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The Law of Air Space, by Robert R. Wright

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THE LAW OF AIRSPACE. By Robert R. Wright. Indianapolis: The Bobbs-Merrill Company, Inc. 1968. Pp. xv, 575. $17.50.

Prior to this century the law of airspace was an exotic sub-species of the law of real property and aroused more theoretical than practical concern. But with the advent of the airplane and more recently the use of the airspace above railroads for commercial building sites the law of airspace has become a very vital concern. The construction of the Chicago Merchandise Mart over the tracks of the Chicago and Northwestern Railroad and the Grand Central Terminal over New York's Park Avenue in the 1920's were the forerunners of a trend which has continued and promises to accelerate as the shortage of prime land in the center city forces developers and planners to utilize the airspace over railroads and freeways for building sites. Airspace development holds considerable promise for improving urban design and for providing sites upon which needed low and middle income housing can be constructed.[1] It also poses a challenge to lawyers, judges and legislators to insure that artificial concepts are not used to restrain airspace development. In *The Law of Airspace*, Professor Wright has addressed himself to this challenge by exploring the relationship between law and the development of airspace over the nation's railroads, freeways and highways.

The Law of Airspace is a product of the program of empirical research directed by the late Professor Jacob Beuscher of the University of Wisconsin. Professor Wright has gone beyond an analysis of possible conceptual and statutory restraints to airspace development and examined a number of large-scale transactions and has also touched briefly some of the fundamental policy choices which must shortly be faced. The book carries forward Wisconsin's admirable "law-in-action" tradition of providing lawyers and administrators with greater insights into the operational and socio-economic dimensions of a contemporary resource allocation problem. It is a welcome addition to the small but growing body of real property scholarship which focuses on the dynamics of urban development.

The primary purpose of the study is to provide "a law and practice book for lawyers."[2] This objective is well fulfilled by the sections of the book dealing with possible doctrinal and legislative restraints on airspace development and the case histories of important transactions. However, having undertaken this laudatory but professionally damning objective,

1. See Lynch, *The Possible City*, in ENVIRONMENT AND POLICY: THE NEXT FIFTY YEARS (W. Ewald, Jr. ed. 1968).

2. R. WRIGHT, THE LAW OF AIRSPACE 5 (1968) (hereinafter cited as WRIGHT).

the author felt compelled to qualify it with the hope "that it is to some extent different . . . because the lawyer's function is somewhat different now than in other times."[3] He no longer functions simply as a traffic cop saying yes and no at the appropriate times but he has become "something of an arranger" in putting together business transactions. This kind of lawyer has need of "economics and the value of things, of high finance, of taxation, of governmental policies and practices, and of the overall social and economic tendencies and trends of the nation, state and locality in which he practices."[4] According proper treatment to all of these factors is a difficult objective and Professor Wright is only partially successful. Aside from a very useful chapter on airspace valuation,[5] the materials designed to place airspace utilization in context are too superficial. Superficiality is largely unavoidable because the social and economic questions which should go into a decision of what constitutes the optimum utilization of airspace can only be studied in the much broader context of urban economics and planning. Thus, the practicing lawyer will find this book a useful source of information for putting together an airspace transaction, but the reader seeking approaches to some of the hard economic and social issues implicit in the use of airspace in urban areas must view *The Law of Airspace* as only an introduction to these broader questions.

The first one-half of the book is devoted to a discussion of whether the airspace can be conveyed, leased or subdivided in approximately the same manner as land. The development of the *ad coelum* doctrine in both the English and American cases is traced to support Professor Wright's conclusion that it can. In this respect the book ratifies the conclusions of other writers such as Stuart Ball.[6] The contribution Professor Wright has made lies in his well-researched and balanced synthesis of the cases and commentary, rather than in new insights. Fortunately, the author has included a summary chapter and the reader may start with Chapter VI if he does not desire an extensive discussion of the *ad coelum* doctrine.

Restraints on development should not arise from the non-recognition of property rights in the superadjacent airspace. They are more likely to arise from a lack of power on the part of railroads and municipalities to permit multiple use of their rights of way because of common law restrictions stemming from the type of interests they hold. A railroad or municipality which holds an easement instead of a fee title or long-term lease may be prohibited from leasing or selling the airspace, even when

3. *Id.*
4. *Id.*
5. WRIGHT, ch. IX, *Valuation of Airspace.*
6. See Ball, *Division Into Horizontal Strata of the Landscape Above the Surface,* 39 YALE L.J. 616 (1930); and Ball, *The Jural Nature of Land,* 23 ILL. L. REV. 45 (1928).

the proposed use is consistent with the existing use of the right of way, because of the principle that its rights extend upward and downward only to the extent necessary for the use of its franchise.[7] A similar doctrine holds that a dedication to a municipality of land for street use creates an easement which the city holds in trust for street purposes only. And, some cases suggest that the trust doctrine might be used to prohibit airspace development even if the city holds a fee title. In *Sloan v. City of Greenville*,[8] the city granted a building permit for a parking structure which would overhang two public streets for distances of six and eight feet, starting at heights of twelve and thirteen feet. A taxpayer brought suit to enjoin the issuance of the permit but the trial court held in favor of the city because there would be no actual interference with vehicular and pedestrian traffic. The Supreme Court of South Carolina reversed in a highly mechanistic opinion. The city held only an easement in trust for street purposes, but the court placed its reversal on the broader ground that "[t]he public right goes to the full width of the street and extends indefinitely upward at least as to prohibit encroachment on such limits by any person. . .",[9] thus suggesting that the result would have been the same even if the city had held a fee title. The court held, that the proposed structure interfered with the public's right to the free use of the air, in effect, that injury to this public right could be shown without actual interference with use of the surface interest, thus indicating that abstract public rights may be used to block airspace development.[10] The court's willingness to treat any projection into the superadjacent airspace as an encroachment suggests that statutory reform of the common law may be necessary unless courts take a less mechanistic attitude toward these problems. Professor Wright has identified many of these problems in Chapter VII, but his discussion is not meant to be comprehensive, nor has he surveyed the law of each state. Thus, before airspace development can take place in many jurisdictions it will be necessary to undertake a survey of the powers of railroads and municipalities to make multiple use of their rights of way so that legislative changes may be proposed in appropriate instances.

The most doubtful inclusion in the book is the 108-page chapter on "Aviation and Airspace Ownership." Its principal purpose is to rationalize

7. WRIGHT 293. See Hickey v. Illinois Cent. R.R., 35 Ill. 2d 427, 220 N.E.2d 415 (1966), which held that if the state granted an easement to the railroad and thus retained a fee simple it could sell the air rights over the property as long as the proposed development was compatible with continued railroad usage.

8. 235 S.C. 277, 111 S.E.2d 573 (1959).

9. *Id.* at 284, 111 S.E.2d at 577.

10. Even if the court had not classified the projection as an encroachment, the result would probably have been the same on the theory that because the city had only an easement they had no power to authorize non-street uses. WRIGHT 300.

the writings of the early aviation propagandists and the opinions they influenced with the commercial use of airspace. In their rush to encourage air commerce, many early writers and courts asserted that the *ad coelum* doctrine should be totally rejected as a noxious feudal relic because it could theoretically entitle a landowner to an action for trespass against every airplane which flew over his land. If the rejection of the *ad coelum* doctrine were followed to its logical conclusion, most airspace development of the kind Professor Wright envisions and documents would be prohibited. The chapter is successful in placing these writings and cases in perspective by showing that "[w]hat happened to the *ad coelum* maxim in terms of airspace ownership in these aviation cases was that it was made responsive to the economic and social demands of the air age while recognition was simultaneously accorded its inherent limitation, which should have been obvious all along."[11] However, in addition, the author has included a lengthy discussion of all of the overflight cases and topics such as airport zoning which are duplicative of existing scholarship and unnecessary for complete coverage of the subject matter of the book. The inclusion of these extraneous matters has forced the author to treat them in a fairly superficial manner and has led to some positive assertions which may turn out to be erroneous in light of subsequent cases.[12]

If the book has a theme, it is that airspace utilization is a desirable economic development and that the law should "expand and shape itself to new situations so as to accommodate the economic growth function of society with the support function of the law."[13] Professor Wright is principally concerned with eliminating what he considers artificial restraints to airspace development. While it is proper to perceive law as supporting economic development by permitting maximum freedom of choice to developers and planners, this is an overly narrow view of the

11. WRIGHT 208-09.

12. The author concludes a discussion of state and federal regulation of airspace with the observation that "[t]he statement found in some cases that Congress pre-empted the field with its regulation of air commerce is simply erroneous." WRIGHT 202-03. A recent decision enjoined the enforcement of a municipal anti-noise ordinance which would have required planning landing at the John F. Kennedy International Airport to alter FAA flight patterns and procedures. While the court based its decision on the grounds that the local ordinance conflicted with FAA regulations, they noted in a footnote:

> In some situations, federal legislation and regulation is deemed so pervasive as to rule out all state and local attempts to regulate in the areas thus 'pre-empted' by the federal government. See, *e.g.*, Campbell v. Hussey, 368 U.S. 297, 82 S. Ct. 327, 7 L. Ed. 2d 299 (1961). The area of flight patterns and procedures may be one of these. . . .

This indicates that the question may still be very much open. American Airlines, Inc. v. Town of Hempstead, 398 F.2d 369, 376 n.4 (2d Cir. 1968.).

13. WRIGHT 282.

function law should perform in airspace utilization. Much development will occur over and around the interstate highway system, and this airspace might well be thought of as urban public domain. As such, it offers unique opportunities to shape our cities to fulfill more defined social objectives and it also offers private developers a potential source of subsidized building sites, as much of this development will take place through urban renewal. The lessons learned from the disposal of the public domain in the nineteenth century and our more recent failure to realize the social objectives of urban renewal in the execution of many projects[14] suggests that we need to be concerned as much with maintaining rigid public controls over airspace development as with eliminating artificial legal restraints.

The need to take a more critical view toward the function of law in airspace utilization is illustrated by the problems discussed in the last two chapters and in developments which have occured since the book was published. The chapter on "Airspace Utilization, Views, Policies and Problems" is primarily devoted to tracing the changing attitudes of the Bureau of Public Roads toward the location and use of interstate highways in urban areas. The Bureau has moved, with considerable pressure from an increasingly aroused public and now the courts,[15] from taking the position that considerations of engineering efficiency alone should determine highway location to the position that highway policies should be coordinated with programs for the economic and social development of the area affected by the freeways. Multiple use of highway corridors has been proposed as one method of implementing this policy.

The Highway Assistance Act of 1968 makes multiple use of highway corridors federal policy.[16] Some idea of the impact such use may have on future highway planning is suggested by a recent conference sponsored by the Highway Research Board. A group of architects and

14. Present defects in urban renewal planning are well documented in Mandelker, *The Comprehensive Planning Requirement in Urban Renewal*, 116 U. PA. L. REV. 25 (1967).

15. See District of Columbia Fed'n of Civic Ass'ns v. Aires, 391 F.2d 478 (D.C. Cir. 1968).

16. Federal Aid Highway Act of 1968, § 128, 81 Stat. 772 (1968).

In the closing days of the Johnson Administration, the Federal Highway Administrator implemented this section by proposing a two level hearing procedure for highway location and design. A corridor hearing must be held by the state highway department before it becomes committed to a specific location at which time the impact of the proposed highway on the existing environment and alternative locations or methods of transportation would be considered. After the location has been selected, a design hearing must be held to consider the social, economic and environmental effects of the design or alternative designs. Proposed addition to part 3, Title 23 of the Code of Federal Regulations, 33 Fed. Reg. 15663-66 (1968). This procedure is bitterly opposed by state agencies and private contractors and whether it will be enacted remains one of the question marks of the Nixon Administration.

planners suggested that the state highway departments buy corridors of land wider than needed for the roadway and that they be given the power, in conjunction with other local authorities, to control the development of these corridors. The federal highway administrator proposed that platforms be constructed over the corridors capable of supporting intensive development, and a team of Princeton architects presented a plan for a 'linear city" which included multi-level structures comprising a total city concentrated over the freeway.[17] In his recent book, *The Last Landscape*,[18] William Whyte endorses proposals such as these and enthusiatically urges that densities in the center city be increased through development of airspace over reservoirs, railyards and freeways in order to preserve the surrounding countryside from the ever on-pushing tide of suburbanites so that it may remain a green belt. Professor Wright's recommended changes in federal policy with respect to disposal of the airspace would facilitate this kind of development. He criticizes federal policy as being overly restrictive and thus not conducive to airspace development and urges that the airspace over and under the interstate and other federal-aid highways in urban areas be subject to sale or long-term leasing arrangements.[19] If this is done, it must be accompanied, as the author recognizes in his concluding chapter, by regional planning controls. Otherwise the social objective of airspace development may not be realized. For example, in a recent review of Whyte's book, Charles Abrams asks "Is it only the suburbanite for whom open space and recreation should be preserved, while the less privileged stay in the slums? Green belts are fine too, but what if one of their functions is to separate the urban black belt from the suburban white belt."[20] It would indeed be tragic if airspace development were to become a sophisticated method for the preservation of racial segregation.

These consequences can be avoided if governments are willing to create new institutions. Professor Abrams and others have suggested that new regional public agencies be created to acquire land, plan its development, and after "reserving the space needed for public services, low-cost housing and other essential services . . . the rest could be sold to developers subject to a plan."[21] While it is doubtful if this much development initiative will be shifted to public agencies in the foreseeable future, it seems likely that the current movement toward regional planning efforts will lead to institutions which exercise direct controls over land

17. The conference is reported in Nunn, *Corridor to the Future*, Louisville Courier-Journal, Nov. 24, 1968, § F, at 1, col. 1.
18. W. WHYTE, THE LAST LANDSCAPE (1968).
19. WRIGHT 403-04.
20. Abrams, Book Review, N.Y. Times, Nov. 10, 1968 (Book Reviews), at 50.
21. *Id.*

development at the regional level. For example, regional planning agencies might be given the power to approve or reject local land use decisions depending on whether they were consistent with regional development policies.[22] These proposals will neither be cheap nor easy to implement, but they seem necessary if we are to approach optimum utilization of our land and related natural resources, one of which is unused airspace. Because we have few of these types of institutions at the present time, I would urge that all levels of government should move with considerable caution in implementing airspace development proposals, for it is necessary to withstand pressures for rapid utilization until a proper structure for decision making is developed. Professor Wright has performed a service by calling attention to the prospects and problems for airspace development. What is now needed is future research and scrutiny of the development process.

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22. See Mandelker, *New Incentives and Controls* in ENVIRONMENT AND POLICY: THE NEXT FIFTY YEARS (W. Ewald, Jr. ed. 1968).

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