

**AIR RIGHTS OVER GOVERNMENT PROPERTY**  
**REPORT OF THE**  
**COMMITTEE OF COUNTIES, CITIES AND TOWNS**  
**OF THE HOUSE OF DELEGATES,**  
**THE COMMITTEE ON LOCAL GOVERNMENT OF THE SENATE,**  
**AND THE COMMITTEES ON COURTS OF JUSTICE**  
**FOR THE HOUSE OF DELEGATES AND SENATE**  
**TO**  
**THE GENERAL ASSEMBLY OF VIRGINIA**

**HOUSE DOCUMENT NO. 6**

**COMMONWEALTH OF VIRGINIA**  
**DIVISION OF PURCHASES AND SUPPLY**  
**RICHMOND**  
**1979**

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JOINT SUBCOMMITTEE**

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**Air Rights Over Government Property**

**Report of the**

**Committee of Counties, Cities and Towns**

**of the House of Delegates,**

**The Committee on Local Government of the Senate,**

**And the Committees for Courts of Justice**

**For the House of Delegates and Senate**

**To**

**The General Assembly of Virginia**

**Richmond, Virginia**

**December, 1978**

To: The General Assembly of Virginia

**I. Introduction.**

The joint committees were directed by House Joint Resolution No. 161 to study air rights over governmental property and report their findings. A copy of the resolution is as follows:

**HOUSE JOINT RESOLUTION NO. 161**

WHEREAS, there is nationally a trend to develop air space over highways and other government-owned lands; and

WHEREAS, the Washington Metropolitan Area Transit Authority has announced plans to lease air rights over a future subway station in the District of Columbia; and

WHEREAS, air rights development is possible over public lands but many unanswered questions regarding development control, taxing authority, zoning and entitlement to revenue have arisen; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the House Committee on Counties, Cities and Towns, the Senate Committee on Local Government, and the Committees for Courts of Justice of the House of Delegates and Senate are requested to study all aspects of the development of air rights over public lands under existing law, including:

(a) Who has the right to authorize development over lands owned by the local, State or federal government or by any of their instrumentalities;

(b) Whether these lands, acquired by condemnation for a specific purpose, can have air rights developed for any other purpose;

(c) Which governmental authorities or agencies have taxing authority since the surface land is exempt from local taxation;

(d) Who, if anyone, has planning and zoning control over such air rights development;

(e) Who is entitled to the revenues derived from the leasing of such air rights; and

(f) Any other relevant matters pertinent to air rights development.

The Committees are requested to report their findings and recommendations to the nineteen hundred seventy-nine General Assembly.

The respective Committees appointed the following members to conduct the study on their behalf:

From the Committee of Counties, Cities and Towns of the House of Delegates:

C. Richard Cranwell of Vinton;  
Clinton Miller of Woodstock; and  
Robert E. Washington of Norfolk.

From the Committee on Local Government of the Senate of Virginia:

Joseph V. Gartlan, Jr., of Alexandria;  
Nathan H. Miller of Harrisonburg;  
Frank W. Nolen of New Hope; and  
J. Lewis Rawls, Jr, of Suffolk.

From the Committee on Courts of Justice for the House of Delegates:

James F. Almand of Arlington;  
Floyd C. Bagley of Dumfries; and  
Richard R. G. Hobson of Fairfax.

From the Committee on Courts of Justice for the Senate of Virginia:

Hunter B. Andrews of Hampton; and  
Willard J. Moody of Portsmouth.

Members of the Joint Subcommittees elected Delegate James F. Almand chairman of the study.

The Joint Subcommittee wishes to express its appreciation to the personnel of the Office of the Attorney General and the Department of Highways and Transportation for their assistance to the Joint Subcommittee in its deliberations.

## **II. Findings.**

While the resolution, most times, uses the term "air rights" the subject being studied is space above the surface of the earth. This report will use the word "airspace."

It is a settled principle of common law that land has an indefinite extent upwards. This principle was modified in the Causby decision [U.S. v. Causby, 328 U.S. 256 (1946)] to provide that the landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. Such ownership is further subject to the right of transit through navigable airspace. In the development of the law it has recognized horizontal subdivision of airspace with the resultant separate ownership of the land surface and the airspace above, in addition to the right to lease same.

Airspace is dealt with legally by one of four methods with the difference between the second and third methods being limited to the method of providing for ground support. It should be kept in mind when thinking of airspace that there must be a connection with the surface of the earth to utilize it. In effect, one is discussing the erection of structures on a platform with a non-connected function taking place, or being provided for, beneath the platform. The four methods are:

1. lease of airspace and ground support areas;
2. sale of airspace with easements for ground support areas;
3. sale of airspace and ground support areas; and
4. sale of airspace and ground with an easement back to, or reserved by, the grantor for use of the ground surface.

Virginia has at least two statutes that treat different aspects of airspace. Section 15.1-376.1 authorizes certain cities and counties, by ordinance, to sell or lease the airspace over any public street, highway, lane or alley in such cities and counties subject to the restrictions set out therein. This statute makes no reference to Section 9 of Article VII of the State Constitution which provides that a lease of air rights (space?) by a city or town shall not exceed sixty years. There is at least one question raised by Section 9. Can the prohibition found in Section 9 be avoided by a sale of air rights? The members of the Joint Subcommittee believe this question and others should wait court decisions interpreting the section before a determination is made to propose a Constitutional amendment—if one be needed. The proposed legislation makes reference to the Constitutional provision to alert persons relying on § 15.1-376.1, and other sections pertaining to airspace; to the existence of the constitutional limitation. The other section, § 58-758.1, provides for the taxation of leasehold interests to the lessee where the owner (lessor) is exempt from assessment for taxation.

### **III. Conclusion.**

Members of the Joint Subcommittee are of the opinion the present common law and statutes pertaining to real property govern the use and ownership of airspace and only minor clarifications are needed.

### **IV. Recommendations.**

The proposed legislation, Appendix One, covers the following points:

1. Amends §§ 15.1-262 and 15.1-847 to expressly grant to counties, cities and towns the authority to convey or lease airspace other than that superjacent to a public way;
2. Amends § 15.1-376.1 to make it applicable to airspace over all public ways owned by all counties, cities and towns, deleting the requirement of securing the approval of the State Highway and Transportation Commissioner except where the Commonwealth has an easement for public travel;
3. Adds § 15.1-491.01 to provide airspace is subject to the zoning ordinance of the county, city or town wherein it is located when such airspace is not owned and used by the Commonwealth or other political jurisdictions;
4. Adds § 33.1-183.1 authorizing the State Highway and Transportation Commission to sell or lease airspace over public ways owned by the Commonwealth; and
5. Amends § 58-758 to make clear airspace owned by a person other than the subjacent landowner shall be separately assessed for real property taxation.

Respectfully submitted on behalf of the following:

Committee of Counties, Cities and Towns  
Of the House of Delegates,  
The Committee on Local Government of the Senate,  
And the Committees on Courts of Justice  
For the House of Delegates and Senate

James F. Almand, Chairman

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Robert E. Washington

## Appendix One

§ 15.1-262. Purchase, sale or exchange of real property; how sale or exchange made.—The governing body of the county shall have power to sell, at public or private sale, or exchange and convey the ~~corporate~~ real property [*which includes the superjacent airspace (except airspace provided for in § 15.1-376.1) which may be subdivided and conveyed separate from the subjacent land surface*] of the county; to purchase any such real estate as may be necessary for the erection of all necessary county buildings; to provide a suitable farm as a place of general reception for the poor of the county, and to ~~make such orders~~ *adopt such ordinances authorized by law* as they deem expedient concerning such ~~corporate~~ real property as now exists or as may hereafter be acquired; provided, that no sale or exchange of such property exceeding twenty-five thousand dollars in value or any combination of sales or exchanges exceeding one hundred thousand dollars in value during the county's fiscal year shall be made without the approval and ratification of such sale and exchange by an order of the circuit court of the county ~~or by the judge thereof in vacation~~, entered of record; however, this approval and ratification shall not be required for the conveyance, with or without consideration, of easements for highways, streets, alleys, curbs, sidewalks, storm drainage, sanitary sewers, electricity, gas, water and other public utilities, by the governing body of any county ; ~~county board or local authority~~; provided, however, no such order of court shall be required for the sale or exchange of school property when the unanimous approval of the school board and the local governing body is obtained for such sale or exchange.

But this section shall not be construed to deprive the judge of the right to control the use of the courthouse of the county during the term of his court therein.

§ 15.1-376.1. Counties, cities and towns may sell or lease airspace over public streets, ways, etc., under certain conditions.— *Subject to the provisions of Article VII, Section 9, of the Constitution when applicable*, the governing body of any city having a population of more than five thousand or any county having a density of population in excess of one thousand inhabitants per square mile every county, city and town may, by ordinance, authorize the sale or lease of the airspace over or under any public street, highway, lane or , alley or other way in such city or county county, city and town owned by it in fee simple ; provided, however, that no any building, structure or appurtenance thereto, constructed over any such street, highway, lane or , alley or other way shall have less than a minimum clearance of sixteen feet and providing further that nothing herein shall be construed to relieve any such grantee or lessee of such airspace of the liability for negligence on their part. No such ordinance shall be adopted by any city or county until the governing body has held a public hearing thereon after public notice as provided in § 15.1-431 and has obtained, in writing, the consent of the State Highway Commissioner . *In addition, in those public ways in which the Commonwealth has a prescriptive easement for maintenance and public travel the airspace shall be conveyed or leased only with the consent, in writing, of the State Highway and Transportation Commissioner.*

Should the construction of any building or structure in any such airspace require the relocation of any overhead utility, the cost of such relocation shall be borne by the grantee or lessee.

§ 15.1-491.01. Zoning applicable to airspace.— A. A zoning ordinance shall be applicable to the superjacent airspace of any non-public owned land area.

B. Airspace superjacent or subjacent to any public highway, street, lane, alley or other way in this Commonwealth not required for the purpose of travel, or other public use, by the Commonwealth or other political jurisdiction owning same, shall be subject to the zoning ordinance of the county or municipality in which such airspace is located.

C. Airspace not provided for in paragraph B above that is superjacent to any land owned by the Commonwealth or other political jurisdiction and occupied by a non-political entity or person shall be subject to the zoning ordinance that would be applicable if the land were owned by a private person.

§ 15.1-847. Use, management and disposal of property. A municipal corporation may control and regulate the use and management of all of its property, real and personal, within and without the municipal corporation; and may sell, lease, mortgage, pledge or dispose of such property [*which includes the superjacent airspace (except airspace provided for in §15.1-376.1) which may be subdivided and conveyed or leased separate from the subjacent land surface*] , subject to such

limitations as may be imposed by *the Constitution or general law.*

*§ 33.1-183.1. Authority to lease or convey airspace.—The Commission may lease or sell and convey the airspace superjacent or subjacent to any highway in this Commonwealth which is within its jurisdiction and in which the Commonwealth owns fee simple title after satisfying itself that use of the airspace will not impair the full use and safety of the highway or otherwise interfere with the free flow of traffic thereon and it cannot be reasonably foreseen as needed in the future for highway and other transit uses and purposes. It may provide in such leases and conveyances of airspace for columns of support (in fee or otherwise), ingress, egress and utilities.*

*No lease or conveyance shall be entered into by the Commission until after the time the county, city or town, by action of its governing body by majority recorded vote, approves the projected use and has zoned the airspace in question or has otherwise taken such steps as it deems proper to regulate the type and use of the improvements to be erected in such airspace.*

*All leases and conveyances shall contain those terms deemed necessary by the Commission to protect the interests of the Commonwealth and the public and shall not be entered into until after public advertising for bids for such airspace. The Commission shall advertise for bids at least two weeks (fourteen days) prior to the execution of a lease or a conveyance. The advertisement shall state the place where bidders may examine a map of the airspace, the general terms of the lease or conveyance and the time and place when bids will be opened by the Commission. The highest bid from a responsible bidder, in the sole discretion of the Commission, shall be accepted; however the Commission may reject all bids and advertise the property again.*

*Compensation paid for such leases and conveyances shall be credited to the fund for Highway Maintenance and Construction.*

**§ 58-758. Application of chapter.—All taxable real estate having been segregated by law for local taxation only, such taxable real estate shall be assessed for local taxation in accordance with the provisions of this chapter and other provisions of law. Airspace when owned by a non-tax exempt person other than the person owning the subjacent land surface shall be, as soon as practicable after the first day of January of each year, specially and separately assessed at its fair market value, including all improvements therein. For the purposes of this chapter, and other provisions of law relating to the assessment of real estate for taxation the term “taxable real estate” shall include 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. This chapter shall not apply to the assessment of any real estate under the law by the State Corporation Commission.**

**This section, as hereby amended, shall apply to the tax year beginning January one, nineteen hundred and fifty-five, and to every tax year thereafter until otherwise provided by law.**