Air Rights Development: Is it Different From Traditional Land Development?

by

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Submitted to the Department of Urban Studies and Planning

In Partial Fulfillment of the Requirements
for the Degree of

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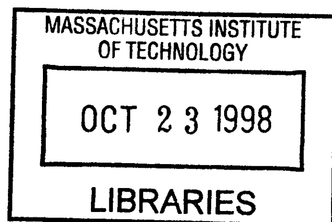

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ABSTRACT

The availability of large desirable urban development sites continues to diminish. Air rights development is an innovative way for real estate entrepreneurs to create space for developing large-scale projects. Because a portion of these projects are constructed on air, one would expect the deal structure for an air rights developments to be dramatically different from those used for traditional land developments.

This paper examines the how the general development issues - ownership, financing and taxation – are structured for air rights developments. Generic air rights development issues and resolution are identified. These finding are then used as the base for in-depth analysis of three existing air rights developments completed in the Boston area. Each development contains unique components as a result of the different individual characteristics of every real estate project, however, the ownership, financing and taxation components of these deals were structured similarly. This study supported the conclusion that air rights development has little affect on the deal structuring of large-scale real estate developments.

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INTRODUCTION

The development of air rights presents an opportunity for many American Cities. As large undeveloped parcels of land become scarce, the development of air rights provides a way for cities to continue to grow. Air rights development is often undertaken above publicly owned land or structures such as highways, train tracks or train stations. As the underlying properties will continue to operate and remain publicly owned, air rights projects differ from traditional land development projects that typically involve the sale or long-term transfer of the use of a parcel in its entirety.

This study will investigate whether the unique shared property use between an air rights project and the underlying property requires air rights developments to be structured and developed in a fundamentally different fashion from traditional land development projects. To answer this question, this study will look at the structural, ownership, taxation and financing mechanisms commonly used for air rights developments and determine how, if at all, these differ from traditional land development projects.

For the purpose of this study, the term air rights refer to the use of air space for development or improvement. It is assumed that the owner of this parcel has the rights of possession of a parcel and the capacity to build within the space within the limits imposed by pertinent zoning laws.[1]

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[1] Galowitz, Sam W., *The Use and Abuse of the Term "Air Rights"*, Real Estate Review, Spring 1996. p.60-5

This study will begin by identifying common "generic" structural, ownership, taxation and financing issues prevalent in air rights developments.

From a deal structure perspective, it is important to understand who owns what? These developments result in the division of a parcel into two portions, with one party "buying" the right to develop in three dimensions over a horizontal boundary from another. This untraditional division of space raises questions about how things are divided, and who gets what under what circumstances?

When a developer buys the right to develop over a structure or road, who is responsible to maintain, that which holds the entire thing up? Who is responsible for the foundation? The developer has bought rights to everything above a horizontal boundary, what are his/her rights below this boundary? Does the developer get an easement going down into the ground? What happens when the owner of the lower portion of the parcel needs to do something at their level that affects the development above? Alternatively, what happens when the construction, maintenance or modernization of the air rights development affects the normal activities of the lower use?

What are the intangibles that must be thought-out in advance for air rights projects? How does the structuring of these deals ensure that there is ample anticipation of changes that might be made in the future? If you do not own the air rights in fee, what do these deal structures look like? The reality is that projects get renovated, roads get resurfaced, and roads get widened or sometimes even go away. What are the processes for dealing with changes on either side of the transaction?

What are the common issues relevant to ownership structure? There are different mechanisms used to create air rights ownership including a lease of air space, a fee

division of air space, or a fee division of air space for a term of years. Each alternative has different legal consequences and may also result in different taxation treatment for the development. What are the property tax issues that result from how air rights developments are appraised under each ownership structure? From an income tax perspective, how are these developments depreciated? Are the leasehold payments treated as groundlease payments?

Finally, what do the financial components of air rights developments look like? If the air rights are leased, it would appear that the financing should come in the form of a leasehold mortgage. If that is the case, are these mortgages different from any other leasehold mortgage? What about subordination? With leased air rights, is the lease subordinated or unsubordinated? How does this affect financing? What if the air rights are a purchased fee division? Would a development with this type of ownership structure be underwritten the same as a land development of similar scope? Finally, what of fee division for a term or years? Does this arrangement eliminate potential mortgage indentures while looking enough like traditional fee ownership to allow the development to secure traditional construction and permanent financing?

Chapters two through four are individual case studies of three development projects with air rights components completed in Boston during the 1970's and 1980's (Copley Place, Gateway Center, Dewey Square, later renamed One Financial Center). These case studies will provide project overviews, explain how each development dealt with the issues discussed above and discuss the unique issues that surrounded each development, and the causes and outcomes of these issues.

The final chapter of this study will use the information from the previous chapters to look at the question, "Is air rights development special, or is it essentially little different from traditional land development?" This subject matter has particularly relevance to Boston where there are currently several large-scale air rights development proposals in various stages of the approval process. Also, over the next decade Boston will have a substantial amount of new air rights development opportunities as a result of the submersion of the Central Artery.

GENERIC AIR RIGHTS ISSUES

Transferring the right to airspace – creating legal ownership for this space - can be achieved through several means. Those most commonly used include long-term or short-term leases, fee simple division, or the easement of airspace.

Long and short-term leases provide the lessee with occupancy rights to the airspace and any included land for the period of the lease. Air rights leases are usually structured similar to long-term groundlease with a term including renewal options of 99 years. Fee title grants the developer fee or absolute title to the desired air space and adjacent land. Additionally, when building over a highway or railway, foundation supports can be granted in fee, but are more commonly conveyed through easement. Easements of airspace create a perpetual or limited-term right in which the fee owner of the land grants a non-possessing interest in the use of a portion of the property for a specific purpose.

Air rights development can also be structured to provide the development with ground and air rights ownership rights in fee. In this circumstance the highway or railway is given a long-term easement to operate through or below the development. An example of this was The Prudential Center in Boston. For this project the development entity purchased the property from the original owner, a railroad which, in turn, reserved an easement for its railway. The development entity subsequently granted a perpetual easement to the Massachusetts Turnpike Authority for a highway, which the development was built above.

The three described forms can be used in various combinations. Each of these forms of legal ownership conveys an adequate title, but create differences in the control of the parties involved.

Leasing air space provides the most control for the original owner of the land. The owner retains title subject to the lease terms, which will be strucuterd to protect the owner in the case of tenant default, has the right to receive rent, has a reversionary interest and may ultimately realize appreciation in the assets value at the termination of the lease. The lease structure is also advantageous for the air space user. The lease will result in a lower site control cost because there is no purchase of the space. Also, the lessee is allowed to deduct the lease payments for taxation purposes.

Grants of fee title or perpetual easement for the air rights divest the original owner (highway entity) of title to the air space and could diminish the state's long-term control over the highway portion of the site.[2]

Accordingly, air rights developments located above highways or railroads typically lease the airspace and required adjacent land and obtain an easement for access and support/foundation structures.[3] Straight fee sales are also sometimes used. Most often, this results in the development entity providing non-expiring easement for the highway and/or railway that pass through the property. (Prudential Center Boston, Massachusetts)[4]

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[2] Interview with William Tuttle, Real Estate Representative, Massachusetts Turnpike Authority
[3] Pedowitz, James, Air Rights, Air Space, and Transferable Development Rights, (Practicing Law Institute, Course Handbook #269, 1995. p 14.)
[4] Interview with William Tuttle, Real Estate Representative, Massachusetts Turnpike Authority

Differences in taxation treatment for each ownership structure are nominal. The effect of leasing or granting fee or easement title to highway airspace will create taxable interests in real property for the benefit of the local taxing entity.

The lease of real property from the Turnpike Authority to a private party creates a leasehold interest that is separately assessable for possessory interest tax purposes. In addition, improvements constructed on property owned by a state and leased to a private party are regarded as property of the lessee and are assessable to lessee for tax purposes. The conveyance of fee title or an easement to airspace would be a transfer of a portion of the land on which the highway is located, constituting a taxable interest in real property.

Because of the complex deal structures that are necessary to undertake air rights development, the right to use the air rights over a public use must be governed by strict guidelines. These guidelines must ensure the long-term accessibility and unrestricted use of that space. This is particularly relevant for the type of air rights developments that this paper is focused upon: those above public transportation uses such as highways or railroads. Problems with the air rights development could adversely affect a necessary public service. Accordingly, it is essential that responsibility for ongoing maintenance and repairs for both the air rights development and the underlying public use be clearly defined. The public reliance on the lower-use mandates that the authority overseeing that use maintains the ability to ensure the continued operation of its space. This is achieved through careful stipulations in the ownership agreement which clearly define the lessee's duties concerning both the construction and maintenance of their property in a condition that allows the public use to continue unobstructed. The right of the public agency to

take actions to eradicate any problem in the event that the lessee is unresponsive to their duties as described in the agreement is also essential.

Likewise, it is appropriate for the developer to seek rights and remedies in the case that the value or operation of their development is adversely affected by a condition steaming from the lower use. However, often recourse for the developer is only available in the case of landlord negligence. Typical ownership agreements for developments above publicly owned land uses requires the developer to waive claim against the agency overseeing the lower use or occupancy on account of noise, vibration, fumes, odor, or other causes.[5]

While the forementioned issues need to be addressed in all air rights developments, there are several deal specific issues that require case-by-case consideration and modification to development agreements. An example of this is the construction process and timetable. If the development is being constructed over a roadway (as is the case in the three cases that this paper will look at) the project must make adjustments to accommodate both the traffic flow and project construction.

From a development design and engineering perspective, the project must be sensitive to the basic characteristics of highway operation and to the fact that the project is an air rights development. The underlying highway use mandates that no structural columns may intrude between lanes or onto the side clearances, construction, staging and storage must be done with minimal interference of traffic flow, particularly during hours of highest use. In many cases the interruption of traffic flow must be limited to off-peak hours (nights and weekends). Limitations on the construction schedule negatively effect

[5] Amended and Restated Lease Massachusetts Turnpike Authority to Urban Investment and Development Company. December 22, 1978. p. 14

the project in several ways. First, the cost for labor and hence construction is significantly increased. And, the amount of work that can be accomplished in a 24-hour period is greatly reduced, resulting in a longer construction period, which increases project financing costs and the associated project market timing risk. Together these limitations, which are unique to air rights development, can add between $10-$100 per square foot to the cost of air rights projects.[6] [7]

From a project financing perspective, the financing structure of a large-scale, mixed-use air rights development differs little from that of a project of similar scope that is built entirely on land. The need to demonstrate a sustainable market demand for the development is the largest concern of potential financial sources regardless whether the project is air rights or traditional land development. Financing sources seek assurances that the project will generate sufficient operating income to pay back the loan and that their rights to collect on the debt will not diminished in the case of tenant lease defaults. The financial structure of an air rights development differs very little from that of a land development project built on a long-term groundlease.[8] Similar to a long-term ground lease, the extended duration of air rights leases (typically renewable for 99 years) allows the development to be considered owned in fee for underwriting procedures[9].

Lender repayment concerns are eased by ensuring that their rights to repayment cannot be dissolved as a result of lessee default. This is essential to the lender because if

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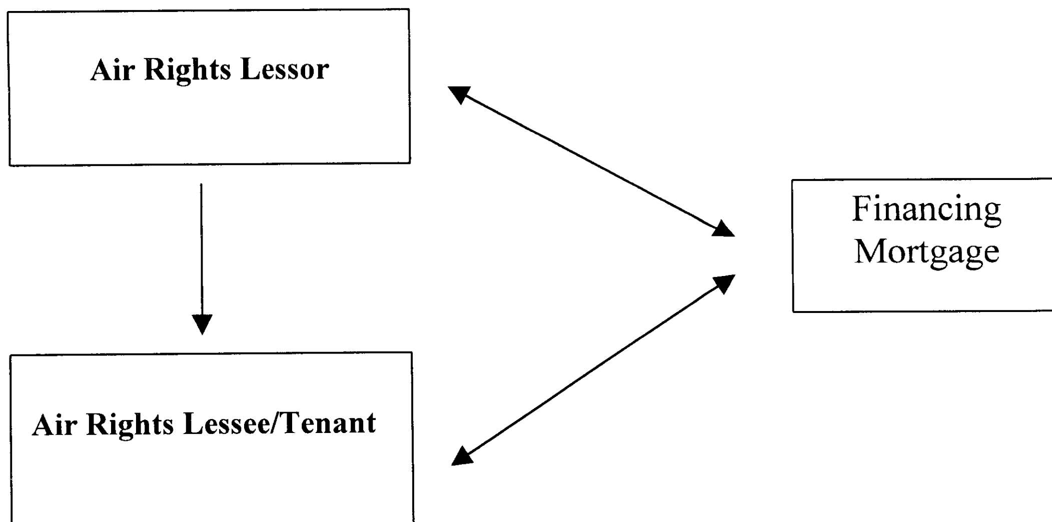
[6] Jolliffe, Michael, "Highway Air Rights Construction Adds New Land To Boston" Urban Land, August, 1994. p.8
7 Interview with Norm Adams, Architect, Jung/Brannen
[8] Interview with Henry Putman, Real Estate Representative, J.F. White Properties
[9] Interview with Jeffry Dando, Manging Parter, Goodwin, Proctor and Hoar.

the relationship between the lessor and lessee were broken due to lessee default, the mortgagee's position would be wiped out. Consequently, a relationship is developed between the mortgagee and the lessor where the lessor is required to notify mortgagee of any lessee default and the mortgagee is guaranteed the opportunity to cure all defaults. The agreement goes further to commit that no defaults are incurable. Additionally, the note will be written in a manner that ensures that any default under the lease represents a material default under the note. This further ensures the lender will have the ability to foreclose, cure the default and assume the position of the lessee. After foreclosure, the mortgagee is also given the opportunity to assign the lessee position to a new party who must simply assume the conditions of the in- place lease. This allows the mortgagee to resume its "removed" status from the lessor, lessee relationship.

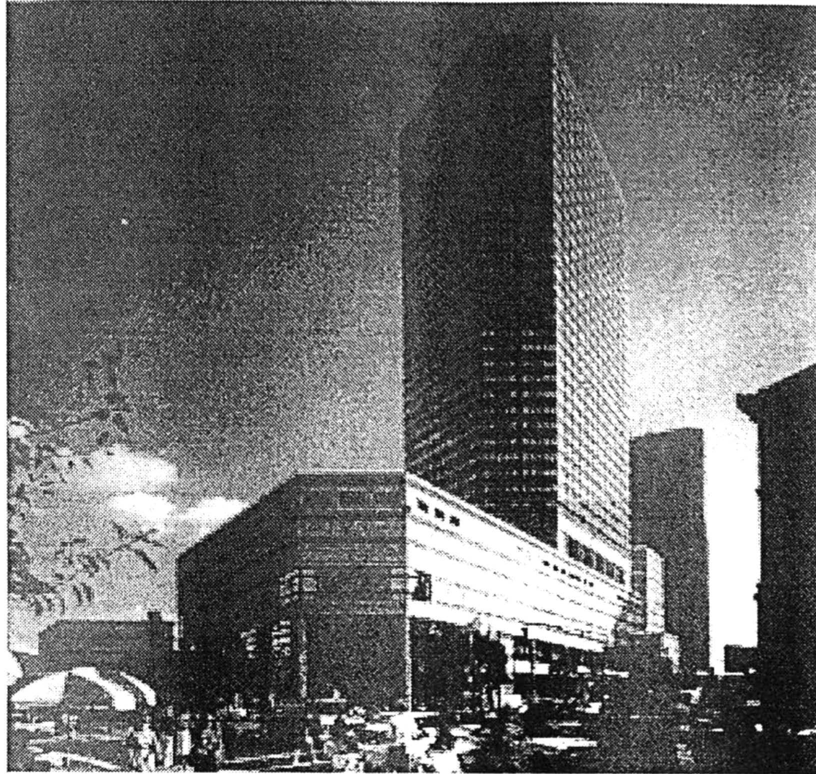
Air Rights Deal Subordination Structure

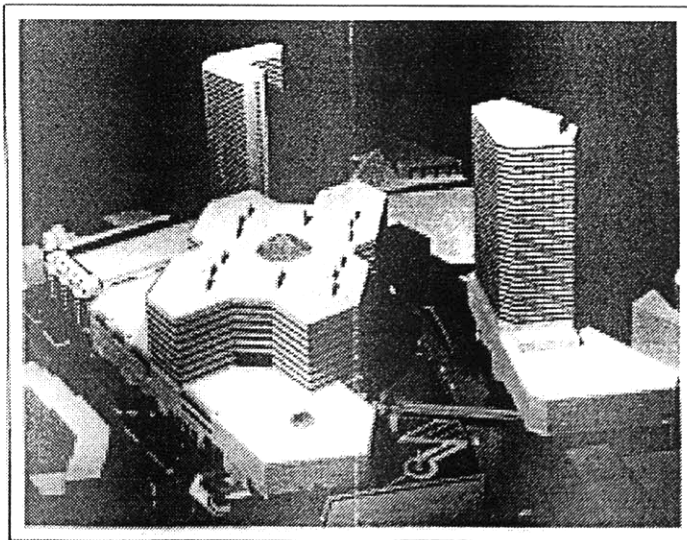


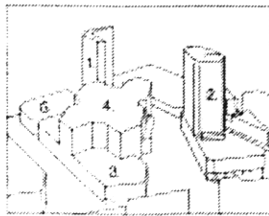
The following three case studies depict how air rights development has been used for the creation of three large-scale mixed-use developments located in Boston. The case

studies will detail how the previously mentioned generic issues were handled in each project as and describe the basis and solutions for unique air rights related development issues for each project.

COPLEY PLACE







COPLEY PLACE

Overview:

The largest development project ever completed in Boston is Copley Place. Completed in phases through the mid-1980's by Urban Investment and Development Company (UDIC), Copley Place is a 3.4 million square foot mixed-use complex with luxury and convention hotels, class "A" office space, exclusive shops and restaurants, one hundred units of housing, and parking facilities for 1432 vehicles.[10]

Copley Place is situated on 9.5 acres of land and air rights adjacent and over the Massachusetts Turnpike. At one time consisting of several individual parcels and buildings, the site was consolidated and cleared by the Massachusetts Turnpike Authority in the late 1950's. The Turnpike Authority acquired this land in order to extend its depressed, eight-lane Highway, which provides commuting access between downtown Boston and its western suburbs. After completion of the highway extension and access ramps, the site remained a combination of submerged highway and inaccessible open space.

History/Process:

Prior to the development of Copley Place, the site was a virtual "dead-zone" creating a geographical boundary between two dramatically different Boston neighborhoods. On one side of the site is the Back Bay neighborhood, which has long been home to many of Boston's wealthiest households. Its streets lined with elegant

[10] Watts, Elemuel. Copley Place: The Design Development of a Major Environmental Intervention .(MIT Masters Thesis, 1982)

brownstone townhouses and sidewalk gardens; the Back Bay was radically different from the site's other neighbor, The South End. This distressed neighborhood was home to mostly lower income, minority households with a large transient population.

When plans to build Copley Place were first announced in the early part of 1977, proponents of the project saw it as an opportunity to restore an urban character to the area. They believed Copley Place could convey some of the attractiveness of the Back Bay to the South End neighborhood, resulting in a cohesively integrated community of improved quality. Opponents of Copley Place saw the project as a sure catalyst for gentrification in the South End and the eventual displacement of its long-term lower income residents.

Through significant public outcry over the project, residents and activists from the Back Bay and South End, as well as City and State officials all demanded to be included in the project's planning process. The high level of civic concern around the project forced UIDC to endure unusually heavy government and local resident involvement during the project's planning phase.

Normally the disposition and future development of publicly owned land is undertaken through a request for proposals (RFP) process. However, because the Massachusetts Turnpike Authority, a quasi-public agency, owned the Copley Place site, the requirements were different. Most public agencies dispose of land by issuing an RFP and selecting a developer for the site based on this competitive process. However, Turnpike Authority is a not subject to the disposition laws that govern City and State agencies. Not only did the Turnpike Authority have the autonomy to dispose of its properties in a less public manner, but it was allowed by law to transfer ownership rights

to properties that it owned without the public's approval and/or involvement. In fact, Turnpike owned land as specified through the Enabling Statue of the Massachusetts Turnpike was allowed several unique privileges. Most importantly, it was immune from many statutory constraints and limitations that historically made the re-use of many publicly owned sites notoriously troublesome. Under state law and the Turnpike's Enabling Statue, Turnpike owned land within the City of Boston was not subject to local zoning and building code requirements. The Copley Place site by statue did not require any zoning and/or building review approvals from the City of Boston in order for the project to be legally developed on the site.

Excerpt from Chapter 81A of the Enabling Statue of the Massachusetts Turnpike Authority:

"The use of Air Rights leased under this section respecting land within the territorial limits of the city of Boston and the construction and occupancy of buildings or other things erected or affixed pursuant to any such lease shall be made in accordance with the provisions of the state building code enacted pursuant to chapter one hundred and forty-three and such other requirements as the authority deems necessary or advisable to promote the public health, convenience and safety of persons and property but shall not be subject to any other building, fire, garage, health or zoning law or any building, fire, garage, health or zoning ordinance, rules or regulation applicable in the city of Boston."

However, because City and State officials were concerned about possible affects of a project the large and visible, officials insisted that they be involved in determining the feasibility of and subsequent planing and development of Copley Place. These officials were insistent on being involved in these processes despite the clearly defined role and authority that City officials possess for air rights developments on Turnpike owned property as addressed in Chapter 81A of the Enabling Statue of the Massachusetts Turnpike Authority.

> "The Authority shall not lease any air rights in a particular location unless it shall find that the construction and use of buildings or other things to be erected or affixed pursuant to any such lease shall be in no way detrimental to the maintenance, use and operation of the turnpike or the metropolitan highway system and, in the city of Boston, unless authority shall also find, after consultation with the mayor that the construction and use of such building or other things shall preserve and increase the amenities of the community."

Public input during the feasibility, planning and predevelopment levels of Copley Place was coordinated by the State. To ensure that the development would include community and City feedback on issues such as project size, massing and design, the Office of State Planning (OSP) was assigned to oversee a detailed public/private planning process. OSP conveyed representatives from more than twenty-five community groups and public agencies to form a Citizen Review Committee, to oversee the planning process. This committee was responsible for making a final recommendation to the

Governor's office whose approval was required for the groundlease because the lease was for more than forty years. These recommendations were regarding the overall feasibility of Copley Place and subsequent project design recommendations that would help integrate the project with its surrounding neighborhoods. The planning process was structured to balance the ideas and suggestions of these groups while also being sensitive to the realities of the developer. Ultimately a method of project planning called front-end impact assessment was instilled.

Front-end impact assessment is designed to allow assessment and development planning to occur simultaneously. Using this process, a developer is chosen and given an initial commitment to undertake the project. The developer's planning process and the public review, feedback and impact assessment studies are undertaken during the same period. This process differs from the traditional development process which steps include: development guidelines being issued, developers being solicited, a developer is chosen, and then that developer undertakes predevelopment planning. Once completed, these plans are revised to include address concerns steaming from impact assessments and community input.

The use of front end assessment for Copley Place was designed to allow the developer to concentrate on predevelopment and financial feasibility analysis while state and local agencies and community groups looked at the potential impact of the project on a myriad of issues. These issues included affects on local businesses, neighborhood traffic congestion, integration with the area's historically significant character, and the likelihood that the project would trigger the gentrification of adjacent neighborhoods. It

was hopped that the front end assessment process would allow the planning process to be thorough, expeditious and economical for all parties involved. [11]

The ultimate usefulness of the front-end assessment process for Copley place remains debatable. During the planning process, UIDC was continually coping with the challenge of creating a program with enough density to yield operating income sufficient to defer the high construction costs associated with developing on air rights. Alternatively, the Citizens Review Committee was extremely concerned that the project massing be in character with the surrounding neighborhoods. Ultimately, UIDC put forward a financially feasible mixed-use program including office, hotel and retail that it believed was architecturally responsible. The CRC considered the massing in this plan to be excessive and required that the program be modified. The CRC was particularly insistent upon the elimination of one of the two large-scale retail tenants that were planned at opposite ends of the site to increase foot traffic draw. After modifying the plans to confirm to the CRC's recommendations, the project was no longer financially feasible. At this point, in order to make the project work; UIDC sought public assistance for the project. With the assistance of the City, UIDC was awarded an Urban Development Action Grant (UDAG) for $19.7 million to cover the cost of decking the turnpike. Later revisions to the development program resulted in the addition of a second hotel where the second retail tenant had been planned. This alteration to the project invoked the City to request that UIDC repay up to $15 million of the UDAG grant to form a revolving neighborhood improvement fund. This fund was to be used for

[11] Hollister & Lee, Development Policies: Private Development and the Public Interest. (The Council of State Planning Agencies, 1980).

alleviating any Project related externalities that adversely affected the surrounding neighborhoods.[12]

Deal Structure:

Similar to the public input, design and construction components of Copley Place, the deal structure, (ownership and financing components) for the project was also complex.

Site Ownership rights, or more accurately the development's long-term right to use the site was created through a long-term groundlease, renewable for up to 99 years. This groundlease between the Turnpike Authority and Urban Investment and Development Company provided the developer and/or a future formed development entity the right to build and operate Copley Place upon the 9.5 acres of land and air rights. This lease created a relationship between the Turnpike Authority and UIDC where the Turnpike Authority was the landlord, and Urban Investment Development Company was the tenant. In addition to providing the rights to use the 9.5 acres of land and air space, the groundlease also provided easements at and below the turnpike level to construct, use maintain, replace and repair supporting columns and other supports and footings. The lease also held the project responsible for maintaining and keeping the appearance of good repair all support structures for the safety of all Turnpike users.

> "Tenant shall have the appurtenant right and easement, subject to the obligations herein contained, to construct, use, repair and replace or renew as may be required supporting columns, bearing walls, retaining walls...Tenant

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[12] Jeffry Dando, Managing Partner, Goodwin Proctor & Hoar.

> agrees, at its cost and expense, to maintain and keep in good repair and appearance such columns, bearing walls, retaining walls and other supports and to renew or replace the same if required for the safety of travel in and use of the Excepted Portion or adjoining portions of the Turnpike...Any such work of maintenance or repair shall be done only in such manner, at such time, and subject to such supervision and control, as the Landlord shall have specifically approved in writing…"[13]

In-place site characteristics also affected the term of the groundlease. At the time Copley Place was built, Amtrak already had easement rights for railroad tracks in the site adjacent to the turnpike. Accordingly, Copley Place's groundlease mandated that if any work for the construction or operation of Copley Place would likely affect the easement of the railroad, the project must request and receive permission from the railroad before undertaking such work. Additionally, Copley Place was responsible for ensuring the continued safety of railroad activities during the construction period and for compensating the railroad for any lost income resulting from such work. To ensure that small inconveniences for the railroad could not unreasonably stop the building of Copley Place, the lease included a clause that allowed the project to seek a third party arbitrator to resolve such a dispute.

> "…(which approval may not be withheld or delayed unreasonably, as provided specifically in Section 14.11), it shall set forth promptly in writing the reasons for such refusal to approve and Tenant shall have the right to refer the same to binding arbitration under the rules of the American Arbitration Association. The

[13] Amended and Restated Lease between Massachusetts Turnpike Authority and Urban Investment and Development Company, p.8

parties will share the cost of such Arbitration, and will instruct the Arbiter that the intended result is as promptly as possible to establish plans, specifications and construction details for the proposed work which adequately protect the Turnpike's and Railroad' s interests but permit work to commence as soon as reasonably possible..."[14]

Copley Place was built above a highway that is an essential transportation means for residents of the area. As such, the Turnpike Authority required provisions to ensure the long-term viability of the Turnpike regardless of the success or failure of the Project. The Turnpike Authority was concerned about the Project affecting two types of issues, the ongoing use of the Turnpike and the Turnpike Authorities long-term ownership of the site, both land and air rights.

To ensure the ongoing operation of the Turnpike, the groundlease stipulated that the tenant must agree to keep at all times insurance ample to cover the required demolition of all or any portion of the buildings and improvements affecting or above the Turnpike. This would ensure the Turnpike that it would be able to eradicate any project encumbrances that affect the highway portion of the no matter the situation of the Project and/or its owners.

To ensure that its ownership position for the land and air rights could not be diminished, the groundlease was structured to protect the Turnpike Authority's ownership in the case of any eminent domain, subordination or lien actions against the project. If any part of the project over the turnpike is taken by eminent domain leaving the development no longer financially feasible the lease expires immediately. The

[14] Ibid., p.29

landlord's interest in the lease is expressly subordinate to the rights and lien of any mortgage. The lease provided the mortgagee with the right to foreclose and assign the lease to another party. In the event of foreclosure or assignment of the lease, the mortgagee or their assigned party is bound to the operating, maintenance and other conditions defined by the original lease.

The groundlease further protected the ownership rights of the Turnpike Authority by stipulating that no mechanic's or other lien for any labor or material could be attached to or affect the reversionary or other estate or interest of landlord. To ensure this, the lease called for the tenant to bond or pay any and all such liens within 30 days. If UIDC failed to do this, The Turnpike Authority had the right to cure the lien and add it onto the due rent.

Because of the long-term duration of the groundlease, taxes for Copley Place were structured in the same manner and to the same extent as if UIDC were the owner of the entire site in fee.[15] However, with regards to property taxed, the tax-exempt status of the Turnpike Authority is conveyed to the project.

> "..no part of the value of the land comprising the Entire Premises
> shall be included in the assessment on which such taxes are levied,
> and neither the Tenant nor Landlord shall be required to pay any such
> taxed based on any land value."[16]

The financial structure for Copley Place was unique because the development was constructed in several phases. The retail and office space was completed first, followed by the Westin Hotel, the Marriott and lastly the residential component. All of the phases

[15] Interview with Jeffry Dando, Managing Partner, Goodwin Proctor & Hoar.

were constructed under the one ground/air rights lease, however the Westin, Marriott and residential piece were each carved out and separately financed. UIDC financed the construction of the retail and office components with a combination of commercial construction loan and UDAG Grant. This component of the development was ultimately sold to JMB's Carlyle 13 Fund. The Westin was financed through commercial loans from Citibank and Aetna and ultimately sold in-part through a joint-venture to a group of Arabian-based investors. The Marriott was financed with through a commercial loan from First Chicago and ultimately sold in-part through a joint-venture with United Postal Service. The residential component of the project was financed commercially and held by UIDC. (See attachment on page 28)

Unique Aspects of Project Due to Use of Air Rights:

Aside from the structural and construction issues involved with using air rights above a working highway and rail system, the use of air rights did not dramatically alter the development of Copley Place.[17] The long predevelopment and construction period needed to complete Copley Place was more a result of the project's massive size than its air rights nature. The project did have to assume exorbitant costs to both design and operate special lighting and ventilation systems for Turnpike lanes located under the project decking. Similarly the project was forced to upgrade the ventilation system for the portion of the subway system that ran through the site.

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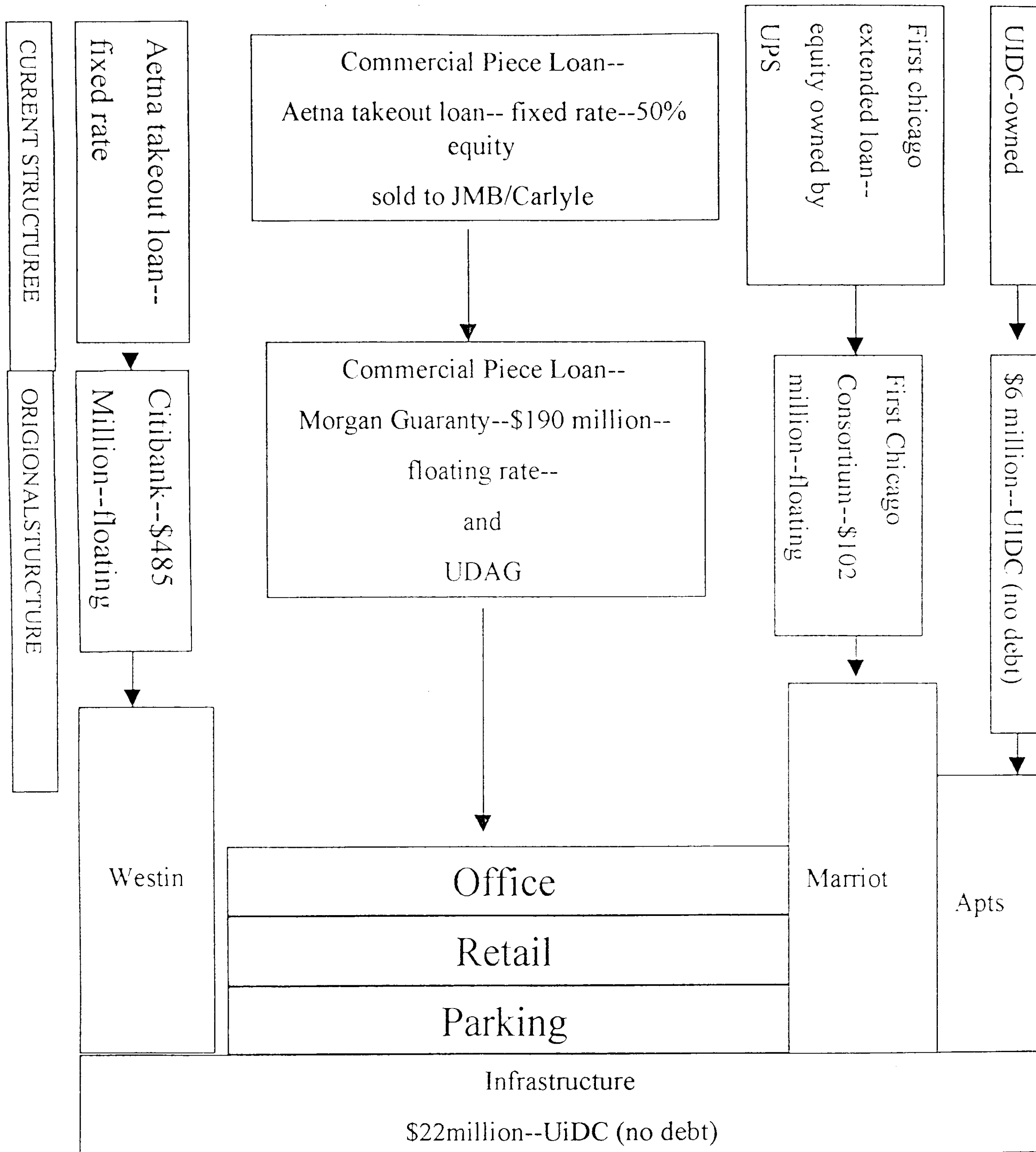
[16] Amended and Restated Lease between Massachusetts Turnpike Authority and Urban Investment and Development Company, p.5

Conclusion:

The fact that Copley Place was built on air rights did not radically alter the Project's development process, deal structuring and/or financing. While there certainly existed engineering/design and construction challenges related to supporting and building a 3 million square foot structure over an operating highway, these issues were only a small portion of the challenges that the project faced. In Interviews with parties representing different roles in the development of Copley Place, including the developer, developer's counsel, Director of the State Planning Office at the time Copley Place was built and staff from the Turnpike Authority, unanimously agreed the Project's development process was really not affected because it was an air rights development. The real challenges and issues that were confronted during the development of Copley Place resulted from the Project's massive size, highly visible location and unusually high level of involvement and sophistication of the area's residents and civic groups.

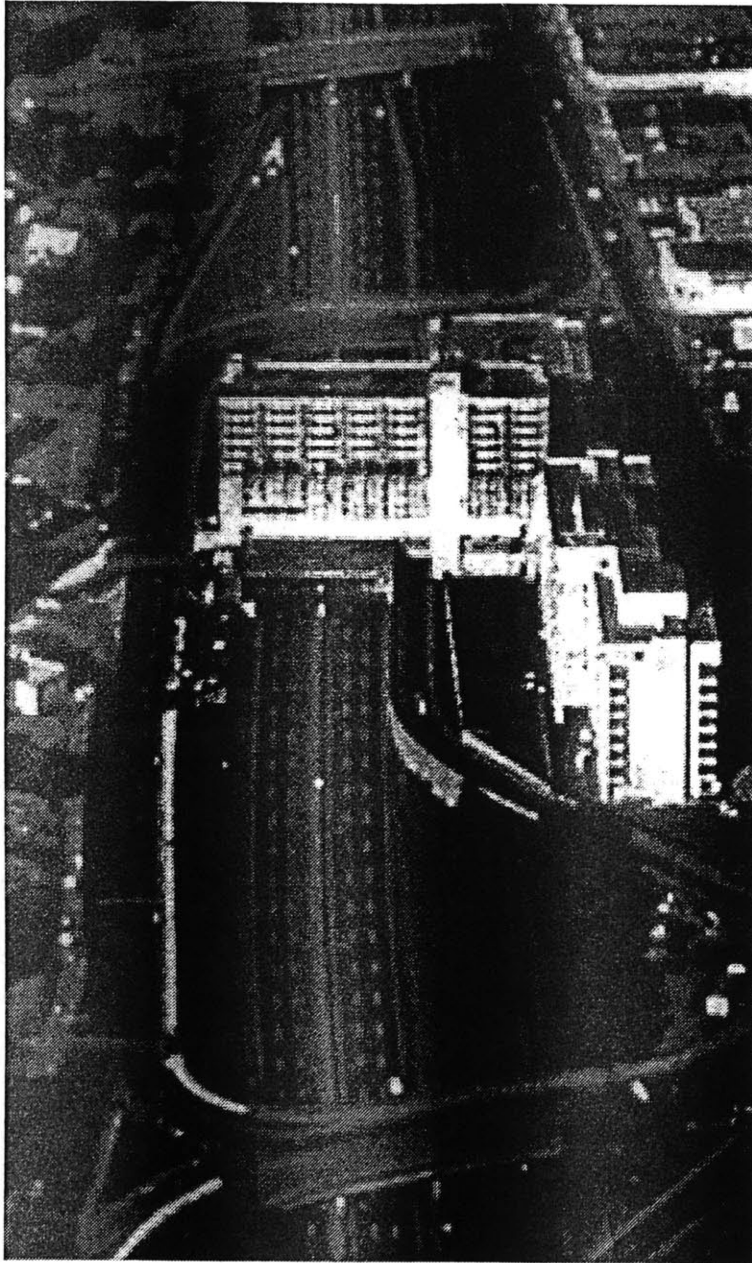
[17] Interview with UIDC's Council, Jeffry Dando, Goodwin Proctor and Hoar.



COPLEY PLACE FINANCIAL STRUCTURE
(mix of uses not drawn to scale)

Watts, Elemuel. Copley Place: The Design Development of a Major Environmental Intervention
(MIT Masters Thesis, 1982)

GATEWAY CENTER



GATEWAY CENTER

Overview:

The first mixed-use air rights development constructed in the State of Massachusetts was Gateway Center, in Newton. Completed in 1970 by The White and Waltch Trust, a partnership formed between Mark Waltch and Joseph White, Gateway Center is a 610,000 square foot mixed-use complex with a hotel, office space, shops and restaurants and parking facilities for 540 vehicles.

Gateway Center is situated on 2 acres of land and air rights adjacent to and over the Massachusetts Turnpike. At one time consisting of several individual parcels and buildings, the site was consolidated and cleared by the Massachusetts Turnpike Authority in the late 1950's. Prior to the construction of Gateway Center, the site was a combination of vacant land and a Turnpike on-ramp for westbound traffic. This ramp was later incorporated into Gateway Center.

History/Process:

Prior to the development of Gateway Center, the idea of using the air rights above the Massachusetts Turnpike for development had little precedent and was given little thought by either the real estate community or The Massachusetts Turnpike Authority.[18] However, the nearby Star Market expansion over part of the Turnpike showed that such development could be done. This expansion was the result of negotiations between Star Market and The Turnpike Authority when the Turnpike sought a portion of the store's original site for enlarging the Turnpike extension.

With Star Market as a precedent, Gateway Center was the idea of Mark Waltch and Tom White. Designed to address the unmet demand for quality office and hotel space outside but within close proximity to downtown Boston. Mr. Waltch with his considerable real estate design, development and finance experience, and Mr. White with his experience as the head of a Newton-based construction company together possessed the capacity to develop a project to meet this demand.

Finding the appropriate location for this idea, an area with a combination of Turnpike access and nearby amenities, proved challenging. Eventually White and Waltch concluded that Newton Corner with its proximity to Downtown Boston, Interstate-93 and Route 128 and easy access to exit 17 of the Turnpike would be an ideal location. With large tracks of land not readily available at this location, the idea of creating a site through a combination of vacant land and air rights over the Massachusetts Turnpike was explored. Using air rights over the Turnpike would not only provide the needed space to complete the project they envisioned, but also create a unique landmark facility with excellent visibility to the thousands of daily commuters that traveled the Turnpike.

The project was planned to be a "destination location", ideal for companies whose business did not require them to be located in downtown Boston and would welcome the reduced rents and convenient location of Gateway Center. The project would also be attractive to travelers who were doing business in the 128 area or desired or were willing to stay outside of the Boston in return for lower room rates and a more suburban surrounding.

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[18] Interview with Peter White, President, J.F. White Properties, Inc.

Gateway Center was built at a time when public input into matters like real estate development was non-existent by today's standards. In order to undertake the project, the developers were not required to go through a public process; they simply needed the support of the Massachusetts Turnpike Authority and the City of Newton.

Because Gateway Center was to be built on Turnpike owned land located outside of the city of Boston, the ability to develop on this land was contingent upon the support of the local municipality. By contrast the Turnpike's Enabling Statue allowed Turnpike owned land within the City of Boston to be immune to local zoning and building code requirements. This act specified that outside of Boston, the development of any structure on Turnpike owned land and/or air rights is subject to the approval of the local laws.

Excerpt from Chapter 81A of the Enabling Statue of the Massachusetts Turnpike Authority:

> "The construction or occupancy of any building or other thing erected or affixed under any lease under this section of air rights respecting land out-side the territorial limits of the city of Boston shall be subject to the building, fire, garage, health and zoning laws and the building, fire, garage, health and zoning ordinances, by-laws, rules and regulations applicable in the city of town in which such buildings or other things are located."

The Turnpike Authority and the City of Newton each viewed the development of Gateway Center differently. For The Turnpike Authority, the leasing of this underutilized land and unrealized airspace was found money. Their concerns where primarily limited to ensuring that the project would never jeopardize the operation or

access to and from the Turnpike. Assured of this, through conditions in the lease agreement that will be discussed later in this paper, The Turnpike Authority agreed to support the project.[19]

Convincing the City of Newton to support the project was slightly harder. The developer pointed to the successful precedent of Star Market, and the fact that the City of Newton stood to gain significant long-term fee and tax income from the successful completion of Gateway Center. Additionally, the project's office, hotel and retail components would each create a number of job opportunities for local residents. Despite this, Newton officials remained suspicious and skeptical of the project's impact on the City and its residents. Their concerns were primarily focused on the increased traffic and congestion that the project would cause. Only after the developer agreed to adhere to several strongly stipulated conditions did Newton officials agree to support the project. These conditions were primarily focused around ensuring public safety during the construction period and ongoing operation of the project.[20]

Deal Structure:

Likely a reflection of the period when this project was developed, the ownership, taxation and financial structure for Gateway Center was incredibly straight forward for a project with no local precedent. The idea of using air rights over the Turnpike to build Gateway Center was surely innovative at the time the project was built. The underlying agreement was structured to efficiently protect the interests the parties involved, instead

[19] Interview with Peter White, President, J.F. White Properties, Inc.

[20] Ibid.

of the behemoth legal document that one would expect to accompany the development of such a deal today.

Gateway Center was built on land and air rights that directly affect the operation of the Turnpike. As such, the Turnpike Authority needed to be able to control any issue that could jeopardize Turnpike operations, and have the rights to cure such a problem if the developer did not do so in the time or manner necessary. Additionally, the Turnpike Authority needed to protect its long-term ownership position of the land regardless of the success or failure of Gateway Center.

The White and Waltch Trust needed ownership rights to the property that would meet the underwriting requirements of lenders. Their concerns were not about the perpetual ownership of the site, but to have the right to use the site for the useful life of the development.

A long-term (99-year) ground lease was the best vehicle to provide both parties the rights and remedies they sought. This lease which called for annual rent payments totaling $37,825 once the project was fully operational provided The White and Waltch Trust the ability to build and operate Gateway Center upon the Turnpike owned land and air rights. The lease also provided the necessary easements at and below the highway level to construct, maintain, replace and repair project support columns, footings and other project required supports. Ultimately this groundlease created a relationship between the Turnpike Authority and The White and Waltch Trust where the Turnpike Authority was the landlord and The White and Waltch Trust was the tenant. The lease was structured so that both the land and air rights and any improvements would revert back to the Turnpike Authority at the end of the lease term.

The lease included several covenants designed to ensure the long-term viability of the highway regardless of the success or failure of Gateway Center. These covenants ranged from the obvious, "the project could not interfere with or present any danger to Turnpike Traffic", to the more benign, "any signs or displays visible from the Turnpike area required the approval of the Landlord."[21]

Tenant agrees:

"To maintain and control the Demised Portion in such a manner that neither Tenant, its subtenants nor customers nor any of them shall interfere with activities of Landlord in the Excepted Portion or impede or endanger the safe and orderly flow of traffic in and along the Turnpike area…"[22]

The lease also outlined the procedures for ongoing project quality and maintenance procedures if this work would disrupt Turnpike travelers.

"…Tenant agrees, at its cost and expense, to maintain and keep in good repair and appearance said columns, bearing walls, retaining walls and other supports and renew or replace the same if required for the safety and unimpaired strength of said improvements or safety of travel …Any such work of maintenance or repair shall be done only in such a manner, at such times, and subject to such supervision and control, as Landlord shall have specifically approved…"[23]

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[21] Lease of Premises in Newton, Massachusetts, Massachusetts Turnpike Authority and The White Waltch Trust p.6
[22] Ibid.
[23] Ibid., p.8

The lease also required the tenant to keep insurance for the air rights portion of the project in an amount not less than eight per cent (80%) of the fair insurable value of the building and improvements on this portion of the project.[24] If the project received substantial damage, resulting in the air rights portion of the project being beyond repair. The Turnpike Authority had the rights to use the insurance money to eradicate any encumbrances to the highway without the approval of and regardless of the condition of the rest of the project.

The groundlease also included specific provisions to ensure that the Turnpike's ownership position could not be diminished. To ensure that a default on financing by the tenant cannot affect the Turnpike's ownership position, the lease is structured to be unsubordinated. However, the groundlease does provide the first leasehold mortgagee with rights to cure tenant default and right to a new lease. In the event the tenant defaults on the lease, the mortgagee is given rights to cure the default. Should the mortgagee be forced to cure, it is given the rights to assign the lease to another party, which will then be bound by the conditions defined in the original lease.

> "...if Tenant shall be in default in the observance or performance of any covenant in this Lease beyond ht applicable period of grace referred to in article XIV, Landlord shall send written notice of such default to the First Leasehold Mortgagee...Such Mortgagee shall have sixty (60) days After delivery of such written notice from Landlord within which to cure or remove such default..."[25]

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[24] Ibid., p. 9

[25] Ibid., p.21

To further ensure the Turnpike's ownership rights, the lease also mandates that no mechanic's or other liens shall be attached to the property. Should any lien be filed against the property, the tenant must remove or satisfy the lien within 30-days. If the tenant fails to do so, the Turnpike Authority has the right to cure the lien and add the cost of doing so to the tenant's rent.

Taxes for Gateway Center are assessed as if The White and Waltch Trust owned the property in fee simple. However, because the land and air rights remain the property of the Turnpike Authority, a tax-exempt organization, the development is not required to pay property taxes.

> "...no part of the value of the land comprising the Entire Premises shall be included in the assessment on which such taxes are levied, and neither Tenant nor Landlord shall be required to pay any such taxed based on any land value."[26]

Gateway Center was financed using traditional methods. With limited developer's equity and a lease with Howard Johnsons to lease and operate the Hotel portion of the project, the project was able to secure construction financing from a local commercial bank and take-out and permanent financing from the Connecticut General Insurance Company. Forming a fifty/fifty partnership between The White and Waltch Trust and Connecticut General, the project was financed despite no singed preleases for the office space.

<u>Unique Aspects of Project Due to Use of Air Rights:</u>

[26] Ibid., p. 3,4

Because Gateway Center was built over a functioning highway and had a portion of a downward sloping access ramp on the site, the largest challenges involved the structural design and actual construction of the building. Built in a period when construction technology was light years behind where it is today, the development used concrete frame and slab for the entire building including the decking over the Turnpike and building support system. The use of concrete, due to extended time that it must be given to dry, made the logistics of building/decking an operating highway extremely difficult. However, other than these construction and planning issues, and the costs associated with them, Gateway Center was similar to any other project of similar scale built in this period.

Conclusion:

This project is particularly interesting because as a new type of development, generally unprecedented in the area, the evolution of the idea and eventually development of Gateway Center was amazingly uneventful. The project was built at a time when there existed neither the political anxiety nor public influence or the economic drivers that today ultimately decide most business maters.

At the time that Gateway Center was built, the Turnpike Authority was responsible for maintaining highways, and that was what it did. When Gateway Center was built, the leasing of the air space was found money to the Turnpike Authority and little more.[27]

Today, the development world is very different. As creating value from federal or state owned property is a highly visible and talked about topic. Public agencies are now

[27] Interview with Peter White, President, J.H. White Properties, Inc.

seeking rents for the use of their air space in amounts that would make building a project of the scale of Gateway Center unfeasible without significant public subsidies. Accordingly, it appears that future air rights development, will need to be large enough in scale to assume both the increased costs associated with air rights development and the likely increases in rents for the future use of air rights.

ONE FINANCIAL CENTER

ONE FINANCIAL CENTER

Overview:

Completed in 1982, One Financial Center is a unique example of how air rights can be used to in the development of a large-scale mixed-use project. Built by Rose Associates, this 1.1 million square foot development consists of forty-six (46) stories of class "A" office space, including a combination of retail and restaurant shops on the ground level and two levels of underground parking. Unlike Copley Place or Gateway Center, One Financial Center is not built above a functioning highway. However, because the site abuts the Southeast Expressway and houses important ventilation equipment for a submerged section of this highway, the project includes an air rights component.

One Financial Center is situated on a 1.4-acre site, which directly abuts the Southeast Expressway and an expressway access ramp. The site is across from a point in which the expressway is submerged as it winds through downtown Boston. While neither the above grade portion nor any of the foundation work for One Financial Center cover the expressway, the building's proximity to the highway and the presence of highway ventilation equipment on it site caused the project to include an air rights component.

History/Process:

One Financial Center is located at the southeastern tip of Boston's financial district. Prior to the development of One Financial Center, this section of the City was largely underdeveloped. Located only steps from South Station, the site is passed daily

by thousands of business professionals on their way to work. Believing that this underdeveloped area would be a prime location for a modern office tower, Rose Associates began acquiring land for this project in the late 1970's. Ultimately, Rose Associates acquired an entire triangular shaped block bounded by the Central Artery on the north, Essex Street on the south, Atlantic Avenue on the east and South Street on the west.

With the rest of the site acquired, one small parcel on the Northwest corner of the block remained. Owned by the Massachusetts State Department of Public Works (SDPW), this parcel included a small one-story structure brick building. This structure housed facilities that controlled the ventilation and other electrical utilities for the submerged portion of the Southeast Expressway. Insistent that the equipment in the building could not be moved, the SDPW declined several offers by Rose Associates to purchase this property and relocate the equipment to a nearby offsite location.

Aware that this small structure could not be cleared, yet still believing that this block was an ideal location for the project, Rose Associates approached the SDPW about encompassing their building into the project.[28] To achieve this the project would include an attached three-story addition where the equipment building stood. From the street level, this addition would appear to be back of the building, decorated with windows and doors similar to other sides of the buildings. However, functionally this addition would encapsulate the SDPW building, leaving the systems necessary for the operation of the highway unaffected. Even today the SDPW's building is left unchanged, and remains a brick building inside the structure of One Financial Center.

[28] Interview With Norman Adams, Architect, Jung/Brannen Associates.

Through this process, Rose Associates made a fundamental decision regarding the construction of One Financial Center. Because they would not be able to own the entire site in fee, Rose Associates was concerned with the issue of what are the differences between what they own, as supposed to what they can use through an air rights lease? Primarily concerned about the long-term implications of each, Rose Associates decided to construct the tower solely on fee owned land.

In addition to the tower, and its attached six-story atrium, the project used a small portion of air rights above the SDPW building. Two stories were built above the SDPW building to serve as utility and equipment rooms for the One Financial Center. These two stories represent the entire air rights portion of this project. Because the State would not allow their equipment to be moved and the project could not be built with the state building in its current condition, the innovative use of a long-term, air rights groundlease, was a crucial part in making this project feasible.

Deal Structure:

The site ownership structure used for One Financial Center was complex and involved several parties. Aside from the SDPW owned land, Rose Associates owned all other parcels in fee. Use of the State owned parcel and the below grade space connecting to the Expressway access ramp was structured through a long-term (99-year) groundlease. This lease gave Rose Associates the right to use the air space above the structure, and also provided the easement rights adjacent and below the structure and access ramp for the project to construct supports and footings.

Effectively, One Financial Center was constructed around the Department of Public Works building. Covenants governing the construction and maintenance of these spaces are identical to those in place for Copley Place and Gateway Center. These covenants are structured to ensure that neither the success nor failure of the project will negatively affect the operation of the highway or SDPW's ownership of the property.

One way in which this lease differed from the Copley Place and Gateway Center leases was the rent structure. The rent for One Financial Center was paid in a one time up front payment of $296,200. This method of payment was chosen by the developer, believing that paying the entire lease amount up-front would reduce the likelihood of any lease related complications at a later date.[29] Additional Rent could only be charged as penalties resulting from the project's failure to comply with the covenants of the lease. Both Copley Place and Gateway Center had annual rental payments, with escalating amounts adjusted at defined periods.[30]

Another interesting twist in the ownership structure for the project was caused by plans from the City of Boston's to enlarge Essex Street. City planners and the Boston Redevelopment Authority desired to redesign this street into a two-way road that would connect the waterfront area to the Back Bay. The site for One Financial Center included parcels that fronted Essex Street that would be necessary to enlarge the street.

Accordingly, the City of Boston approached Rose Associates about using a portion of the property on Essex Street. A "land swap" was structured to provide the City of Boston enough space to enlarge the street and give Rose Associates additional land for the project. This arrangement entailed Rose Associates providing the City with the use of

[29] Interview with John A. Kessler, Jr., Counsellor at Law, Peabody & Arnold LLP
[30] Ibid.

their space along Essex Street through an easement. The City then sold Rose Associates City owned land along Atlantic Avenue for fair market value. This transaction was structured through a land-disposition agreement between Rose Associates, which by this point had formed a development entity Bostrose Associates, L.P., and the Boston Redevelopment Authority. In this agreement, Bostrose Associates provided a non-expiring easement to the Boston Redevelopment Authority for the use of approximately 15,449 square feet along Essex Street, referred to as parcel A. The agreement also provided the City with sidewalk easement over parcels B and M as defined in the attached site plan. This transaction did not alter the aggregate size of the site.[31]

Similar to Copley Place and Gateway Center, taxes for One Financial Center were structured as if Bostrose was the owner of the entire site in fee. However, just like the other two projects, the tax-exempt status of the MDPW resulted in no part of the MDPW owned land being included in the assessed value of the site.

The financing component of One Financial Center was little different from financing used for any similar large-scale development. Rose Associates, the developers, contributed a limited amount of equity and formed a joint partnership with Metropolitan Life Insurance, which provided the construction take-out loan and subsequent permanent financing.

[31] Amended and Restated Land Disposition Agreement between Boston Redevelopment Authority and Bostrose Associates, L.P., May 3, 1982.

Unique Aspects of Project Due to Use of Air Rights:

The limited air rights component of One Financial Center did not dramatically alter the physical development of the project. In fact, the small portion of air rights used above the SDPW structure was a way to overcome a major site problem, not a necessary built component required to successfully develop the project.

When Rose Associates approached the SDPW about purchasing their property and relocating the contents of the building elsewhere, they were told that this would not be possible. After further discussions between these parties and their lawyers it became clear that as a policy SDPW did not dispose of property it owned unless the property was considered excess property and served no purpose in the department's operations. As this property obviously did not meet this requirement, Rose Associates sought another alternative.

Because the SDPW property was used for the operation of a state highway, this property was eligible to be leased as air rights, as mandated by the Massachusetts Highway Department Statue for the leasing of air rights above state highways. After determining that the project could be redesigned to encapsulate the SDPW building. Rose Associates and SDPW executed an air rights lease for the air rights above the SDPW structure. Although the use of this space was not required to build One Financial Center, the air rights lease provided a solution for this issue that was amicable for both parties.

Conclusion:

One Financial Center is an interesting example of how air rights can be used as an innovative way to overcome a major project obstacle. As reflected in this paper, different from the other two projects that I have analyzed the actual built portion of this project does not require and only uses a tiny amount of air rights. This is vastly different from Copley Place and Gateway Center where air rights were essential for the "creation" of space. Instead one Financial Center used air rights to solve a major site constraint, which had it not been able to be solved would have made the project unfeasible.

Because of the uniqueness of the situation in One Financial Center, it is unlikely that many air rights will be used in similar ways for many future projects. However, it will be interesting to see how future projects planned over the Massachusetts Turnpike with deal with existing utility and ventilation systems for the highway and submerged subway below.

JOHN F. FITZGERALD EXPRESSWAY

SURFACE ARTERY SOUTH

SURFACE ARTERY NORTH

SUMMER STREET

ATLANTIC AVENUE

SOUTH STREET

ESSEX STREET

COMM. OF MASS.

LOT	m²	sq. ft.
1	4,839	52,083
2	241	2,592
3	13	139
4	800	8,616

EASEMENT AREA	m²	sq. ft.
a	1,112	11,964
b	281	3,025
c	74	800
d	9	93
e	58	625
f	21	223
g	309	3,331
h	4	48
i	49	524
j	7	72
k	76	821
l	89	957
m	12	133
n	30	327
o	2	22
p	20	218

REFERENCES

B.R.A. PROJECT NO. MASS. R-82 MAP NO. 8-1 OF 8
DATED JULY 1, 1970

SUFFOLK REGISTRY OF DEEDS
DEED BOOK [illegible] PAGE 334
" " [illegible] " 121
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" " [illegible] " 434 (" 3)
" " [illegible] " 441 (" 4)
CERT. [illegible] (LOT 2)

SUFFOLK REGISTRY OF DEEDS
MAY [illegible] 1982
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9946/END

I HEREBY CERTIFY THAT THIS PLAN HAS BEEN PREPARED IN CONFORMITY WITH THE RULES AND REGULATIONS OF THE REGISTERS OF DEEDS OF THE COMMONWEALTH OF MASSACHUSETTS

27 April 1982 — DATE

[signature] — REGISTERED LAND SURVEYOR

LOT	OWNER
1	ROSE ASSOCIATES
2	WOLLMAN ASSOCIATES
3	" "
4	" "

SECTION B - B

SECTION A - A

SECTION C - C

DEMISED PREMISES

SUB-SKETCH

PLAN OF LAND
IN
BOSTON, MASS.
(SUFFOLK COUNTY)

SCALE: 1 : 240 APRIL 27, 1982

BOSTON SURVEY CONSULTANTS
BOSTON, MASS.

9946~END

CONCLUSION

The use of air rights does not radically alter the development process nor deal structure - ownership, taxation and financing - of air rights developments. Aside from additional lease covenants used in air rights leases to protect the long-term viability of the underlying use and the landlord's ownership rights, air rights developments look very similar to traditional land development projects of similar scale and scope. The largest challenges associated with air rights development are not deal structure related, but the engineering and architectural challenges of constructing and supporting a large structure above a functioning use. This conclusion is supported through the research completed for this paper and reflected in the exploration of the general components of air rights developments and detailed analysis of three completed air rights projects.

This conclusion raises the question, if air rights development is not very different from traditional land development, then why haven't more air rights developments been constructed? This paper suggests that the answer to this question is as follows:

Because of the economies of scale that must be generated to offset the additional costs of building an air rights project, these projects are only feasible if they are large. The development of any large-scale project initiates a high level of public involvement. This public involvement slows down and complicates the development process often to the point were undertaking the project is no longer desirable for the developer. Furthermore, the level of public involvement increases if the air rights are located above

a public use and are publicly owned, which is the case for the majority of air rights projects.

Ultimately these projects can only happen if they are supported by the necessary public agencies. Herein lies the dilemma and reason that so few air rights developments exist. The public agencies are concerned about the benefits that the project will offer. The number of jobs the development will create. The amount of public funding required for the project and the return or "bang-for-the-buck" that the public dollars and land-use will receive and the amount of revenue that the project will generate for the agencies.

At the same time, the developer is trying to structure a development that will generate a level of return commensurate with the risk and time that are associated with developing a large-scale air rights project. Because of the inherent high costs of air rights development, the developer will seek provisions from the locality to make the project feasible. The developer will likely seek public subsidies, tax abatements, and low rent for the development site.

The contradictory motives and requirements for the developer and the public agencies have resulted in air rights developments occurring at the rare time when a deal structure that is agreeable to both parties is achievable. This may require the unique situation where forces in the real estate market will allow the project to generate returns large enough to satisfy both parties, while simultaneously public agencies are actively seeking innovative opportunities to generate revenue from their assets, or a combination of both.

Within the twenty-five year period during which time Gateway Center and Copley Place were built, these projects were undertaken at periods when there was some level of

public support for such a project. As discussed in each case study, the levels of support that each project received may have differed as a result of the time period and project location, but each of these projects benefited from some sort of public subsidy. Whether in the form of a lower than market rate lease agreement or assistance in receiving a UDAG grant, these subsidies were crucial to the feasibility of the project.

More recently, the public world and some of government's perceived roles have changed. Creating value from publicly owned assets is a highly visible and expected practice. Currently, there exists pressure on public agencies to receive maximum rents and returns for the use of their assets. The use of public air space for a large-scale, several hundred million-dollar project would certainly be subject to these pressures.

However, it appears that today there exists a rare combination of private and public incentive for another era of air rights developments in the Boston area. The booming real estate economy combined with an in-progress multi-billion dollar transportation and infrastructure project is initiating a new interest in air rights developments. The draft development agreement between the Massachusetts Turnpike Authority and Millennium Back Bay LLC, for the development of a 1.2 million square foot, mixed-use development indicates that today may be a period when both sides can get what they want. The state is receiving rent levels significantly higher than either Copley Place or Gateway Center, and additional income from rent premiums for all project retail space, percentage rent on the gross revenue of the project, and percentage rent on project parking income. The owner/developer, Millenium Back Bay LLC is receiving the use of approximatley 4 acres of Massachusetts Turnpike Authority owned air space and land and the support of the Massachusetts Turnpike Authority and City of

Boston Redevelopment Authority to develop the 1.2 Million Millenium Back Bay Project.[32]

There exist several other air rights development proposals for the downtown Boston area that are in various stages of the development process. These recent development proposals have occurred during this booming real estate cycle and have received a warm reception from public agencies, which are in need of additional funding for the Central Artery Project. It will take several months or even years of public hearings and meetings and project modifications before any of these proposed developments are approved. The trials and tribulations of Copley Place clearly depicted the effects that high levels of public involvement can have on a development. It is even possible that an extended predevelopment/approval process could delay these projects to the point where they miss the up real estate market and are no longer desirable.

Today developers and public agencies are each in the position to benefit from the development of new air rights projects. This has revitalized the interest in air rights development for the Boston area after nearly 15-years since the completion of Copley Place. And while the use of air rights may complicate the design and construction of these deals, the deal structures for these developments will be similar to those being used for traditional land development projects. Further supporting the notion that air rights development projects differ little traditional land development.

[32] Draft Development Agreement between the Massachusetts Turnpike Authority and Millennium Back Bay LLC. June 9, 1998.

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15. Draft Development Agreement: The Massachusetts Turnpike Authority and Millennium Back Bay LLC, June 9, 1998.

16. Enabling Statue of the Massachusetts Turnpike Authority

17. Parsons Brinckerhoff Quade and Douglas, Inc. Air Rights Study: Implementation Guidelines. Prepared for the Massachusetts Turnpike Authority, December 1992.

18. Parsons Brinckerhoff Quade and Douglas, Inc. Joint Development Parcel by Parcel Analysis. Prepared for the Massachusetts Department of Public Works, July 1991.

INFORMATIONAL INTERVIEWS

19. Frank Keafe, Former Director, Massachusetts Office of State Planning
20. William Tuttle, Real Estate Representative, Massachusetts Turnpike Authority
21. Jeffry Dando, Managing Partner, Goodwin Proctor and Hoar
22. Henry Putnam, Real Estate Representative, J.F. White Properties, Inc.
23. Peter White, President, J.F. White Properties, Inc.
24. Norman Adams, Architect, Jung/Brannen Associates
25. John Kessler, Attorney, Peabody & Arnold