

# **Overview of the Virginia Department of Transportation (VDOT) Study on Air Rights Development**

## **Background on Air Rights Development**

- “Air Rights” is a legal term used to describe the area above or below a transportation facility located within the existing right-of-way boundary.
- The right to use these areas by a public or private party for non-transportation uses may be granted through lease of the airspace, as long as it meets the following conditions:
  - Does not interfere with the construction, operations, or maintenance of the facility;
  - Does not hinder meeting anticipated future transportation needs; and,
  - Does not negatively impact the safety and security of the facility for transportation and non-transportation users.
- Federal regulations grant states the right to lease airspace over interstates with Federal Highway Administration approval. The regulations require the funds received to be utilized for eligible highway projects.
- Virginia Code §33.2-226 grants the Commonwealth Transportation Board the authority to lease or sell and convey airspace above or below any highway owned by the Commonwealth; compensation paid for such leases and conveyances must be credited to the Transportation Trust Fund.
  - The Code also states that no lease or conveyance of this type can be entered into until the locality has approved the projected use and has zoned the airspace in question, or has otherwise taken such steps to regulate the type and use of the improvements to be built.
- Air Rights developments have typically been successful in dense metropolitan areas, where shortages of land near transportation facilities create a demand for mixed-use transit-oriented development (TOD).
- Long-term leases (defined as lease terms of 50 years or longer) of airspace are subject to local real estate taxes, and the lessee would be required to pay local real estate taxes unless the lessee is tax-exempt.

## **VDOT Review of Air Rights Development**

- In 2012, VDOT began to evaluate the use of Air Rights leases as a potential revenue stream to directly fund highway projects.
- The Virginia Office of Public-Private Partnerships (OP3) performed the evaluation for VDOT. In 2013, OP3 recommended advancing two pilot projects after a detailed project screening. The projects were to seek partners to develop underutilized air space over I-66 for TOD development at:
  - East Falls Church Metro Station Area in the City of Falls Church (*since removed from consideration*)
  - Rosslyn Metro Station Area in Arlington County (*suspended until further notice due to OP3 staff resources*)
- A Request for Information (RFI) was issued in 2013 by OP3 to identify potential private sector interest in Air Rights development projects at these two sites. As a result of the RFI, the East Falls Church site was removed from consideration and OP3 is not moving forward with an Air Rights project in that location.

### **2016 Study by Commonwealth Transportation Board (CTB)**

- The 2016-2018 biennium budget passed by the 2016 General Assembly included the following directive to the CTB:  
*“The Commonwealth Transportation Board is hereby directed to enter into discussions with Arlington and Fairfax Counties regarding use of air rights over Interstate 66 in their respective jurisdictions no later than October 1, 2016. A report on the progress and outcome of such discussions shall be submitted to the Chairmen of the House Appropriations and Transportation Committees and the Senate Finance and Transportation Committees no later than July 15, 2017.”*
- While the study language is limited to the I-66 corridor, VDOT has expressed an interest in developing a process for potential development within any state right-of-way corridors.
- VDOT and OP3 have asked the County to provide feedback on the process the County may use to review future Air Rights development projects.
- The Board should consider an approach for handling these types of project requests.

### **Issues for Fairfax County**

- The County discussed Air Rights in September 2013, receiving a presentation on the 2010 Metropolitan Washington Airports Authority (MWAA) Study of Air Rights in the Reston area at a Board Transportation Committee meeting. That 2010 study concluded the following, among other items:
  - Air Rights in Reston would likely require about a 7.0 FAR to reach private sector internal rates of return, particularly due to the width of the roadway;
  - The cost of building a platform (i.e. creating ‘new’ developable land) was estimated at twice the average of traditional land sales in nearby TOD areas; and,
  - Providing vehicle access to the Air Rights development would be challenging and would have impacts on the surrounding road network.
- However, given VDOT’s interest in this issue, staff believes the current development process in place for all land use cases is appropriate to use for proposals for Air Rights development within the right-of-way. Currently, there is no density allocated to right-of-way areas in the County; therefore, development proposals for Air Rights would likely include comprehensive plan amendments, as well as rezoning applications.