

1. Report No. FHWA/TX-93/1329-1F		2. Government Accession No.		3. Recipient's Catalog No.	
4. Title and Subtitle LEASING OF TxDOT's RIGHTS-OF-WAY				5. Report Date September 1993	
				6. Performing Organization Code	
7. Author(s) Stephen S. Roop and Sondip Mathur				8. Performing Organization Report No. Research Report 1329-1F	
9. Performing Organization Name and Address Texas Transportation Institute The Texas A&M University System College Station, Texas 77843-3135				10. Work Unit No. (TRAIS)	
				11. Contract or Grant No. Study No. 0-1329	
12. Sponsoring Agency Name and Address Texas Department of Transportation Research and Technology Transfer Office P. O. Box 5080 Austin, Texas 78763-5080				13. Type of Report and Period Covered Final September 1992 - August 1993	
				14. Sponsoring Agency Code	
15. Supplementary Notes Research performed in cooperation with the Texas Department of Transportation and the U.S. Department of Transportation, Federal Highway Administration. Research Study Title: Leasing of TxDOT's Rights-of-Way					
16. Abstract This report was developed for use by the Texas Department of Transportation (TxDOT) in expanding and developing its airspace or right-of-way leasing program. The report collects and presents policy and procedure data from several states currently involved in airspace leasing with the goal of providing information that TxDOT can use to expand its right-of-way leasing program. The report covers policy and procedures data on lease provisions, marketing and advertising, and staffing considerations.					
17. Key Words Airspace, Right-of-Way Leasing, Property Management, Asset Management			18. Distribution Statement No restrictions. This document is available to the public through NTIS: National Technical Information Service 5285 Port Royal Road Springfield, Virginia 22161		
19. Security Classif.(of this report) Unclassified		20. Security Classif.(of this page) Unclassified		21. No. of Pages 107	22. Price

LEASING OF TxDOT'S RIGHTS-OF-WAY

by

Stephen S. Roop
Research Scientist

and

Sondip Mathur
Research Assistant

Research Report 1329-1F
Study Number 0-1329
Research Study Title: Leasing of TxDOT's Rights-of-Way

Sponsored by the
Texas Department of Transportation
In Cooperation with
U.S. Department of Transportation
Federal Highway Administration

September 1993

TEXAS TRANSPORTATION INSTITUTE
The Texas A&M University System
College Station, TX 77843-3135

IMPLEMENTATION STATEMENT

The findings of this research suggest that there are many policy and procedure issues previously addressed by states with longer term involvement in airspace leasing from which Texas may benefit. The benefits range from organization and training of airspace units and staff to the procedures followed during an environmental assessment of lease applicants or property uses.

DISCLAIMER

The material presented in this report was assembled during a research project sponsored by the Texas Department of Transportation and the U.S. Department of Transportation, Federal Highway Administration. The views, interpretations, analyses, and conclusions expressed or implied in this report are those of the authors. They do not represent a standard, policy, or recommended practice established by the sponsors. NOT INTENDED FOR CONSTRUCTION, BIDDING, OR PERMIT PURPOSES.

ACKNOWLEDGMENT

The research staff would like to thank several individuals and organizations for their help and support. Individuals interviewed from the various states visited included Robert Peters and Paul Lovgren of Washington, Will Brilz and Scott Atkins of California, and Mike Akridge of Florida. John Radke of Wisconsin also went to some lengths to send material on their airspace program.

The airspace staff at several other DOTs contributed their time to fill out and return questionnaire material. These are: from Arizona, Joe Marin; from Pennsylvania, Gary Fenstermacher; from Illinois, Zach Taylor; from New York, Bob Idzik; and from Michigan, Ronald Adams. In addition, Bob Wheeler from the FHWA provided information on the airspace survey they conducted.

From TxDOT, Carlton Bernhard, the project technical chairman, offered excellent guidance and professional support throughout the effort.

TABLE OF CONTENTS

	Page
LIST OF FIGURES	xi
LIST OF TABLES	xii
SUMMARY	xiii
1.0 OVERVIEW	1
1.1 History of Airspace	2
1.2 The Economic and Financial Pressure Behind Asset Leasing	3
1.3 FHWA Regulations Pertaining to Airspace Leasing	4
2.0 ORGANIZATION OF AIRSPACE UNITS	9
2.1 General Goals and Responsibilities of Airspace Units	9
2.2 Management of Airspace Units	12
3.0 AIRSPACE LEASES	19
3.1 Characteristics and Types of Airspace Leases	19
3.2 Options	25
4.0 LEASE MANAGEMENT	27
4.1 Inventory of Airspace	27
4.2 Reporting and Monitoring	29
4.3 Non-Monetary Rent	33
4.4 Construction Monitoring	34
4.5 Zoning of Airspace Property	36
4.6 Maintenance and Inspection of Airspace Sites	37
4.7 Environmental Clearance	39
4.8 Environmental Procedures	42

5.0	POLICIES AND PROCEDURES	47
5.1	Utility Company Use of Airspace	47
5.2	Design Standards	47
5.3	Lease-Back Procedures	48
5.4	Internal Use of Airspace	49
5.5	Appraisal and Valuation of Airspace	49
5.6	FHWA Approval	52
5.7	Processing Steps - Internal	54
6.0	BUSINESS PLAN AND MARKETING STRATEGY.	63
6.1	Airspace Business Plan	63
6.2	Airspace Marketing Plan	66
7.0	REVENUE AND STAFFING SUMMARY	71
8.0	QUESTIONNAIRE SUMMARY.	73
8.1	Organization.	73
8.2	Lease Characteristics	75
8.3	Marketing	80
8.4	Miscellaneous	82
8.5	Unique Aspects	83
9.0	CONCLUSIONS AND SUMMARY	85
9.1	Conclusions	85
9.2	Summary	89
10.0	References.	91
	APPENDIX	93

LIST OF FIGURES

	Page
Figure 1. Caltrans Airspace Organizational Structure	15
Figure 2. WSDOT Organizational Structure	16
Figure 3. Florida DOT Airspace Organizational Structure.	17
Figure 4. Airspace Inventory	28
Figure 5. Annual R/W Airspace Development Report	31
Figure 6. Airspace Development - Environmental Checklist	44
Figure 7. Study Requirements for Internal Use for Category No. 1C and 2	50
Figure 8. Bid Lease Procedures	56
Figure 9. Negotiated Lease Procedures.	57
Figure 10. Marketing Plan	67
Figure 11. Broker's Agreement for Bid Parcels	69

LIST OF TABLES

	Page
Table 1. Summary of State Airspace Leasing Programs	71
Table 2. Existence of Lease-Back Policies or Provisions	82

SUMMARY

This report was developed for use by TxDOT in expanding and developing its airspace or right-of-way leasing program, which TxDOT developed after receiving authority through House Bill No. 557. This bill enabled TxDOT to lease any part of the highway right-of-way, whether surface, airspace above, or underground space below, that it determined was not needed for highway purposes. This authority was later expanded with House Bill No. 357, which enables TxDOT to lease any real property held or controlled by the agency, as long as its leasing is not inconsistent with applicable highway uses.

The research concluded after an analysis of nine state airspace leasing programs that there is a positive relationship between the number of employees and the revenue generated by an airspace leasing program. It also appears from the data that there is a critical mass necessary to efficiently operate a leasing program. It was also found that Caltrans has successfully instituted an advisory committee to screen lease arrangements, advise the department on business matters, and relieve the commission proper from burdensome review and decision-making responsibilities. TxDOT should consider a similar mechanism as the leasing activities of the department increase. It was found also that proactive leasing through a marketing program requires that potential inventory be identified, classified as to value or the priority with which it will be marketed, and cataloged via computer-inventory system.

Also, three standard lease forms should be created to correspond to the three most common types of leases: short term permits, bid leases, and long term development leases. States with lidding experience should take careful consideration of the limits that lidding a freeway will impose on a department's ability to widen or increase the vertical limits of a highway corridor for the term of the agreement. The cost of lidding could be reduced greatly if it were anticipated at the time of freeway design. Lease proposals should be circulated to all areas of highway responsibility, such as design, geometric, maintenance, and planning, and all reviewing parties should be linked in terms of feedback and outputs.

Airspace or right-of-way leasing activity in Texas is providing the Texas department of Transportation with much needed additional revenue. Under a supportive TxDOT administration, the airspace leasing activity of Texas could increase to levels approaching those of other states. In order for the Texas program to grow and pay not only for itself, but for other transportation-related activities, TxDOT needs to attune itself to four business-related items:

1. First, sufficient staffing and a critical employee mass is necessary to move away from a purely responsive mode into a more goal-oriented mode.
2. Second, TxDOT needs information and some degree of automation. The real estate suitable for leasing needs to be identified, described, and stored in a system that facilitates planning and marketing.
3. Proactive leasing will require marketing selected properties. The urban centers in the state (Houston, Dallas-Ft. Worth, and San Antonio) and especially the CBDs will provide, if not today, then at some point in the not too distant future a ready market for parking, storage, and possible construction of buildings. Simple signing on the "good" sites may be all that is necessary to generate inquiries.
4. TxDOT will need to continue refining the operations of its program. Like any undertaking, airspace leasing requires planning, organizing, and proven, logical, expedient policies and procedures. The program at TxDOT is currently making the kinds of changes necessary to expand its activities and increase the revenue generated. Over time, changes and additions such as de-centralizing, standard lease forms, and lease-back policies (all of which are being addressed by the right-of-way leasing group at TxDOT), will increase the unit's scope. These types of changes and adjustments will need to be continued as the environment within which airspace leasing operates changes.

1.0 OVERVIEW

Airspace is any property within the right-of-way (ROW) limits of an existing operating highway which is capable of other uses without undue interference with the operation and foreseeable future expansion of the transportation corridor, for highway or other transportation uses. It may consist of surface rights under a viaduct structure, the space above the traveled lanes, space within a loop of an interchange, space between the main lanes and on or off ramps, or area in cut or fill slopes.

Several states have been engaged in leasing programs for many years. Washington State, for example, has been involved in airspace leasing since 1975 and can point to several successful joint ventures with commercial developers. The Washington State Convention and Trade Center, built over the Interstate 5 in Seattle, is a remarkable example of innovative airspace use. California started leasing highway right-of-way as early as 1968. Recent estimates suggest that California's program generates more than \$12 million per year over about 450 leases.

Freeway "lidding," which is the term used to refer to building an enclosed structure over a freeway, has been undertaken in a number of states in urban areas where real estate values or space considerations are at a premium. Several regions within Texas have similar constraints. With the up-turn in the state economy, this kind of commercial activity may present Texas with a financial opportunity benefitting the community, commercial developers, and TxDOT. In addition to thousands of miles of right-of-way, TxDOT has other real estate holdings which may be marketable. The practices of other states may provide valuable insight into the activities that work to the benefit of the state and those that do not.

This research will evaluate the practices of those state DOTs identified as having substantial experience in the leasing of real estate assets, large numbers of leases, and substantial staff support. The proposed research will examine several facets of other state programs including policies and practices, marketing, and staffing, and will develop a comparative analysis with corresponding practices existing within TxDOT.

1.1 History of Airspace

During the 1970s and 1980s, state departments of transportation across the country began to lease highway rights-of-way. Financial pressures stimulated both the disposing of land holdings and the leasing of existing holdings. Referred to generally as the leasing of airspace, it addresses that area within the highway right-of-way that can be used for non-highway purposes without endangering either the facilities or the traveling public. In 1986, the Federal Highway Administration (FHWA) issued a new policy stating that revenue derived from airspace activity is to be used by the states for the highway program. Through the same policy, the FHWA actively encouraged air rights development and marketing and offered technical assistance to states engaged in airspace leasing.

Contemporary airspace leasing activity is based on innovations introduced early in this century. The first significant commercial use of transportation right-of-way occurred in New York City at the turn of the century. The development of airspace above the New York Central Railroad's right-of-way includes what is today the new Madison Square Garden, the Pan Am Building, and other structures along Park Avenue. The land and air rights to approximately ten city blocks of this complex were recently offered for sale and are expected to bring approximately one billion dollars (*1*).

In the 1920s, Chicago's Merchandise Mart and the Daily News Building were constructed over the Illinois Central Railroad right-of-way. The Prudential Mid-America Building, Marina Towers, and the Outer Drive East Apartments are more recent additions to airspace development in Chicago. Currently large scale plans exist for developments along the Randolph Terminal area and south between the Outer Drive and Lake Michigan. These are reported to be as extensive as those found in the Park Avenue area of New York.

In the early 1950s, the Pennsylvania Railroad's elevated rail yards were moved underground, freeing more than 20 acres of prime right-of-way for commercial development and use. The Penn Center complex, composed of hotels, offices, and apartments, was constructed on the site and presently occupies most of the area.

The use of airspace above highway right-of-way has a much shorter history. Beginning in 1962, four apartment towers were constructed over the approach to the George Washington Bridge in upper Manhattan. Since then, commercial developments can be found in Massachusetts, Oklahoma, Nevada, Colorado, Washington, and California. It is significant to note, however, that experience with development above the highway right-of-way is limited relative to the use of airspace under the highway or on adjacent right-of-way land. In nearly every state, public and private developments of parking lots, warehousing and storage, parks, and playgrounds have used highway right-of-way (1).

In California, the use of airspace began in 1968 and was originally intended to allow for parking and storage under Los Angeles freeways. By 1972, the program expanded to include commercial developments. Today Caltrans reports right-of-way used for restaurants, manufacturing, parking, mini-storage, boat launchings, and community parks (2).

One of the most widely publicized airspace leasing programs exists in the state of Washington. In June of 1988, the Washington State Convention and Trade Center, a 371,000-square-foot structure spanning the twelve-lane I-5 in Seattle, opened to the public. Washington State Department of Transportation owns the airspace surrounding the new facility, but leases property above, below, and in the surrounding right-of-way to various public and commercial entities (3).

At least three other convention centers in the United States and Canada utilize airspace over transportation facilities. In Denver, Colorado and Phoenix, Arizona, the facilities bridge city streets. In Montreal, Canada, the convention center sits astride a depressed freeway similar to the Seattle center (4).

1.2 The Economic and Financial Pressure Behind Asset Leasing

In September of 1987, the Texas Department of Transportation (TxDOT) received authority through House Bill No. 557 to lease any part of the highway right-of-way, whether surface, airspace above, or underground space below, that it determines is not needed for highway purposes. This act placed

Texas with an expanding number of local, state, and federal government organizations involved in the leasing of property rights, specifically highway right-of-way, to public or private entities. These leasing programs represent an innovative property management alternative which is returning significant monetary benefits to state citizens through highway revenue enhancement.

In 1991, TxDOT received expanded authority to engage in leasing through Senate Bill No. 352, also known as the Sunset Bill. Now, in addition to the authority to lease highway right-of-way, TxDOT may lease any real property held or controlled by the agency, as long as its leasing is not inconsistent with applicable highway uses. The Sunset Bill also requires TxDOT to charge, at a minimum, fair market value, suggesting that lease programs should be undertaken in order to generate as much revenue as possible for the state highway fund. Revenue short-falls, experienced throughout Texas state government in recent years, have served to add impetus to pro-active revenue generating activities that include the leasing of highway rights-of-way.

1.3 FHWA Regulations Pertaining to Airspace Leasing

Federal Highway Regulations Highway airspace is currently defined under Code 23 of Federal Regulations (CFR 713.203). The regulations allow use of property for public or private purposes. These regulations define airspace as:

"Space located above, at, or below the highway's established grade line lying within the approved right-of-way limits."

The Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Section 126 (23 United States Code (U.S.C.) 156), requires that:

"States shall charge a minimum fair market value for new airspace proposals, with some exceptions (social, environmental, economic mitigation, governmental use under state law; present worth of the total income for the lease or agreement is \$1000 or less). Furthermore, the federal share of net income obtained by the states for these leases, arrangements, sales, etc., shall be used for projects eligible under Title 23."

The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) redefined federal responsibilities to allow use of State Highway Authority (SHA) laws.

Federal Highway Administration Review In 1992, the FHWA undertook a review of selected airspace leasing programs and found that airspace leasing activity tends to be concentrated in states with high population densities and high land values in urban areas. The study's best estimate places the total annual airspace income from across the U.S. within the \$15-\$20 million range.

The FHWA study examined:

- Airspace policy (pro-active/reactive)
- Size of programs (number of leases, annual income, inventory)
- Process for review of proposed airspace uses
- Offices involved (maintenance, design, planning, legal, traffic, construction, and right-of-way)
- Monitoring
- Valuation of leases
- Accounting of lease proceeds
- Special problems of airspace leases

FHWA Study Findings The FHWA study examined programs ranging in size from California's program with more than 400 active leases to Wisconsin's program with only 22. It found that the terminology used by airspace programs varied greatly; leases were referred to as agreements, permits, rental agreements, etc. The study also determined that SHAs, rather than local governments, are the major players in airspace leasing.

The primary activities performed by the SHAs in their management of the airspace consist of pre-leasing activities, review of proposed leases, property valuation, and monitoring. The findings for each of these areas is summarized below.

Pre-leasing Activities Some states approach airspace leasing passively, responding to inquiries as they occur. Other states are more active. California and Florida post signs on the property indicating it is for lease. They work actively (especially California) with commercial real estate brokers, and run advertisements in local and national newspapers. California, in particular, has a trained staff available to make presentations to interested parties.

California also considers potential airspace use in early project planning. Some states also consider the option of the acquisition of excess right-of-way to be "bundled" together with airspace properties to produce a marketable unit. This planning strategy is desirable in high density urban locations and can be used to recapture some of the cost of the highway facility. Other states considered airspace as a by-product of highway projects and did not plan for its use.

Review of Proposed Leases All the states examined have a process in place to review proposed uses of highway airspace. The ROW unit normally coordinates the overall effort, but includes district offices, maintenance, design, traffic, legal, construction, and planning offices in the process. Review by planning is considered crucial, since the impact of future transportation projects on proposed airspace uses can be significant. Most of the states studied carefully evaluate airspace proposals in terms of future highway uses, and some even decline to enter into long-term airspace agreements, preferring short-term uses such as parking, which can be discontinued if the property is needed.

After review at the district level, submissions were then forwarded to the central office, in some cases, for additional review and approval. Approval levels ranged from the director of ROW to the governor.

Valuation In all instances, the right-of-way units were charged with the responsibility of establishing a fair lease value. For *Development Leases*, development of major facilities (shopping centers, office buildings, mini-warehouses, etc.) lease periods are usually set at 25 years to allow potential investors to secure reasonable returns on their investments. Many airspace units secure the services of outside appraisers since they lack appraisal expertise on their own staff. A full appraisal

is needed to project income streams, vacancy rates, and expenses. These leases usually have rental adjustments based on annual income.

The study found that valuation for *Leases to Adjoining Owners* often present a problem because, in many cases, only the adjacent owner can utilize the airspace. A common approach is to establish a unit value for the leased land with a discount included for factors such as being a part of highway ROW or the short-term provisions of the lease. This unit value is then translated into market rent utilizing interest rates and an appropriate risk factor.

Public bidding is seen as an effective means to establish fair rental value, given sufficient demand. Bidding reflects market forces and eliminates bias in awarding leases. Further, it is reported that parking lot leases of 3-5 years are a good reflection of changes in demand.

The FHWA report addresses the *maintenance tradeoffs* that should be considered as leased properties reduce the highway maintenance burden, particularly in low demand areas. The tradeoff suggests that a net reduction in lease rate is possible.

Escalation clauses included in most agreements allow states to adjust rents during the lease period. A variety of approaches are used in establishing escalation adjustments. These range from fixed percentages set in advance or changes to the consumer price index (some states did not favor this method), to adjustments based on net income generated by the development or reappraisal at periodic points during the lease term.

Monitoring Monitoring of airspace leases was seen as a weak area in most cases (except California). There were often no regular reviews, no identified personnel or procedures. Most airspace offices assume that maintenance personnel are performing the reviews when, in fact, none are being undertaken. The FHWA report also looks at safety factors such as pier protection, emergency access, sprinkler systems, chemical processing activities, container storage, and hazardous materials.

2.0 ORGANIZATION OF AIRSPACE UNITS

2.1 General Goals and Responsibilities of Airspace Units

CALIFORNIA

California has published 10 goals and responsibilities for their airspace units. They are:

1. Development of a positive marketing program for maximum revenue and utilization of highway airspace in compliance with stated goals and objectives.
2. Implementation of multiple use concepts during the planning and design process.
3. Administration and management of all freeway lease hold and airspace areas.
4. Identification of potential airspace sites and maintenance of a current Airspace Site Inventory.
5. Administration of streets and highways codes for the homeless, for joint development of property with commercial developers, and for community parks.
6. Coordination of early liaison with the environmental branch, or equivalent unit, with the objective of identifying project environmental implications and to assist the developer in the preparation of environmental studies for eventual environmental clearance.
7. Coordination with district maintenance and landscaping units in locating internal use facilities on airspace sites.
8. Encouragement and coordination of joint development proposals relating to safety roadside rest areas and park and ride facilities.
9. Cooperation with private industry in development of improvements on sites suitable for such use.
10. Protection of the marketability of airspace sites against adverse impacts such as inappropriate utility encroachment and discriminatory down-zoning.

WASHINGTON

WSDOT's airspace lease program has the following goals:

1. To integrate highways into the communities through which they pass in a manner consistent with local planning objectives.
2. To enhance and protect the transportation corridor and its environs.
3. To increase the local tax base by restoring leased right-of-way to the tax rolls.
4. To reduce the impact on private properties utilized for highway support facilities and other public uses and to conserve an increasingly valuable resource: land.
5. To manage suitable lands in a businesslike manner to increase the return on the public investment through generation of rental income and to reduce maintenance.

FLORIDA

Florida is the only state studied that focuses attention on the lingering problems of construction using asbestos. Those properties acquired by the state containing asbestos building materials are to be withheld from the market place and dismantled.

Florida policy reads, "FDOT shall not allow the leasing of any building acquired as part of the right-of-way where an asbestos survey has identified the presence of friable asbestos-containing materials unless action has been taken for the removal, encapsulation, or enclosure of the friable asbestos-containing materials."

Otherwise, FDOT may convey a leasehold interest in any land, building or other property owned by FDOT which is not presently needed for proposed or anticipated transportation facilities. The parcel must be declared temporarily surplus prior to execution of the lease. Florida policy states that FDOT may lease to the owner from whom the property was acquired, the holders of leasehold estates existing at the time of FDOT's acquisition, or to other interests through negotiation.

WISCONSIN

In Wisconsin, the responsibility for leasing of airspace either over, under, or abutting freeways rests with Milwaukee County. The Milwaukee County Department of Public Works, Transportation Division has been delegated as the action agency making its recommendations through the Expressway and Transportation Commission to the County Board. All airspace agreements must be approved by the state and FHWA.

Milwaukee County is the lessor of airspace under Wisconsin Statutes with the recommendation of the Expressway and Transportation Commission. Airspace agreements must also be approved by the Wisconsin Department of Transportation, Division of Highways (state) and the Federal Highway Administration (FHWA).

Legal Authority for the county to lease airspace either under, over, or abutting freeways in certain areas, where such use will in no way impair safe operation and maintenance of the freeway facility, is established in:

1. Title 23, United States Code.
2. Section 59.965, Wisconsin Statutes.
3. Milwaukee County Ordinances 56.10, with amendments.
4. Section 84.09 (7) Wisconsin Statutes.

Wisconsin requires that the lessee, at his own expense, improve the property subject to the requirements put forth in the lease. This may include, but is not limited to, the following:

1. Grading and drainage.
2. Surfacing.
3. Height restrictions.
4. Protection of existing highway facilities and public and private utilities remaining in leased lands.
5. Appropriate lighting and necessary screening of lighting for protection of freeway traffic.
6. Decorative fencing and necessary protecting fencing.
7. Landscaping and site development.

Wisconsin further holds that, "no expenditures of Federal, State or County funds will be involved in the development, construction and maintenance of airspace facilities." Wisconsin policy goes on to state that, "In essence, the state and county are merely providing the airspace, over, under or abutting freeways for any such development." The present concept is that such airspace is to be developed into its *highest and best use* and the return to the state and county is to be predicated on such use.

TEXAS GENERAL LAND OFFICE (GLO)

The Texas General Land Office is involved in leasing for several state agencies. The agency is charged with handling most of the land transactions for the state government. The GLO is divided into two sections or functions:

1. Land Acquisition, and
2. Leasing

The GLO has a mandate dating back to the 1950s to generate money for the Permanent School Fund (PSF). Historically, the primary source of revenue for the PSF was oil and gas taxes. The economy of Texas supported this method of financing well for years. With the down turn in the oil industry, the sale and leasing of state-owned land became a bigger component of PSF financing.

The GLO operates under the following enabling legislation:

1. Coastal leasing of submerged lands Section 33 of Public Domain Statutes - the state owns the land from the line of mean high tide to 3 marine leagues (10.3 miles). Based on Spanish law.
2. Upland Sales and Leasing Upland tracts fall under Section 51; negotiated lease arrangements.

2.2 Management of Airspace Units

A number of different management arrangements have been employed by departments of transportation in setting up and operating airspace units. Many airspace units are found in the

division of right-of-way. Others, however, are located in property management, land acquisition, or real estate divisions. Most airspace units are decentralized with a central office supported by airspace personnel in outlying districts. The personnel may be dedicated to airspace activities or split their workday between several related activities. The following material presents an overview of how airspace units may fit into the department's organizational structure.

CALIFORNIA

All airspace leasing activities fall under the policies established by the California Transportation Commission (CTC) and the guidelines recommended by its Airspace Advisory Committee (AAC). The role of the Airspace Advisory Committee in California is to review and approve proposed leases. The committee serves a critical role in relieving the commission from detailed review and approval responsibilities. The members of the committee are drawn from around the state and are usually leading figures in building or real estate. The AAC evaluates negotiations, resolves disputes, advises on technical considerations, monitors program efficiency, and evaluates program direction.

The District Airspace Review Committee (DARC) is responsible for clearing all proposed airspace developments in the district. The DARC consists of representatives from right-of-way, including utility relocation, traffic, landscaping, maintenance, environmental, project development, structures, hydraulics, and the state fire marshal's office. The committee is chaired by the Right-of-Way representative.

The District Airspace Development Unit provides technical advice including DARC recommendations, policy, and developer proposals. The unit takes the necessary action to implement multiple use concepts developed in the project planning and design stages. Figure 1 presents the organizational structure for Caltrans and shows how the District Airspace Development Unit operates under the guidance of the DARC.

WASHINGTON

Airspace leasing in Washington is organized under the property management program within the real estate services division. The leasing functions performed by the Airspace group are complimented

by the property disposal activities found within the disposal section. The disposal section is currently composed of three property agents and one senior property agent. The Airspace section is made up of two leasing agents and a senior leasing agent. Figure 2 presents an organizational chart showing the arrangement of divisions and programs relative to the Airspace group at WSDOT.

FLORIDA

Property Management Program Florida's property management program is responsible for the leasing of department rights-of-way. In addition, the property management program oversees the removal of improvements, through sale or demolition contracting, rodent control, maintenance and security of structures, asbestos management, and disposal of surplus property. All seven districts in Florida generally perform the same airspace functions. Figure 3 presents a portion of the Office of Right-of-Way organizational structure.

Florida specifies five principal positions within their property management function. The R/W Administrator I and II, the R/W Specialist Supervisor, and the R/W Specialist I and II. In addition, the largest district (Fort Lauderdale), with a staff of seven, has an environmental unit within property management which handles all hazardous waste and asbestos activities for that district. Most of the 26 positions found within the property management area have received certification training in asbestos inspection and management planning.

CALIFORNIA DEPARTMENT OF TRANSPORTATION (Caltrans)
Organizational Structure

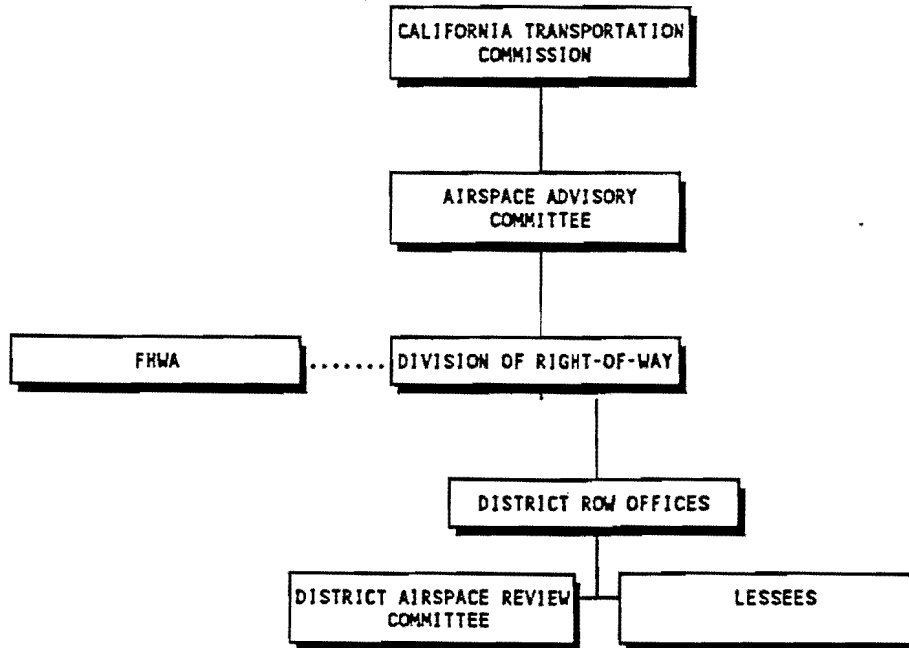


Figure 1. Caltrans Airspace Organizational Structure

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION
Organizational Structure

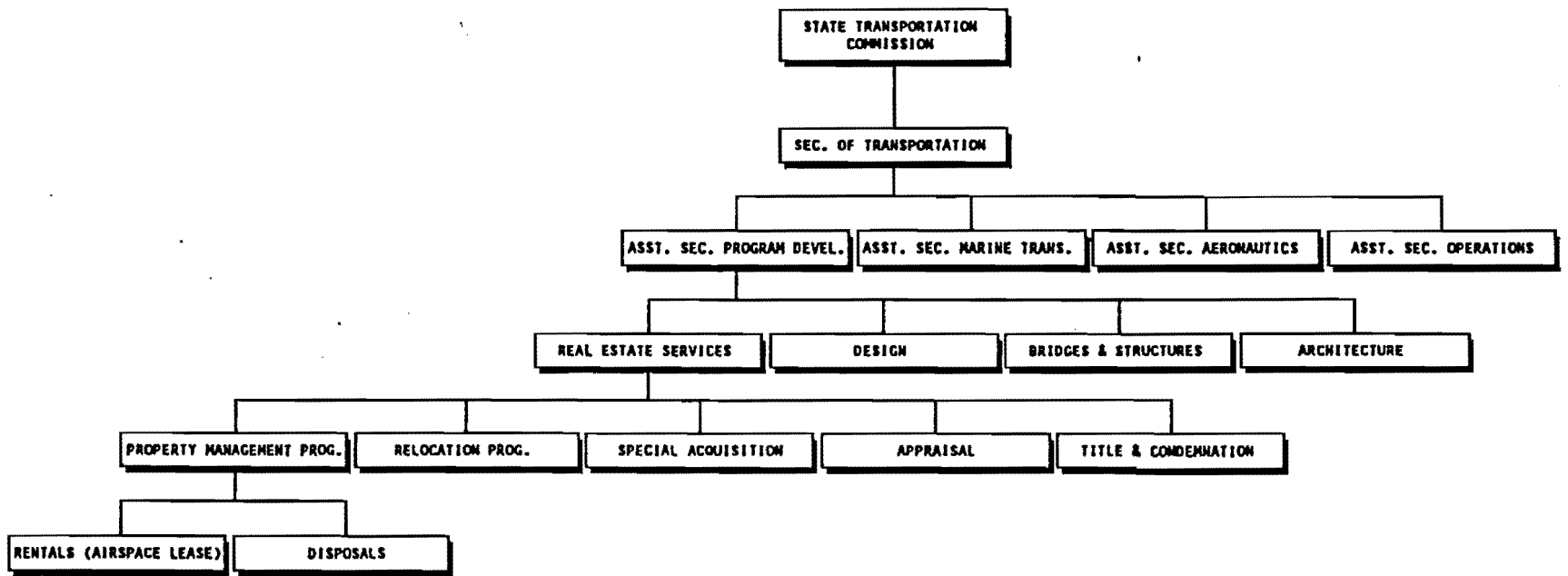


Figure 2. WSDOT Organizational Structure

FLORIDA DEPARTMENT OF TRANSPORTATION
Organizational Structure

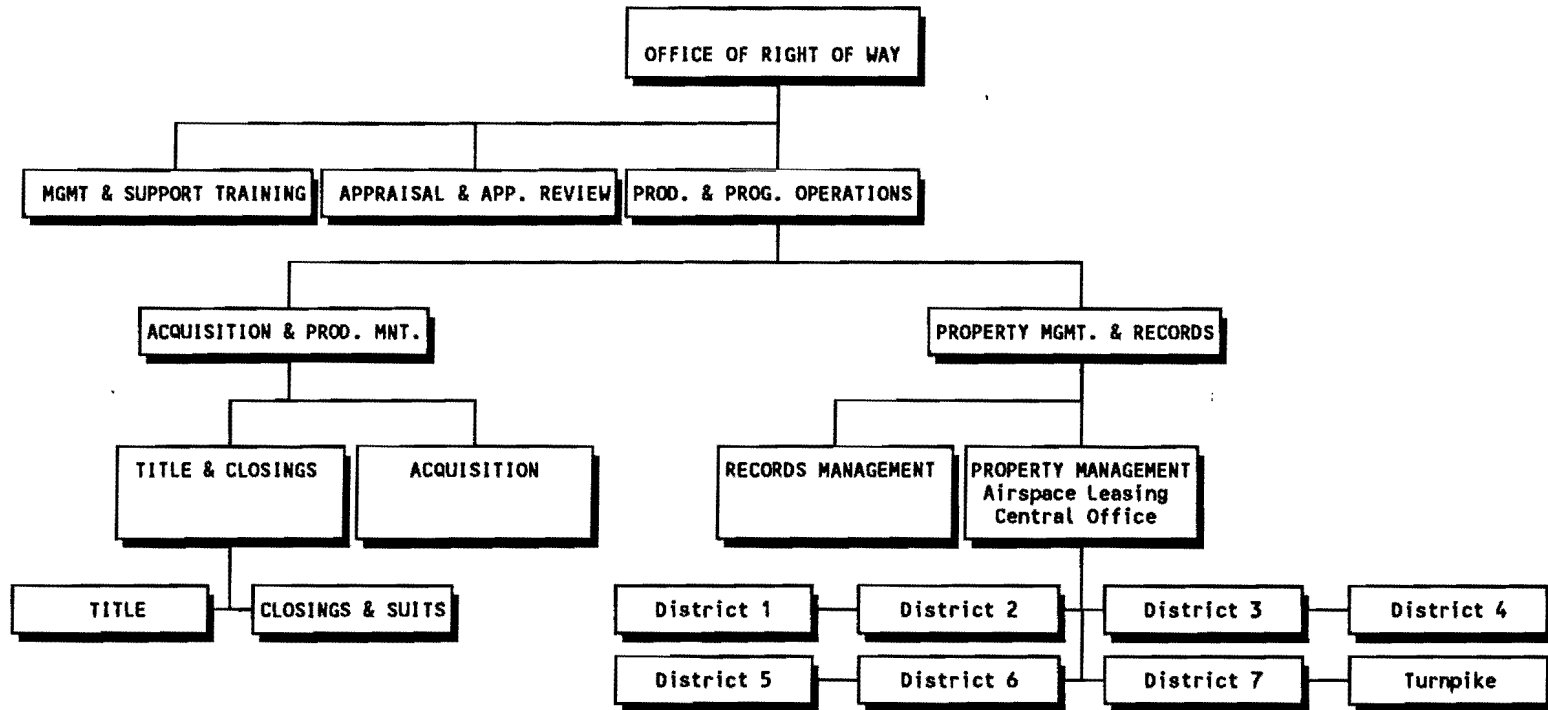


Figure 3. Florida DOT Airspace Organizational Structure

3.0 AIRSPACE LEASES

The survey of state airspace programs identified three basic types of leases: the short-term rental agreement, the intermediate-term bid lease, and the long-term development lease. Rental agreements are typically short duration leases with limited approval requirements that may be canceled upon short notice. A typical rental agreement may rent right-of-way to an abutting land owner for additional parking. Bid leases are usually for periods of up to five years and reflect the real estate market as it pertains to the scarcity of property in congested urban areas. Parking lots under elevated freeways are a common form of the bid lease. Long-term developmental leases are those relatively few cases where developers lease strategically located airspace for the purpose of commercial improvement. In some cases multi-million dollar structures are built within airspace when no other viable property is available.

The following sections present information on how other states define their airspace agreements.

3.1 Characteristics and Types of Airspace Leases

CALIFORNIA

California defines five basic forms of leases utilized in the Caltrans Airspace Program:

Rental Agreement A rental agreement is a lease resulting from a proposal submitted by the tenant. It is limited in term to six months (six-month extension possible). Lease approval rests in the district subject to FHWA concurrence and is not subject to CTC approval.

Short Term - Bid Lease A bid lease is a lease resulting from competitive bidding. It normally runs for a maximum of two years and is used for parking of wheeled vehicles or, with prior approval, for open storage. Approval and execution of these leases is at the district-level in California, but while not subject CTC approval, it is subject to FHWA concurrence.

At Caltrans, the Airspace Program's goals give first priority to the development of buildings on airspace sites. It is recognized at Caltrans, however, that there are many sites in the airspace inventory not suited for development or that have not yet attained their highest and best use. These sites can generate substantial amounts of money if leased for interim uses, such as parking.

When parking leases are solicited by Caltrans, the following guidelines apply:

- a. Leases are for as short a term as possible, preferably not over a five to ten year period.
- b. Leases are offered only on properties not ready for long-term building development.
- c. Maximum return to the state should be obtained.
- d. Rental adjustments are made on an annual basis and preferably with no limit to the Consumer Price Index (CPI).

Airspace Ground Lease This is also referred to as a non-building lease. It results from competitive bidding or, with prior division of right-of-way approval, by negotiation. The term normally is for a maximum of five years, and the use does not include construction of more than a very minor improvement.

Long-Term Building Development Lease A long-term development lease results from competitive bidding or, with prior division of right-of-way approval, by negotiation. The term will normally be ten years or more, and is for the purpose of constructing substantial improvement.

Marler-Johnson Park Act Lease This type of lease is with local agencies for the development of park or recreational facilities. As with the other forms of leases, fair market rent must be secured.

WASHINGTON

Encroachment Leases Encroaching improvements are those which are located in whole or in part on highway right-of-way. They are generally constructed by an abutter through ignorance of the common boundary between his property and the state's right-of-way (the R/W line).

Leases may be considered where:

1. Such improvements do not constitute a safety hazard, blight or otherwise interfere with operation and maintenance of the highway facility.
2. Improvements are of enough value that the immediate removal, if required by WSDOT, would be a hardship on the abutter which could be eased with a period to budget for the removal.
3. Conversely, leases for portable storage sheds, carports, dilapidated chicken coops, etc., are unlikely to be approved.
4. There is no evidence that they have been knowingly constructed on the right-of-way.
5. The state is not liable for costs claims, damages resulting from the lessee's use of the property, or for termination by the state prior to expiration of the lease if highway construction is necessary and would require the area leased.

There are several goals on leasing encroachments:

1. Having the encroaching party acknowledge the state's title to the land.
2. Eliminating the encroachment in a reasonable period of time not longer than the estimated remaining life of the improvements.
3. Not compounding the problem by allowing the adding to or reconstruction of existing improvements.

Economic rent is generally required for encroachment leases or a rent which is at least the minimum rate established by current policy, whichever is greater. Any deviation requires the prior concurrence of the property management program manager.

Mutual Benefits Leases When it is of direct benefit to the motoring public and WSDOT, the District Real Estate Services Manager (RESM) may coordinate the lease of property under the control of WSDOT on a mutual benefit basis.

A proposal may qualify if:

- a. Mutual benefits are truly a fact: benefits to the motoring public and/or WSDOT

equal or exceed those received by the lessee, are documented, and are identified in the lease.

- b. The lease serves a transportation purpose: a purpose for which WSDOT might likely have been able to condemn the land.
- c. The area within the right-of-way lines is adequately controlled by language within the lease.
- d. The present worth of the property's income stream is under \$1000 and FHWA concurs on the rent-free nature of the agreement.

Sites Suitable for Use Only by an Abutter WSDOT holds that such sites need not be advertised except that abutters may be advised of their availability. However, where the proposed use represents a significant change or appears controversial, sites are posted with a *Notice of Receipt of Application* which solicits public comment.

Farming, Cultivation, and Landscaping Leases Washington has discovered that it is mutually beneficial for the state to lease highway right-of-way to abutting agricultural interests. Referred to as "convenience leases," these are for nominal amounts, but serve to transfer maintenance responsibilities from WSDOT to the abutting land owner. If feasible, the right-of-way is added to the productive portion of the land, and consequently, is harvested, plowed, or otherwise maintained at the expense of the land owner.

FLORIDA

In Florida, airspace leases are restricted for a period of not more than five years. FDOT keeps the option to lease for an additional five year term open, but at the conclusion of two five-year terms, the entire lease process must commence again. Leases of FDOT-owned rail corridor property to public agencies and to private organizations to provide public recreational trails are exempt from the five-year term requirement.

Joint Public/Private Development A joint public/private development refers to the leasing of department-owned property, including airspace, on which major improvements will be

constructed by the lessee; the term of which may be greater than five years. The FDOT may accept cash, goods, or services for rent. The maximum term of a joint public/private development lease in Florida is 50 years, including options or extensions.

Lease Provisions Florida requires that all leases be in writing and include the following provisions:

1. Any significant revision in the design or construction of a facility must receive prior written approval from FDOT.
2. The builder or contractor is required to provide certification attesting that no lead-containing products will be used in the construction of the facility.
3. Facility construction must be fire resistant and in accordance with the local building codes. It cannot be used for the manufacture or storage of flammable, explosive, or hazardous material.
4. Any change in the authorized use of the property must receive prior written approval.
5. The lease is not assignable nor transferable without prior written approval.
6. Standing authorization exists for FDOT staff or representatives to enter the property for inspection, maintenance, or reconstruction of the facility.
7. The improvements and the property must be maintained in good condition, both as to safety and appearance, and maintenance must be accomplished in a manner so as to cause no unreasonable interference with the transportation facility.
8. If proper maintenance is not performed, the FDOT reserves the option to perform the maintenance and obtain reimbursement from the lessee.
9. An indemnification of FDOT for any costs and liabilities resulting from the lessor's use of the property.
10. The lessee is required to purchase casualty insurance in an amount specified by FDOT based on facility type, the number of individuals housed, the amount of anticipated visitor traffic, and any other reasonable factors that might affect risk liability.
11. Optional provisions may be included by FDOT that specify conditions and intervals for rental rate increase. The amount of increase may be based on a generally accepted index, such as the Consumer Price Index (CPI). A provision is also included which allows for a

periodic review of the market value of any goods or services which are being provided under the agreement in lieu of rent. If it is determined that the monetary value has decreased, the lessee is required to make up the difference in cash.

12. All permits and licenses must be obtained by the lessee.
13. Mortgages, liens and other secured loans cannot be attached to the fee property owned by FDOT. Further, the lessee is required to indemnify the FDOT against such encumbrances.
14. The lease must specify that all improvements constructed on the property will revert to FDOT upon expiration of the lease.
15. If the total value of lease payments exceeds \$200,000 for any given year, the lessee must provide FDOT with an audit of the lease operation. The audit must be prepared by a certified public accountant and submitted within 45 days of the anniversary date of the lease. No audit is required when the lease payment is a fixed cash amount.
16. FDOT reserves the right to inspect or audit any and all records related to the lease operation, including fiscal and operational activity.

GENERAL LAND OFFICE

The GLO attempts to include several protective features in its leases. First, it attunes to the need for increases in rent as real estate values change. Escalator clauses (based on CPI) are standard. Second, most GLO leases contain language requiring the removal of structures after the lease period expires. The state does not (usually) want to buy improvements. This is sometimes referred to as the no-bed rule. Third, leasing, licensing, or permitting can, when appropriate, be based on a percentage of gross sales or revenue (6-7 percent is standard practice for restaurants). This approach has potential for short-term permitting of roadside merchants in Texas. Finally, lease fees for the GLO (a one-time charge) run from \$50 to 1.5 percent of the total transaction.

By statute, the GLO cannot "subordinate fee interest." That means it cannot make the land or access and ownership to the land part of any lease agreement. Therefore, financing under the restrictions of non-subordination of the property must be based on liens on the improvements to the property made by the lessee. Since the money generated by the GLO is dedicated to the Permanent School Fund, restrictions forbid the agency to place debt against this fund. The same restrictions apply to TxDOT and the Highway Fund.

3.2 Options

CALIFORNIA

Option Rights (Existing Lease) For a lessee to exercise his option rights in a lease, he must notify the district of his intent in accordance with the provisions of the lease. Normally there is a time frame specifically stated during, or before, which notice must be given to effect the option period. California holds that the lessee must do this by letter. A telephone call or a personal, verbal statement will not suffice. It must be written, dated, and must specifically state the intent to exercise the option. The district will then send an acknowledging letter to the lessee. Unless there is a change in the provisions of the basic lease, Caltrans does not require an amendment to the lease to exercise an option. If there are changes to the basic lease, they will be handled the same as amendments and exceptions.

FLORIDA

FDOT may choose, after the consideration of airspace proposals, to award an option to lease. This approach is most often used when building permits and licenses are to be obtained by the holder of the successful proposal. The option amount is negotiated or bid as a percentage of the total current fair market rental value of the property in its present condition (*i.e.*, unimproved) for the term of the option, as determined by an appraisal performed by an independent appraiser. All appraisal costs are to be borne by the applicant. The appraisal is subject to review and approval by the department. An option may be negotiated for a two-year period with an additional option to extend for one year. If the option expires and the property is re-advertised for lease, the former option holder is not barred from submitting a new bid, but an option from this party will not be considered.

4.0 LEASE MANAGEMENT

4.1 Inventory of Airspace

CALIFORNIA

Forms California uses an *Airspace Inventory Sheet* (Figure 4), to track each designated airspace site. The inventory sheet depicts the physical and developmental characteristics of each site. The inventory data is used to readily obtain site specific information and to prioritize the sites with the highest developmental potential. The prioritized sites are then marketed according to each district's annual marketing plan (see Section 6.0 of this report).

New sites, prior to inclusion in the inventory, must be approved by DARC, the district director, and the FHWA. This is to assure that an airspace development will not interfere with existing or future transportation needs. Best sites, those parcels within the inventory that are considered to be the highest revenue potential, are catalogued on a separate list. On new freeway projects, Caltrans recommends that airspace sites be added to the inventory within six months of completion of construction.

Identification Numbers In addition, California assigns an identification number to each site, called a *freeway lease area (FLA) number* composed of the district number, the county abbreviation, the highway route number and parcel number, followed by FLA in parentheses; e.g., 04-SF-101-10 (FLA). California does not assign a permanent FLA number until all necessary approvals are obtained. California also maintains lease area index maps and individual site maps which become part of the inventory maintained by the district.

Additions and Deletions Annual reviews are conducted by the district airspace unit to determine if sites should be added or deleted from the inventory. Any proposed changes are accomplished with the concurrence of the DARC. Deletions are accomplished with a written request submitted to the division of right-of-way for approval.

AIRSPACE INVENTORY

1. Freeway Lease Area Number _____
2. City _____ County _____ P.M. _____
3. Total Area of Parcel _____ Sq. Ft. Dimensions _____ X _____
 - a. Area under Structure _____ Sq. Ft. _____
 - b. Open Area _____ Sq. Ft. _____
4. Potential Use: _____
5. Site Characteristics:
 - _____ a. Area available under structures
 - _____ b. Airspace with excess adjoining
 - _____ c. Loop of Interchange
 - _____ d. Area alongside roadbed large enough for Surface Development
6. Topography: _____ Level _____ Gentle Slope
_____ Steep Slope _____ Moderate Slope
7. Landscaping: _____ Extensive _____ Moderate
_____ Minimal _____ None
8. Access: Conventional Street Frontage _____
9. Average clearance under structure _____ Ft.
Minimum Clearance _____ Ft.
Maximum Clearance _____ Ft.
10. Restriction on Development
Lease area under hold _____ Yes _____ No
 - a. Engineering Hold
 1. Reason _____
 2. Period of Hold _____
 - b. Use by Caltrans
 1. Division _____
 2. Period of Hold _____
 - c. Restrictions on Use
 1. List Restrictions _____
 2. Time Period _____
11. Attachments:
 - a. Area map showing highway design
 - b. Site map

Figure 4. Airspace Inventory

Inventory Reports The current status of the district's airspace inventory shall be included in the annual statewide airspace report that is required by the state legislature.

WISCONSIN

Inventory Similarly, in Wisconsin, each district office maintains an inventory of all authorized airspace leases. This inventory is required to include at least the following items for each authorized use of airspace:

1. Location.
2. User of the airspace.
3. A three-dimensional description or a metes and bounds description.
4. Construction plans of the highway facility where the airspace was authorized.
5. Construction plans of the airspace facility.
6. A copy of the executed airspace agreement.

WASHINGTON

Washington procedures call for the District RESM to prepare a report summarizing potential sites, potential uses, and potential income to the state. Sites which should be promoted for joint development during the project design phase are identified and added to the district lease site inventory for response to inquiries as warranted. WSDOT provides for further review for sites with wet-lands or other significant natural resources.

4.2 Reporting and Monitoring

CALIFORNIA

Leasing Reports California is required to submit two annual reports. The *Annual Right-of-Way Airspace Development Report* is designed to provide information on the airspace inventory, information on pending negotiations, and information on those leases executed during the fiscal year (production). The report is included as Figure 5. The *Annual Report* is required at the end of each fiscal year so that the information can be presented to the California Transportation Commission, and can be included in the Annual Right-of-Way Report.

Provisions for Monitoring Airspace Sites To determine if each district's operation is effectively implementing the goals of the airspace program in maximizing public and private multiple use of right-of-way, California has developed a checklist covering inventory, process, reporting, adherence to laws and policy, and special project status. The checklist is used as a tool to help airspace staff determine the status of a given site and to determine what changes are necessary, if any, to correct procedures to more effectively lease airspace.

The California *Checklist* is outlined below:

A. Inventory

- (1) Are inventory records in agreement with central (Sacramento) records?
- (2) Are new sites (new routes, etc.) and old sites accounted for?
- (3) Are sites properly mapped?

B. Process

- (1) Have sites been adequately promoted?
 - Signing
 - Advertising
 - Personal contacts
 - Field review of parcels (maintenance and unapproved uses)
- (2) What is the status of executed leases?
 - Insurance
 - Rental received
 - Construction commencing on schedule
 - Internal use justified
 - Renewal properly approved
 - Field review of parcels

ANNUAL R/W AIRSPACE DEVELOPMENT REPORT

District _____ F.Y. _____

I. Airspace Inventory

A. Total Sites in Inventory

- 1. Best Sites _____
- 2. Other Sites _____
- 3. Total _____

B. Sites Occupied

- 1. Market leases ---
 - Long Term (5 years or more) _____
 - Short Term (less than 5 years) _____
- 2. Internal Use ---
(Maintenance use) _____
- 3. Marler-Johnson _____
- 4. Total _____

C. Sites Available

- 1. Best Sites _____
- 2. Other Sites _____
- 3. Total _____

***D. Building Development (constructed or under construction)**

- 1. Private _____
- 2. Public _____
- 3. Internal _____
- 4. Total _____

*List building development in each category.

Figure 5. Annual R/W Airspace Development Report

- (3) Are there pending negotiations?
 - Offers and proposals
 - Copies sent to Sacramento
 - Proceeding on schedule
 - Proper contacts being made/files properly closed out
- (4) Letters of understanding
- C. Reporting
 - (1) Adequate to deputy district director, right-of-way, and Sacramento
 - (2) Leases delinquent
 - (3) Proper review of maintenance of leased airspace sites
- D. Laws and Policy
 - (1) Properly adhered to
 - (2) Changes needed
 - (3) Bid lease policy and procedure
- E. Special Project Status
 - (1) Parcel diary - completeness
 - (2) Documentation - copies of all pertinent documents with justification and approvals.

FLORIDA

Like California, Florida develops two reports dedicated to airspace leases. The *Quarterly Credit To Federal Funds Report* reflects the revenue collected from the lease, rental, and sale of surplus property. The report indicating the appropriate credit to federal funds is submitted by each district FDOT's Office of the Comptroller on a quarterly basis.

Each district also submits a *Lease Aging Report* to the state administrator of property management, containing payment information on the lease. The information includes due dates, payment schedule and amounts, and interest or penalty data.

WASHINGTON

During airspace occupancy, Washington assigns the District RESM the following responsibilities:

1. To serve as the tenant's liaison in WSDOT, to answer questions, and to resolve subsequent problems.
2. To perform an annual inspection of leases to assure continued compliance with the terms of the lease agreement.
3. To adjust rental rates in accordance with lease provisions.

As suggested by Item 3 above, Washington attunes to the need for rent adjustments in its airspace leases. The department requires an adjustment clause in all leases extending beyond five years. According to the WSDOT Airspace Manual the adjustment provision, " must be specific and tied to market rent indicators." WSDOT does not call for a complete appraisal for each rate review, but does require that any adjustment be supported by current market data.

Importantly, any reliance on the Consumer Price Index (CPI) for rate adjustments is discouraged. It is not considered a reliable measure of the price activity in localized real estate markets.

4.3 Non-Monetary Rent

WASHINGTON

Rent Credits for Site Improvements Several of the states examined for this report provided some form of non-monetary compensation in airspace leasing arrangements. Washington requires, as do other states, that the economic value of the alternative to cash be established prior to credit being allowed. Washington focuses on provisions which serve to encourage lease holders to make site improvements benefitting not only themselves, but also WSDOT and future leaseholders of the same site (property management division, through improved future marketability of the site, or increased utility of the airspace).

Washington identifies five specific conditions where improvements can qualify for credit:

1. Where site work such as utility relocation, landfill, paving, curbing, lighting, or landscaping that is needed to bring airspace to a condition where it is comparable to unimproved property

on the open market.

2. Where the expected life of the improvements extends beyond the term of the lease.
3. Where improvements add to the utility or value of the property to WSDOT.
4. Where improvements help control future encroachment if the lease terminates.
5. Where improvements enhance the desirability of the site in the marketplace and contribute to increased rent during subsequent terms of the lease (since rent reflects value of improvements).

FLORIDA

Non-Monetary Rent Florida manages any goods or services that are provided to the department in lieu of cash for the lease of airspace as non-monetary rent. The airspace applicant is required to document the value of such goods or services for the department to review. The review proceeds as follows:

1. The district verifies the value of products or commodities in consultation with the district estimates office and the district purchasing office.
2. An appraisal may also be required for the valuation of real property. These appraisal costs are borne by the applicant.
3. The valuation of services are determined by comparison with costs incurred in procuring these services.

4.4 Construction Monitoring

CALIFORNIA

California policies and procedures provide for careful monitoring of airspace development that involves construction. The procedures employed include requiring the developer to obtain an executed encroachment permit prior to construction. The encroachment permit states that the improvements will not be occupied by the lessee until all work is completed to the satisfaction of the state and a notice of completion has been issued. Application for the encroachment permit is arranged by district airspace staff with the lessee providing that three conditions are met:

1. A complete set of final construction plans and specifications have been submitted to the District Airspace Committee (DAC).
2. The final plans have been approved by the District Airspace Committee.
3. The approved final plans are attached to the encroachment permit.

In addition, California assigns a state field inspector to ensure that construction of improvements is accomplished according to the approved final plans. In the event construction involves any bridge structures, appropriate personnel from that department are enlisted to assist in monitoring the project.

Engineering Holds Engineering holds may be placed on airspace when a request has been made to limit the use or timing of airspace development because of a future potential transportation use. California has developed procedures to ensure that the hold is fully evaluated prior to issuance. An analysis may be undertaken by the requesting unit to explore the economic ramifications of the hold. California specifies that the analysis should include at least the following seven factors:

1. Estimated value of site.
2. Potential length of a lease.
3. Present worth of estimated gross income to the state.
4. Estimated annual possessory interest revenue potential to local agencies.
5. Date of proposed construction of transportation facility.
6. Potential exposure requiring reimbursement to lessee if lease is canceled; *e.g.*, cost of capital improvements, and engineering costs.
7. Environmental considerations including potential neighborhood effect or community betterment, if any.

The results of the analysis is presented to the DARC for a decision regarding the proposed hold. Recommendations for approval by the DARC are forwarded to the district director.

Column Protection The frequent location of airspace sites under existing highway structures requires that construction monitoring include consideration of column protection. In determining whether column protection is required on a specific parcel, there are two basic elements

to consider:

1. What are columns made of.
2. How the property is to be used.

California policy states that, "If the columns are made of steel, and the use is anything other than passive, property management division, park or landscaping use, they must be protected." Protection for concrete columns depends on the use.

Where protection is required, the airspace unit works with Caltrans' structures maintenance to provide acceptable methods and forms of protection. The FHWA and Caltrans' structures maintenance have agreed that under normal circumstances there is not a need to retrofit protection for parcels currently leased.

WASHINGTON

During the construction phase, the district RESM notifies the district administrator so that construction may be inspected for compliance with approved plans and "as built" plans may be secured from the tenant, verified by the inspector, and placed in the lease file.

4.5 Zoning of Airspace Property

CALIFORNIA

The zoning of airspace has an obvious impact on the economic potential and marketability of the property. California has developed a set of procedures to identify and address any discriminatory rezoning of airspace development property proposed by local agencies. Within Caltrans it is the responsibility of the district airspace units to investigate and monitor local agency zoning proposals which affect airspace development properties.

California places the responsibility of active opposition to rezoning efforts on the legal division. This includes making appearances, presenting arguments at public hearings, and consulting with local agency staff. It does not include political opposition. If the legal division's opposition to

rezoning or discriminatory planning activity is unsuccessful, the matter is then referred to the office of the director of transportation for a determination as to whether or not the case warrants filing a lawsuit against the local governmental agency.

FLORIDA

Florida policy merely states that any proposed use of department-owned property, "shall not conflict with permissible land uses established by the local government which has jurisdiction over the area in which the property to be leased is located." No provisions seem to be in place to improve the marketability of airspace through zoning.

GENERAL LAND OFFICE

According to the GLO, zoning laws do not restrict the use of property when the government is the principal party involved. As with many states, there is an over-ride provision in Texas state law. The zoning over-ride, however, does not apply to non-state use; thus, property zoned for non-commercial activities cannot be leased by the state to a non-state entity for commercial purposes.

4.6 Maintenance and Inspection of Airspace Sites

CALIFORNIA

California policy requires that the district airspace development section make quarterly inspections of all leased airspace sites. The inspections are undertaken to determine if the lessee is maintaining the site as required in the lease agreement.

The Caltrans airspace policy manual states that "whenever a lessee is not maintaining the premises as prescribed by the lease, the lessee will be informed of the violation immediately in the most appropriate and effective manner suitable to the particular circumstances to elicit the lessee's cooperation."

If there are conditions that require immediate attention, the lessee is given notice to correct and properly maintain the premises and a 30-day notice to correct the cited condition. If the condition

is not corrected within 30 days, the lessee will be declared in default and served a three-day notice requiring immediate corrective action.

All violations requiring a 30-day notice are reported to the central right-of-way office in Sacramento and maintained in a log at the District office.

Fire Inspection Inspection for fire hazards at airspace sites is an important function carried out by most airspace units in conjunction with the appropriate fire marshal.

California defines the fire marshal's responsibilities as:

1. Select sites to be inspected and developing a timetable for inspections (quarterly and annually).
2. Take responsibility for fire safety, unapproved construction, illegal or dangerous storage practices, wiring, fire extinguisher, sprinklers, etc.
3. File inspection report with the district office. The report takes the form of a list of those parcels that are acceptable and individual reports on those with deficiencies.
4. Provide expertise to the airspace agent responsible for the parcel and make recommendations.
5. Establish priority review of sites:
 - (a) Building plans
 - (b) Consistent, uncorrected problem with lessees
 - (c) Sites involving extreme danger of fire or explosion (immediate phone notification to be given)

The agent's complementary responsibilities include:

1. Coordinate with the fire marshal to establish inspection schedule.
2. Follow up on delinquent inspections.
3. Follow up on deficiency reports.
4. Aid the fire marshal in gaining access to any parcel where there has been an access problem.
5. Refer habitual problems to superior.

In addition to general inspection guidelines, California addresses access to, and inspection of, mini-warehouse facilities. The policy, based on the recommendations of the state fire marshal's office, stipulates that every lease or sublease of airspace property for the construction and/or operation of a mini-warehouse facility contain wording providing state or other authorized personnel (property management division, FHWA) the right of immediate access to all rental storage spaces for the purposes of conducting a quarterly safety inspection program.

California puts forth four specific requirements to effect the mini-warehouse inspection program:

1. Management of each mini-warehouse facility will be able to supply immediate access to any storage unit.
2. All inspections will be conducted in the presence of a representative of the management.
3. A minimum of 25 percent of all units in a facility shall be inspected each quarter.
4. The inspector is to maintain a record of units inspected to ensure that all units are inspected at least once a year.

WASHINGTON

In Washington it is the responsibility of the district RESM to perform an annual inspection of leases to assure continued compliance with the terms of the lease agreement.

4.7 Environmental Clearance

Sensitivity to environmental issues has acquired significance in most all functions performed by departments of transportation. Those responsible for the planning, design, construction, and maintenance of highway facilities must attune to the impacts that their activities and operations have on the environment. Those involved in airspace leasing activities are faced with the same responsibilities. The policies and procedures documented in the following sections reflect the environmental safeguards put in place to ensure environmentally sound airspace leasing practices.

CALIFORNIA

California has a reputation for leading the nation in environmental initiatives such as those associated with clean air, water conservation, or the banning of pesticides. It is not surprising therefore, that Caltrans would have extensive environmental provisions for their airspace leasing program. The following material, excerpted from the Caltrans Procedures Manual, may serve as a guide for the development of similar steps and processes in TxDOT.

Environmental Clearance As part of the procedures for leasing and use of airspace, California may require preparation of an environmental document used to clear the airspace for use. What follows are definitions of various terms used in the processing of this environmental clearance. The terms and definitions serve to give a sense of the basic activities and steps involved in the process:

Environmental Impact Report (EIR): "A detailed analysis of the environmental effects of a specific project."

Environmental Impact Statement (EIS): "... prepared pursuant to the National Environmental Policy Act (NEPA)."

In the environmental assessment, Caltrans may act either as a lead agency or as a responsible agency. Caltrans takes the lead agency role when there are no other public agency approvals required, or if it has been agreed by the involved public agencies that Caltrans will act as the lead agency. Caltrans will act as the responsible agency, the public agency which proposes to carry out or approve a project, when another public agency is the lead agency.

Definitions Caltrans employs the following definitions relative to the environmental evaluation of a project:

1. *Categorical Exemption:* "An exception from the requirements of the California Environmental Quality Act (CEQA) for a class of projects based on a finding by the secretary for resources that the class of projects does not have a significant effect on the environment."

2. *Categorical Exclusion*: "A category of federal actions which do not individually or cumulatively have a significant effect on the environment and for which neither an Environmental Assessment or an EIS is required."
3. *Discretionary Project*: "A project which requires the exercise of judgement or deliberation for its approval or disapproval. It is distinguished from projects for which the approval or disapproval is simply a determination of conformity with applicable statutes, ordinances, or regulations."
4. *Federal Action*: "An action or project which involves the use of federal funds or requires federal approval."
5. *FONSI - Finding of No Significant Impact*: "A document by a federal agency briefly presenting the reasons why an action will not have a significant effect on the environment and therefore does not require the preparation of an EIS. It shall include a copy of the environmental assessment. Federal regulations use the term FONSI in place of the term Negative Declaration (ND) which is used in CEQA."
6. *Environmental Assessment*: "A concise public document for which a federal agency is responsible that serves to briefly provide sufficient evidence and analysis for determining whether to prepare an EIS or a FONSI. Federal regulations use the term environmental assessment in place of the term Initial Study which is used in CEQA."
7. *Initial Study*: "A preliminary analysis prepared by the lead agency to determine whether an EIR or a negative declaration must be prepared."
8. *Lead Agency*: "The public agency which has the principal responsibility for preparing environmental documents and for carrying out or approving a project which may have a significant effect on the environment."
9. *Local Agency*: "Any public agency other than a state agency, board, or commission. Local agency includes but is not limited to cities, counties, charter cities and counties, districts, school districts, special districts, redevelopment agencies and any board, commission, or organizational subdivision of a local agency when so designated by order or resolution of the governing legislative body of the local agency."
10. *Ministerial Action*: "An action for which approval or disapproval is simply a determination of conformity with applicable statutes, ordinances, or regulations. In other words, there is no

discretionary action exercised by the approving agency."

11. *ND - Negative Declaration*: "A written statement by the lead agency briefly describing the reasons that a proposed project, although not otherwise exempt under CEQA, will not have a significant effect on the environment and therefore does not require the preparation of an EIR. It shall include a copy of the initial study documenting reasons to support this finding."
12. *Notice of Determination*: "A brief notice to be filed by a public agency after it approves or determines to carry out a project which is subject to the requirements of CEQA."
13. *Responsible Agency*: "A public agency which proposes to carry out or approve a project, for which a lead agency has prepared the environmental documents. For the purposes of CEQA, the term "responsible agency" includes all public agencies other than the lead agency which have discretionary approval power over the project. Federal regulations use the term 'co-operating agency' in place of 'responsible agency.'"
14. *Significant Effect*: "A substantial or potentially substantial adverse change in any of the physical conditions within the area affected by the activity including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance."

4.8 Environmental Procedures

CALIFORNIA

To ensure that relevant environmental procedures are undertaken, California requires that proposals or letters of understanding between Caltrans and the prospective developer include reference to the preparation of necessary environmental studies and environmental clearance. Caltrans cannot require completion of an environmental document as part of the application for a private development project, but the developer is required to provide the data and information necessary for Caltrans to perform its initial study and to prepare the appropriate environmental document. All proposed projects are reviewed by the district airspace committee which, in environmental assessment cases, includes representation from the environmental branch. To ensure that proper procedures have been followed, Caltrans has developed an *Environmental Checklist* summarizing the steps and contingencies. Figure 6 shows the Caltrans Environmental Checklist.

When property is included in the Federal Aid System, federal approval is required. Caltrans encourages early coordination with the FHWA. No project requiring either an ND (Negative Declaration) or an EIS can be completed (property management division, lease signed) until after the environmental document has been approved and the necessary Notice of Determination has been filed with the Secretary for Resources.

It is the policy of Caltrans to ensure that all airspace sites are, and continue to be, free of hazardous wastes.

The term *hazardous waste* is applicable to storage, deposit, or contamination involving a hazardous material which has escaped, been discarded, or abandoned and which may be defined in general terms as being any of the following:

- flammable
- reactive (subject to spontaneous explosion or flammability)
- corrosive (however, if its use is under control and in accordance with applicable regulations, no problem may exist)
- toxic

In California all airspace sites will be monitored as to use and possible contamination. A district hazardous waste coordinator is requested to investigate and test any site the airspace unit has reason to believe is contaminated.

Further, all properties identified as potential hazardous waste sites, including those with underground tanks, under the control of airspace development, are to be inventoried in the districts. Those sites are input into a "Tracking System" maintained by the division of project development and the hazardous waste advisor. Monitoring by airspace development of all leased sites with a potential for hazardous waste is required. An inventory of all hazardous waste sites is maintained and updated by the airspace unit. The inventory is reviewed as part of a scheduled management review process.

AIRSPACE DEVELOPMENT -- CHECKLIST

1. Determine proposed use.
2. Determine who is lead agency (in cooperation with Environmental Unit).
3. Environmental checklist submitted by developer with explanations as necessary and a project review is called (by lead agency) to evaluate environmental significance of project which should include: Local Agency, developer, FHWA, Environmental, Right-of-Way, and other affected units of Caltrans or Local Agency involved to determine if project is a:
 - A. Ministerial Action -- FHWA should be advised at time of conceptual approval applications; or
 - B. Major Action; or
 - C. Nonmajor Action.
 - D. If major action:
 1. EIS/EIR required if significant effect.
 2. ND required if not a significant effect.
 3. All parties should work together even though it is lead agency's responsibility to assure that circulation and advertising are done in compliance with State EIR Guideline and Federal requirements.
 - E. If nonmajor action:
 1. Categorically exempt -- Categorical Exemption/Nonmajor Action Determination is prepared by Environmental, sent to FHWA by Right-of-Way with conceptual approval request.
 2. If not categorically exempt -- ND must be submitted, circulated and advertised.
 3. Again, cooperation and communication is required to see that compliance with State and Federal requirements is obtained.
 4. When environmental documentation is gained and approved, it must be forwarded to Sacramento for inclusion in the CTC memo for the Commission's review prior to their approval of the proposed lease.

Where the Local Agency is the lead agency, it is to file the Notice of Determination per CEQA Guidelines 15083 (f) (4) or 15085 (h) (3). A copy of the filed Notice is to accompany the environmental documentation forwarded to Sacramento.

Where Caltrans is the lead agency, a Notice of Determination must be filed with the Secretary for Resources. The District Environmental Unit responsible for coordination of this total effort will be responsible for preparation, completion and submission of this document to District Right-of-Way for submittal to Division Right-of-Way for obtaining the CTC execution of the Notice.

Distribution

- Original plus copy of ND (and attachments) to Secretary for Resources
- 1--cc to District
- 2--cc's to OEP (Attn Blackmer)
- 1--cc to R/W File

Figure 6. Airspace Development - Environmental Checklist

All underground tanks must be covered by permits issued by the local regulatory agency. The owner of the property is responsible for ensuring a permit is obtained. The lessee will be responsible for all permits and all costs of monitoring the system. If a new tank is allowed, a provision for removal and cleanup by lessee at expiration of lease must be included in the lease.

The hazardous waste coordinator will inspect each site and determine that:

1. No testing is necessary and will make a statement that no hazardous waste is present.
2. Further investigation is necessary and proceed to hire a consultant to determine if hazardous waste actually exists.
3. There is no hazardous waste present, but hazardous materials are present and being used and what future inspections and controls, if any, may be required.

California procedures contain an optional clause covering hazardous materials. This clause will be included in all existing and future airspace leases except where, in the district's judgment, hazardous waste problems are extremely unlikely. However, before a lease is entered into with a new tenant, the airspace manager is required to inquire into the specific type of use proposed and, with advice as needed, consider the risk.

5.0 POLICIES AND PROCEDURES

5.1 Utility Company Use of Airspace

In California, utility use of the freeway right-of-way is not an airspace issue. Utilities are covered by state statutes and requests from utilities are ruled on by the Caltrans encroachment committee. California does not encourage or promote utility use of right-of-way and underscores their reluctance by stating that "under no circumstances will a utility company be granted an airspace lease after they have been denied an encroachment permit."

5.2 Design Standards

Airspace design standards, which cover an array of building specifications intended to safeguard the transportation facility and the public's well-being, vary considerably across states. An example of design standards from two states, California and Washington, are included to demonstrate the kinds of design issues addressed.

CALIFORNIA

Fire Safety Guidelines California's airspace fire safety requirements are based on the FHWA requirement that the state fire marshal give concurrence to proposed airspace development. Their guidelines have requirements for:

1. General building specifications: location, distance from freeway, and supporting structures.
2. Automatic fire extinguisher systems: buildings required to have automatic fire extinguishing systems, be regularly maintained and inspected.
3. Buildings under concrete freeway structures: minimum fire rating of one hour and specific clearance limits.
4. Buildings under steel freeway structures: required to be of noncombustible construction, have independent roof.
5. Storage of fuel: no fuel tanks, pumps, or vents installed within specific clearance limits.

WASHINGTON

Washington also maintains design standards governing the proposed use of airspace. The standards specify limits within which structures can and cannot be placed. Sight distances are stipulated as are criteria associated with supports and support columns. Safety features include sprinkler systems, fire resistant materials, and protective fencing to prevent material being thrown onto operating portions of the highway. Washington further stipulates that no airspace facility may be used for the production of flammable, explosive, or otherwise dangerous material.

Since Washington is notable for its lidding of freeway airspace, it specifies criteria ensuring adequate ventilation of operating freeway under the over-hanging portion of any structure. Structures built over a highway cannot occupy more length of the highway than will permit natural ventilation of the enclosed section. The criteria for Washington's standards specifies the worst case situation--bumper-to-bumper traffic, stopped, with engines running. An exception is provided when the airspace development allows for complete tunnel ventilation and lighting.

Finally, Washington requires that airspace be designed and constructed so as to facilitate inspection, maintenance, and repair.

5.3 Lease-Back Procedures

For the purposes of this discussion, a lease-back is defined as a policy tool that stipulates the invocation of a lease after property is obtained from an owner through condemnation or other means. A previous owner who wishes to remain on the acquired property is given a grace period after which he may automatically be placed under lease to the department. The survey presented in Section 8.0 of this report presents additional information on lease-backs.

Florida defines lease-back as those leases in existence prior to physical construction. The condition applies where construction is scheduled or pending and former owners or tenants have not yet been relocated. A written lease agreement is required when the lease period extends beyond thirty days and the rate charged must be the current market rate (as determined by appraisal). For federal-aid

projects, when the lessee was previously a tenant, the lease-back rate is set at the rate charged by the former owner.

5.4 Internal Use of Airspace

To ensure that the state is properly using its land assets, internal departmental use of airspace is evaluated relative to other potential uses, property management division airspace income. Examples of internal uses are maintenance operations, landscaping projects, employee parking, and park-and-ride lots. California has developed detailed procedures to justify existing internal uses of airspace sites. The procedures categorize internal use of airspace as temporary use or permanent use. Temporary use is where no capital funds have been expended for improvements. Permanent use is where a building improvement has been added and the value of the structure (replacement cost) equals or exceeds the estimated fair market value of the airspace.

Given California's emphasis on highest and best use of airspace assets, decisions are formulated to maximize returns to the department. An internal aid to that end is presented in Figure 7, *Study Requirements for Internal Use*. The form documents physical characteristics of the site, economic analyses, and records recommendations.

5.5 Appraisal and Valuation of Airspace

CALIFORNIA

California has three approaches to determining the value of potential airspace sites:

1. **Airspace Estimates:** Airspace estimates provide a figure for preliminary discussions with potential users or for minimum value sites.
2. **Airspace Appraisals:** Market value airspace appraisals are required for airspace to be leased without competitive bids.
3. **Bid Lease Valuations:** Bid lease valuation are used for establishing minimum rental rates for leasing airspace parcels on the basis of competitive bids.

STUDY REQUIREMENTS FOR INTERNAL USE FOR CATEGORY NO. 1C & 2
(Existing) or (Proposed) Facility (Circle One)

1. **Location**
 - a. County, Rte and P.M. _____
 - b. Adjacent Streets _____

2. **Physical Characteristics of Site and Facility**
 - a. Size of site _____ Ac/SF
 - b. Access (Describe) _____
 - c. Clearance (if under structure) _____
 - d. Type and function of facility _____
 - e. Describe specific operation performed from site (or to be performed) _____

 - f. Are there (or will there be) any buildings? _____
If yes, number _____ Size _____ Age _____
Condition _____ Deficiencies -- Building _____
Site _____
 - g. Minimum and maximum response time to boundary of territory _____
 - h. Other _____

3. **Economic Analysis**
 - a. Proper use of site if unimproved _____
 - b. Estimate of fair market value of site for private use _____
 - c. Zoning _____
 - d. Estimate of possessory interest tax _____
 - e. If existing facility -- Estimate replacement cost of land and improvements _____
 - f. If proposed facility -- Estimate cost of development _____

4. **Noneconomic Analysis**
 - a. Compatibility with neighborhood (describe) _____

 - b. Landscaping _____ Screening _____ Irrigation _____
Describe _____
 - c. Efficiency of service of territory from site _____

 - d. Comment on effect of facility upon local traffic patterns _____

 - e. Have there been any local objections to the facility? _____
If yes, what and who? _____
 - f. Is, or will, site be used completely? _____
If no, how much area is left over? _____
 - g. Plans which would alter existing or proposed use _____

5. **Site Conclusions and Recommendations by**
 - a. Airspace Committee _____
 - b. User Unit _____

**Figure 7. Study Requirements for Internal Use
for Category No. 1C and 2**

WISCONSIN

Wisconsin addresses airspace leases on FHWA financed projects. These are required to generate fair market rent, as determined by one of two methods: public bidding or detailed appraisal.

FLORIDA

Florida, like California, employs three methods to determine the value of airspace property: appraisals, bid lease valuations, and negotiation. Whatever method is used, the airspace lease is required, at a minimum, to be fair market rental value.

If an appraisal is performed, the date of the appraisal cannot be more than six months prior to the date of lease execution. Appraisal update fees are paid by the potential lessee. FDOT may lease by sealed bid after advertising in a newspaper circulating in the area where the property is located. If the market value is not obtained during the first round of bidding, FDOT may advertise a second time. FDOT's policy states, "If the specified minimum bid or the current fair market rental value is still not obtained, the district secretary may approve the highest bid received during the second sealed bid opening." FDOT may also negotiate a lease (for the current market rate) with the owner from whom the property was acquired or with the holders of leasehold estates existing at the time of FDOT acquisition.

WASHINGTON

For value determination, Washington discriminates between short-term leases and long-term leases. For short-term leases on property where there will be limited improvements, the district RESM can establish market rent and provide support to be approved by district appraisal. In the case of leases where long terms and/or major improvements are proposed, a rental rate is requested from district appraisal. For long-term leases, an appraisal from the district appraisal section or an independent fee appraisal is required. Both long-term and short-term leases require headquarters' concurrence prior to presenting the proposed rent to the applicant.

GENERAL LAND OFFICE

The General Land Office considers short term access to land, as one might find with airspace leases, a difficulty to overcome in the appraisal and negotiating process. Five to 20 year access is too short for financing purposes since banks view nothing less than 35 years equivalent to ownership. Another issue, agency provisions for early termination of the lease and the consequent inability of the developer to obtain financing, factors into the appraisal equation. On top of this, the GLO considers its appraisal process bureaucratic and slow. Surveying, appraisal, and field inspections take time and add significantly to the time frame associated with closing a deal.

The GLO does not usually bid leases. Estimates place the bid to non-bid ratio at only one out of ten. The prevailing opinion at the GLO is that required bidding inflicts considerable damage on an agency's ability to transact business. Bidding is seen to have one of two potential effects on the value of property:

1. Forced bidding for property that has a limited market drives down the property value or drives off interested developers.
2. The bidding process can enhance the value of the property by arriving at an empirical market value.

5.6 FHWA Approval

As with all airspace arrangements when the site is located on a highway included in the federal aid system, the Federal Highway Administration must approve the lease. The Federal requirements, as stated in Federal Aid Highway Program Manual (FHPM) 743, include several steps. The first is a *Conceptual Approval Application*. The Conceptual Approval Application (Conceptual Submittal), is a request by the state for the early review of a proposed airspace development. Approval by FHWA is made only on the general concept of the proposal and in no way binds FHWA to accepting the final lease agreement. The Conceptual Airspace Approval Application submitted for FHWA review needs to contain sufficient data for the FHWA to determine safety to the highway and its structures, safety to the traveling public, and if the proposal is in the public interest.

The following information is required at the conceptual stage:

1. The proposed use of the airspace.
2. A map showing the location of the lease site.
3. Preliminary plans detailing vertical and horizontal relationship between the proposed development and the highway, size and location of the proposed development, access and parking, location of piers and other existing structures, landscaping, and visual treatment of the proposed development.
4. A schematic description showing methods of providing protection and access to piers and structures.
5. A statement that the local city or county has been contacted and their reaction to the proposed development. This statement should address current zoning, noting if the proposed use is at variance with this.
6. Environmental assessment.
7. An affirmative statement that the final submission will incorporate all the appropriate requirements, controls and safety provisions set forth in FHPM 743.

Final approval by FHWA is required before any construction on the proposed development can begin.

The FHWA has shown indications that it no longer wishes to review all lease applications. Many of the applications received are for routine airspace uses such as parking and, therefore, have been well defined by precedents and existing guidelines. The FHWA communicated to WSDOT, in a letter dated January 8, 1986, that it has no interest in review of those leases:

- Not associated with the interstate system,
- Which can be canceled on short notice,
- Which do not involve a change in facility access control,
- Utilizing the standard WSDOT format, and,
- Are approved by the DRES or higher authority.

5.7 Processing Steps - Internal

CALIFORNIA

California has a well defined and documented process for internal approval of airspace lease arrangements. The steps for division of right-of-way review and approval, from the Caltrans Airspace Manual, include the following:

1. A one-page summary of the pertinent facts including a District recommendation.
2. Fact sheet summary for analysis of proposals.
3. Supporting data including a financial statement from the applicant.
4. Three separate maps: an area or district map relating the airspace site to broad geographical area, vicinity map showing the parcel location and its relationship to highway, streets, or county roads, and a parcel map showing area, dimensions, and reference points.

Rental Agreements In California, rental agreements are short-term arrangements, six months or less in length, and require minimal processing. The potential lessee submits a letter stating the proposed use, the rental rate and the period of rental. The district consults with the FHWA on appropriateness of use. Establishment of the rental rate does not require either an estimate of value or an appraisal, however, it must be reasonable and must have a basis in the market place.

Short-Term Bid Lease When a parcel is offered for bid lease, Caltrans attempts to contact all interested or potentially interested parties. The contact includes signing, media advertising, personal contact with abutting owners and/or tenants, and mailing to parties on the District's inquiry list.

Where airspace has never before been bid on, Caltrans requires that the minimum bid be based on market data. On previously bid airspace, guidelines suggest that the new minimum bid should be the sum of the last successful bid plus any increase in the CPI since that last bidding. California normally sets the term of the bid lease at two years, unless, "the lessee intends to pave, fence, light, or in any other way improve the leasability of the state's property." With capital improvements, the

lessee may be given a term up to five years or a rental offset.

Bid Lease Procedures include the following:

1. The first step in Caltrans' bid process involves a request to lease as an airspace parcel, submitted to their District Airspace Review Committee (DARC). The proposed use is specified, if known. The DARC may approve or disapprove the request.
2. The FHWA is asked its conceptual approval.
3. Schedule bid lease evaluation.
4. The lead Caltrans district sends proposed bid package to division for review and approval.
5. Advertising is undertaken by placing signs on the parcel, placing media advertisements, and contacting proximate owners and/or tenants.
6. Bid packages are mailed to all identified interested parties.
7. Bidding is held. The lead district is responsible for analyzing the bids received and for recommending to the right-of-way division which bid to accept. As in other cases the division secures FHWA approval of the use proposed by successful bidder.
8. Option signed by division and returned to district. The remaining steps involve the environmental impact process, submitting preliminary and final plans for FHWA approval, and legal review. Figure 8 summarizes the bid lease procedures developed by Caltrans.

Negotiated Lease Negotiated leases are undertaken in California when negotiations rather than bidding is considered in the state's best interests. Justification for a request to negotiate can include:

1. The return to the state would be much higher.
2. Landlocked parcel-single user.
3. Plottage value could be expected.

Approval to negotiate is required from the Airspace Advisory Committee (AAC). The AAC must also approve the offer and proposal at the conclusion of negotiations. Negotiated lease procedures are illustrated in Figure 9.

BID LEASE PROCEDURES

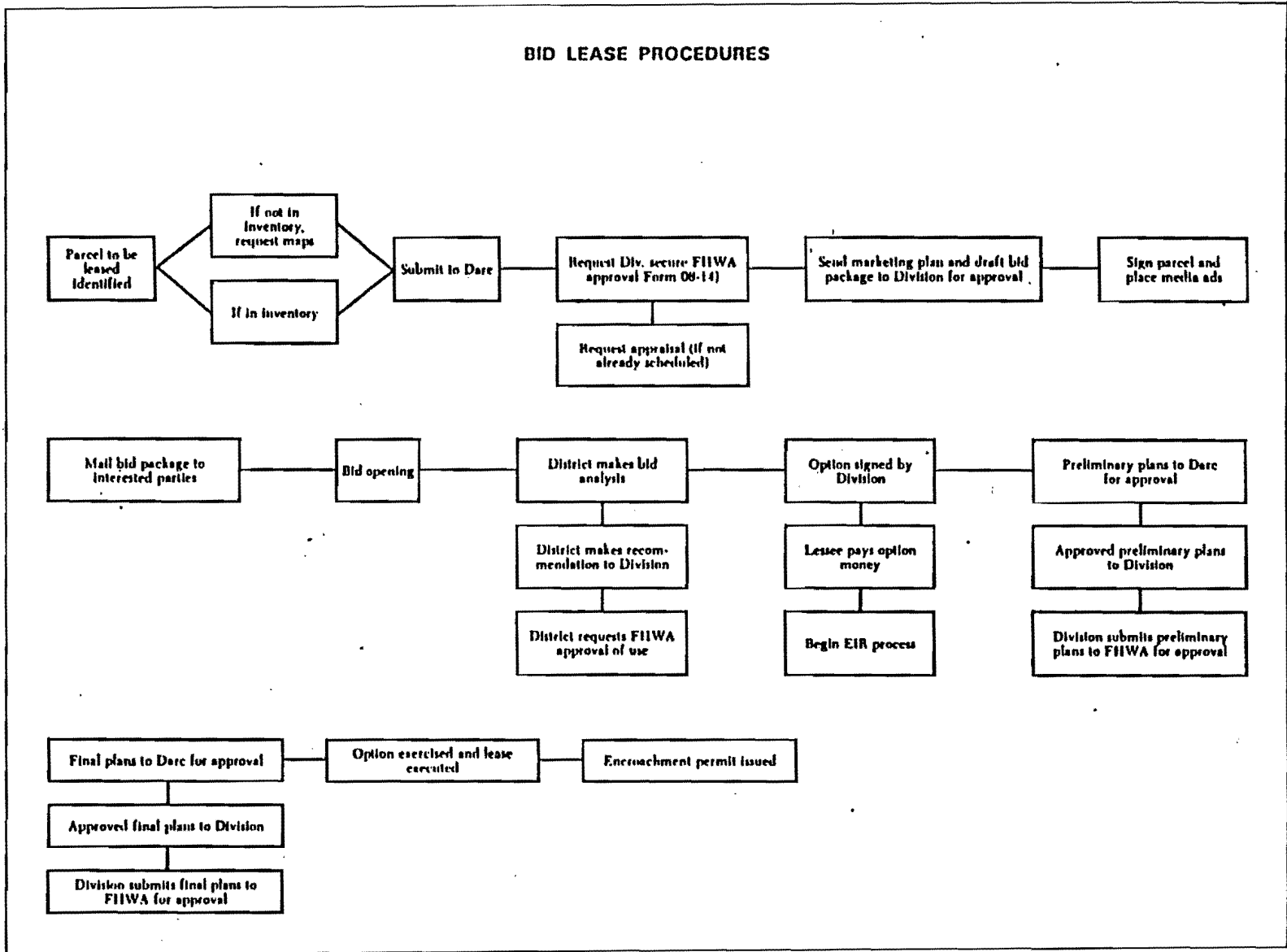


Figure 8. Bid Lease Procedures

NEGOTIATED LEASE PROCEDURES

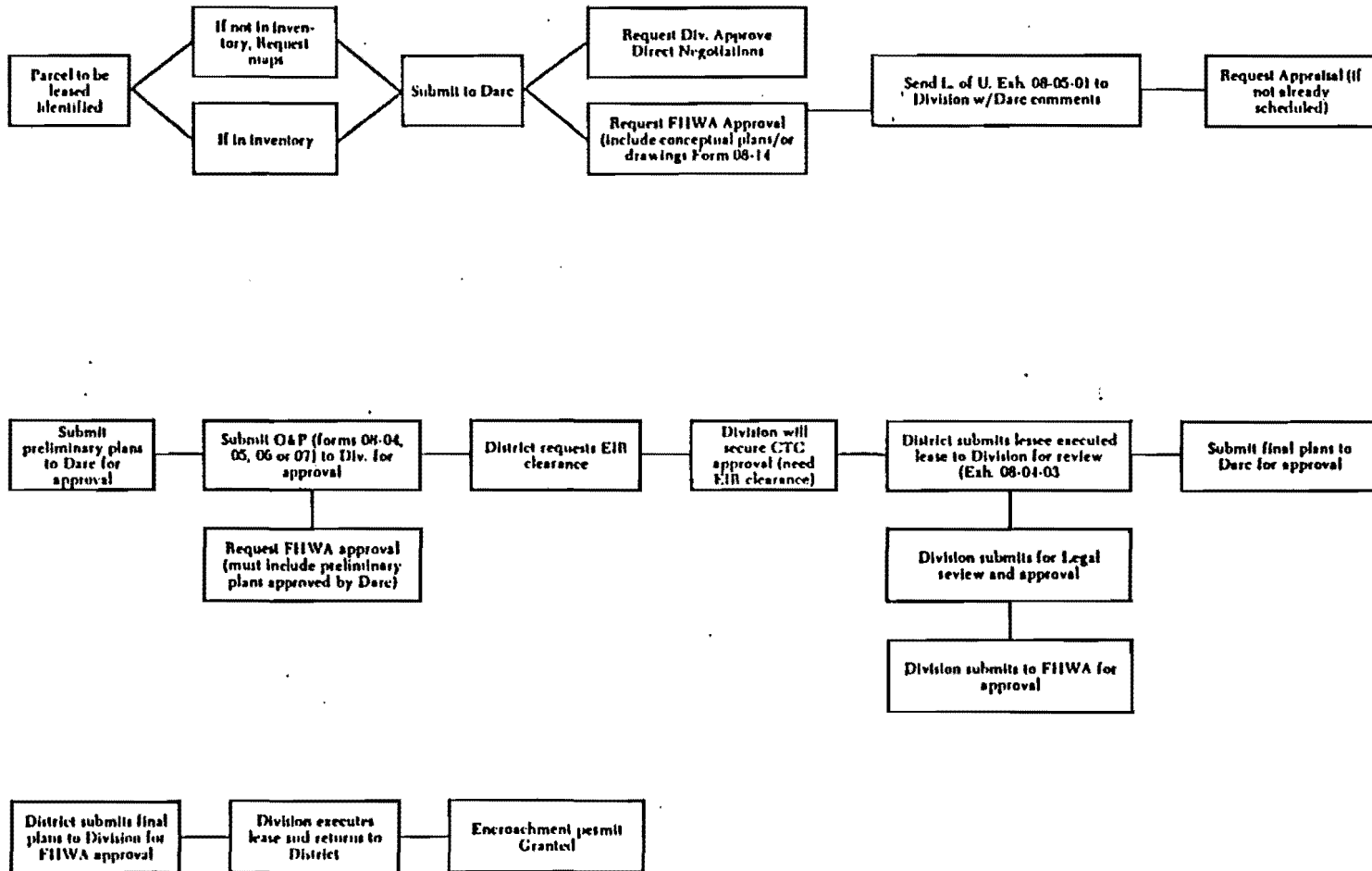


Figure 9. Negotiated Lease Procedures

The application for park leases are processed in the same manner as the negotiated development lease, but CTC approval is not required when the lease meets all other park lease requirements. Caltrans invites local agencies to apply for lease of potential park sites through the Marler-Johnson Highway Park Act. The usual lease term is for ten years and standard provisions require a fair market return, except that rents may be offset up to the amount the department would benefit by savings in landscaping and maintenance costs.

Approvals Leases with a term of two years may be executed by the district director of transportation, with the condition that the FHWA concurs. If the parcel has never been leased before, or has not yet been cleared by the FHWA, the division of right-of-way, must get FHWA clearance and notify the district to effect the lease. Every parcel must have been environmentally cleared for the proposed use by Caltrans (or an approved agent), and FHWA must have reviewed and signed off on the document.

Amendments and Exceptions Changes to leases are accomplished through amendments. California defines amendments as any suggested change to an executed lease that alters:

1. The term of lease (primary or option).
2. The rental rate or amount of return to the State (up or down).
3. The use.
4. The type or size of development.
5. Rental escalation (property management division, frequency, rate).

After analysis of the impacts of any proposed amendments, they must be submitted to the division of right-of-way for approval by the CTC and the FHWA.

FLORIDA

Florida allows for the negotiation of leases for joint public/private development without competitive selection. Two instances are specified where this may occur:

1. Where property is acquired by eminent domain, "the department may negotiate a lease of all such property or the remainder property with the prior owner in lieu of full or partial

monetary compensation by the department."

2. Where property is donated to the department, "the department may negotiate a lease of all such property or the remainder property with the donor."

In evaluating proposals, Florida establishes criteria prior to advertising the airspace for lease. Who reviews the proposal is partially determined by the "cash" value of the benefits received by FDOT.

1. For a proposal in which the cash value or other benefits to the Department is expected to exceed \$1,000,000 over the life of the lease, review must be by a board of advisors.
The board of advisors is appointed by the district secretary and is required to have no monetary, nor proprietary, interest in the lease or the property. The board of advisors, "examines proposals and advises the department on technical issues related to the success and feasibility of the proposed joint development and the expected benefits to the department."
2. If the board of advisors recommends a proposal for which the cash value or other benefits is expected to exceed \$1,000,000, it requests review of such proposal by the governor and cabinet. If the value of the proposal is expected to be less than \$1,000,000, the district secretary may approve the lease.

WASHINGTON

The approval of lease arrangements, while dependent on review from several departments, such as planning, maintenance, is made at the relatively low organizational level of chief of right-of-way. No review by the state transportation commission is involved. Washington specifies the following steps for the review, approval, and execution of airspace leases:

1. Secure approval as to form from assistant attorney general.
2. Circulate (for approval) the lease, application, and background material to:
 - Headquarters design engineer.
 - Bridge and structures engineer (when appropriate).
 - FHWA.
3. Reviews and resolves comments generated by headquarters and FHWA review.
4. Secures the DRES's execution of the lease.

For potential lease sites, newly available as a result of construction or other changes in demographics or economic conditions, Washington offers only general procedural guidelines. Attempting to maintain flexibility, WSDOT suggests that each case be considered on its own merits, with recommendations submitted to the headquarters airspace program manager for concurrence.

Washington spells out the following guidelines where there seem to be no apparent engineering or title problems (*e.g.*, easements), and the airspace site appears to have utility:

1. Notify other governmental agencies (federal, state, county, and local) in a six-block area surrounding the site. The notification includes a statement that if no response is received within 30 days, it will be assumed by WSDOT that the agency has no interest in the site.
2. If no governmental body has an interest in the site, abutters are notified that the site is for lease.
3. If no interest is expressed, the site is advertised and posted with a "For Lease" sign. It is suggested that conceptual approval be requested from the headquarters real estate services office prior to advertisement.

Where there are encumbrances or some other obligation to an owner in the immediate vicinity which would affect the use of the site, Washington offers the following guidelines:

1. The site may be offered to the abutter who holds such rights. The lease rate will reflect rights held as well as the rights to be leased.
2. If the abutter does not desire to lease, the site may be offered to other potential customers.

Where there are problems that appear to make the site unsuitable for use or promotion:

1. The site may still be posted or contacts may be made with individuals suspected of having an interest in the site. WSDOT suggests that the agent document not less than three contacts to avoid any appearance of collusion.
2. WSDOT selects the proposal most compatible with, "highway facilities, neighborhood goals, and which - other considerations being equal - provides the greatest income." And, as in California, an option is granted to the successful applicant while the lease application is being processed.

WISCONSIN

Wisconsin, in a unique and effective arrangement, administers its airspace leasing program with the help of the Milwaukee County Department of Public Works, Transportation Division. Wisconsin defines the following procedure for those interested in airspace utilization:

1. Meet with developer and outline the requirements and procedures necessary to lease airspace. Provide a sample agreement form.
2. Developer initiates a written request expressing an interest in utilizing certain airspace either over or under the freeway at a specific location. The developer's proposal is to include the following information:
 - a. Area under consideration.
 - b. Purpose for which the area will be used.
 - c. Conceptual plans (when the proposal deviates from previously approved uses - these plans require state and FHWA approval).
 - d. Estimated cost of the development.
 - e. Period of time the developer is proposing to lease.
 - f. Monthly rental the developer proposes to pay.
 - g. A statement of understanding that the developer is aware all items are subject to review and approval by the following:
 - Expressway and Transportation Commission.
 - County Board.
 - the State.
 - the FHWA.

Discussions may take place with staff to establish an acceptable term and monthly rental rate prior to submission of a formal agreement.

1. A draft agreement is submitted to the state and FHWA for review and comment.
2. Concurrent with Step 3, the developer is required to prepare an environmental *screening work sheet* to be used to assess the environmental significance and impact of the proposal.
3. State and FHWA review draft agreement.
4. Consideration and approval by the Expressway and Transportation Commission.

5. Consideration and approval by the County Board.
6. Developer to prepare final construction plans. Concurrently, staff prepares a final agreement for execution by the County and developer, which is submitted to the State and FHWA for review and approval.
7. No work may take place until the County issues the official notice to start. This notice is issued after State and FHWA approvals of final plans and certification of insurance coverage.

6.0 BUSINESS PLAN AND MARKETING STRATEGY

6.1 Airspace Business Plan

Introduction The purpose of an airspace business plan is to set goals and establish meaningful action plans. The goals may be stated in quantitative terms such as number of leases or net revenue received. As an alternative to quantitative measures, goals may take into account public service issues such as park space added or acres of property placed back on tax roles. Whatever form they take, goals can provide management with a source of direction for airspace units activities.

Through goal setting, critical issues may be identified, providing the backdrop for long-range strategic planning. Typically, the formative years of an airspace program see evolution from a reactive program to a more proactive program. The maturation can be seen in terms of more streamlined leasing procedures and documentation. An integral part of the long-range plan is an active marketing strategy. Marketing will serve to fuel the unit's efforts toward goals and make the program more vibrant and innovative.

As with many sections of this policy analysis, the California airspace business plan serves as a useful baseline for the development of a similar resource document for TxDOT. The following goals are based on those cited in the California Business Plan:

1. Maximize program income.
2. Streamline leasing procedures.
3. Monitor local and internal actions impacting land values.
4. Improve budget forecasting and cost accountability.
5. Develop a program for staff development and training.
6. Analyze short and long-term impacts of legislative actions.

The remainder of this section presents important components of a business plan.

Mission Statement The business plan should be predicated on a succinct statement summarizing the mission of the airspace program. The mission statement should facilitate the formulation of goals and strategies to accomplish the unit's goals. The mission statement should seek to maximize public and private use of rights-of-way in a manner that maximizes revenue generation.

Policy Statement A policy statement defines program standards and direction. For an airspace program, with emphasis on revenue enhancement, the policy statement should be oriented towards cost-effective resource utilization and partnership with the private sector.

Given the general policies of TxDOT, airspace policy should optimize public and private use of rights-of-way in conformity with community requirements and competent land planning. The program should promote multiple use of airspace in transportation corridors which will blend transportation facilities and other resources in the community in a manner which enhances local planning, environmental, and developmental aspirations. Policies should aim to enhance the local tax base and increase taxpayers' net returns. Toward this end, the department should seek to reduce pollution and congestion, lessen the private resources expended on transportation, and conduct an effective leasing program.

Assessment of Existing Shortcomings A key ingredient of the business plan is a critical assessment of program shortcomings. The weaknesses of the program can be gauged in terms of an established policies and procedures, training programs, and competence of the staff, which needs to compliment the maturity of the program. The identification of conflicting goals is also an important aspect of the assessment. Conflicts may prove to be bottlenecks in the program, decrease the effectiveness of asset management, and increase the costs associated with developing leases.

An important goal of the assessment should be to streamline leasing procedures. This would aim to reduce the processing time of airspace leases by smoothing interdepartmental processing and approval. Such an effort would reduce the agenda backlog and reduce per-lease overhead. Effort should be directed at shortening the processing time between lease application and execution.

Some factors contribute to the strength of a program. Among these are political influence, an ability to adapt to recessionary conditions in the economy, and adequate internal support and financing. High vacancy rates in the real estate industry impact statewide real estate activity and can lead to a loss of interest in leasing and development. The program must be able to operate efficiently during these lean periods by using staff for alternate functions.

Management Airspace management should interact with other divisions and at various levels of the organization in order to spread an understanding of program objectives. Communication with airspace staff on goals and direction will create an improved appreciation of the program objectives and at the same time create an innovative environment for implementing and streamlining policy and procedures.

The personnel management policy of the airspace unit should increase job satisfaction and create a sense of belonging. In order to make the program more productive, training and other developmental activities (seminars/information sharing activities) should be initiated. The division should conduct an appraisal of training needs and formulate a training plan and the associated budget for each level of staff in the airspace function. Even though this may prove to be an expense in the short-run, increased productivity in the long-run will offset the investment.

Airspace Data Systems As an airspace operation diversifies, grows, and increases in complexity, the collection and availability of data becomes increasingly important. The data related to an annual marketing plan, for example, can be used to establish fiscal year objectives and staffing levels. In addition, a centralized database can integrate right-of-way functional activities and maintain the statewide airspace inventory. The inventory can identify parcels, their uses and values, vacant property, or sites being used for internal uses. Periodic reports can be generated tracking targets achieved, transactions in process, income and expenditure data, and performance reports.

Public Relations & Local Government Liaison The airspace unit should track local land use issues and seek assistance on matters related to local public policy in order to assess the impact of such issues on airspace sites. The airspace unit should track the actions of local government

entities that influence the value and use of airspace development sites. Further, effort should be made to keep contact with any local agency that influences TxDOT planning decisions.

6.2 Airspace Marketing Plan

Marketing airspace is no different from marketing any other commodity. An agency with valuable property, as determined by the frequency of inquiries or an assessment of surrounding real estate activity, is faced with locating a customer and consummating a deal. The organization must put policies and procedures in place to guide the process to that outcome returning the greatest revenue to the agency.

CALIFORNIA

Of the several states surveyed, California has the most advanced marketing program. For long-term leases, each district submits to the division of right-of-way an annual marketing plan for the subsequent two fiscal years. This marketing plan will show, by month, parcels the District intends to market during this period, and the process (direct negotiation or bid) that will be used to market them. The marketing plan will assist the district in scheduling due dates for appraisal and/or bid lease valuation requests. The marketing plan is also the basis for budgeting staff needs for the upcoming period. Figure 10 lists the data collected and analyzed by Caltrans for its marketing plan.

Typically, the parcels in the marketing plan are drawn from the districts' inventory prioritization process. Other sites that have had numerous inquiries may also be included in the plan. In terms of advertising, Caltrans suggests that signs should be placed on airspace parcels according to the marketing plan. In the case of a two-year parking or open storage site, the parcel should have a sign at least one month in advance of the bid opening. For long-term development use the site should be signed at least three months prior to the bid opening. Caltrans highlights the importance of using appropriate media such as newspapers and builders' newsletters, but notes that there are several other steps that may be taken to make the public more aware of an available airspace site:

Parcel _____

APPRAISAL:

Amount
Date
H&B Use
Zoning
Size of Parcel

RENT:

Minimum monthly rent to be bid (Rationale for minimum bid when lower range of value used).
Percent of Gross Income (if applicable) (Rationale for percent used)

RENT ADJUSTMENT:

Method to be used (CPI, CPI with lid, percent of Gross Income, etc.)
Frequency

OPTION PRICE:

Rationale as to how price was chosen and advantages to single option price or series of option payments)

TERM OF OPTION:

Special rent considerations during term of option or any incentive to developer to exercise option before completion of option term

TERM OF OPTION:

(Rationale)

UNIQUE FEATURES OF PARCEL:

Who would be primarily interested in parcel?

ADVERTISING:

Where
When
Cost

LEASE:

Use standard form and "Z" out clauses not needed.
Cite special clauses drafted or needed due to unique conditions.

Figure 10. Marketing Plan

1. Public information news releases.
2. Staff presentations to community and professional real estate organizations and, where appropriate, local government entities.
3. Personal contact and discussion with local builders and developers.

Use of Brokers and Broker's Commissions The department of transportation was authorized by the California Transportation Commission to pay real estate commissions or brokerage fees (not to exceed three percent of fair market value appraisal) to any licensed real estate brokers who assist in the development of airspace sites, through a long-term lease. There are terms and limiting conditions for the department to enter a nonexclusive agreement and broker approval procedures. A sample agreement regarding the broker's commission is shown in Figure 11.

WASHINGTON

WSDOT does not seek out nor actively market lease sites. Their administration focuses on transportation and transportation-related expenditures. Therefore, studies, surveys, or appraisals of potential airspace lease locations are not frequently approved. If, however, an interested party approaches WSDOT wishing to lease a site, the department may (usually will) consent to work with the party to develop a workable arrangement. The primary motivation for this activity seems, in Washington's case, to be public relations and a melding of community interests along a transportation corridor.

EXHIBIT _____
(Parcel Number)
(Address of Property)

STATE OF CALIFORNIA
DEPARTMENT OF TRANSPORTATION

AGREEMENT REGARDING BROKER'S COMMISSION

THIS AGREEMENT is entered into this _____ day of _____, 19____, by and between THE STATE OF CALIFORNIA acting by and through its DEPARTMENT OF TRANSPORTATION, hereinafter referred to as "State", and _____, a licensed Real Estate Broker, hereinafter referred to as "Broker".

WITNESSETH:

WHEREAS, State is engaged in the leasing of right of way which will accommodate multiple use development;
and;

WHEREAS, State desires to lease and Broker has secured _____, hereinafter referred to as "Tenant", as a prospective tenant to execute a Lease on certain land described herein as Freeway Lease Area _____ (FLA) located at (complete address):

NOW, THEREFORE, THE PARTIES HERETO DO MUTUALLY AGREE AS FOLLOWS:

1. State shall pay to Broker a real estate commission or brokerage fee on any lease which State concludes with Tenant regarding Freeway Lease Area _____ (FLA), according to the provisions as provided hereinafter. *No commission will be paid to Broker, in the event Broker becomes the tenant or is a partner in any entity which becomes the tenant.*
2. Broker shall be paid a commission in the amount of \$_____.
3. The commission, if any, shall be paid at the time the State's Lease with Tenant is fully executed, and State has received the _____ lease payment. However, if the _____ lease payment is less than the commission, the commission will be paid in installments at the rate of one-half (½) of the lease payments until fully paid. If tenant defaults on lease payment before commission is fully paid, this agreement is terminated and Broker is no longer entitled to any further payments.
4. It is expressly understood by Broker that in the event the Lease is terminated, for any reason whatsoever, State shall not be liable for any unpaid portion of the commission.
5. No commission shall be incurred, due, or paid unless the lease relating to Freeway Lease Area _____ (FLA) is executed by Tenant and State. It is expressly understood by the parties to this Agreement that if the lease transaction is not consummated, no commission will be paid by State to Broker.
6. Broker fully understands that title to this leased property is subject to all matters of record.
7. This agreement shall terminate five (5) years after the execution of the Lease, or on the date the Lease is terminated, whichever occurs first.

IN WITNESS WHEREOF, the State and the Broker have executed this agreement as of the date first hereinabove set forth.

Figure 11. Broker's Agreement for Bid Parcels

Table 1. Summary of State Airspace Leasing Programs

STATE/AGENCY	NUMBER	FTE'S	ANNUAL REVENUE	COMMENTS
Washington State DOT	200 Fee Free 200 Revenue	5-6	\$400,000/YR (\$500,000 more will result from one additional lease in the works)	Decentralized with either .25-.50 FTE'S dedicated to leasing, depending on the size of the district. Two FTE'S located centrally.
California DOT	450+	21-22	\$10,500,000+/YR (Program expenses run about \$1.6 million/YR)	Seismic activity has required Caltrans to retrofit elevated freeways with improved structural characteristics necessitating the (temporary) removal of airspace tenants and reducing revenue.
Florida DOT	50-60	13	\$600,000+/YR	Decentralized across 7 Districts and Turnpikes. Central Office monitors/communicates policy and legislative changes.
Arizona DOT	10	0	\$20,000	Program started in 1991, temporarily suspended.
Illinois DOT	40	6	\$260,000	
Michigan DOT	383	1	\$13,000	
Pennsylvania DOT	60	13	\$200,000	Two employees are centrally located, 11 reside in Districts.
New York DOT	1250	22	\$5,900,000	Many of the leases engaged in are permits.
Wisconsin DOT	22	2	\$1,800,000	Wisconsin uses Milwaukee County employees to help in the administration of their program.

8.0 QUESTIONNAIRE SUMMARY

INFORMATION ON ROW/AIRSPACE LEASING PROGRAM BY STATES

8.1 Organization

Year ROW/airspace program initiated:

Arizona	1990
Illinois	1972
Michigan	1925
New York	---
Pennsylvania	1977
Wisconsin	1962

Airspace Leasing Program Division:

Arizona	Highways, Acquisition, Property Management
Illinois	Division of Highways - Bureau of Land Acquisition
Michigan	Real Estate
New York	Real Estate
Pennsylvania	Right-of-Way and Utilities
Wisconsin	Division of Highways

Program organization:

Arizona	Centralized
Illinois	Decentralized
Michigan	Centralized
New York	Decentralized
Pennsylvania	Decentralized
Wisconsin	Decentralized

Number of employees involved in airspace leasing program:

Arizona

Headquarters	None
District	None

Illinois

Headquarters	1
District	5

Michigan

Headquarters	1
District	---

New York

Headquarters	4
District	18

Pennsylvania

Headquarters	2
District	11

Wisconsin

Headquarters	1
District	1

Texas GLO

Uplands	3
Coastal	4
Commercial	5
Processing area	3

Existence of specialized training of leasing staff:

Arizona	Yes
Illinois	No
Michigan	No

New York	Yes
Pennsylvania	No
Wisconsin	No

Extent and nature of training:

Arizona	International Right-of-Way Association Course 701 - Property Management Leasing; FHA - Effective R/W Acquisition and Property Management Course No. 14121.
Illinois	N/A
Michigan	N/A
New York	Rental of D.O.T. properties is covered in the training courses provided to new employees; periodic property management seminars for regional (district) personnel are held in Albany to resolve problems and clarify policy.
Pennsylvania	N/A
Wisconsin	N/A

8.2 Lease Characteristics

Number of currently active leases:

Arizona	10
Illinois	40
Michigan	383
New York	1,250
Pennsylvania	60
Wisconsin	22
Texas GLO	4,000

Annual growth rate of leasing program:

Arizona	0 to +5%
Illinois	0 to +5%
Michigan	0 to +5%

New York 0 to +5%
 Pennsylvania +5 to +10%
 Wisconsin 0 to +5%

Annual dollar amount generated from airspace leasing program:

Arizona \$19,064 (+\$51,240 pending)
 Illinois \$258,960.00
 Michigan \$13,315.00 (1992)
 New York \$5,900,000.00
 Pennsylvania \$200,000.00
 Wisconsin \$1,800,000.00
 Texas GLO \$2,000,000

Percentage of leases associated with:

Arizona

State roadways 33%
 Federal 66%

Illinois

State roadways 0%
 Federal 100%

Michigan

State roadways 80%
 Federal 20%

New York

State roadways 68%
 Federal 32%

Pennsylvania

State roadways 20%
 Federal 80%

Wisconsin

State roadways	10%	
Federal	90%	(all revenue producers on interstate highways)

Allocation of airspace leases by category:

Arizona

Commercial entities	5	
Private citizens	1	
Local government	2	
Other state agencies	1	

Illinois

Commercial entities	98%	
Private citizens	---	
Local government	2%	
Other state agencies	---	

Michigan

Commercial entities	60%	
Private citizens	30%	
Local government	10%	
Other state agencies	---	

New York

Commercial entities	72%	
Private citizens	10%	
Local government	10%	
Other state agencies	6%	

Pennsylvania

Commercial entities	65%	
Private citizens	10%	
Local government	25%	

Other state agencies ---

Wisconsin

Commercial entities 85%

Private citizens ---

Local government 10%

Other state agencies 5%

Most common use for airspace leases:

Arizona Park; parking; farming

Illinois Parking; storage

Michigan Parking; landscaping

New York Underground pipelines; commercial parking; residential usage; encroaching buildings and signs; beautification, public uses.

Pennsylvania Public parking; recreational purposes; advertising device displays; walkway or roadway access to government facilities; various community uses; scenic area maintenance; school bus shelters.

Wisconsin Parking (most numerous); pedestrian walkways; governmental or utility facilities.

Provision(s) for escalation of lease rates as real estate values change:

Arizona Term in lease allows review of rental rate and adjustment to market rent.

Illinois Leases are given for five years at the fair appraised value.

Michigan Appraisals when leases come due.

New York Rental appraisals are updated every two years.

Pennsylvania A policy of re-appraising biannually based on a formal fair market evaluation of the property.

Wisconsin Competitive bidding; appraisal; changes on CPI (now discarded)

Lease characteristics:

Arizona			
Categories of Lease	Short Term	Mid Term	Long Term
Lease Term	month to month	1 year	5 years
Illinois			
Categories of Lease			
Lease Term	5 years		
Awarding Technique	sealed bid, oral auction		
Michigan			
Categories of Lease	Short Term	Mid Term	Long Term
Lease Term	1 year	5 years	20 years
Awarding Technique	negotiation	negotiation	negotiation
New York			
Categories of Lease	Permits		Leases
Lease Term	month to month		Varied
Awarding Technique	negotiation or sealed bid		oral auction
Pennsylvania			
Categories of Lease	Annual	Intermediate	Nominal Val.
Lease Term	1 year	10 years	99 years
Awarding Technique	negotiation	negotiation	negotiation or sealed bid
Wisconsin			
Categories of Lease	Short Term	Mid Term	Long Term
Lease Term	2 or 5 years	10 years	25 years
Awarding Technique	sealed bid	sealed bid	sealed bid

Basis of minimum bid notice in the case of sealed bids:

Arizona

Minimum bid notice	Yes
Minimum bid basis	Appraiser determines market rent

Illinois

Minimum bid notice	Yes
Minimum bid basis	Appraised value is base.

Michigan

Minimum bid notice	---
Minimum bid basis	---

New York

Minimum bid notice	Yes
Minimum bid basis	Appraised value is basis.

Pennsylvania

Minimum bid notice	Yes
Minimum bid basis	Department policy (\$85.00 mo. min.)

Wisconsin

Minimum bid notice	Yes (when no previous bids have been taken)
Minimum bid basis	Appraised value is base.

Proof of insurance requirement as part of bid process:

Arizona	Required (minimum \$1,000,000)
Illinois	Required
Michigan	Required
New York	Required
Pennsylvania	Not required
Wisconsin	Required

8.3 Marketing

Airspace marketing (active/reactive):

Arizona	Reactive only
Illinois	Reactive only
Michigan	Reactive only

New York	Actively market
Pennsylvania	Reactive only
Wisconsin	Reactive only

Marketing media:

Arizona	Newspaper
Illinois	---
Michigan	---
New York	Newspapers; Signs
Pennsylvania	---
Wisconsin	---

Annual marketing budget:

Arizona	\$750.00 (used once)
Illinois	N/A
Michigan	0
New York	\$5,000-\$10,000
Pennsylvania	---
Wisconsin	0

Use of consultants for marketing effort:

Arizona	No
Illinois	No
Michigan	---
New York	Yes (Consultants used only rarely for complex situations; <i>e.g.</i> , have had consultants perform air rights marketing study for New York City corridors.)
Pennsylvania	---
Wisconsin	No

Provision for brokers as part of sales or marketing efforts:

Arizona No
 Illinois No
 Michigan No
 New York No
 Pennsylvania ---
 Wisconsin No

8.4 Miscellaneous

Table 2. Existence of Lease-Back Policies or Provisions

State	Does sate have lease-back policy, Yes or No?	If yes, what is the grace period allowed before lease-back takes effect?	If no, is previous owner allowed rent-free access or evicted?
Arizona	Yes	1 month	
Illinois	No		eviction
Michigan	No		eviction
New York	Yes	3 months*	
Pennsylvania	No		eviction
Wisconsin	No		

* New York comments: Owners will be allowed to remain beyond three months provided the property is not immediately required for the project and provided they agree to pay rent. Actually, to date rent has been owed to the state from the day of acquisition. However, legislation has just passed both houses of the legislature allowing for a 3-month grace period. The governor is expected to sign it into law.

Nature of potential lease site inventory system:

Arizona Automated system (description: airspace inventory is kept on computer system and updated each Monday with the previous week's activity).
 Illinois Automated System (description: simple PC-based inventory system).
 Michigan No inventory retained.

- New York Automated inventory system (description: each regional office maintains a computerized inventory of properties currently under permit or lease and those available for rent. The inventories include information descriptive of each parcel and gives the current account status.)
- Pennsylvania Automated inventory system (description: Lotus 123 spreadsheet listing potential and existing lease agreements.)
- Wisconsin Inventory retained but not automated.
- Texas GLO The GLO is investing in new software - called *Horizon*, to track, monitor, and manage its leasing function. Billings, payment due dates, insurance requirements/bonds, will all be integrated in a LAN/PC-based system.

Direct involvement of Department in property management activities such as renting, repairing, or contract for these activities with a property management firm:

- Arizona Direct involvement
- Illinois Direct involvement
- Michigan Direct involvement
- New York Direct involvement and contract outside service (except for a handful of commercial properties in New York City, NYSDOT personnel manage the department's properties). Staffing limitations in N.Y. City office do not allow for state management).
- Pennsylvania Direct involvement (use of service purchase contracts for specialized services).
- Wisconsin Contract to outside service (partnership with county departments of public works).

8.5 Unique Aspects

- Arizona Department realized need for an airspace program in 1990. After a year the program was set aside due to funding/staffing problems. Airspace agreements are addressed as they come along.
- Illinois ---

- Michigan A system of reviewing and issuing airspace agreements for discharging effluent into department right-of-way was developed to make it possible for a permit applicant to comply with the Michigan Department of Natural Resources hazardous material cleanups such as contaminated, buried tank cleanups. Michigan also made available longitudinal use of limited access right-of-way using an airspace agreement with a charge per mile to use the right-of-way; policy was implemented in 1992.
- New York By law, NYSDOT is prevented from entering into leases unless properties are offered publicly and competitive bids are obtained. Additional approval from other state agencies are also required. Consequently, only leasing of valuable properties is undertaken, and where department's need for the property is relatively distant. The result is that the 30-day revocable permit policy allows for expeditious renting, but gives the department control of usage and enables it to regain possession quickly.
- Pennsylvania Property management function is governed by state Act 37 and various regulations and rules covering the administration of the act. Also, the leasing procedures must conform to federal regulations when leasing airspace on federally assisted projects.

9.0 CONCLUSIONS AND SUMMARY

9.1 Conclusions

Over the last twenty years, airspace leasing programs in many states have put property back into tax-producing status. The process of leasing excess or temporarily unneeded right-of-way has been shown to attract and encourage new business, reduce the maintenance burden of DOTs, and enhance the appearance of the leased properties. These benefits are in addition to the supplemental revenue generated for state citizens through additions to highway funds and state departments of transportation.

The following conclusions are offered as guidance to TxDOT in the continued development of their airspace leasing program.

Employees

- An analysis of nine state airspace leasing programs suggests that there is a positive relationship between the number of employees and the revenue generated by the program. While it must be asked if the employees *generate* the revenue or if the number of leases *creates* a need for larger staff, the end result seems to be the same--larger staffs and greater revenue.

It also appears from the data that there is a critical mass necessary to efficiently operate a leasing program. The data collected shows that, on average, three employees dedicated to airspace leasing can generate about \$60,000 each, probably just covering costs. Five employees can triple the revenue generated to over \$180,000 each, or more than \$900,000 total. When a program reaches the magnitude of a Florida or Caltrans (10 to 20 dedicated employees), the revenue involved reaches \$275,000 to \$350,000 per employee, respectively.

Organization

- The most predominant organizational arrangement includes the airspace unit as a department within the right-of-way or property management division. The airspace unit most typically operates in a de-centralized fashion, with functions such as negotiating or billing being handled centrally. Day to day administration is performed by trained employees at the District level.
- Several states provided routine training to airspace personnel to enhance the autonomy with which they can operate. The most common training mechanism found is the right-of-way association's training course on real estate and leasing.
- Caltrans has successfully instituted an advisory committee to screen lease arrangements, advise the department on business matters, and relieve the commission proper from burdensome review and decision-making responsibilities. TxDOT should consider a similar mechanism as the leasing activities of the department increase.
- Providing management services for properties acquired by the department has offered a challenge for several DOTs. The consensus obtained through this research is that management activities can be diversionary and counter-productive. It may be a better use of department resources to contract-out management services for a fee and attune to the central mission of the unit.

Marketing

- Proactive leasing through a marketing program requires that potential inventory be identified, classified as to value or the priority with which it will be marketed, and cataloged via computer-inventory system.
- Annual marketing plans can aid airspace marketing activities by adding direction to the program and correcting the projections of preceding periods. Given the state's prohibition on excess land acquisition, attention should be given to those few "prime sites" identified through the inventory process.
- Parking leases are the most often cited airspace lease. They are transportation-related, involve limited risk, are easily (if only temporarily) moved for maintenance, and can return

substantial revenue to the department.

- In vicinities where zoning of airspace lease property may be an issue before or after the lease arrangement, pre-zoning efforts by the department can add value to the lease.

Rent Free Leases

- Rent free leases, which all the states studied have engaged in, should be restricted to indisputable "highway purposes" (high occupancy vehicle parking, landscaping, etc.).
- The department should not bind itself beyond the reasonable life expectancy of the lease improvements (*e.g.*, for parking lots, not more than 20 years; any extensions beyond that time should be subject to renegotiation).
- When an abutter is required by local ordinance to provide land for landscaping and landscapes the right-of-way as a substitute for landscaping his property, such a lease for landscaping should be based on the value of his property. It should not be free.

Leases and Lease Term

- Three standard lease forms should be created to correspond to the three most common types of leases: short-term permits, bid leases, and long-term development leases.
- Appraisal of airspace property should consider the value added to adjoining property if leased by an abutter -- not just the base value established through condemnation.
- Consideration should be given to the risks and benefits of a lease relative to its proposed term and impact on the Department's future use of the right-of-way.
- Lease terms should be as brief as possible and still allow a desired project to be completed. This "term issue" is one of the most fundamentally difficult aspects of airspace leasing: Banks typically require 35, 45, or even 55 year leases to finance major improvements. These terms exceed the design life of most facilities and thus create a basic incompatibility between long term development efforts and highway structures.

Cancellation

- There are limited cases where it might be necessary for the department to give up the right to terminate a lease without cost:
 - Where reconstruction of the highway is unlikely, and
 - Where reserving the right to terminate without cost would significantly lower rents.
- The department should reserve the right to buy out a lease, as part of the business strategy in case unanticipated highway construction is required ahead of schedule.

Tenant Contingency Plan

- When airspace property is crucially linked with the abutter's business, it is advisable to make the applicant aware that the lease may be terminated and that a contingency plan should be put in place.
- An applicant's contingency plan (in the event of termination) should be considered prior to entering into a lease.

Lidding

- Lidding a freeway will impose limitations on a department's ability to widen or increase the vertical limit of a highway corridor for the term of the agreement. Careful consideration of these limits is recommended by those states with lidding experience.
- The lease term for lidding projects, therefore, should not exceed the design life of the highway (corridor redevelopment, etc.).
- The lease agreement should reflect the cost of building a lid and the value of similarly zoned land in the vicinity.
- The cost of lidding could be reduced greatly if it were anticipated at the time of freeway design. A six or eight lane freeway might have two or three lanes, a "median" for support columns, another couple of lanes, etc.

Compatibility and Risk

- Compatibility of airspace projects with highway operation should be considered, *e.g.*, while undertaking bridge repair, parking lot use can be disrupted more easily than an occupied building can be vacated.
- Risk of injury is greater from highway disaster with an occupied building. Risk of injury could be cut by using the site for parking for nearby businesses.

Leasing Decisions

- All lease proposals should be circulated to all areas of highway responsibility, such as design, geometric, maintenance, and planning, and all reviewing parties should be linked in terms of feedback and outputs.
- For longer term leases (over 15-20 years), a synchronized review with the responsible agencies (round table meeting) will provide an opportunity to resolve all of the concerns at the same time.

Lease Rate Adjustments

- The use of an index (property management division, CPI) should be complemented with reappraisal to adjust rents relative to any deviation of an index from local real estate values.
- Lease periods should be no longer than five years before adjustments are allowed, although larger projects should provide for a longer period before the first adjustment is allowed (*e.g.*, 6-8 years).

9.2 Summary

Airspace or right-of-way leasing activity in Texas is providing TxDOT with much needed additional revenue. Under a supportive TxDOT administration, the airspace leasing activity of Texas could increase to levels approaching those of other states. Limitations on property acquisition in Texas coupled with the reduction in new highway facility construction, however, may put a cap on the ultimate size of the Texas program.

In order for the Texas program to grow and pay not only for itself, but for other transportation-related activities, TxDOT needs to attune to several business-related items:

- First, sufficient staffing and a critical employee mass is necessary to move away from the purely responsive mode into a more goal-oriented mode.
- Second, TxDOT needs information and some degree of automation. The real estate suitable for leasing needs to be identified, described, and stored in a system that facilitates planning and marketing.
- Proactive leasing will require marketing selected properties. The urban centers in the state (Houston, Dallas-Ft. Worth, and San Antonio) and especially the CBDs will provide, if not today, then at some point in the not to distant future a ready market for parking, storage, and possibly construction of buildings. Simple signing on the "good" sites may be all that is necessary to generate inquiries.
- TxDOT will need to continue refining the operations of its program. Like any undertaking, airspace leasing requires planning, organization, and proven, logical, expedient policies and procedures. The program at TxDOT is currently making the kinds of changes necessary to expand its activities and increase the revenue generated. Over time, changes and additions such as de-centralizing, standard lease forms, and lease-back policies (all of which are being addressed by the right-of-way leasing group at TxDOT), will increase the unit's scope. This type of change and adjustment will need to be continued as the environment within which airspace leasing operates changes.

10.0 References

1. Daniel, Mann, Johnson, and Mendenhall, "Multiple Use of Highway Corridors - Valuation of Airspace." Selected Studies in Highway Law, Transportation Research Board, 1985.
2. Covington, L. "Caltrans Sells Airspace, Land, for Highway Money." *Roads and Bridges*, September 1989.
3. "A Look at What Some States Are Doing - Unique Use of Airspace," *AASHTO Quarterly*, October 1988.
4. Peters, Robert F., "Rush is on to Put Air Rights to Creative Use," *Puget Sound Business Journal*, May 1986.

Sources

California Department of Transportation - Division of Right of Way", Procedural Handbook," 1986.

California Department of Transportation - Division of Right of Way, "Airspace Business Plan," 1992.

Washington Department of Transportation, "Right of Way Manual," August 1991.

Wisconsin Department of Transportation, "Real Estate Program Manual," December 1991.

Florida Right of Way Office - Property Management Program, "Right of Way Property Leases," Topic Number 575-060-012-c, October 1992.

Florida Right of Way Office - Property Management Program, "Rules of the Department of Transportation Chapter 14-109," Joint Public/Private Development of Right of Way, October 1992.

Florida Right of Way Office - Property Management Program, "Scope of Property Management Program," October 1992.

U. S. Department of Transportation - FHWA, "Management of Highway Airspace," Report OPR-R92-1, October 1992.

State Department of Highways and Public Transportation Right of Way Division, "Memorandum: Leasing of Right of Way", March 1991.

APPENDIX

STANDARD AIRSPACE LEASE AGREEMENT

State of Florida, Department of Transportation

State Project No:
W.P.I. No:
F.A.P. No:
State Road No:
Parcel No:
County:

AIRSPACE AGREEMENT

This agreement made and entered into this _____ day of _____
19____, by and between _____
(hereinafter called Lessee) and the STATE OF FLORIDA, DEPARTMENT OF
TRANSPORTATION, a component agency of the State of Florida (hereinafter called Department
or Lessor).

WITNESSETH

WHEREAS, under Section 337.25(5) of the Florida Statutes Department may convey a
leasehold in the name of the State, to any land, buildings or other property, real or personal; and
WHEREAS, the United States Department of Transportation, Federal Highway Administration
(hereinafter called FHWA) requires any use of airspace above, at or below, the highways established
grade line, lying within the approved right-of-way limits on a Federal Aid System to be pursuant to
an airspace agreement providing for adherence to all policy requirements ion the applicable directive,
(23 CFR 713 Subpart B), where such are appropriate to the intended use;

WHEREAS, the Department has acquired sufficient legal right, title and interest in the right-
of-way _____ which includes a the
property described in Exhibit "A" attached hereto and by reference made a part of hereof, which
right-of-way is part of a highway on a Federal Aid System; and

WHEREAS, the Department desires to lease the airspace above the property described in
Exhibit "A" to Lessee for the following purpose: _____

_____ ; and

WHEREAS, the proposed use will not impair the full use and safety of the highway; or require or permit vehicular access to such space directly from the established grade line of said highway; and will not result in violation of Part 262 of the Regulations of the Administrator, Federal Aviation Agency, as amended;

NOW, THEREFORE, in consideration of the premises, and the covenants, promises, understandings and agreements made by each party to the other as set forth herein, the Department and the Lessee do hereby mutually agree as follows:

1. Premises

The premises hereto are true and correct and form an integral part of this Agreement.

2. Property and Term

The Department does hereby lease unto the Lessee the airspace above the lands described in Exhibit "A", attached hereto and made a part hereof, for a period of _____ beginning with the date of this Agreement. One renewal of this Agreement may be made for _____. However, except for a public purpose conveyance, such renewal may not exceed five years. Nothing herein shall be construed to in any way grant an interest in the land itself lying below said airspace.

3. Rent

a. Lessee shall pay to the Department as rent each year in advance _____ plus applicable sales tax. When this Agreement is terminated, the unearned portion of any rent and sales tax payment shall be refunded to Lessee. However, no such refund shall be made where termination is due to Lessee's violation of a term or condition of this Agreement.

b. The Department reserves the right to review and adjust the rental fee biannually and at renewal to reflect market conditions.

c. All rental payments are to be made by check or money order, payable to the State of Florida Department of Transportation and delivered on or before the due date to:

_____.

d. Lessee shall be responsible for all state, county, city and local taxes that may be assessed, including real property taxes and special assessments. In the event that no rent is specified herein, then it has been determined that either the use by Lessee is a nonproprietary use by a governmental agency or an exception from the current fair market rental value requirement (23 U.S.C. Section 156) has been obtained for social, environmental and economic mitigation (SEE) purposes. In the event that it should be determined at any time that the use is not a nonproprietary use by a governmental agency or that SEE exception does not apply or has been revoked, lessee agrees to pay, at that time, the rent that should have been paid under the fair market rental value requirement as determined by an independent appraiser certified by the Department, and Lessee further agrees to pay such rent, under the terms and conditions of this Paragraph 3, for the remaining term (including renewals) of this Agreement.

e. Any installment of rent not received within ten (10) days after the due date shall bear interest at the highest rate allowed by law from the due date thereof. This provision shall not obligate Lessor to accept late rent payments or provide Lessee a grace period.

4. Use, Occupancy and Maintenance

a. The Lessee shall be responsible for developing and operating the airspace as set forth herein.

b. The Lessee's proposed use of the space is as follows: _____

_____.

c. The general design for the use of the space, including any facilities to be constructed, and the maps, plans, and sketches setting out the pertinent features of the use of the space in relation to the highway facility are set forth in composite Exhibit "B" attached hereto and by this reference made a part hereof. In addition, said composite Exhibit "B" also contains a three-dimensional description of the space to be used, unless the use is of a surface area beneath an elevated highway structure or adjacent to a highway roadway for recreation, public park, beautification, parking of motor vehicles, public mass transit facilities, or other similar uses, in which case, a metes and bounds description of the surface area, together with appropriate plans or cross sections clearly defining the vertical use limits, may be substituted for said three-dimensional description in said composite

Exhibit "B".

d. Any change in the authorized use of the airspace or revision in the design or construction of the facility described in Exhibit "B" shall require prior written approval from the District Secretary of the Department, subject also to concurrence by the FHWA.

e. The Department, through its duly authorized representatives, employees and contractors, and any authorized FHWA representative, may enter the airspace facility at any item for the purpose of inspection, maintenance, or reconstruction of the highway and adjacent facilities, when necessary; or for the purpose of surveying, drilling, monitor well installation, sampling, remediation, and any other action which is reasonable and necessary to conduct an environmental assessment or to abate an environmental hazard.

f. Lessee, at lessee's sole cost and expense, shall maintain the facility to occupy the airspace so as to assure that the structures and the area within the highway right-of-way boundaries will be kept in good condition, both as to safety and appearance. Such maintenance will be accomplished in a manner so as to cause no unreasonable interference with the highway use. In the event that Lessee fails to so maintain the facility, the Department, through its duly authorized representatives, employees and contractors, may be chargeable to the Lessee and shall be immediately due and payable to the Department upon the performance of such work.

g. Portable or temporary advertising signs are prohibited.

h. The occupancy and use of the space shall not be of such as will permit unreasonably objectionable smoke, fumes, vapor or odors to rise above the grade line of the highway.

i. Where, for the proposed use of this space, the highway requires additional highway facilities for the proper operation and maintenance of the highway, such facilities shall be provided by the Lessee without cost to either the Department or the FHWA and subject to both Department and FHWA approval.

j. The proposed use shall not cause or allow any changes in the existing drainage on the land under the airspace.

k. Lessee shall not occupy or use or permit or suffer the demised premises or any part thereof to be occupied or used for any illegal business use or purpose, nor for any business, use or purpose deemed to be hazardous or involving any substance which under State law, Federal law, or

common usage, constitutes a hazardous substance or waste; nor for any purpose or in any way in violation of any present or future laws, orders, directions, ordinances or regulations of the United States of America, the State of Florida, any county or other lawful authority.

1. Existing utilities and all corresponding easements shall remain in place and Lessee shall not disturb the same.

5. Insurance and Indemnification

a. Lessee and its contractors constructing the facility shall at all times during the term of this Agreement (unless a shorter time is specified) maintain such insurance coverage in such amounts as are specified in the Addendum, if any, attached hereto and by this reference made a part hereof. Upon execution of this Agreement by both parties (or upon execution of the construction contract with respect to Lessee's contractors), Lessee shall provide to the Department certificated of insurance showing such coverage to be in effect and showing the Department to be an additional named insured under such policies. Such policies shall provide that the insurance is not cancelable except upon thirty (30) days prior written notice to the Department, and the coverage thereunder shall apply on a primary bases to any other insurance maintained by the Department, and the coverage thereunder shall apply on a primary basis to any other insurance maintained by the Department, its officers, servants, agents and employees. Except with respect to the total limits of liability, the insurance coverage provided shall apply to each insured in the same manner as if separate policies had been issued to each.

b. Lessee shall be solely responsible for the payment of any damages occurring to the highway or any related facilities or structures or to the public for personal injury, loss of life, and property damage which arise out of or relate to the construction, maintenance, or use of the airspace or of the facility existing or to be constructed.

c. The Lessee understands and agrees that the rights and privileges herein set out are granted only to the extent of the state's right, title and interest in the land to be used by the Lessee. The Lessee will at all times assume all risk of and indemnify, defend, and save harmless the State of Florida and the Department from and against all loss, damage, cost or expense, including attorney's fees, arising in any manner on account of the exercise or attempted exercises by said lessee of the aforesaid rights and privileges including, but not limited to, the construction, operation, and

maintenance of the facility or the Lessee's default under this Agreement, regardless of the apportionment of negligence of the parties involved, unless due to the sole negligence of the Department. THE LESSEE, THEREFORE, AGREES TO INDEMNIFY THE DEPARTMENT FOR THE DEPARTMENT'S OWN NEGLIGENCE.

Lessee's obligation to indemnify, defined, and pay for the defense or at the Department's option, to participate and associate with the Department in the defense and trial of any claim and any related settlement negotiations, shall be triggered by the Department's notice of claim for indemnification to Lessee. Lessee's inability to evaluate liability or its evaluation of liability shall not excuse Lessee's duty to defend and indemnify within seven days after such notice by the Department is given by registered mail. Only an adjudication or judgment after the highest appeal is exhausted specifically finding the Department solely negligent shall excuse performance of this provision by contractor. Lessee shall pay all costs and fees related to this obligation and its enforcement by the Department. Department's failure to notify Lessee of a claim shall not release Lessee of the above duty to defend.

6. Termination and Revocation

a. This Agreement may be terminated by the Lessor upon thirty (30) days notice to the Lessee.

b. It is understood and agreed to by the Lessee that the Department reserves the right to revoke this lease without liability, in the event the Lessee violates any of the conditions of this Agreement and such violation is not corrected within a reasonable time after written notice of noncompliance has been given. In the event the Agreement is revoked and the Department deems it necessary to request the removal of the facilities occupying the space, the removal shall be accomplished by the Lessee in a manner prescribed by the Department at no cost to the Department or the FHWA.

c. The Lessee must notify the Department of its intention to renegotiate the lease not later than (30) days prior to the expiration of the original lease term, but no earlier than one hundred eighty (180) days prior to the expiration of the original lease term. Lessee's failure to comply with the foregoing notice provision may result in the Department's refusal to renegotiate the lease.

d. Upon expiration of this Agreement, Lessee shall peaceably surrender and deliver the

premises to Lessor, or its agents, in the condition existing at the commencement of this Agreement, (except for the removal of the facility if removal is not requested), normal wear and tear excepted.

e. If removal of the facility is requested, any such structures or improvements shall be removed by the Lessee at the Lessee's expense by midnight of the day of termination of this Agreement and the land restored as nearly as practicable.

f. This Agreement is revocable by the Department in the event that the airspace facility ceases to be used or is abandoned.

g. Lessee acknowledges and agrees that its relationship with Lessor under this Lease is one of Landlord and Tenant and no other relationship either expressed or implied shall be deemed to apply to the parties under this lease. Termination of this Lease for any cause shall not be deemed a taking under any eminent domain or other law so as to entitle Lessee to compensation for any interest including but not limited to (i) any residual interest in the Lease, or (ii) any other facts or circumstances arising out of or in connection with this Lease.

h. Lessee hereby waives and relinquishes any legal rights and monetary claims which it might have for full compensation, or damages of any sort, including but not limited to special damages, severance damages, removal costs or loss of business profits resulting from its loss of occupancy of the leased property specified in this Agreement, or adjacent properties owned or leased by it, when any or all such properties are taken by eminent domain proceedings or sold under the threat thereof. This waiver and relinquishment applies whether (i) this Lease is still in existence on the date of taking or sale; or (ii) has been terminated prior thereto.

7. Miscellaneous

a. The airspace and Lessee's rights under this Agreement shall not be transferred, assigned or conveyed to another party without the prior written consent of the Department, subject to concurrence by the FHWA.

b. In conformance with the Civil Rights Act of 1964 (Title VI, Appendix "C") and Title 49 Code of Federal Regulations Part 21, the Lessee agrees as follows:

1. That as a part of the consideration hereof, Lessee does hereby covenant and agree as a covenant running with the land that (1) no person, on the ground of race, color, sex or national origin shall be excluded from participation in, be denied the benefits of, or be otherwise

subjected to discrimination in the use of said facilities; (2) that in connection with the construction of any improvements on said lands and the furnishing of services thereon, no discrimination shall be practiced in the selection of employees and contractors, by contractors, and (3) that the Lessee shall use the premises in compliance with all other requirements imposed pursuant to Title 15 Code of Federal Regulations, Commerce and Foreign Trade, Subtitle A, Office of the Secretary of Commerce, Part 8 (15 C.F.R. Part 3), and as said Regulation may be amended.

2. That in the event of breach of any of the above discrimination covenants, the Department shall have the right to terminate the lease and to re-enter and repossess said land and the facilities thereon, and hold the same as if said lease had never been made or issued.

c. During the term of Agreement Lessee shall, at Lessee's own cost and expense, promptly observe and comply with all present or future laws, requirements, orders, directions, ordinances and regulations of the United States of America, the State of Florida, county or city governments or lawful authority whatsoever, affecting the demised premises or appearances or any part thereof, and of all insurance companies writing policies covering the demised premises, or any part thereof.

d. In addition to the terms and conditions contained herein, the provisions of any Addendum of even date herewith which is identified to be a part hereof is hereby incorporated herein and made a part hereof by this reference. In the event of any conflict between the terms and conditions hereof and the provisions of the Addendum(s), the provisions of the Addendum(s) shall control, unless the provisions thereof are prohibited by law.

e. This Agreement constitutes the complete and final expression of the parties with respect to the subject matter hereof and supersedes all prior agreements, understandings, or negotiations with respect thereto. Any provisions hereof found to be unlawful or unenforceable shall be severable and shall not affect the validity of the remaining portions hereof.

f. This Agreement shall not be recorded in the public records of any city, county, or other governmental entity.

g. In the case of litigation arising out of the enforcement of any terms, covenants or provisions of this Lease, the prevailing party shall be entitled to recover its reasonable attorney's fees from the non-prevailing party.

h. Lessee acknowledges that it has reviewed this Lease, is familiar with its terms and has had adequate opportunity to review this Lease with legal counsel of Lessee's choosing. Lessee has entered into this lease freely and voluntarily. This lease contains the complete understanding of the parties with respect to the subject matter hereof. All prior understandings and agreements, oral or written, heretofore made between the parties and/or between Lessee and the previous owner of the leased property and landlord of Lessee are merged in this Lease, which alone, fully and completely express the agreement between Lessee and Lessor with respect to the subject matter hereof. No modification, waiver or amendment of this Lease or any of its conditions or provisions shall be binding upon Lessor or Lessee unless in writing and signed by both such parties.

i. Lessee shall be solely responsible for all bills for electricity, lighting, power, gas, water, telephone and telegraph services, or any other utility or service used on the land.

j. This Agreement shall be governed by the laws of the State of Florida, and any applicable laws of the United States of America.

k. All notices to Lessor shall be sent to the address for rent payments and all notices to Lessee shall be sent to the property address.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed, the day and year first above written.

WITNESSES:

STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION

BY: _____
District Secretary

District

As to Lessor

LESSOR

ATTEST:

Executive Secretary

APPROVED AS TO FORM
AND LEGALITY

District Counsel

WITNESSES:

BY: _____

As to Lessee

TITLE: _____

ATTEST: _____

TITLE: _____

LESSEE

ADDENDUM

This is an Addendum to that certain Airspace Agreement between _____
and The State of Florida Department of Transportation dated the _____ day of _____, 199____. In addition to the provisions contained in said Agreement, the following terms and conditions shall be deemed to be a part thereof pursuant to Paragraph 7 (d) of said Agreement:

Dated: _____

STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION

By: _____
District Secretary

District _____
LESSOR

By: _____
LESSEE

TITLE: _____

