

It's Up In the Air: Air Rights in Modern Development

By: Martin A. Schwartz

Brief History of Air Rights

Romans gave us architectural marvels, funny looking numbers and the concept of property rights in airspace under the doctrine "*culus est solum, cius est usque ad coelum*" translated as "[to] whomsoever the soil belongs, he owns also to the sky."¹ This doctrine endows a landowner with a private property right in the airspace, upwards to an indefinite extent, above the land. It was incorporated into both English and American common law appearing in Edward Coke's commentaries in the seventeenth century and William Blackstone's commentaries in the eighteenth century.²

Although this doctrine may have worked well in the age of Robin Hood, the unlimited right of ownership of airspace above private property created a problem with the advent of commercial aviation in the early twentieth century. In response, Congress limited the scope of landowners' airspace rights to an upper limit of private ownership in order to allow for air travel. The enactment of the Air Commerce Act of 1926 created a "public right of freedom of transit in air commerce" through the navigable airspace of the United States. "Navigable airspace" is defined as airspace above the minimum altitudes of flight and is designated a nationally-shared common area for modern flight. Generally speaking, the "navigable airspace" consists of airspace above an elevation of 500 feet from ground level.

Currently, although 49 U.S.C. § 40103(1) states that "The United States Government has exclusive sovereignty of air space of the United States," subsection 2 recognizes public use of airspace only above "navigable airspace," thereby retaining private ownership below "navigable airspace."

Because the statutory limitation on ownership of airspace conflicted with the common law rights in unlimited ownership of airspace, a potential taking issue arose as a result of this early federal legislation. This issue came before the Supreme Court in 1946 in *United States v. Causby*.³ The main issue in this case involved a low flight path of U.S. bombers and other aircraft over plaintiff's property. The flight path and size of the aircraft caused intense noise and vibrations resulting in death to plaintiff's chickens and mental distress to plaintiff. Justice Douglas, however, writing for the Court, stated that the so called "ad coelum" doctrine "has no place in the modern world. The air is a public highway, as Congress have declared."⁴ The Court noted, however, that landowners still maintain a property interest in the non-navigable airspace above their land.

The common law doctrine of ownership of airspace has been limited to allow for air travel, but the concept of a landowner's ownership of airspace above the surface of owned land below "navigable airspace" remains well established. The ownership and use of air rights is significant in today's society in the context of view easements, solar access easements, flight path easements and development rights in the non-navigable airspace above an owner's land. It is important to note, however, that while one may own the non-navigable airspace above one's property, local zoning and land use regulations may make it impossible or expensive to utilize such airspace in development.

Horizontal Subdivision of Airspace

Most development situations involve an integrated ownership of fee interest in the underlying land, the building and the airspace occupied by the building. However, is it possible to transfer airspace and own airspace separately and apart from the ownership of the surface of the land? Some courts held that one must own underlying surface land in order to own the overlying airspace.⁵

Today, the law is less clear but separation of ownership appears to rely on statutory authority. Tiffany's textbook on real estate notes:

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. . . .[A]s a practical matter, leases or sales of air space for the erection of buildings, signs, etc., are by no means uncommon, especially in the larger cities of this country. However, it has been held that airspace is an integral part of the land below and is not separate property that may be conveyed completely detached from the land.⁶

One of the ways the Legislature has permitted separation of ownership in air rights is by the creation of condominiums. Condominium unit ownership illustrates that a single condominium unit owner can hold title to the envelope of airspace occupied by the condominium unit. Condominiums allow the subdivision and transfer of exclusive rights in airspace - rights that are separate from ownership of the surface land below. In fact, under the Florida Condominiums Act, the definition of "land" may include "all or any portion of the airspace . . . between two legally identifiable elevations" and may exclude the surface of a parcel of real property.⁷

Air rights may be divided into separate units of real property created by the horizontal subdivision of real estate. Accordingly, two or more parties may possess separate ownership interests or rights of control over real property located in different tracts of horizontal airspace over the subjacent land. By dividing the airspace above a parcel of land, it is often possible to "stack" uses in a mixed use development owned by more

than one owner, in the same way it is possible to subdivide and develop side-by-side a horizontal surface subdivision.

Subdivision Laws

Although the concept that a landowner may horizontally divide and convey his or her property interest in the airspace above the land has been accepted, such conveyances always involve retention of a footprint on the surface of the land. It is unclear whether a conveyance of airspace can be totally divorced from surface ownership without legislative enabling.

Is the vertical subdivision of airspace a "subdivision" for purposes of platting? Some counties appear to treat it as a subdivision and others do not. Developers try to avoid platting wherever possible in order to avoid delays and reduce costs it may entail but platting may solve other issues relating to the viability of the divided airspace.

Real Estate Tax Issues in Utilizing Air Rights

With the advent of mixed use projects, developers sought to carve up airspace among various uses and separate ownership. One of the earliest examples in South Florida was the Four Seasons building on Brickell Avenue in Miami. The building contains a hotel, an office component, a spa component, a parking component, all separately owned, and a residential condominium and a hotel condominium with hotel units. The building looks like a single integrated structure when viewed from the outside but when its legal descriptions are analyzed, it looks more like a jig-saw puzzle with various interlocking pieces. Given the vertical separation in ownership, the individually owned components should each receive a separate tax folio number. However, while the Miami-Dade Tax Assessor has issued separate tax folio numbers for the units in the two separate condominiums, the residential and hotel condominiums, he has refused to issue separate tax folio numbers for the remainder of the building, all of which components receive only a single tax folio even though each has a separate owner. The Tax Appraiser has taken the position that existing legislation requires a separate tax allocation between land and building in a tax parcel. Airspace, without a footprint on the ground, cannot be separately assessed except in the case of condominiums for which statutory authority currently exists.

The separation of tax folios in a mixed use project can be avoided if only one element in the project is not a condominium unit. Thus, if a project contains a commercial condominium, a residential condominium and non-condominium retail space, the retail space would receive a separate folio by default. But if the non-condominium portion of the building consists of more than one separate element, like in the Four Seasons' building, there is a serious problem.

The absence of separate folios for individual building components makes it difficult, if not impossible, to separately finance the individual components. A legislative "fix" for projects which subdivide airspace has been proposed and will hopefully be enacted in

the 2015 session. It is not clear whether other counties in Florida share the same problem.

Transferring Air Rights for Development

Air rights are sometimes critical for proposed development of a parcel because they allow more dense development. In the early 1900s, property owners in New York and Chicago began trading air rights, separating the ownership of defined parcels of airspace from ownership of the surface of the earth. Airspace has become an increasingly valuable resource, especially in urban areas. According to Robert Von Ancken, an air rights expert and appraiser, "[t]he trading of air rights is more prevalent than it's ever been before." Von Ancken estimates that air rights trade for 50 to 60 percent of what the earth beneath them would sell for.⁸ In New York, the price of air rights has dramatically increased: 20 years ago, \$45 a square foot was considered a reasonable fee, but in recent years the norm in prime neighborhoods has crept toward \$450 a square foot.⁹ A recent article indicated that some professionals believe that air rights may be worth more than the underlying land.¹⁰ While this may sound ridiculous, it is attributable to the premium a developer may obtain for penthouse units in a taller structure affording more dramatic city views.

The determination of what air interests can be transferred can be a critical issue. Development rights in airspace may be sold or transferred to other parcels of land in two main ways. A zoning lot merger joins two or more adjacent zoning lots into one new zoning lot so that the unused development rights in one lot may be shifted to the other. This may be true even though the individual parcels are separately owned. For example, two adjacent lots may each permit an 8-story structure. But if the improved lot consists of only 2 stories, the adjacent developable lot may then support a 14-story building.

Alternatively, a transfer of development rights ("TDR") allows for the transfer of unused development rights from one zoning lot to another lot which may not be located adjacent to the property. A TDR severs the unused development value from a property known as a "contributing site" and allows the landowner of the contributing site to transfer or sell the development rights to another property known as the "receiving site" to increase the density of development potential on the receiving site.

Creation of TDRs is often used by governments to restrict development on certain properties while mitigating a regulatory taking claim. In essence, TDRs transform potential development rights into currency for the property owner of the restricted property.

Although the Miami 21 Zoning Code imposes height limits for buildings in the Miami Modern Biscayne Boulevard historic district, the Code allows for TDRs.¹¹ The TDRs enable owners of historic property to sell to developers whose projects are located in specially designated, high-density zoning areas of Miami the development rights that they are unable to utilize because of historic designation. In such transactions, the property in the high-density zone obtains a "development bonus" in the form of greater

height or density rights. The revenue from such transfers for the contributing site, which can amount to millions of dollars, can then be used for renovations of the historic property.

As an example, developer Avra Jain sold 440,000 square feet of Vagabond motel's development rights for \$3 million to developers who were able to enlarge the size of their condominium projects in Coconut Grove, Edgewater and Brickell. She also sold the Royal Motel's 142,868 square feet of air rights to a developer for a 57-story Brickell project. Jain commented that the ability to raise money through a TDR sale "is key to the restoration of the deteriorated boulevard motels, whose small size and big renovation needs would otherwise make the job financially unfeasible."¹² TDRs also appeal to condominium developers because they have been able to purchase them for \$7-9 per square foot, considerably cheaper than the cost of buying additional development capacity through the city's Miami 21 "bonus" program, which also permits builders to purchase the right to add volume to their projects at about \$17 per square foot.¹³

Municipalities can also create additional sources of income by the sale of air rights over public rights of ways and public land. Swire Properties, in developing Brickell City Center in downtown Miami, paid millions of dollars to build over streets to connect properties on both sides of the street. The failure to collect payments on another massive project in Miami has generated controversy.¹⁴

Sunny Isles Beach allows the purchase of TDRs from a municipal site or a private site. It also allows "banking" TDRs following purchase so there may be no connection to the contributing site. TDRs can then be traded as currency or sold to a development site.

Each municipality has their own rules regarding TDRs and transferring air rights so that each municipality's code needs to be examined to the extent air rights are sought for development.

Conclusion

Air rights are significant in 21st Century development but we are still somewhat tethered to the ancient Roman construct tying air rights to ownership of the surface of property. Permitting transfers of air space without a surface component might promote more ingenious developmental structures. It appears, however, that further development in this area will be reliant on a legislative developed framework since most courts have been reluctant to sever ownership of air space from the underlying property.

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¹ Troy Rule, *Airspace and the Takings Clause*, 90 Wash. U. L. Rev. 421 (2012)

² Troy Rule, *Airspace in the Green Economy*, 59 UCLA L. Rev. 270 at 283 (2011)

³ *United States v. Causby*, 328 U.S. 256 (1946).

⁴ *Id.* At 261.

⁵ Troy Rule, *Airspace in the Green Economy*, 59 UCLA L.Rev. 270 (2011)

⁶ *Tiffany Real Property* §583 (2011).

⁷ See Florida Statutes 718.103(18): "Land" means the surface of a legally described parcel of real property and includes, unless otherwise specified in the declaration and whether separate from or including such surface, airspace lying above and subterranean space lying below such surface. However, if so defined in the declaration, the term "land" may mean all or any portion of the airspace or subterranean space between two legally identifiable elevations and may exclude the surface of a parcel of real property and may mean any combination of the foregoing, whether or not contiguous, or may mean a condominium unit."

⁸ Robin Finn, *The Great Air Race*, *The New York Times*, February 22, 2013.

⁹ *Id.*

¹⁰ Kaitlin Vgolik, *Developers Reach Deep For Rights To Build Sky-High*, *Law 360*, September 24, 2014.

¹¹ Erik Bojnansky, *Rebuilding the Boulevard*, *Biscayne Times* (Mar. 2014).

¹² Andres Viglucci, *Kitschy, Cool Vagabond Motel Coming Back to Life on Biscayne Boulevard's MiMo District*, *Miami Herald* (November 3, 2013).

¹³ Carolina Bolado, *Historic Sites Cash In As Miami Real Estate Takes Off*, *Law 360*, December 1, 2014

¹⁴ Eleazar David Melendez, *Daily Business Review*, September 26, 2014.