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PROPERTY: CONDOMINIUM: WHAT PLACE — SPACE?

Since early 1962 when Congress added Section 234 to the National Housing Act¹ bringing condominium apartments within the FHA mortgage insurance program to provide an additional method of financing multiple housing structures,² there has been growing enthusiasm among lawyers, land developers, and members of the real estate profession about the condominium concept of real property ownership. In a condominium an owner obtains a fee simple title in severalty to a particular space within a structure together with an undivided interest with other owners in the common areas, walls, floors, ceilings, supports and other facilities of common usage. The condominium unit is exclusively owned and possessed as an estate in real property, separately assessed for tax purposes and having all the characteristics ordinarily associated with other real property estates. The word condominium is of Latin derivation and is generally translated as "common ownership" or "joint dominion." The FHA Model Statute for Creation of Apartment Ownership has provided the general guide lines for state legislation passed during the last two years. Oklahoma followed some thirty other states³ by passing a condominium statute in 1963.⁴ Thus a word which was practically unknown to attorneys and real estate people a few months ago is fast becoming one which is frequently used in discussions among the members of these professions. The first condominium apartment in Oklahoma has just been completed⁵ and there are indications that many more are in various stages of planning.

Although Section 234⁶ and the various state statutes have obviously been directed toward multiple apartment unit ownership, discussion and planning by practitioners seems to center upon adapting the state statutes to the building and financing of such structures as commercial buildings, shopping centers, office buildings, industrial centers and retirement villages.⁷

¹ Housing Act of 1961, § 104, 75 Stat. 160, 12 U.S.C.A. § 1715y (West Supp. 1962); FHA Regulations, 24 C.F.R. §§ 234.1-234.300 (1962).

² FEDERAL HOUSING ADMINISTRATION, FACT SHEET No. 491, *FHA Mortgage Insurance on Condominiums* (1962).

³ State legislatures which have passed enabling statutes or amendments to existing statutes recognizing the condominium concept are: Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin.

⁴ 60 OKLA. STAT. §§ 501-530 (Supp. 1963).

⁵ Claimed by owners of Swisssaire Apartments in Tulsa, Oklahoma. The necessary declarations have been filed with the Clerk of Tulsa County and can be found in Book 3406 at Page 554.

⁶ 24 C.F.R. §§ 234.1-234.300.

⁷ FEDERAL HOUSING ADMINISTRATION, FACT SHEET No. 491, *op. cit. supra* note 2.

The Condominium Concept

Undoubtedly there will be many facets of the new statute to be explored; many changes and modifications to be made; many thoughts to be voiced and written on this subject. Questions are being asked about all phases of condominium. Most of them involve the legal characteristics and legal consequences. In this note no attempt is made to deal with the various applications and mechanics of condominium. Discussion is confined to the examination and evaluation of the concept, espoused by the condominium statutes, of conveying "space" as real property.

The word condominium does not appear any place in the Oklahoma statute even though it is usually used in professional articles and discussions. The statute refers instead to the concept as ownership of a unit estate.⁸ Such an estate is defined by the statute as an enclosed space,⁹ which may be conveyed, encumbered, inherited, devised or otherwise dealt with consistent with the laws of this state.¹⁰ Each unit owner is entitled to an undivided interest in certain common elements specified in the declaration.¹¹ Here then is Oklahoma's first statutory authorization for the conveyance of a fee simple title to "space."¹² The divided estate conveyed under this new concept is exactly that. The estate conveyed contains nothing but air. The fee simple possessory right to the condominium unit is to "airspace" and nothing more. The statute authorizes and requires the simultaneous conveyance of the common elements. No partition or division of the common elements from the "space" estate is permitted.¹³ If it were not for these associated undivided interests in the common elements, it would be difficult to reconcile this "space estate" concept with our accepted principles of real property law. The FHA Model Statute and the state statutes carefully provide for keeping the condominium "on the ground." The Oklahoma statute requires that "the common elements shall not be separated from the unit to which it appertains and shall be deemed conveyed or encumbered with the unit even though such interest is not expressly mentioned or described in the conveyance or other instru-

⁸ Oklahoma's statute is designated "Unit Ownership Estate Act." Other states' statutes use "Horizontal Property Act" (Arkansas, Hawaii, Louisiana, Virginia). Arizona's Act is called "Horizontal Property Regimes Law."

⁹ 60 OKLA. STAT. § 503b (Supp. 1963).

¹⁰ 60 OKLA. STAT. § 504 (Supp. 1963).

¹¹ 60 OKLA. STAT. § 505 (Supp. 1963).

¹² Even though the state has recognized fee simple title to space, it is still necessary for city and county ordinances to recognize a "cube of air" as a separate and distinct "lot" of real property. It must be permissible to record separate deeds and mortgages for each unit. Ad valorem assessments must be permitted on each unit separate from the assessment of the common elements. Planning and zoning commissions must be willing and able to interpolate the "air lots" in terms of subdivision plats, density regulations, parking space requirements, set back lines, multiple uses and major street plan arrangement.

¹³ 60 OKLA. STAT. § 505 (Supp. 1963).

ment."¹⁴ This divided space estate is the intriguing element of this new statutory concept of real property. The existence in law of such a property right seems to bring into focus a legal problem that may become increasingly disturbing as condominium litigation begins to appear in our courts. The question may now well be asked—what place will space occupy in the near future in relation to our established and time honored law of real property?

In considering space as real property it is necessary to introduce the third geometrical factor—height. Heretofore this dimension has been of little significance in describing real property. Measurements of width and length were sufficient. At the time of the early English law, man's limited means of moving laterally on the earth made travel slow and distances short. His ability to project himself, his fixtures and chattels above the surface were even more restricted. Consequently early English law was required to deal only with property rights in two dimensions. The element of height could be ignored. Yet, despite this fact and the relative simplicity of the early real property cases, the jurists of the time still found it necessary to place some significance upon the vertical character of real property. It was usually enough to take "judicial notice" of the vertical factor and pass on to other matters. This tacit acknowledgement that real property is a three dimensional bit of space rather than a plane area of earth was observed in the English law as early as 1628.¹⁵ The maxim expressed by Lord Coke: *cujus est solum, ejus est usque ad coelum et ad inferos*,¹⁶ was the backbone of real property jurisprudence until near the end of the nineteenth century. The law developed with a sort of judicial allegiance to the *ad coelum* rule as a quaint concept which could be safely embraced when equity and justice required it. In the early part of the twentieth century, however, man's conquest of the air began to assert itself with greater frequency and it became more and more difficult for the courts to stretch the *ad coelum* doctrine.¹⁷ In 1928 one legal writer asserted:

" . . . there can be no logical escape from a recognition that the jural concept of land can be described only by terms applicable to relative three-dimensional space There is no logical reason why the law should not recognize space as distinct from the matter which occupies it. Whether space is or

¹⁴ *Ibid.*

¹⁵ Co. Litt. 4a.

¹⁶ 2 BLACKSTONE, COMMENTARIES *18, "To whomsoever the soil belongs, he owns also to the sky and to the depths," BLACK, LAW DICTIONARY (4th ed. 1951).

¹⁷ Note, *Airspace: A New Dimension in Property Law*, 1960 U. ILL. L.F. 303, 306. Space has long been regarded as being of three dimensions according to ordinary or Euclidean geometry but Einstein's theory adds a fourth dimension. No doubt our twentieth century jurisprudence may place this scientific factor in the same position as the early Roman and English law placed the *ad coelum* maxim.

is not objectively real, the law may conceive of it as existing."¹⁸

The writer further reasoned that:

"A piece of land, as a thing in law, must be defined by ascription to three-dimensional space It is believed that realization of the nature of the concept of land will aid in the solution of some of the vexing problems which changes in our mode of living have begun to bring into the courts."¹⁹

Courts parried the myriad questions of air rights as man's flight into space became more frequent and attained greater heights and greater speed. Our case law is becoming more and more filled with matters involving air easements,²⁰ airspace nuisances,²¹ navigation rights,²² trespass of airspace,²³ and even trespass by wireless transmissions through the space above the owner's surface area.²⁴ In 1960 one legal writer queried: "if the surface owner owns the space to the extent that he can maintain a trespass action and demand compensation for governmental taking, why shouldn't he be allowed to divide it up and convey it to another?"²⁵ The answer seems to resolve itself into two parts—first, can space as an abstract estate be owned and conveyed to another; and second, is it necessary in law for such a space estate to be irrevocably joined to the earth plane either in whole or in part?

The Oklahoma statutes follow the *ad coelum* theory in providing that the owner of land in fee has the right to the surface and to everything permanently situated beneath and above it.²⁶ Until the enactment of the unit ownership estate act, however, the statutes did not provide for the partition or separate conveyance in fee of the space alone. Can space without the benefit of enclosure be permanently located and described? Under the condominium statute the unit space estate can be definitely described and located at a fixed place in space by means of the solid substance of foundations, walls, floors and ceilings. If this is possible under the law, then it

¹⁸ Ball, *The Jural Nature of Land*, 23 ILL. L. REV. 45, 62 (1928); but see, 2 TIFFANY, REAL PROPERTY, § 583 (3d ed. 1939); "Whether the owner of the land, in the ordinary case, actually owns the air space above the land, and whether such air space is susceptible of division into strata for the purpose of separate ownership, is a question of difficulty." See also Pearson v. Matheson, 102 S.C. 377, 86 S.E. 1063 (1915); Note, 29 HARV. L. REV. 525 (1916).

¹⁹ Ball, *op. cit. supra* note 18, at 67.

²⁰ Reaver v. Martin Theatres, Inc., 52 So.2d 682 (Fla. 1951).

²¹ Swetland v. Curtiss Airports Corp., 41 F.2d 929 (N.D. Ohio 1930).

²² Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).

²³ Hyde v. Somerset Air Service, 1 N.J. Super. 346, 61 A.2d 645 (1948); Smith v. New England Aircraft Co., 270 Mass. 511, 170 N.E. 385 (1930).

²⁴ Ball, *op. cit. supra* note 18, at 59.

²⁵ Note, *op. cit. supra* note 17, at 310.

²⁶ 60 OKLA. STAT. § 64 (1961) (Real property ownership fee simple); 3 OKLA. STAT. §§ 61-65.22 (1961) (Aircraft and Airports); 3 OKLA. STAT. §§ 101-115 (Airport zoning); 3 OKLA. STAT. § 113 (1961) (Acquisition of air rights, easements and interests).

seems to follow that free unenclosed space could be severed and separately conveyed in fee simple apart from the surface of the earth. Whether space is a thing or the absence of things puts us into the realm of imponderables but under the accepted Euclidean definition of space²⁷ there can be nothing more permanent, thus making it unnecessary to dwell upon the character of space itself. It follows that if space is permanent, it can be described and permanently located with certainty. It seems unlikely that the Oklahoma real property statute²⁸ contemplated the severance and separate conveyance of airspace estates, yet there seems to be no conflict between this statute and the new condominium act. Horizontal and vertical enclosed spaces above the surface, attached to the earth by the common elements of support, would lend itself to this construction. It is reasonable to suggest that as long as condominiums remain in reasonable relationship with the ground, the Oklahoma courts will favorably view space estates of real property. As to the second part of the general question raised, is it really necessary to find a place in our real property law for space estates not related to the earth plane? It is submitted that having crossed the first statutory span, it is almost a certainty that we must anticipate the need for crossing the remaining legal span. There is a growing need for concentrating commercial, industrial and residential activities in certain areas for convenience, comfort and economy. Land values in such concentrated areas are becoming so high in price that multi-story structures and activities are an absolute necessity. Urban sprawl is creating many problems and costly expenditures. Valuable and irreplaceable agricultural land is being taken out of production. The "exploding population" of this twentieth century is forcing the utilization of space in the air whether we like it or not. Our jurisprudence must be prepared to keep abreast of these developments.²⁹

The Res For Space

The idea of real property without land was given consideration by one writer over thirty years ago.³⁰ Even at that time it was ob-

²⁷ Euclidean Geometry assumes space has definite properties and magnitudes measurable in three dimensions.

²⁸ 60 OKLA. STAT. § 64 (1961).

²⁹ Note, *op. cit. supra*, note 17, at 313; "What impact new developments in the field of anti-gravitational mechanics may have upon the utilization of airspace is a question which must be left for the engineer. Suffice it to say that revolutionary advances in architectural designs or transportation forms could well multiply man's present abilities to utilize airspace apart from simultaneous use of the subjacent surface. Thus, there would seem to be every reason to believe that the practice of airspace subdivision will continue to grow at a rapid pace throughout the nation. Clearly its future depends not only upon the ingenuity of the engineer, but also upon the imagination and skill of the modern lawyer."

³⁰ Ball, *Division Into Horizontal Strata of the Landspace Above the Surface*, 39 YALE L.J. 616 (1930).

served that this problem was not purely academic but rather anticipatory of problems which must some day be settled by the courts. It was suggested that the superjacent landscape be divided by horizontal planes into strata capable of several ownership. This prophetic reasoning is now approaching reality in many condominium statutes. Perhaps the National Housing Act inadvertently breathed new life into this almost forgotten concept and centered new emphasis upon its need for analysis.

An examination of the problem of unattached space freeholds requires an initial acceptance of the *ad coelum* rule. Unless there is a basic assumption that the owner of the land fee has some possessory right to the space above his land the problem becomes an abstruse point of law. The controversial factors then turn upon acceptance of one of several theories of interpretations of the *ad coelum* maxim. Tiffany gives four different theories. The first and generally accepted one is that the landowner's rights are limited to that part of the space above his land of which he has effective possession—that is, so much of the space as is essential to the complete use and enjoyment of the land.³¹ The second limits the landowner's rights to so much of the airspace above his land as he actually uses, giving no consideration to possible future use.³² The third believes the landowner has no ownership or possessory rights above his land.³³ The fourth is the theory expressed in most statutes and text books and admits the landowner's ownership of the airspace but grants to aircraft the right of navigation therein, subject to certain restrictions.³⁴

It is fairly obvious that the law of ownership of space above the land and the vertical extent of such ownership, if any exists, is still a matter of uncertainty.³⁵ The landmark case of *United States v. Causby*³⁶ seems to subscribe to the first theory in stating that "the landowner owns at least as much of the airspace above the ground as he can occupy or use in connection with the land, and the fact that he does not occupy it in a physical sense by the erection of buildings is not material." On the other hand the *ad coelum* doctrine has been denounced. In *Hinman v. Pacific Air Transport*, the court said: "We think it is not the law, and that it never was the law. This formula 'from the center of the earth to the sky' was invented at some remote time in the past when the use of space above the land actual or conceivable was confined to narrow limits, and simply meant that the owner of the land could use the overlying

³¹ *Swetland v. Curtiss Airports Corp.*, 41 F.2d 929 (N.D. Ohio 1930).

³² *Hinman v. Pacific Air Transport*, 84 F.2d 755, 758 (9th Cir. 1936).

³³ *Maitland v. Twin City Aviation Corp.*, 254 Wisc. 541, 37 N.W.2d 74 (1949).

³⁴ *Hyde v. Somerset Air Service*, 1 N.J. Super. 346, 61 A.2d 645 (1948); see generally Williams, *The Existence of the Right of Flight*, 79 U. PA. L. REV. 729 (1931).

³⁵ TIFFANY, REAL PROPERTY, *op. cit. supra* note 18.

³⁶ 328 U.S. 256, 66 Sup.Ct. 1062, 90 L.Ed. 1206 (1946).

space to such an extent as he was able. . . ."³⁷ The court sounded a note of caution that ownership of space would lead to "space speculation."³⁸ Such a situation might be unfortunate but it would certainly not be a new problem in the field of real property. There is no denying that there will be complex and confusing issues, but it seems to be important at this time for the law to find the proper tools to make a substantive determination of all the aspects of space estates and space rights. The res for space must be clearly defined.

Conclusion

It has been some seventy years since man has had the scientific knowledge and mechanical and engineering ability to utilize space at heights much over 100 feet. Perhaps the real significant change came when the Wright brothers made their historic flight and removed the inexorable ties of gravity. It has been less than ten years since man leaped from the Air age to the Space age. Today we witness new and amazing feats of science transpiring with incredible regularity. Man's propensity to favorably adjust to scientific transition has been enlightening. It remains to be seen whether jurisprudence can keep abreast of this quickly changing world. The guide lines relied upon in real property jurisprudence should be adequate to encompass the new space concept of fee ownership. Courts should be prepared to make justiciable reformations to meet the challenges, the most formidable of which may be the substantive determination of all aspects of space estates and space rights. Writers have conceived of separately owned cubes of space and cubical channels of space at various plane elevations completely severed from the earth plane.³⁹ Although science has not yet found a way to neutralize gravitational forces for general application to everyday use, it would seem reasonable that in this day of rocket ships such an accomplishment is not far in the future. Legal answers will no doubt be burdened with deeply embedded feelings, dating from early times, that all things must be a part of the earth. Perhaps the initial portions of the space res are now being enunciated in the modern condominium statutes.

Ben H. Crowley

³⁷ 84 F.2d 755, 757 (9th Cir. 1936); see *Allegheny Airlines v. Village of Cedarhurst*, 132 F.Supp. 871 (E.D.N.Y. 1955), *aff'd* 238 F.2d 812 (2d Cir. 1956); *Roosevelt Field v. Town of North Hempstead*, 84 F.Supp. 456 (E.D.N.Y. 1949).

³⁸ *Id.* at 758. The court stated: "It would be, and is, utterly impracticable and would lead to endless confusion, if the law should uphold attempts of land owners to stake out, or assert claims to definite, unused spaces in the air in order to protect some contemplated future use of it. Such a rule, if adopted, would constitute a departure never before attempted by mankind, and utterly at variance with the reason of the law."

³⁹ Note, *op. cit. supra* note 17, at 310, argues the concept: ". . . [A] designated portion of airspace is no different than a lot, parcel, or acre of land, all of which are equally abstract dimensions in their primary and technical sense as contradistinguished from their referential sense."