first comment as a matter of historical significance that the problem of use of airspace over rights-of-way first arose in connection with railroads, rather than highways, and quite a few analogies can be drawn in that connection. As a matter of fact, in 1927 the Illinois legislature passed a landmark statute permitting railroads to divide their real estate (if owned in fee) into different lots and levels, and to sell or lease any part of the real estate, whether at, above, or below the land surface, so long as there was no reasonable impairment of the property for railroad purposes.

This statute, of course, was only limited to railroads, and you are not interested in railroads. However, this is the type of statute we are talking about, and I think the analogy is quite clear. Illinois later adopted an equally significant statute empowering every municipality "to lease the space above and around buildings" located on municipally owned land for a period of not more than 99 years and "to lease in the same manner and for a similar term, space over any street, alley or other public place . . . more than 12 feet above the level . . . to the person who owns the fee or leasehold estate . . . in the property on both sides of said street, alley or public place." This is found in the Illinois Annotated Statutes, Chapter 24, Section 11-75-1 and following. Certain terms were provided in connection with the lease, and other

provisions pertaining to the lease were provided in other sections of this same act.

A similar statute is in effect in Wisconsin, which is Wisconsin Statutes Annotated, Section 66.048(3). In addition to these statutes, Colorado, New Jersey, and Pennsylvania have adopted the following provision (or essentially this provision, since there is some change in the wording in Pennsylvania): "Estates, rights and interests in areas above the surface of the ground, whether or not contiguous thereto, may be validly created in persons or corporations other than the owner or owners of the land below such areas and shall be deemed to be estates, rights and interests in land." This statute, of course, leaves no doubt in states adopting it that the surface owner owns both the airspace above him to the extent that it is capable of being used and occupied, as well as the land surface, and that he has the right to subdivide, sell, and convey the airspace the same as he could the land surface.

On this, you might see New Jersey Revised Statutes, Section 46:3-19; Colorado Revised Statutes Annotated, Section 118-12-1; and Pennsylvania Annotated Statutes, Title 68, Section 801. Another section of this same act provides that these airspace estates, rights, and interests shall pass by descent in the same manner as land and "may be held, enjoyed, possessed, alienated, conveyed, exchanged, transferred, assigned, demised, released, charged, mortgaged, or otherwise encumbered, devised and bequeathed in the same manner, upon the same conditions and for the same uses and purposes" as land and shall be dealt with and treated as land. This act further provides that all the rights, privileges, powers, remedies, burdens, duties, liabilities and so forth pertaining to estates and interests in land apply to such supersurface estates. The New Jersey statute, incidentally, was interpreted (although not adjudicated) to permit the highway commissioner to sell airspace over state highways.

In addition to these enactments, Ohio adopted a provision, which became effective in November 1965, concerning the conveyance, transfer or permit for the use of land not needed for highway purposes. This is Ohio Revised Code Annotated, Section 5501.162. Among other things, this statute provides 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. The statute provides that this conveyance, transfer or permit to use may include areas or space on, above, or below the surface of the earth and include the grant of easements or other interests in any such property for use 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. The statute makes other extensive provisions allowing quite broad powers in dealing with airspace over highways. Its implication, moreover, would seem to

extend full power to the director of highways for Ohio to divide the airspace into separate parcels.

This Ohio statute provides the basis, then, 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. Without trying to improve upon the wording of the statute, I would have to say that its intent and its concept are excellent. Similarly, I would say that the provisions of the Colorado, New Jersey, and Pennsylvania statutes are also quite good, although I think you could do all those things that they provide at the common law.

Let me say at this point that I much prefer statutes of a very broad and general nature encompassing all types of options that might be available to someone making use of airspace over highway, railroad, street, and alley rights-of-way. I prefer the Ohio approach to the more specific and limited statutes in Illinois and Wisconsin. The type of statute I think is needed is a statute combining some of the wording of the Ohio statute on the one hand and the Colorado, New Jersey, and Pennsylvania enactments (which are approximately the same statute) on the other hand. The value of these latter statutes is that they provide for private, non-right-of-way usage. I would reiterate that the enactments in Colorado, Pennsylvania, and New Jersey are only expressive of the common law, but the value in them is that they give certainty to the law.

More and more, in America, we have become used to dealing in somewhat a continental fashion with codes and statutes and the like, rather than with the common law. It is my opinion that it is not absolutely necessary to have these statutes, but certainly I think a state is better off by having them. The beauty of the Ohio statute is that it specifically deals with the distinct problem we are concerned with — the problem mentioned previously of the power of governing agencies to deal with airspace over rights-of-way. I think the Ohio statute should apply to municipalities, however, as well as to state highway authorities. It should be very broad, allowing the greatest flexibility and permitting the same estates, interests, and rights to be created in airspace as are created in the land surface. Airspace should be viewed as land, of course, because that is all it is from a strictly legal concept.

I am not going to go into some of the enactments that have been proposed in the District of Columbia with regard to the use of airspace within the District. I have noticed, however, that whenever Congress gets ready to pass a statute permitting a building to be erected in airspace in the District of Columbia, you have to get the permission of everyone in order to do anything. Despite the shortcomings of the legislative process as it operates in the various states, I must say that the statutes the states come up with are often simpler and more clean-

cut, at least in the field of airspace, than those emanating from the United States Congress.

Legislative Standards for Joint Public or Public-Private Ventures

First of all, we ought to stop thinking of the joint concept purely in terms of a highway matter or a housing matter. What is needed is a statute which takes into account, first of all, the fact that airspace is property and should be dealt with as such; second, the proposition that the highway and street authorities on a local, state and national basis are still in the transportation business and that they still have as their chief aim the necessity to move people and goods as rapidly as possible and as safely as possible over wide areas; third, that there is a great deal to be gained from the standpoint of public housing and from the standpoint of land use within a highly concentrated urban area by making multiple use of highway rights-of-way; and fourth, that in a private enterprise system such as we have in the United States, there is no reason why private developers should not be permitted to engage in this sort of thing as well as public developers.

As a matter of fact, in connection with the last point, this is the best way to get the thing operating on a substantial and active basis, in my opinion. Therefore, the standards you engage in have to be at least sufficient, first of all, to protect the users of the highway and to permit the rapid transit of people and goods without any interference from the structures that are constructed over and above the highways and freeways. You still have to have limited-access facilities in urban areas. You have to provide access from these structures to side roads that eventually feed on at various points to the freeways without clogging up the traffic patterns. In other words, you have engineering problems in that respect, and most of those individual engineering problems have to be resolved in favor of the highway or freeway and the transportation problems involved, rather than in terms of the multiple-use aspect.

At the same time, however, once these considerations have been met, there is no reason why more flexibility cannot be provided than has been provided in the past under the memorandums and regulations of the Bureau of Public Roads, as far as public and private developments are concerned. We have learned from railroad developments in the United States that at the very minimum you have to permit long-term leases of airspace in order to make it salable and in order to develop it. Moreover, you should permit the sale of airspace in fee; in short, you should permit people to deal in airspace in essentially the same manner that they deal in land. Once you have protected the highway and the rights of the traveling public, once this overriding consideration has been met, then the object becomes to make airspace reasonably usable to the greatest degree possible.

In my opinion, previous memorandums of the Bureau of Public Roads have not done this. I am referring specifically to IM 21-3-62.

This memorandum hampered the use of airspace and deterred 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. We need to consider fully the public interest considerations in terms of public and urban redevelopment and the appropriate use of land in an urban setting, in the type of situation that exists today in large cities such as New York, Chicago, Philadelphia, and Washington.

Therefore, the legislation that is drawn in this connection, once it has provided enough protections for the traveling public, should provide the broadest possible flexiblity in permitting a full public and private development of airspace over, under, and around rights-of-way. In this manner, I think we can promote a much fuller development of our urban areas, providing for a more sensible use of the land that is available to us. I think we can help eliminate slums in this manner; I think we can put people closer to transportation facilities; I think we can begin to convenience rather than to inconvenience the urban poor in terms of housing redevelopment and urban renewal in large American cities. I think we can find in private development and private investment a source of support that can be tapped much more fully than it has in times past. And further, I think we need to develop more Federal and state programs that are aimed in this direction and that attempt to solve the problems of urban blight by taking into consideration the full range of urban problems and available solutions.

Airspace certainly is not the sole answer to the problem of crowding in urban areas. It is simply another asset that should be used in resolving such problems as urban renewal, slum clearance, public housing and relocation, zoning, and the myriad related problems that confront us in our congested cities.

Panel Discussion

MR. PIGNATARO: I wonder whether the wide flexibility you recommend in legislation would possibly deter the development of air rights and multiple use because it may lead to controversy of intention or interpretation or lack of interpretation and therefore to litigation in the courts.

MR. WRIGHT: Lawyers are going to litigate no matter what kind of laws you pass, so you might as well pass the kind of laws you want while you are passing them.

It seems to me that on the national level you have a situation in which you have laws pertaining to housing and urban redevelopment, and then you have laws pertaining to highways, and if you want to fulfill this joint concept it seems to me you might begin to put them together. And I think the same thing would be true on the state level. You do run into a problem on the state level of constitutional prohibitions. On the other hand, where the state constitution provides that you can condemn land for public purposes rather than for public use, you have a much broader flexible base to operate from in that state.

MR. KRAUSE: You said the common law is flexible enough to permit individuals to make any lawful use of airspace that they wish. I certainly agree with that concept. However, difficulty arises when it is applied to the public agency or a political subdivision that is inhibited by statutory and sometimes constitutional limitations on what it can do, deriving all its powers from the legislature. I think it might help all of us if we also follow a dictum that most of these things are possible but anything may be litigated.

I had one question to ask Professor Wright, and that is on the definition of right-of-way in the airspace. I know Professor Wright is familiar with Section III of Title 23 and our regulations, Section 1.23 of the Code of Federal Regulations. It seems to me that our statute is somewhat ambiguous in talking about nonhighway uses within the right-of-way. Professor Wright, has that ambiguity ever bothered you, and do you have any suggestions?

MR. WRIGHT: I have noticed that, and I think it is somewhat ambiguous. As a suggestion I would say that after you have made provision to protect the highway right-of-way that the first thing you ought to do is get rid of that provision, because if you are going to have a really meaningful joint development of the highway you are going to have to have some highway uses within the right-of-way unless you seriously limit what the right-of-way extends to at the present time. Otherwise you are going to have to change your concept of nonhighway uses within the right-of-way.

I think what you intend is that you do not want any outside use interfering with the transportation facility. But by this provision you eliminate the public and private development of airspace to a large extent, or at least you hamper it.