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CONDOMINIUMS IN DOWNTOWN PUBLIC PARKING LOT AIR RIGHTS: A CREATIVE CITY PLANNING TOOL

I. INTRODUCTION

The City of Palo Alto, located on the San Francisco Peninsula, recently adopted an air rights policy which recognizes the potential value of air space development in city planning. The first project given formal consideration involves residential condominiums built in air rights over a downtown public parking lot: a creative idea that raises many legal, planning, and real estate development issues. This comment examines the feasibility of California cities leasing public downtown parking lot air rights for residential condominium use from the legal, planning, and real estate development viewpoints. This investigation demonstrates the need for specific California air rights legislation that encourages widespread utilization of air rights as a real property form.

The concept of owning the space above land as well as the land surface itself has been an apparently unstated assumption in property law for centuries. How else could buildings be placed upon land unless the landowner held title to more than the actual land surface? Yet, traditionally landowners were...

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1. Policy guidelines direct that air rights be conveyed by long term lease where possible, that development primarily be for housing and that projects be evaluated on the basis of public benefits provided. Palo Alto, Cal., Guidelines for Air Rights Development Over Assessment District Parking Lots (Jan. 7, 1980).

2. The proposal, initially submitted in 1979 by a local developer, evolved over a two-year period into an air rights sale project over a public parking lot adjacent to property owned by the developer. The condominium would have been constructed partly on private property and partly within public air rights. In March 1981 the Palo Alto City Council awarded the developer a two-year option to purchase rights to develop the property. In October 1981 the Council decided not to proceed in further processing the project for a nine-month period due to the staff's conclusion that the project was not currently economically feasible. STAFF OF PALO ALTO, CAL., REPORT TO CITY COUNCIL CMR:184:1 (March 12, 1981) and PALO ALTO, CAL., MINUTES OF CITY COUNCIL MEETING (October 13, 1981).

3. Air rights can be sold or leased. Leasing is the most commonly employed conveyance method because it allows a city to maintain control over the air rights. Conveyance by lease will be the focus of this comment for simplicity. See Morris, Air Rights are Fertile Soil, 1 URB. LAW. 247 (1969).
not thought of as "airowners." Air rights statutes were enacted in the United States as early as 1927 and development projects were constructed in large, old cities where the buildable lot shortage came earliest and most acutely. These projects commonly employed commercial buildings in railroad right-of-way airspace. Unfortunately, airspace as a real property concept remains largely unknown to, or at best underutilized by, small urban California cities. It is, however, equally applicable and of potentially great value to them.

II. THE LEGAL FRAMEWORK

In 1872, section 659 of the California Civil Code (hereinafter referred to as the Civil Code), defined "land" as "the solid material of the earth, ... whether soil, rock or other substance." An amendment in 1963 deleted the word "solid" and added: "and includes free or occupied space for an indefinite distance upwards as well as downwards ...." This deceptively insignificant addition signaled California's recognition of a new property form: airspace or air rights. Perhaps it took exploration of outer space and the concurrent birth of space law addressing issues of ownership of extra-terrestrial space to trigger California's consideration of the Earth's superjacent airspace. Or perhaps it is mere coincidence that the Civil Code recognition of airspace ownership was enacted during the apex of the National Aeronautics Space Administration space program. In any event, California now distinguishes airspace as alienable real property.

Constructing condominiums in leased air space over city owned parking lots (hereinafter referred to as "the Project")

4. For the history of air rights law in general, see Morris, supra note 3.
5. New York City's Park Avenue was constructed over New York Central Railroad's tracks nearly sixty years ago. The Chicago Loop business district is another famous large-scale air rights project built over a railroad right-of-way. New York City's United Nations Plaza Building represents one of the most complicated air rights developments employing a garage, office building, and two separate residential cooperative towers, all of which were built on the condominium concept before enactment of a condominium statute. In 1960, the State of New York sold airspace over a two-block section of Interstate 95 on the George Washington Bridge Approach for construction of four 32-story apartment buildings. Restaurants built in highway air space, particularly in Eastern and Midwestern states, comprise another popular form of air rights use. Id. at 248.
6. CAL. CIV. CODE § 659 (Deering 1971).
7. For a discussion of the historical development of U.S. air rights law in general see Morris, supra note 3.
involves integration of four concepts: airspace ownership, power to lease public air rights, the public trust doctrine, and the leasehold condominium.

A. **Air Rights Ownership**

The Project raises the initial question of whether a city holds title to the air rights above its parking lots. Civil Code sections 658 and 659 and Public Utilities Code section 21402, read in progression, define real property as including airspace, and place ownership in the surface landowner. Civil Code section 658 defines "real property" as consisting of "land." Civil Code section 659 defines "land" as:

the material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance, and includes free or occupied air space for an indefinite distance upwards as well as downwards, subject to limitations upon the use of airspace imposed, and rights in the use of airspace granted, by law.\(^8\)

Public Utilities Code section 21402 concerns ownership of airspace: "The ownership of the space above the land and waters of this State is vested in the several owners of the surface beneath, subject to the right of flight . . . ."\(^9\) Judicial interpretation of the airspace portions of these statutes is virtually non-existent.\(^10\) The statutes, simple and straightforward on their face provide, however, a firm foundation upon which to conclude that California landowners are also "airowners."\(^11\)

B. **Cities' Power to Lease Public Air Rights**

If a city owns the air rights superjacent to its parking lots, the next question is: does the city have power to lease the air rights to private interests? The government and civil codes grant municipalities authority to lease city-owned property

\(^8\) CAL. CIV. CODE § 658 (Deering 1971).
\(^9\) CAL. CIV. CODE § 659 (Deering 1971) (emphasis added).
\(^10\) CAL. PUB. UTIL. CODE § 21402 (Deering 1970).
\(^11\) See CAL. CIV. CODE § 659 Notes of Decisions (Deering Supp. 1971) and CAL. PUB. UTIL. CODE § 21402 Notes of Decisions (Deering 1970). See also CAL. JUR. 2D *General Index* at 185 (1960) and CAL. JUR. 3D *Interim General Index* at 21 (1979) (indicative of how recently the term "airspace" has come to mean a form of real property since indices cross-reference to "aviation").
\(^12\) See *supra* notes 8-10 and accompanying text.
generally. Since air rights are part of the real property owned by the cities, these statutes, by inference, also authorize leasing air rights over public parking lots.

Government Code section 50490 states:

[T]he legislative body of a local agency may lease real property owned by it if . . . it appears to the legislative body that it is advantageous to the owner of property in the local agency or assessment district to use the property for purposes other than the original purpose.

The city council, in other words, must determine that private non-public parking use of the Project air rights will benefit city landowners who paid taxes used to acquire the property for its original purpose. This requirement represents statutory incorporation of the common law public trust doctrine, the primary issue of judicial review discussed later in this comment.

Civil Code section 718 sets the allowable lease term of city-owned property at fifty-five years. This relatively short lease term limitation potentially determines Project success or failure in terms of locating financing. Institutional lenders tend to balk at lending on less than ninety-nine year ground leases. An unconventional and novel air rights lease development project would presumably cause greater lender resistance.

13. See infra notes 14-17 and accompanying text.
14. See supra notes 8-10 and accompanying text.
15. CAL. Gov't Code § 50490 (Deering 1974).
16. See infra notes 21-64 and accompanying text.
17. CAL. CIV. CODE § 718 (Deering 1971).
18. Air rights leases are analogous to ground leases in certain respects. In a ground lease the landowner retains fee title to the underlying real property which is generally leased for exclusive use by the lessee who typically constructs commercial improvements on it. An air rights lease, in contrast, can be designed to permit continued surface, or below surface, use by the lessor who retains fee title to both the underlying land surface and the superjacent airspace. For information on California ground leases see generally G. GNERT, GROUND LEASE PRACTICE (1971).
19. The Palo Alto air rights project developer surveyed a number of Bay Area institutional lenders in 1980, to ascertain the likelihood of obtaining a mortgage using an air rights lease as security. The lenders responded that "[t]he fact that the City of Palo Alto is required by law to limit leasing of public lands to a maximum of 50 years, with no option extension is considered quite unfavorable. A ninety-nine year lease would be more acceptable . . . but a 50-year lease term would definitely be detrimental to securing financing." Letter from C. Kinney to J. Diaz, Real Estate Administrator, City of Palo Alto, (May 1, 1980), reprinted in STAFF OF PALO ALTO, CAL., REPORT TO CITY COUNCIL CMR:184:1 app. (March 19, 1981).
Streets and Highways Code section 104.12 contains California's only statute specifically authorizing a government agency to lease public air rights. It authorizes the State Department of Transportation to lease areas above or below state highways to public agencies or private entities for up to ninety-nine years. The statute contains only two broad restrictions: prior to the lease the department must determine that the use is not in conflict with local zoning regulations; and private leases require a competitive bidding procedure unless the highway commission finds that bidding is not in the State's best interest. In one particular instance, then, state-owned air rights may be leased for ninety-nine years whereas cities are limited to a fifty-five year lease term. This is an interesting contrast and one wonders why state highway air rights should be singled out for special long-term treatment.

C. The Public Trust Doctrine

Even with statutory authority to convey publicly-owned air rights, a city as landowner is bound by the common law public trust doctrine. A city holds public property in trust for public use and benefit. When property is purchased, condemned, or otherwise acquired for parking lot use, the expenditure of public funds is justified by the public purpose furthered—to provide public parking. The city council, when considering leasing parking lot air rights must ensure that funds expended for parking lot acquisition will not inequitably enrich private interests. Justification for private use of public property generally fits into three judicially-recognized categories: surplus property, integration of public and private uses, and economic necessity.

An often cited 1929 California case, Gridley Camp No. 104 v. Board of Supervisors, established the surplus prop-

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21. See supra notes 6-10, 15, 17 and accompanying text for enabling statutes.
23. See Hodgman, supra note 22, at 628-30, 632-34.
erty doctrine which sanctions private use of public property if it is not needed for present public use. In Gridley, a municipality erected a building for the purpose of renting it as a veterans’ meeting hall, considered a public use. The municipality later allowed non-veterans groups to use the hall. The court permitted continued use where it did not interfere with veteran organization use, i.e., during periods when the hall would have been empty. This doctrine often relies upon the temporary nature of the private use and/or a finding that no public use is needed.

Integration of both public and private uses in a project may justify conveyance of public property. In City and County of San Francisco v. Ross the court used this doctrine to support the concept of leasing a public parking garage occupying subsurface public air rights. The private profit-making garage “concession” would have been allowed to operate on public property because it would have provided a much-needed public service. The federal government's wide employment of this concession concept is exemplified by national park hotel and restaurant concessions, private profit-making operations which provide public services.

Economics may dictate the necessity of a public agency permitting private use of public land. In Bush Terminal Co. v. New York, a leading economic necessity case, the New York Port Authority erected a building, principally for Authority use, and leased portions of it to private businesses. The Authority successfully demonstrated that without the rental income to offset construction costs the building would not have been constructed. The court upheld this private use of public land, reasoning that the construction cost offset constituted sufficient public benefit.

In public-private project associations, courts usually require public benefit to be “predominant” and private benefit

25. Id.
27. 44 Cal. 2d 52, 279 P.2d 529 (1955).
28. Id. at 56-59, 279 P.2d at 531-33. This particular project was, however, declared invalid by the court because it lacked sufficient rate controls and other parking regulations.
30. Id. at 315, 26 N.E.2d at 273.
31. Id. at 314, 26 N.E.2d at 272.
to be "incidental." If the need for government action is clear, the public purpose behind it is real, and the action taken is appropriate to fulfill that need, then the private benefit, no matter how great, will often be termed "incidental."

The facts and circumstances surrounding a public property conveyance determine the extent of judicial inquiry into a municipality's compliance with the public trust doctrine. Factors determining the extent and outcome of judicial review of projects include: the method of project site acquisition; the relationship between public and private aspects of the project; the extent to which the agreement incorporates public controls ensuring continued and adequate public benefit; the sufficiency of public debate on the proposal; and the existence of statutory authorization.

If the city condemned the property, then the justification for permitting private use must be very strong. Section 1240.010 of the California Code of Civil Procedure states that "the power of eminent domain may be exercised to acquire property only for a public use." Further, the power of eminent domain may be exercised to acquire property for a proposed city project only if "[t]he public interest and necessity require the project" and "[t]he property sought to be acquired is necessary for the project." A city's purpose would be highly suspect, therefore, if property had been condemned for public parking garage construction and was later conveyed for condominium development. The time lapse between condemnation and the private proposal may weigh in favor of a permissible conveyance. If the project proposal came after the condemned land served the intended public parking use for a significant time, and the air rights were not needed for facility expansion, the surplus property doctrine may be sufficient justification for air rights conveyance.

Site acquisition by purchase or gift represents the smallest obstacle to public property conveyance. If the property

33. Lawrence, supra note 22, at 668.
34. Hodgman, supra note 22, at 642-49.
35. Id.
38. Hodgman, supra note 22, at 644.
39. Id. at 649-57.
has been dedicated to public use, however, the deed terms and
the city's incorporation law may control. City and County of
San Francisco v. Linares has involved a fifty-year public park-
ing garage lease of subsurface space below Union Square. The
Town of San Francisco (predecessor of the City and County of
San Francisco) acquired title to the property from the pueblo
of San Francisco by deed granting the property as a public
reserve. After examining the deed and pertinent provisions in
the city charter regarding dedication of park land, the court
concluded that there was nothing in the terms of the original
grant which deprived the city and county of the right to
change the use of the land so long as the contemplated use
was not inconsistent with the public's enjoyment of the land
as a park. Linares, decided forty years ago, comes closest to
directly addressing a public air rights lease in California. There
is no reason to believe that the Linares principles
would not apply to an above surface air rights project. A pro-
possed parking lot air rights project also would presumably
generate less public controversy than park land development.
Parties to a public air rights proposal should find encourage-
ment in this case, keeping in mind potential changes in judi-
cial climate and the public's legal and political sophistication.

Judicial review of public trust doctrine compliance fo-
cuses on the relationship between the public and private por-
tions of a project. The degree that the scales tip in favor of a
private benefit at the public's expense determines whether a
project exceeds a city's power. A 1966 Pennsylvania Supreme
Court case, Price v. Philadelphia Parking Authority, set
down the only existing guidelines for weighing the balance be-
tween public and private benefit in an above surface air rights
lease.

Price concerned two proposed air rights agreements be-
tween the Philadelphia Parking Authority and private par-
ties for construction of an office building (Rittenhouse
Square), and an apartment complex containing public parking

40. 16 Cal. 2d 441, 106 P.2d at 369 (1940).
41. Id. at 446, 106 P.2d at 371.
42. CAL. CIV. CODE § 659 (Deering 1971) classifies both above and below surface
property rights as "airspace."
44. The Parking Authority is a public corporate agency exercising public powers
as created by the City of Philadelphia. Id. at 319, 221 A.2d at 140.
facilities (Academy House). The dispositive issue concerned a procedural error by the Authority in failing to solicit statutorily mandated competitive bids. The plaintiff raised a second issue, that the leases exceeded the Authority’s power because the projects were “predominantly private in nature.” After deciding the case on the bidding question, the court discussed the latter issue, stating that “in the light of the importance of the public issues raised by the challenged transaction, we find it appropriate to discuss [this] aspect of the litigation.”

The planned apartment complex, called the Academy House Project, proposed a complex sale-leaseback arrangement. The Authority operated an open-air 100-car parking area, owned by the City of Philadelphia. This property adjoined National Land and Investment Company’s (the proposed developer) property which contained a vacant hotel. The negotiated agreement required the Authority to purchase National’s property and to acquire the city’s parking area. The Authority was to demolish the hotel, finance and construct an eight-story public parking garage on the site, and lease it to National. In addition, National was to lease air space over the garage for construction of a high-rise 1000 unit apartment complex. The Authority would have retained title to the entire project and National would have held an exclusive option to acquire the land, garage and apartment building at the end of the lease. The purchase price, based on the appraised value of the garage or its original cost, did not require National to pay for acquisition of title to the apartment structure.

The court scrutinized the proposal and found fault par-
particularly with the purported public benefit of increased parking; a criticism directly related to the type of project which provides the focus of this comment. The public parking garage was to have an 862-car capacity. The building code required that the apartment complex provide 500 spaces for residential tenants. Commercial tenants\(^5\) required another eighty spaces. Since the pre-project parking area furnished 100 spaces, the project would have supplied only 180 additional public parking spaces.\(^5\) The court concluded that the additional public parking spaces did not constitute sufficient public benefit to justify the substantial public involvement. The project, in the court's view, would have subordinated the public's interest to that of a private developer.\(^4\) In other words, even if proper bidding procedures had been followed, the project would have failed to pass the balancing test since private benefit was predominant and public benefit incidental.

The Rittenhouse Square project, the proposed office building, received less detailed treatment by the court. In contrast to Academy House, this structure would have been built in leased air rights over an existing Authority-owned parking garage. The same type of leaseback arrangement would have been followed with the office building constructed by the developers; the Authority would have held title, and the developer would have had an exclusive right to purchase on termination of the lease.\(^5\) The court enjoined the project because of the Parking Authority's failure to comply with the competitive bidding requirement\(^6\) and declined to reveal its view of the project's merits or the proposed agreement's validity.

The Price court correctly recognized the air rights sale-leaseback arrangements as hidden public financing of a private development. Sale-leasebacks involving ground leases have long been used as real estate financing mechanisms.\(^5\) The same principle logically applies to air leases.\(^5\) As development projects and real estate financing devices become in-

52. By the agreement, National was permitted to sublet portions of the garage to private commercial enterprises. Id. at 327, 221 A.2d at 148.
53. Id. at 328, 221 A.2d at 149.
54. Id. at 329, 221 A.2d at 150.
55. Id. at 322, 221 A.2d at 142.
56. Id. at 330, 221 A.2d at 151.
57. See G. Grenert, supra note 18, § 1.72.
58. See supra note 51 and accompanying text.
creasingly more complex, the public and judiciary will look more carefully for public and private interest conflicts in projects of this sort. (It is only human nature to be suspect of intricate "deals." ) The Price court, sufficiently skeptical of the two complicated plans, feared giving a developer the windfall of an unfair competitive advantage. Wary of establishing precedent condoning significant public financing of private development, the court stated: "To permit the instant project to proceed would establish an unwise and dangerous precedent under which all future development would require and seek similar Parking Authority assistance in order to equalize the advantages accorded National." 59

Even with the proper balance of substantial public benefit and incidental private benefit, courts require public property lease agreements to incorporate considerable public interest safeguards. For example, City and County of San Francisco v. Ross 60 involved a proposed condemnation of land for the purpose of building a privately-leased public parking garage. The California Supreme Court found that a project of this type could have been permissible, but the subject lease agreement lacked public controls to ensure adequate public service and, therefore, declared it an invalid public property conveyance. 61 The City and County failed to incorporate parking fee rate controls which left the lessee free to set fees at its own discretion. As a result the court viewed the agreement as primarily benefitting private business.

Price v. Philadelphia Parking Authority embodies the most extensive analysis of cities leasing public air rights for private development. 62 The California view, gleaned from the several older cases herein cited, 63 incorporates the balancing test carefully articulated in Price. California courts have generally tended to permit leasing city-owned property if: the ar-

59. 422 Pa. at 329, 221 A.2d at 150. The court further reasoned that such precedent could be used to rationalize the use of the Authority's power of eminent domain "for the primary benefit of individual private developers." Id.
60. 44 Cal. 2d 52, 279 P.2d 529 (1955).
61. Id. at 59-60, 279 P.2d at 533.
62. See supra notes 43-59 and accompanying text.
63. City and County of San Francisco v. Ross, 44 Cal. 2d 52, 279 P.2d 529 (1955); City and County of San Francisco v. Linares, 16 Cal. 2d 441, 106 P.2d 369 (1940); Larsen v. City and County of San Francisco, 152 Cal. App. 2d 886, 313 P.2d 959 (1957); Gridley Camp No. 104 v. Bd. of Supervisors, 98 Cal. App. 585, 277 P. 500 (1929).
arrangement does not constitute a windfall for a private developer; the lease agreement incorporates substantial safeguards for the public interest; and there is careful legislative determination that public use will not be subordinated to private profit, and that public and private use of publicly-owned property are balanced. 64

D. The Leasehold Condominium

The last legal question presented by the Project concerns the development form of the leasehold condominium. Is there statutory authorization for leasehold condominiums in California and, if so, how would a condominium air rights lease transaction be structured?

A condominium consists, by statute, of “an undivided interest in common in a portion of a parcel of real property together with a separate interest in space in a residential . . . building on such real property.” 65 Since a condominium owner owns a unit of airspace, condominiums are an ideal air rights project. A generally ignored provision of the condominium statute states that “such an estate may, with respect to the duration of its enjoyment, be . . . an estate for years, such as a leasehold or a subleasehold.” 66 This means that the airspace which each condominium unit occupies may be leased as may the airspace occupied by the structure’s common area (walls, corridors, etc.). 67 The undivided interest in common in a portion of a parcel of real property has traditionally consisted of underlying “ground space.” 68 However, since the statutory definition of real property now includes airspace, 69 the airspace occupied by the condominiums can also be leased. 70

In this type of leasehold arrangement each condominium

64. Hodgman, supra note 22, at 645-48.
65. CAL. CIV. CODE § 783 (Deering 1971) (emphasis added).
66. Id.
68. See generally Conveyance and Taxation of Air Rights, 64 COLUM. L. REV. 338 (1964); Sakai and Reskin, Leasehold Condominiums, 2 CONN. L. REV. 37 (1969-70) (hereinafter cited as Sakai); Historical Districts, Short Form Mortgage, Leasehold Condominiums, Combined School Structures, Scenic Easements, 2 REAL PROP. PROB., & TR. J. 347 (1967).
owner holds fee title to the airspace of his unit and a leasehold interest in the common airspace. The lease may be structured in either of two ways: The condominium association may hold a master airspace lease with the underlying property owner; or each unit owner may enter into a separate lease with the property owner, which covers her unit’s airspace and an undivided interest in the common airspace.\footnote{71. J. Hanna, \emph{supra} note 67, § 10.}

In summary, the legal framework for developing condominiums in leased air rights over city-owned parking lots consists primarily of statutes enabling cities to lease public real property, and public trust doctrine case law assessing projects’ public versus private benefits. An air rights project can be legally feasible if designed within public trust doctrine constraints. The following section highlights the practical air rights project procedure, from the initial proposal stage to the long term lease between the city and condominium owners.

E. \textit{Lease Procedure}

The structure of a city air rights project ultimately determines whether the endeavor will pass public and judicial scrutiny. The challenge is to protect the public’s interest while designing an economically feasible project attractive to developers, lenders, and condominium purchasers. The \textit{Price} decision, ground lease practice, condominium leasehold practice and the public trust doctrine provide guidelines for an appropriate approach.

A city air rights project is likely to create controversy as an innovative idea. Public concern generated by the Palo Alto proposal centered around developer profit, lease value, potential traffic increase, amount of public parking to be provided, as well as general anti-development sentiment.\footnote{72. \textit{Staff of Palo Alto, Cal., Report to City Council} CMR:184:1 Attachment F (March 12, 1981).} Early public participation in formulating an air rights policy diminishes suspicion of improper “deal-making” and haphazard after-the-fact policy-making tailored to fit the current project proposal.

Identifying an appropriate site for the first project may in itself decide the success or failure of a city’s air rights program. The “test project” should ideally be located on existing
parking lot property acquired other than by eminent domain.\textsuperscript{73}

\textit{Price} teaches the importance of strict adherence to the enabling legislation applicable to the leasing agency; proposal solicitation and acceptance procedure may require competitive bidding.\textsuperscript{74} The public trust doctrine requires adequate debate on the potentially conflicting proposed public and private uses.

An overriding financing consideration from the city's viewpoint should be non-subordination of the city's fee interest in the underlying land surface and air rights. As in ground lease practice, it is in the lessor's (or the city's) interest to retain first priority akin to a first trust deed holder.\textsuperscript{75} This guarantees that only the air rights leasehold and not the underlying public surface fee will be encumbered by the construction and/or permanent loans. If the borrower defaults on the loans, the city would not be under an obligation to pay off the loans in order to retain fee title to the underlying real property.

Another real estate financing principle which should be kept in mind, especially with an uncommon and untested air rights project, is to not allow the developer to "mortgage-out." This can be done by requiring significant investment of the developer's own capital, thereby helping to ensure overall success of the project by giving the developer an incentive to realistically design and vigorously implement the project. The lender would likely protect its interest in this way, and so should the city.

After agreement acceptance by the city council, the city issues a long term (statutory fifty-five year maximum\textsuperscript{76}) air rights lease to the developer who uses it as security for a construction loan.\textsuperscript{77} To secure financing for an innovative project, the developer may need to convince the lender of the condominium's marketability by either securing a few unit purchase

\textsuperscript{73} See \textit{Price v. Philadelphia Parking Authority}, 422 Pa. 317, 221 A.2d 138 (1966); see also \textit{supra} notes 34-38 and accompanying text.

\textsuperscript{74} See \textit{supra} notes 43-59 and accompanying text.

\textsuperscript{75} G. Grenert, \textit{supra} note 18, at § 172.

\textsuperscript{76} \textit{Cal. Civ. Code} § 718 (Deering 1971).

\textsuperscript{77} In addition to the lease, an air rights project requires the granting of an easement from the lessor for placement of structure supports, and for ingress and egress and utilities.
agreements, or by securing purchasers who actually enter into permanent mortgages with the lender before construction.\textsuperscript{78}

Upon completion of the development, the construction loan is replaced by the permanent mortgage and the lease between developer and city is supplanted in one of two ways. The condominium owners' association can enter into a master lease with the city, in which case each unit owner's association fees include rent for the air rights occupied by his unit and his interest in the common areas. The city deals with only one party or entity, the Association. In the other method, each individual owner can enter into a lease with the city which involves her unit's occupation of the airspace and an undivided interest in the airspace common area.\textsuperscript{79}

The long term lease, whether between city and homeowners' association or city and individual unit owners, will govern a long term relationship and may include provisions to clearly establish the relationship between the parties as that of landlord and tenant. With this arrangement, the remedy for breach of the covenant to pay rent is re-entry rather than foreclosure.\textsuperscript{80} Rent increases may be fixed at the time the lease is entered into by essentially guessing at the future inflation rate. Another possibility is to establish periodic increases based on the percentage market value fluctuation of the underlying land.\textsuperscript{81} The lease should provide that the city will take title to the project structure(s) at the end of the lease term. An option to renew the lease would presumably violate the statutory fifty-five year lease term restriction. (The Price court cited the developer's exclusive option to purchase as one of the more objectionable provisions of the Philadelphia lease agreement which resulted in its being declared a public financing method).\textsuperscript{82}

To avoid a purchaser windfall from the underlying property tax-exempt status, a provision should be made for assessing a tax-equivalent against the air rights lease. The tax equivalent could be included in the yearly lease fee or sepa-

\textsuperscript{78} Sakai, supra note 68, at 42-45 (based on leasehold condominium experience in Hawaii).
\textsuperscript{79} Id. at 40-42.
\textsuperscript{80} CAL. CIV. CODE § 791 (Deering 1971).
\textsuperscript{81} Sakai, supra note 68, at 45-47.
\textsuperscript{82} See supra note 51.
rately assessed depending on local tax assessment practices. It can be anticipated that problems will arise out of the close physical proximity of public parking use and private residential condominiums. The city might, therefore, want to consider inserting a lease clause wherein the condominium purchasers release the city from liability for nuisance damages caused by parking use. Such a provision serves as a lessee acknowledgement that problems such as noise, exhaust fumes, and security are an accepted risk of living over a public parking area. In addition, a mechanism for guaranteeing adequate city control over potential private conflicts with public parking use should be included. For example, if the agreement allows condominium residents night use of designated public parking space (during hours of low public demand) in exchange for public daytime use of private spaces (during low private demand hours), changes in use patterns may necessitate reevaluation of this portion of the agreement.

The preceding discussion of possible lease provisions obviously does not cover all aspects of the myriad of potential projects. Every public-private air rights development will have its own complexities. The above provisions merely touch on the kinds of public controls that can ensure city adherence with the public trust doctrine when leasing public air rights. The next Project analysis step is to place the legally feasible concept within a city planning context in order to briefly consider the urban design implications. In other words, it may be possible to build residential condominiums over downtown parking lots, but is it something that cities should be aggressively pursuing?

III. THE CITY PLANNING PERSPECTIVE

A city's decision to lease downtown parking lot air rights for residential condominium development involves consideration of the project's compatibility with the city's design poli-

84. Conveyance and Taxation of Air Rights, supra note 68, at 350.
85. See City and County of San Francisco v. Ross, 44 Cal. 2d 52, 279 P.2d 529 (1955) (establishing the importance of public controls guaranteeing continued public use).
cies. Introducing, or concentrating, high-density residential development in an exclusively or primarily commercial district has an impact on physical and social planning in the areas of crime prevention, downtown revitalization, energy efficiency and open space conservation.\textsuperscript{86}

Small attractive urban residential cities, such as Palo Alto, are experiencing an ever-increasing housing demand with a simultaneous buildable lot shortage. Both public and private air rights represent an untapped source of construction space. Focusing on downtown parking lot air rights would enable a city to increase the housing supply while developing already "developed" property. This deflection of development pressure away from undeveloped land conserves urban agricultural and recreational open space. The Palo Alto city limits, for example, encompass a significant amount of land in the Santa Cruz mountains. The foothills, zoned ten acre minimum lot size, provide a scenic backdrop for the city and a marvelous pastoral landscape enjoyed by hikers, bicyclists, and motorists. Downtown parking lot air rights development could safeguard the foothill open space by enabling the city to resist future pressure to upzone it for higher density use. Similarly, downtown air rights development would maintain the highly valued low-rise single-family residential neighborhoods by providing more appropriate downtown locations for high-rise, high-density housing.\textsuperscript{87}

Directing high-density residential development toward downtown areas also saves transportation energy and helps breathe life back into the commercial area, typically deserted after regular business hours.\textsuperscript{88} The energy crisis sparked great interest in chic downtown Palo Alto residential condominiums close to restaurants, entertainment, shops, banks, and work. A diversity of uses in close proximity enhances the quality of life.\textsuperscript{89} Mixing residential and commercial development brings night-time pedestrian and auto traffic into the downtown area


\textsuperscript{87} Contra Development Rights Transfer in New York City, 82 \textit{Yale L. J.} 338 (1972) (problems with developing each parcel to its maximum).

\textsuperscript{88} Kriken, \textit{supra} note \textsuperscript{86}, at 379.

\textsuperscript{89} "[M]ost city planning and governmental action over the past thirty years have tended toward simplification and homogeneity . . . . The resultant homogeneity of use has been troublesome in American cities." \textit{Id.} at 356-57.
which can have the incidental benefit of reducing street crime. The Project, therefore, not only furnishes the obvious city benefits of lease and property tax revenue and increased public parking, but may also contribute to the general public welfare through its role in shaping urban design.

IV. THE NATIONWIDE DIRECTION

If leasing airspace over public property is legally and practically feasible and supported by modern city planning principles, why do city-owned parking lot air rights remain a virtually untapped source of downtown construction area? The lack of specific air rights legislation contributes, at least in part, to airspace underutilization in California. Municipalities appear to be waiting for each other to conduct air rights experiments while other states operate with specific enabling legislation. Illinois and New York, for example, enacted statutes which clearly grant municipalities the power to lease publicly-owned air rights.

In Illinois every municipality has the power to sell or lease air rights over public improvements for the development of "combined occupancy structures"—buildings which provide both public and private uses. The enabling statute requires the governing body to determine that the existing or proposed public improvement does not promote full or efficient land utilization from both a planning and economic viewpoint. In other words, Illinois recognizes combined occupancy structures as a method of enhancing efficient land use.

The State of New York enacted two similar but more detailed laws enabling combined municipal-private air rights projects. The New York City and City of Yonkers Educational Construction Fund Acts established corporate state agencies to construct combined occupancy structures. The buildings contain schools on the lower levels and compatible non-school uses in leased air rights on the upper levels. The lessee pays the amount of real property taxes which would be assessed had the structure occupying air space been built on

90. Id. at 519.
91. See infra notes 92-95 and accompanying text.
other than tax-exempt property. The stated purpose of the acts is to "increase, from both a planning and an economic viewpoint the efficient utilization of available land areas." 95

When the New Hampshire legislature was considering an air rights statute it solicited review of the validity of the proposed legislation by the State Supreme Court. 96 The Opinion of the Justices contains the only judicial overview of air rights legislation. The justices concluded that the right of a municipality to lease public property not needed for public purposes applies to air rights above publicly owned lands. 97

The nationwide direction is to enact laws specifically granting municipalities the power to lease public air rights. California lags behind, forcing creative city councils and private real estate developers to wade through a maze of scattered statutes, old tangentially pertinent case law, and the public trust doctrine for air rights project support. Air rights legislation would clear the way by authorizing local communities (and the state) to acquire, manage, and dispose of air rights by sale, lease, or otherwise. It could specifically grant municipalities the power to lease airspace above public facilities including parking lots. Further provision could be made for property tax assessment of air rights conveyed separately from the surface, including air rights above tax-exempt land. Amendment of Civil Code section 718 to extend the allowable lease term of city-owned property to ninety-nine years would encourage lenders to become involved in air rights projects. Finally, municipalities might be encouraged or directed to enact air rights ordinances containing formalized procedures and criteria for alienation of publicly-owned air rights. The legislation should be broad enough to allow flexibility for the multitude of situations which may arise and specific enough to formulate a practical framework within which to design a project.


97. Id. at 277.
V. Conclusion

Air rights constitute a largely unrecognized and vastly underutilized form of real estate in California. Nearly twenty years ago an insignificant amendment to a section of the Civil Code redefining real property so as to include the space above land, provided the framework for air rights conveyances.

The ever increasing housing demand requires cities to consider creative city planning devices such as the leasing of downtown public parking lot air rights for residential condominiums. Cities can take up the challenge with the support of statutory property definitions and state laws empowering municipal agencies to convey public property. The public trust doctrine represents the strongest challenge to project design. California and Pennsylvania case law establish guidelines for doctrine compliance: public benefit must be “substantial” and private benefit “incidental”; the public-private association must not provide the developer with a windfall; and any public property lease agreement must incorporate substantial public interest safeguards.

California courts have yet to comment upon an air rights project other than subsurface parking garages. When the opportunity to do so arises, the main issues will most likely center around public trust doctrine compliance. The outcome seems dependent upon the balance between public and private benefits. The existing legal framework, however, may not be enough to convince a cautious city council to become an air rights pioneer. Other states, some more intensely developed than California, have recognized air rights as a valuable planning tool and have enacted specific legislation authorizing the conveyance of public air rights. Enactment of air rights legislation in California would stimulate air rights development and encourage foresighted city planning.

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