

**MIXED-USE, MIXED OWNERSHIP DEVELOPMENTS AIR SPACE  
SUBDIVISION TECHNIQUES AND ISSUES**

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Synopsis

This article provides an introduction to various common-interest type structures available in the development of mixed-use real estate developments. Special attention is placed on categories of concerns which will affect all developers, potential users, lenders and other parties. These include sharing of common expenses; obligations for maintenance, repair and replacements and other common ownership issues. Various legal structures are discussed, such as condominiums and air space subdivision, pursuant to which one or more sections of the development may separately be subjected to a condominium form of ownership. Reference is made to the nature of air space divisions and terms such as “lollipop condominiums” and “mega-units”. Prepared for use in the March, 2003 program for the American College of Real Estate Lawyers entitled “So, You Thought You Were a Sophisticated Real Estate Lawyer: Mixed-Use Condominiums and The Otherwise Sophisticated Real Estate Lawyer.”

## **MIXED USE, MIXED OWNERSHIP DEVELOPMENTS AIRSPACE SUBDIVISION TECHNIQUES AND ISSUES**

**David M. Van Atta**

There are several different legal structures that may be used for establishing and managing the operation of mixed use, mixed ownership projects. One such form is the condominium regime. Another format is the vertical subdivision of space by use of maps and reciprocal easement agreements. This paper explores and compares some of the legal issues and complexities of these different systems of legal ownership as applied to mixed use, mixed ownership developments.

There are a variety of legal issues involved with creation and operation of commercial, office and retail developments with multiple owners. The inclusion of a residential component, particularly where the residential units are sold as separate condominiums or cooperative apartments, compounds the legal, regulatory and administrative issues.<sup>i</sup> These projects entail creating vehicles or mechanisms by which transfers or conveyances can be made of distinct ownerships in portions of the building, or buildings, or of a larger project. The ownership divisions might be either, or both, vertical or horizontal in nature, and could entail various different types of air space severance and subdivision.

The establishment of such a project requires documentation which, among other things, designates the different ownership interests, establishes a mechanism of governance among the various ownership parties as to areas of joint use and or control, sets forth a mechanism for budgeting and collection of funds necessary for operation of the overall project and designates rights, limitations and other restrictions pertaining to use and occupancy of the property.

**Approaches:** Although the condominium regime is an effective method for creating mixed use, mixed ownership projects, in the past, divisions of property for commercial purposes have generally been undertaken by the legal mechanism of land and/or airspace conveyances accompanied by reciprocal easements.<sup>ii</sup> In some jurisdictions, the airspace parcels are established by a platted air space subdivision map or plat filed with the local government agency as any other subdivision of land with similar reciprocal easement arrangements.<sup>iii</sup> In more recent times, condominium or other common interest ownership methods have been used for development of mixed use, multiple owner projects.

Historically, when the nature of these projects were, perhaps, a bit simpler, the most common approach was to use air space conveyancing deeds to create separate planes of ownership,<sup>iv</sup> and then devise a scheme of reciprocal covenants for handling joint use of

certain areas of the building and/or the land accompanied by deed restrictions or a separate declaration of covenants to provide for restrictions pertaining to use and operation of the development and its separate parts.

**Use of Condominium Legal Structures:** Although the use of condominium regimes and similar common interest programs might be a feasible manner to create such projects, this may not always be the case because of the potential of involving state or local regulatory laws which were envisioned for residential projects. In choosing a vehicle for establishing the airspace development project the impact of state statutes that govern specific types of developments in the state, such as condominiums or common interest developments, must be scrutinized. The definitions set forth in these statutes are often so broadly worded as to encompass projects that were not specifically intended to be governed by the provisions of the statute. Some statutes have express exemptions for nonresidential projects, others may require that the project be expressly excluded from the application of the statute.<sup>v</sup>

**Goals for Documentation:** The legal documentation for a multi-story mixed use multiple owner development must accomplish several different goals. One of these goals is to establish the separate ownerships of the project. This could either be accomplished by creating deeds of conveyances with respect to different airspaces with the airspace being defined by legal descriptions on a three dimensional basis, or by legal descriptions which reference the airspace as platted on a subdivision map creating a vertical subdivision (the so-called "layer cake" or "flying freehold" approaches), or by reference to a condominium plan which designates the various airspace parcels.<sup>vi</sup>

The mixed use development project is created within the scope of an ongoing process of land use approvals with the local government agencies. The method of dividing the airspace must comply with the local government requirements. In particular, inquiry should be made as to whether some type of a subdivision or plat map must be processed with the local government with respect to the division of the airspace.<sup>vii</sup>

**Nature of Air Space Divisions:** As the airspace is to be divided and conveyed to multiple owners, a critical element of the documentation is to define and establish rights of use over various common elements and facilities of the building. For instance, consideration will have to be made for elevator and for utility systems. In some buildings, these facilities are discrete with respect to the different ownerships. There may be separate entrances, elevator shafts and utility systems which run from a common initial facility to the various components of the building structure. In these instances, subdivision maps or deeds often will show the area for access of these facilities as extensions from the particular floors or areas of the building which are separately owned to the common location. Such may be either designated as easements or as part of the fee ownership as extensions from a particular airspace ownership. A parcel or subdivision map for such a building might look

like a series of parcels layered on top of each other with projections extending down to the basement area for elevator and utility extensions, giving rise to the expression "lollipop" developments.<sup>viii</sup> As an example: Where there is an existing building which cannot be removed, either because of historical landmark status or other compelling reason, the landowner may desire to develop additional facilities above the existing building. In this situation, the developer essentially is developing the airspace situated above the existing building as a separate structure on the same parcel of land, perhaps with certain tie-ins with respect to the existing building for structural support and access for a variety of different utility installations. Therefore, from a vertical view, you would have a separate airspace parcel for the existing structure and a separate air space parcel for the new structure. The airspace for the new improvements could be divided, or subdivided, into more than one airspace ownership. Extending from the airspace for the new structure, through or adjacent to the old structure to the ground and/or basement, would be a stem-like protrusion through which access for location of elevators, stairways and various utility facilities would be provided. This stem for access of such facilities could be created as a reciprocal easement, an exclusive easement, or as an extended portion of the fee of the airspace parcel of the new structure.<sup>ix</sup>

**Condominiums and Mega-units:** As the concept of condominium development has gained acceptance, both as a legal format and from the commercial viewpoint, the condominium legal form has been used to structure large scale mixed use projects. Essentially, the legal concept is to create large condominium units encompassing each of the separate components of the project, such as the residential portion, the office portion, the retail portion, the hotel increment, the parking garage and what other different uses might be appropriate for separate designation. These units might be referred to as "mega-units" to distinguish them from individual units to be owned and occupied by separate users. Mega-units can be "resubdivided" into such smaller increments of units for individual sale and use. One potential advantage to the condominium approach may be in structuring the project documentation. As indicated by our companion materials, traditional documentation for condominium projects can be adapted to encompass the concept of the "Mega-unit" approach. This type of approach may be more acceptable to title companies and other parties than using the somewhat less familiar approach of air space divisions accompanied by cross-asegment agreements and agreements for use and maintenance. A possible disadvantage to using the condominium regime to create such a division of a building into separately owned blocks of different uses may emanate from the laws for establishing and regulating condominiums in the particular state in which the project is located. The laws in the relevant jurisdiction pertaining to condominium development, marketing or operation may have unwanted aspects that would not impinge upon the proposed project if it were established using another method for dividing the airspace.<sup>x</sup> The application of the rules generally applicable to condominium projects to the mixed use development may not be advantageous in the proposed scheme of development.

Some state statutes have express exemptions as to the application of all or part of the regulations generally applicable to condominium projects for nonresidential projects.<sup>xi</sup> An issue for consideration in structuring a mixed use project as a condominium project is the requirement that there be common area that is owned as undivided interests by the condominium unit owners as tenants-in-common.<sup>xii</sup>

**The "Vertical PUD" - Common Interest Developments:** In those states which have adopted the Uniform Common Interest Ownership Act ["UCIOA"], or a similar statute, it is possible to create a mixed use high rise development in a manner which might be preferable to the platted air space subdivision or the condominium, as a "vertical PUD." UCIOA is seen as providing statutory authority for the vertical PUD as "a new scheme of ownership for common areas of multi-tenant buildings that should prove superior to the tenancy-in-common arrangement required in the condominium."<sup>xiii</sup> By the use of this technique, potential technical difficulties and political incongruities which might be faced in attempting to deal with conforming the subdivision map or plat for a high rise, multiple ownership, air space subdivision development with the state and local platting laws might be avoided. The description of the various separately and commonly owned increments of the project would be set forth in an attachment to the declaration which creates the common interest regime, in a manner similar to that often employed for establishing a condominium development. By this method, the common areas would be owned by an association rather than by tenancies-in-common, which might be advantageous from several aspects, including ease of administration, insulation from tort liability and title issues.

**Operational and Management Concerns:** Whether the legal structure of the mixed use development is a condominium project, or some other form of separate legal ownerships. With the creation of separate airspace ownerships, the project documentation must establish the system for operation of the overall facility and responsibilities for the various increments which constitute the overall project. Although some portions of the project might be discrete to each of the particular units of airspace ownership, such as independent elevator lobbies and shafts for elevator cabs, independent utility facilities, and, at times, separate facilities for heating, ventilating and air conditioning, there are almost invariably some base facilities which are common to all of the units of ownerships, including the roof areas, the building exterior, common area lobbies and similar such areas. The project documentation must spell out who has responsibility for what particular facilities, and how decisions will be made with respect to the budgeting, management, maintenance, operation, and replacement of these facilities over time.

Provision will have to be made for allocating the costs for management, maintenance, repair and replacement of these common facilities. Furthermore, there needs to be some type of enforcement mechanism with respect to the owners of the various discreet portions of the building fulfilling their obligations to use, operate, maintain, repair and replace their discreet facilities and systems in a manner that will maintain the integrity

of the overall project.

A matter which often requires special attention in drafting of project documentation is parking facilities and structures. Frequently, the parking portion of the underground area of the building is a separately divided airspace with separate ownership. In some instances, this separate ownership is conveyed to the municipality for operation as a garage facility. In other instances, it is sold and/or leased to a separate entity for operation as a separate business enterprise. The airspace with the garage structure also contains many of the building operating components such as HVAC and elevator facilities. Certain exclusions or easements with respect to these types of facilities will have to be made to separate those facilities from the garage areas.

**Management structure:** In creating the mechanism for decision making, the drafter of documents must anticipate areas of potential conflict and attempt to design a management system which best avoids such difficulties. Particularly where the building or project contains a residential ownership element, as well as commercial, office and/or retail elements, it may be important to consider creating separate decision making processes or bodies for the residential element, at least for those aspects which do not mandate common involvement of all portions of the project ownership. Dealing with this factor may encourage the developer to use a form other than the condominium regime for the mixed use project. Having a condominium system of management, depending on the laws of the jurisdiction may be disadvantageous in some important aspects, such as voting controls, allocation of assessments, and desired management control by the project sponsor. Separate associations or a subassociation for the residential increment is often advisable. Project components which require contribution of all of the ownership for payment of their maintenance and operation should be the subject of some type of joint powers agreement, master association or other joint decision making process. The difficult challenge is developing a reasonable formula or process for allocation of costs and the weight of the voting rights for each of the various project increments.

**Use Restrictions:** Drafting documents for mixed use, mixed ownership projects requires attention to restrictions on uses for the various interests, as well as with respect to the common areas that are used by the various separate unit ownerships. Thought must be given to the enforcement mechanisms for such use restrictions, particularly in the mixed use context where there are residential as well as commercial types of uses. A separation of the administrative processes for the different aspects of the development may be advisable. Commercial owners will not want to be subject to changes or enforcement by the owners of the residential component. It may be advisable to separate the enforcement of use restrictions among different aspects of the project, through the use of subassociations, or similar mechanisms. The drafter must focus on the specific interrelationships within the building or buildings as the uses and occupancies are perceived by the project proponent, to evaluate if specific limitations and prohibitions are warranted. An enforcement mechanism

must be created that is fair, reasonable and workable. Often in the nonresidential development, the project proponent desires to be, at least initially, the arbiter of disputes and the administrator of claims of violation. This may not be a particularly wise course to follow.

Drafting use restrictions for commercial/office properties is much less pro-forma than for residential projects. Combining other uses, particularly residential uses, with commercial and office uses, only makes the drafting and implementation more difficult. Developers of nonresidential projects are concerned that overly restrictive use provisions will limit the marketability of the product they will have to sell and may not be broad enough to allow for new commercial, office or other business uses within the building for which there may be an interest in the future. The occupants and owners of the nonresidential and residential portions of a mixed-use property may have their own expectations as to the degree of flexibility of uses and limitations on types and natures of uses to protect their own use and comfort, and also, as owners of separate interests, their long term investment in the property. Areas of particular concern will include the use and storage of hazardous substances, activities that might require modifications of the structure, such as the Americans with Disabilities Act, creation of variances in the physical requirements of the property, such as parking requirements.

**Project Description and Definitions:** The project documentation usually is a reciprocal easement agreement, a declaration of covenants, conditions and restrictions, or a combination of both of these instruments, either as separate documents or combined into one omnibus agreement. The form and general content for such documentation is often similar to the declaration of covenants, conditions and restrictions or "enabling declarations" used for creation of condominium projects or planned unit development projects. In fact, there may very well be a layering of documentation when the development has portions of its separate areas divided again into subownership categories, such as residential or office condominiums within a part of the distinct air space modules. Describing the various components of the mixed use project, especially where the project is not a condominium regime, can be complex. The separate ownership interests may be specified as conveyances of three dimensional parcels described by vertical, as well as horizontal, metes and bounds, or, more commonly, as air space parcels or units by reference to a separate subdivision map or plat or condominium plan. In setting forth distinct areas of individual ownership and operation and common ownership and operation, the legal implications of various potentially applicable state laws must be contemplated in the drafting exercise. A development may inadvertently, by the nature of its components and its description, be included under a statute for common interest development or ownership, imposing various regulatory and administrative consequences.<sup>xiv</sup>

In drafting the descriptive parts of the project documents, it is very important to involve the project architects and engineers at the earliest possible stage to obtain an

understanding of the intended scheme of ownership and operation, the interrelationships among the various separate ownerships and the nature of the various project facilities, and to provide insights early on as to the legal complexities involved in preparing the necessary documentation. It may be important to involve local government officials who will have oversight of the development as well. Representatives of the potential title insurer must be consulted to discuss the intricacies of this type of development and the requirements of the title insurer. In addition, the counsel of experienced property managers and insurance consultants should be invited.

**Easements:** A most critical element of the documentation for any mixed use development is providing adequate easements for support, access and use. Non-exclusive reciprocal easements must be provided for support of each of the separate building structural components to each of the separate interest holders over and across relevant portions of the project not owned by the separate interest holder. Additionally, non-exclusive easements for use of commonly used facilities, such as common systems, service and deliveries, utility systems and service systems, parking areas, and wall systems, must be provided, as well as for pedestrian and, if applicable, vehicular, access. Exclusive easements for areas which are to be restricted exclusively for the use of one particular ownership over and across other areas of ownership also need to be provided. One of the more complex aspects of the documentation may be the designation of the particular location of some of these easement areas. Although some easement rights, such as support and general access can be created by general verbiage in the document, without having to detail the precise location, for exclusive easement areas and those non-exclusive easements through another airspace which is to be of limited impact, such as access through specific lobbies and corridors, lobbies, utility systems, mechanical rooms and the like, more precision will be required. Identification of these specific easement areas is usually accomplished by reference to areas designated on a detailed map or project plan. It is important to provide for alteration or modification or possible relocation, of these designations in the future operation of the project. Some areas that are commonly subject to the creation of exclusive easements include: separate building systems, private access corridors, separate use areas, such as balconies, patios and decks. Additionally, provisions must be made with respect to potential encroachments of portions of one separately owned element upon another or upon commonly owned or used elements. In designating the party or parties who will have operational management and control, care needs to be taken to provide for rights of access over separately owned portions for undertaking designated activities. There may be a need to identify limitations on such access for maintaining integrity or privacy of occupants of these separately owned portions. Easements should include access for major components used by one owner for facilities situated in other portions of the building, such as elevator facilities situated in the basement or chillers and other components of heating and air conditioning systems situated on the roof. The documents should designate who is to maintain, operate and repair various easement areas

and how costs are to be allocated.

**Maintenance and Repair:** As the project is broken into several ownership increments, decisions must be made at the outset as to who is to be responsible for undertaking the maintenance, repair and replacement of the different physical components of the project and how such responsibility is to be administered. There may very well be a variety of levels of maintenance and repair concerns. In a complex project, there may be several buildings, as well as a variation of levels within a building. Generally, the responsibility for the overall structural integrity of a high rise building cannot be divided and handled by several different ownerships. Either an entity, with a well conceived decision making structure, must be established to handle this responsibility, or, one owner of the collective ownership must be delegated the responsibility with the right of assessing the other owners for their proportionate share of the costs. As is discussed in a later section of this article, there are several different governance structures which might be considered. If maintenance and repair responsibilities for portions of the project are delegated to individual ownership interest, mechanisms for enforcement of these responsibilities are required. Consideration should be given to the appropriateness of adopting a system of fines and liens in this context, and as to whether "self-help" provisions in documents can be enforced under the applicable state law.

**Construction, Alterations, Remodeling:** The drafter of project documentation should consider what types of controls are needed with respect to construction within the various subcomponents of the project. Where the work is structural in nature, visible from the exterior or will involve common operational elements of the project, some type of controls will be required, under the auspices of the overall project management. A fair, efficient process for review, approval and oversight of proposed construction work needs to be established. A mechanism for determining and enforcing remedies for violations of these requirements also must be formulated. When drafting documentation for a high-rise mixed use building, consideration should be given as to the necessity and appropriateness of establishing a process for review and approval of non-structural, interior work within a particular component, and who should be responsible for carrying out this review. It may be preferable to have at least the initial responsibility for much of this review and oversight delegated to a particular ownership component.

**Assessments:** Another area of concern will be allocation of the costs of operation, maintenance and repair of various different components thorough out the structure or structures, and how to collect the assessment of such costs. An initial step will be to determine what matters are "project wide," matters of concern which will be charged on some type of basis to all ownership increments, and what matters are discrete to certain particular ownership interests and are to be charged only to those interests. One approach is to provide for a central management authority that will be responsible for undertaking the operation, maintenance and repair of a particular physical aspect of the building; however,

such does not mandate that all of the ownership interests pay for the costs of this activity, if the benefit inures only to a particular ownership interest or interests. The method of allocation of costs for those allocated across the board to all ownership interests should consider whether one ownership interest obtains a greater benefit than any of the other ownerships, or by its nature creates a greater burden. Otherwise, a formula based upon relative square footage is the most often utilized system of allocation. Different cost elements can be treated individually. There may be some cost elements that should be allocated to certain ownership elements but not others. These are sometimes designated as "cost centers," with specific formulae for allocation to certain of the ownership interests.

Enforcement of payment usually entails a noticed assessment and stipulated payment period. The key issue is how to effect enforcement of payment in event of default. If the project is conceived in the condominium format, establishment of lien rights may be relatively easy to accomplish by following the relevant state law for condominium regimes. However, if the project is not a statutory condominium, but divided by some other legal mechanism, the drafter must evaluate whether there is statutory authority or other legal basis for implementing a lien on the delinquent ownership interest for failure to pay the assessed charges. Analogy may be made to the documentation used for creation of planned development common interest developments where lien rights are frequently imposed in the project documentation and established as affirmative covenants running with the land. Some states, such as California, have established clear legislated authority for imposing liens for collection of common area maintenance matters for common interest developments that are not condominiums. Other jurisdictions, following Uniform Common Interest Development Act, have similar statutory authority that may be applied to the projects to which this discussion pertains. Without an established lien right in the documents, the obvious enforcement is through judicial proceedings on the debt and the subsequent seeking of a judgment lien through enforcement of the monetary judgment. Priority issues obviously result. An ancillary, but important, issue is to establish whether the lien for such delinquent expenses primes the mortgage lien or liens on the ownership interest or interests involved and the drafting of appropriate mortgage protection language to assure that the ownership interests are financable. It should be noted that in the traditional residential project model, the documents often provide that the first mortgages are superior to the assessment lien of the condominium project. This may not be workable for a large scale mixed use development broken into several ownerships. The very sustainability of the project operations will depend on the collection of operational revenues from all of the ownerships. It is imperative that discussion be held with potential mortgage holders to convince them that their mortgages must be subordinate to the project assessments and liens.

**Project Governance:** A question to be contemplated by the drafter of project documentation is whether there should be a formal entity established for governing the

project. Where the number of different ownership interests are relatively few, such as two or three in number, and the matters of common involvement are straightforward, then such separate governing entity may not be necessary. However, under the laws of some states, the project structure may mandate the formation of some type of formal governing entity.<sup>xv</sup> The documents will have to provide a system for decision making as to matters of common involvement among the various ownership interests. A degree of tension may develop as to what matters will involve collective determination and how such decisions would be reached. Day to day operational matters must be differentiated from major decisions requiring such collective input and consensus. In most instances one party must be given the responsibility and authority to operate the premises. An initial budgeting process instigated by what is conceived as the controlling owner, and an annual review thereof by the other ownership interests, should suffice, except for major, nonrecurring type items. Critical concerns include: operation of the common areas of the premises, collection of proportionate shares of the costs from the separate ownerships, and issues of construction matters, such as alterations additions and maintenance and repair by individual ownership interests of separate elements. Some thought should be given to whether a separate entity is necessary to oversee and enforce responsibilities in these matters. Such matters can be subject to an appointed committee of representatives of the ownership interests, with the voting rights of such representatives weighted to reflect some sort of identity of interest. However, it may be preferable to have one ownership interest with the authority with respect to such issues, subject to some type of oversight or arbitration in the event of disputes.

In certain, and probably most, instances, it will be warranted to organize a management structure involving a separate entity for overall project management and operation, as a project association. Where there a many different ownership interests, such as a project with separate residential units and several other individually owned increments, with perhaps subdivided retail or office units as well, a structure with individual ownership associations, operating collectively under an umbrella association or under some type of joint powers agreement may be the appropriate structure.

**Damage and Destruction:** One of the more difficult drafting and management issues for mixed use developments is creating an effective mechanism to be used where there is either partial damage or total destruction of the building structures and components. This must be coordinated with the insurance provisions contained in the project documents. Anticipation of the requirements of mortgagees of individual components is also necessary. It is difficult enough to have to deal with a disaster such as a high rise fire, or earthquake damage in the context of a commercial property occupied by tenants under long term occupancy leases. Issues are greatly compounded when there are multiple ownerships within the structure. In order to accomplish the requisite decision making, clear guidelines for who and how to deal with specific circumstances needs to be laid out. Centralizing the

decision making and management of this issue is critical.

Definition of what events are major events of damage or partial destruction which dictate collective or collaborative involvement is necessary. Where the damage is limited to a distinct separately owned portion of the structure the main concern will be that the ownership effects the necessary repairs with dispatch in a manner which causes as little inconvenience to the other ownerships in the property and imposes no cost or obligation on the other ownerships. Where the damage involves commonly owned or used features, the decisions regarding effecting repair and payment for the costs of repair becomes more of an issue. Particularly in events where insurance proceeds are inadequate to cover the expense of repairing commonly owned parts of the projects, or where there is a need to obtain reimbursement from other owners for repair of common portions, a process for making the decisions as to effecting the repairs and obtaining the funds to make the repairs is needed. If one ownership party does not want to proceed with reconstruction, a method must be devised to allow for rebuilding for the remainder of the project. The documentation must foresee potential disputes as to the desirability of proceeding. The availability of insurance proceeds for each segment of the project is critical and must be subject to periodic review. Use of available insurance proceeds must be controlled. A tie in between the availability of insurance proceeds or the lack thereof and the obligation to proceed with reconstruction is important, so it is common to mandate going ahead to rebuild unless proceeds are insufficient by a stated formula. If one ownership entity does not desire to go ahead, but others do, some understanding should be set forth as to use of available insurance proceeds, even of the entity which chooses not to proceed, at a minimum, to make it possible to rebuild if feasible. Failure of an ownership interest to pay its allocable share should give rise to lien rights for the balance of the interests to foreclose on the air rights interest of the ownership in default.

**Real Property Taxation:** An issue to be reviewed is whether the air space parcels created by the proposed documentation will be separately assessed and taxed. Although condominium statutes generally provide for separate assessment and taxation of condominium units, this may not hold true for other types of air space subdivisions. Real property ad valorem taxation statutes generally do not contain provisions for separate taxation for air space parcels. The project documents should provide for a reallocation of taxes assessed to the project to the separate air space parcels and a mechanisms for the owners to enforce payment by the other owners in event of default of one of the owners.

**Title Issues:** Air space developments generate many concerns for the title insurer, including whether the air space is adequately defined and whether appropriate and adequate easements for access and support are provided. Mechanics liens that might be imposed upon the property because of work undertaken or materials furnished within the real property boundaries need consideration. To avoid a lien relating to one part of the project from affecting the entire property, project documentation must be carefully drafted. The

condominium format may be preferable in some states where the statutes clearly set forth that work with in one condominium unit does not create a lien right as to other condominiums in the project. The project documents should clearly create a duty upon owners of separate interests not to create liens upon other separate interests or the common interests, and remedies to be employed if this duty is breached.

## END NOTES

- i..... *See, generally*, HANNA, JOHN P. AND VAN ATTA, DAVID M., CALIFORNIA COMMON INTEREST DEVELOPMENTS, LAW AND PRACTICE, 2002 Edition, West Publishing, §§ 9.1- 9.11.
- ii. For a historical perspective, see David Van Atta, Reciprocal Easements, Restrictive Covenants, and Airspace Developments in Mixed Use Developments, 7 The ACREL Papers 99 (1995).
- iii..... In some states, it may be legally required to process a subdivision or plat map with the appropriate local governing agency. See, for instance, California Government Code Section 66424. *See*, Pedowitz, *Transfers of Air Rights and Development Rights*, 9 REAL PROP., PROB.& TR J 183 (1974) at 188.
- iv..... *See*, BUSINESS, COMMERCIAL AND MAJOR RESIDENTIAL PROPERTIES, Vol. 3, Matthew Bender, §8.42[1] Form 8-9: Air Space Deed and §8.42[2]: Sub-Surface Deed.
- v..... *See*, Richard J. Wirth, *The Uniform Common Interest Ownership Act Nonresidential Use Exemption: When an Out May Not Be an Out*, 26 REAL PROP. PROB. & TR. J. 885 (1992).
- vi..... The complexity of these projects may vary enormously. Although a verbal description of the boundaries may suffice for a relatively simple project, it is submitted that in most situations, a pictorial, or diagrammatic plan is essential to display the physical location and interrelationship of the various project component.
- vii..... In California, a division of land for purposes of sale lease or financing constitutes a subdivision requiring compliance with the California Subdivision Map Act. Government Code §§66410 et. seq. If five or more parcel are created, then compliance with the Map act will require processing a tentative and final subdivision map with the local governing agency to effect the subdivision. Government Code §§66426. Presumably, all of the distinct vertical and horizontal divisions of the land would be counted in arriving at the calculation of the number of land divisions or parcels created. If four or fewer parcels are created, then the subdivider will be able to process a Parcel Map, rather than a final subdivision map, thereby being able to avoid some of the more onerous provisions of the Map Act. Government Code §§66428. *See*, Tudzarov, *Platting the Condominium: Is It Required?* 15 REAL ESTATE LAW JOURNAL 22 (1986).
- viii..... Mandel and Donohoe, *Using the Lollipop Condominium to Revitalize City Space*, 3 THE PRACTICAL REAL ESTATE LAWYER 55 (March 1987).
- ix..... A form for creation of a lollipop condominium project is set forth and briefly described in ROHAN, PATRICK J. AND RESKIN, MELVIN A., CONDOMINIUM LAW & PRACTICE, Volume 1C, Appendix C-22. The project consists of the conversion of an existing three story residential rental building and, as a separate condominium project, the construction of two additional floors containing six duplex condominium units with an elevator shaft as the "stem" of the "lollipop". The authors state the key to the coexistence of the two separate condominiums sharing one building is the Declaration of Easements, Use and Maintenance whereby "the property of each of the two distinct condominiums is mutual easements of ingress, egress, utilities, support and maintenance, apportionment of expenses and establishment of a joint committee to enact and enforce rules and obligations imposed... for maintenance, repair, and replacement of the common area."
- x..... *See*, Rait, *Lollipop Condominiums: Air Rights, the Takings Clause, and Disclosure Under New York's New Guidelines*, 17 REAL ESTATE LAW JOURNAL 335 (1989).
- xi..... For example, California Civil Code Section 1373, applicable to projects which are defined as common interest developments, specifies that particular provisions of the California Common Interest Development Act are not applicable to common interest developments that are expressly zoned as industrial developments and limited in use to industrial purposes or expressly zoned as commercial developments and limited in use to

commercial purposes. The provisions which are not applicable to such industrial and commercial projects pertain to: amendment of project documents by petition to the courts (Civil Code §1356), distribution of certain documents by the association (Civil Code §1365) or by a selling owner (Civil Code §1368), obligations to review association accounts and limitations on expending reserve accounts (Civil Code §1365.5), certain limitations on the amount of assessments (Civil Code §§1366(b) and 1366.1) and preparation of budgets (Civil Code §1363(b)). *See also*, Wirth, *supra* note 12, at 923.

xii. See for example, California Civil Code §1351, subd.(f).

xiii..... BUSINESS, COMMERCIAL AND MAJOR RESIDENTIAL PROPERTIES, Vol. 4, Matthew Bender, § 10.01[4][a].

xiv..... *See, generally*, Wirth, *supra*, note 12. *See* Gurdon H. Buck, *Beware the Inadvertent Condominium: The Commercial Common Interest Community* - Choices Under the Uniform Common Interest Ownership Act and Uniform Condominium Act, 22 REAL PROP. PROB. & TR. J 65, 75 (1987).

xv..... In California, an airspace development will more than likely fall under the statutory definition of a "common interest development" in Civil Code Section 1352, and, as such, an association for the development, whether incorporated or unincorporated will be required. Calif. Civil Code §1363.