



6.3 AIRSPACE LEASE AGREEMENTS

An airspace lease is a term established by the Federal Highway Administration (FHWA) that refers to the leasing of highway right of way for non-transportation related uses on federal aid highways to generate revenue in the stewardship of state owned resources. The FHWA defines airspace as "that space located above and/or below a highway or other transportation facility's established grade line, lying within the horizontal limits of the approved right of way or project boundaries."

6.3.1 Airspace Agreements vs. Other Lease Agreements

The following situations require use of an airspace lease agreement that is to be approved by the FHWA and subject to all FHWA requirements (see details on other rental agreements in Section 6.2 of this manual):

- Project is complete, and right of way is not needed for other transportation purposes for the long term.
- Property is not surplus, but is anticipated to be used for transportation purposes in the future.
- Subject is along a roadway designated as part of national highway system. If not, standard lease arrangements per Section 6.2 of this manual apply.

Other situations involving mass transit authorities and procedures for the negotiation and approvals for airspace lease agreements can be found in [23 CFR 710 Sub. D](#). In cases where the subject meets situations as described above, procedures outlined in this section must be followed. Any income is subject to financial procedures and reporting as designated by the WisDOT, Bureau of Financial Services. Also see sub-section 6.3.5 below.

6.3.2 Parties to Agreement

Airspace agreements may be drafted between WisDOT and the lessee, with approval of the department. The lessee and the department shall be the signatory parties. In certain situations, and with prior approval of the department and FHWA, a county may be able to act as an agent of the state. In this situation, the lessee and the county shall be the signatory parties, with department approval noted after the signature. In either situation, approval of the FHWA is required only if the airspace is located on an interstate highway system.

6.3.3 Drafting Agreement

6.3.3.1 Fair Market Rental

Airspace leases on the national highway system are required to generate fair market rent. Because of this requirement, it shall be common practice for Real Estate staff to establish a fair market rent for agreements on both federal and non-federal funded projects. Fair market rental rates shall be determined by one of two methods: 1) public bidding for the right to

operate the site; or, 2) a detailed appraisal prepared by an experienced and qualified appraiser that documents the market rent to be collected. If public bidding is chosen as the method to arrive at fair market rent, the request for FHWA and BTS-RE concurrence should contain the documented estimate of the high bid.

6.3.3.2 Format

Two sources are identified in this section that will provide guidance in formatting and provisions for drafting an airspace lease. Further questions and guidance may be requested through the BTS-RE property management coordinator. Milwaukee county staff in cooperation with the FHWA, BTS-RE and regional staff has developed a bulletin entitled "How Freeway Airspace is Leased in Milwaukee County." This bulletin provides background on how to draft and develop airspace agreements. Contact BTS-RE property coordinator for a copy. The sample airspace lease agreement in sub-section 6.3.4 below is another source. It, however, does not contain all federal required elements. Additional details may also be referenced in [23 CFR 713.204](#). Guidance from the BTS-RE property management coordinator and FHWA should be sought if you are new to preparing such agreements.

6.3.4 Executing Agreement

A proposal for a specific airspace lease should be considered first by the regional office and after analysis and examination shall be forwarded to the BTS-RE property management coordinator for review. Such proposal shall include the recommendations of regional Real Estate, Design, Maintenance, Planning and other sections as appropriate, as well as concurrence by the regional director. The submittal to BTS-RE shall contain the following (also see sub-section 6.3.5 below):

1. Copies of all pertinent correspondence with interested parties.
2. Two full-size prints of right of way plat sheet(s) showing area involved.
3. Two full-size sets of developer's proposed plans or sketches as necessary to show proposed use.
4. Two copies of proposed airspace agreement.

BTS-RE, along with representatives from the Operations and Development bureaus and other appropriate areas, shall review the proposal to determine if the airspace identified is, from a statewide perspective, free from future construction needs and/or does not inhibit the safe operation and maintenance of the highway facility. BTS-RE will recommend approval if findings in #3 above are favorable. If federal aid highway systems are involved, the department's approval shall be subject to FHWA concurrence in the proposed lease agreement. BTS-RE will notify the region upon approval. In the event the proposal is rejected, the region shall advise the prospective lessee. See sample air space lease agreement for use of lands and airspace.

6.3.5 Agreements Involving Interstate System

If the use of airspace involves federal aid highway interstate systems, the following shall be submitted to the FHWA for approval or disapproval (3 copies/sets of each):

- All pertinent correspondence.
- Full-size prints of right of way plat sheet(s) outlining area involved.
- Full-size sets of proposed plans or sketches showing proposed use.

- Proposed lease agreement prepared in accordance with [23 CFR 713 Subpart B](#).

Upon approval by FHWA, BTS-RE will advise regional office or its representative to initiate development of site with lessee.

6.3.6 Land Acquired in Name of County

Where the airspace was acquired by the state in the name of a county, the county will handle the proposed leasing of the airspace, subject to approval of WisDOT and FHWA (interstate highways only).

6.3.7 Maintaining Inventory of Leases

Each regional office will maintain an inventory of all authorized airspace leases. This inventory shall be available for review by appropriate federal and state agencies and will include, but not be limited to, the following items for each authorized use of airspace:

- A three-dimensional description or a metes and bounds description.
- As-built construction plans of highway facility locating where airspace use is authorized.
- Copy of executed airspace agreement.
- Identification of authorized airspace user.
- Location by project, survey station, or other appropriate method.
- Pertinent construction plans of facility authorized to occupy airspace.

6.3.8 Maintaining Intended Use

Regional Real Estate or county staff will, through inspection and surveillance, assure that the user carries out the intent of the agreement for use of airspace. In all cases, the applicable provisions of FHWA guidelines apply. In the event of breach of lease provisions and FHWA guidelines, lease termination and eviction shall be the necessary course of action.

6.3.9 Change in Proposed Use of Lease

The regional office shall advise BTS-RE of any change in proposed use. "As built" construction plans and "before" and "after" photographs will be provided the BTS-RE for record purposes.

6.3.10 Special Consideration to Institutions of Higher Learning

Wisconsin Statutes requires special consideration be given to institutions of higher learning concerning contracts. See [s. 118.09\(2\) Wis. Stats.](#) for more information.