



Rights of Way in Airspace: Prospects and Problems

by Andrew J. Demetriou

The future development of innovative property interests such as airspace rights presents new opportunities for flexibility and efficiency in land use.

Andrew J. Demetriou is with the national law firm of Jones, Day, Reavis and Pogue. He is the attorney of Chapter One and as the "Case of the Month" Chairman he has authored many fine columns published in their newsletter devoted to the discussion and analysis of legal issues. He attended UCLA graduating in 1976, *summa cum laude* with an A.B. degree in Economics. He is a member of Phi Beta Kappa, Omicron Delta Epsilon and Phi Eta Sigma honorary fraternities and the American and California Bar Associations.

Right of way acquisition patterns are expected to change in the future to meet the challenges posed by constraints on more traditional techniques. Factors such as increasing costs for fee and fee-related interests, the need to preserve existing structures and economic and land use efficiency considerations will dictate that rights of way in airspace be considered by public agencies.

Historically rights in air have been legally recognized in three categories: (1) easements for light and air, including non-interference with private and public views; (2) condominium estates, in which ownership rights do not include title to a structure and (3) implied and dedicated rights to airspace — such as the military navigation easement at 41,000 feet above sea level. In the future airspace parcels will combine certain of the attributes of the above types of air rights in that they may include rights to construct and operate improvements or structures within the parcel. Air rights may also include intangible property

rights such as transferable development rights which may be moved from one location to another.

The acquisition of an air parcel may permit overhead power lines or cables to cross real estate without necessity for recourse to the underlying property. The use of air rights may allow a local government to preserve historic structures by encouraging the owners of such buildings to build elsewhere rather than demolish in order to construct highrise developments. Acquisition of a condominium type air space estate in a building may permit a public agency to acquire suitable space for a facility such as a transit station at a lower cost than acquisition of the entire structure.

While each of these types of rights have been used and sanctioned in the United States, there are numerous conceptual and legal issues which are implicated. First and foremost is the problem of defining the estate which has been created. A fee estate is a creature of statute and common law and must derive from that source. Condominium estates, for example, are described in California Civil Code §§783 and 1351 *et seq.* On the other hand, leases and easements often create use rights in air, separate from a fee estate. A recent concept is the possibility of a "fee" in a structure, independent of the land on which it sits. The legal status of such estate has not been resolved in California to date, although title companies have in some cases issued insurance on such rights.

The second area of concern lies in the relationship between the airspace parcel and the underlying estate. The issues can range from access, necessitating a reciprocal easement agreement or similar arrangement, to the effect of liens or other defects in title as between the two estates. This latter issue could become particularly nettlesome in the context of a foreclosure action against a private estate which threatens the rights of a public agency to its right of way. It will be necessary to consider various types of non-disturbance agreements which will recognize the supervening air rights while preserving the reasonable expectations of creditors with security interests in land.

Perhaps equally critical will be problems of valuation of airspace estates. In the next few years at least it will be difficult, if not impossible, to find "comparable" properties, suggesting that value will be a function of the use which would or will be made of the parcel. It will be necessary for the appraisal profession to develop new standards and techniques for evaluation of various estates.

The future development of innovative property interests such as airspace rights presents new opportunities for flexibility and efficiency in land use. While there will be technical problems with the definition of these types of estates, it would appear that careful planning and sensitivity to the issues can ensure that potential risks are minimized.