PRACTICAL ASPECTS CONCERNING THE CREATION OF AIR PARCELS

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For more than thirty-five years Illinois real estate attorneys have worked with the Illinois Condominium Property Act[1] as an alternative to the plat of subdivision. But lately some municipalities, apparently equating condominiums with blandness, cheapness, and sameness, have balked at the further introduction of the ubiquitous condo into their corporate boundaries. Developers have reacted by devising a new form of land ownership—the air parcel, a multi-floored living arrangement without the alleged "stigma" of a condominium. These cubes of air, which are neither submitted to the Condominium Property Act nor platted via a vertical subdivision into air lots,[2] have several unique problems that can trap or at least bewilder the unwary practitioner—problems that will be discussed in this article.

The Air Parcel Concept

Most air parcels seem to begin their existence as ordinary lots within a plat of subdivision. These lots are then further divided both horizontally and vertically. That is, a metes and bounds legal description will carve out the parcel's horizontal dimensions, while elevations will distinguish the various floor levels of the parcel. This results in each floor having its own legal description, which is tied to specific elevations. Generally speaking, most of these legals are fairly complex metes and bounds descriptions. However, the air parcel concept can still be illustrated very simply.

Consider lot one, which is a square-shaped lot in a recorded subdivision. The basement might be described as the west half of lot 1, but below a certain elevation. The first floor is similarly described as the west half of lot 1, but between the aforementioned basement elevation and another, higher elevation. The second floor may be defined as the northwest quarter of lot 1, lying above this higher elevation. An adjoining structure might consist of a basement (southeast quarter of lot one, but below a certain elevation), a first floor (the southeast quarter of lot one, but between the basement elevation and a higher elevation), and a second floor (the south half of lot one, lying above this higher elevation). Note how a portion of the second floor of this second structure would be situated above the first floor of the adjoining building.

In deciding whether or not to create a development that contains air parcels, one of the

first issues that the attorney must consider is the Plat Act (765 ILCS 205/1 *et seq.*). This act, generally speaking, requires that land be platted prior to its subdivision. Since air parcels often involve the resubdivision of platted lots, the Plat Act can present a problem. To circumvent this statute, some air developers will carve out tracts that are less than one acre in size, making sure that each parcel has access to a dedicated road. While the further division of a subdivided lot still falls within the purview of the Plat Act, any deed of such an air parcel would most likely be exempt from the Plat Act's application as being a "division of lots or blocks of less than 1 acre in any recorded subdivision which does not involve any new streets or easements of access."[3]

But there may be instances when lot resubdivision results in one or more landlocked air parcels. This may be because of the particular configuration of the metes and bounds legal description. Or perhaps the lots have been platted in a townhome arrangement, being "non-easement areas" that are adjacent to a common area and not a dedicated road. Any parcel not contiguous to the ground, such as one consisting solely of a portion of a second or third floor, would be a third example of a landlocked air parcel. In any of these circumstances an access easement should be created prior to a conveyance. But since such an easement would not be effective until the delivery of the deed that grants the easement, this scenario does appear to present a potential Plat Act problem that probably cannot be cured unless the land is subdivided further.

The Declaration

Because of its unusual nature, an air community should be structured around a declaration of covenants, conditions, and restrictions. This declaration will oftentimes share many of the same characteristics of a townhome declaration—party walls and access easements over common areas, to name just a few. Air parcels, however, have other, unique requirements—most notably, mutual easements for utilities and structural support. Depending on the physical location of the buildings' doors and entryways, ingress and egress easements may also be necessary. Because of the three-dimensional nature of the parcels, the declaration will have to provide for the creation of automatic easements for encroachments caused by land subsidence. Such encroachments would include not only the horizontal shifting of one parcel into the air space of an adjoining parcel, but also the vertical settling of a higher parcel into a lower one.

The drafter of the declaration has to face other issues as well. Who will own the land? That is, will the air parcel owner own the land only under the building, with the homeowners association owning the rest of the land within the lot, or will parcel owners own a "slice" of land and building, as in the traditional townhome concept? Note that in either case it is possible that a second floor parcel owner might not own any land at all, which might be a blessing for free-spirited Generation Xers who for the moment wish to eschew the burdens of land ownership. If an air parcel was designed like the traditional townhome, with at least the first floor parcel owners owning a slice of land and building, then how are easement rights over the land addressed? Will only individual landowners be able to walk on their own portions of land, or will there be cross easements so that at least everyone in the building would be able to enjoy a large backyard? Or should everyone in the complex be permitted to walk through the yards?

Who will maintain the yards, the parcel owners or the association? If the association is to own land as common area, consider 35 ILCS 200/10-35, which provides as follows:

> Residential property which is part of a development, but which is individually owned and ownership of which includes the right, by easement, covenant, deed or other interest in property, to the use of any common area for recreational or similar residential purposes shall be assessed at a value which includes the proportional share of the value of that common area or areas.
>
> Property is used as a "common area or areas" under this Section if it is a lot, parcel, or area, the beneficial use and enjoyment of which is reserved in whole as an appurtenance to the separately owned lots, parcels, or areas within the planned development.
>
> The common area or areas which are used for recreational or similar residential purposes and which are assessed to a separate owner and are located on separately identified parcels, shall be listed for assessment purposes at $1 per year.

New terminology will have to be developed. For example, some declaration drafters have termed air parcels "stacked flat units." Some attorneys have called the right of air parcel owners in one building to the exclusive use of their backyard a "building exclusive use easement." What might have been termed a "limited common element" in a condominium development is now a "unit exclusive use easement."

The Survey

A title insurance company will usually require a survey of the air parcel in order to issue owner's policy "extended coverage," which is the deletion of the policy's general exceptions. Because this plat must somehow illustrate the three-dimensional nature of the air parcel, it is the survey that will usually prove to be most nettlesome to the attorney.

It is suggested that a two-dimensional drawing be made of each floor of the parcel. Each drawing should include the appropriate legal description and identifying floor. Thus, the survey of a three-tiered air parcel (basement, first floor, and second floor) would consist of three separate drawings. All improvements should be shown in relation to the boundaries of the underlying lot. Such a survey can easily be reviewed by the attorney or title examiner.

Part of this review process should include a careful examination of the various elevations. Consider the following legal descriptions, based on the first air parcel description noted above:

Basement: The west half of lot one, lying above elevation 702 and below elevation 711.

First Floor: The west half of lot one, lying between elevation 712 and elevation 722.

Second Floor: The northwest quarter of lot one, lying between elevation 723 and elevation 733.

There are numerous problems with these descriptions. The basement parcel is between two elevations. This ignores the common law concept that one owns land from the top of the sky to the center of the earth. By limiting the ownership to what is essentially that space between the basement floor and ceiling, ownership of that land below the basement is left in the hands of the developer. As a result, the developer bears the theoretical risk that he will be assessed taxes on this remaining subterranean property. But more importantly, this land should be included in the parcel since it forms the servient tenement of all of the support easements above it. By limiting ownership of the second floor to a distinct upper elevation, title to that area above the second floor also remains as potential taxable "land" in the name of the developer that could later be sold or transferred to an adjoining property owner for future development or use—an event that would probably not be desired, much less even contemplated, by any purchaser of this parcel. Finally, note that there are elevation "gaps" between each level—slivers of air space that will also never be conveyed.

It is a simple matter to draft legal descriptions that do not create these problems:

Basement: The west half of lot one, lying below elevation 711.

First Floor: The west half of lot one, lying between elevation 711 and elevation 722.

Second Floor: The northwest quarter of lot one, lying above elevation 722.

Again, most air parcel descriptions are not as simple as these. Instead, they are usually complicated metes and bounds descriptions. Accordingly, it is often helpful for the surveyor to indicate on each drawing the "point of beginning" and if appropriate the "point of commencement" of the description. When the parcel includes a portion of a lot, both the boundary of the entire lot and the outline of the parcel should be shown on all drawings. The measurements of both the lot and parcel should also be noted. The surveyor should dimension the location of the parcel to the lot lines by noting the distance from the corners of the parcel to the lot lines. All this information can be used by the title insurer to verify that there are no gaps or overlaps between parcels. Finally, an off-site elevation benchmark should be set forth on the survey.

Title Insurance Considerations

The title examiner should review the declaration and survey, making sure that both documents contain the above criteria. If they do, no special exception need be raised on a title policy insuring an air parcel other than one relating to the terms, conditions, and provisions of the declaration. But if, for example, the title company is insuring a lower parcel, and the declaration contains no provisions for structural support easements for the air parcel located above the land being insured, the examiner may have to raise an exception relating to this support obligation.

Buyer's counsel should request that any appropriate easements be insured. If counsel requests that a "Plat Act" endorsement[4] be appended to his client's policy, the title examiner should first determine that there is no potential Plat Act problem. Since title policies currently in use in Illinois insure access, there is probably no need for an "access" endorsement. Nonetheless, if the air parcel legal descriptions seem especially complex and if there is no easement to be insured, the attorney for the purchaser may want to consider requesting one.[5] The attorney might also desire a "contiguity" endorsement that gives assurances that there are no vertical gaps between the legal descriptions that make up the air parcel.[6] If available, the attorney should consider obtaining title policy "extended coverage."

Attorney Concerns

The crafting of an air parcel development is not an easy task. The attorney cannot simply utilize a generic declaration of covenants, conditions, and restrictions. Instead, the document must be carefully written, taking into account the various issues outlined above. The attorney must review his client's sales contract, making sure that the unique features of the air parcel are carefully and thoroughly set forth. A seasoned surveyor must be hired, preferably one who is experienced in aerial rights and the writing of tri-dimensional legal descriptions such as those used in bridge easements and those certain aviation interests termed "avigation" easements. Counsel must inform the developer that there will undoubtedly be increased legal fees and surveying expenses. The client's marketing staff must be educated so that they can confidently promote the air parcel to potential purchasers, their attorneys, and especially their lenders. Nonetheless, construction times will surely be lengthened as all parties struggle with new and unfamiliar issues.

The air parcel may be gaining at least a tentative foothold in Northern Illinois. It appears, for example, to be ideally suited to empty nesters who want the convenience of townhome living in a ranch style dwelling. Because of density requirements, townhomes have traditionally been two story structures. Air parcels, though, give the developer added flexibility in home design, allowing aging baby boomers to live solely on one main floor and younger thirty-somethings to trot up and down the stairs of the adjoining residence.

There is a comfort level that the real estate practitioner has reached with condominiums—a familiarity attained through years of practice and backed by years of statutory and case law. The attorney, faced with an air parcel, may at first feel that he or she has been suddenly thrown into the deep end of a real estate morass. No matter. The information contained in this article should be more than enough to get him or her quickly and safely to shore.

1. (765 ILCS 605/1 *et seq.*)

2. Because the property has not been platted pursuant to the Plat Act or submitted to the Condominium Property Act, the use of the words "lot" and "unit" is deliberately avoided. Instead, the term "air parcel" is used throughout this article.

3. See 765 ILCS 205/1(b)(2).

4. For example: "The Company hereby insures the Insured against loss or damage which the Insured shall sustain by reason of any inaccuracy in the following assurance: That any conveyance of the land using the description shown in Schedule A herein need not be accompanied by a plat of subdivision according to the provisions of 765 ILCS 205/1 *et seq.* (The Plat Act), as those provisions are in force at date of policy."

5. For example: "The Company hereby insures the Insured against loss or damage which the Insured shall sustain by reason of any inaccuracy in the following assurance: The parcels of land described in Schedule A, taken as a tract, constitute one parcel of land."

6. For example: "The Company hereby insures the Insured against loss or damage which the Insured shall sustain by reason of any inaccuracy in the following assurance: The land described in Schedule A is contiguous to a physically open street known as _____."