

1-1963

## The Condominium as a Subdivision

William J. M. Thompson

Follow this and additional works at: [https://repository.uchastings.edu/hastings\\_law\\_journal](https://repository.uchastings.edu/hastings_law_journal)



Part of the [Law Commons](#)

---

### Recommended Citation

William J. M. Thompson, *The Condominium as a Subdivision*, 14 HASTINGS L.J. 302 (1963).

Available at: [https://repository.uchastings.edu/hastings\\_law\\_journal/vol14/iss3/10](https://repository.uchastings.edu/hastings_law_journal/vol14/iss3/10)

This Comment is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

## THE CONDOMINIUM AS A SUBDIVISION

By WILLIAM J. M. THOMPSON\*

ALTHOUGH the condominium concept is ancient even in terms of the venerable law of property, having been traced back to the time of the Romans,<sup>1</sup> it has been almost ignored in Anglo-American law until recent years. This lack of attention is pointed up by the fact that the word itself is omitted from some standard legal dictionaries. Elsewhere, it has been tersely defined as "a form of common ownership"<sup>2</sup> or, more aptly, as "common ownership by two or more persons holding undivided fractional shares in the same property and having the right to alienate their shares resembling tenancy in common in Anglo-American law rather than joint tenancy with its right of survivorship."<sup>3</sup>

As applied with growing interest today to apartment house projects, the condominium embraces a fee simple in an apartment and possibly balcony, storage and garage space, plus an undivided interest in common areas such as the structural parts of the building, elevators, hallways and entrances.<sup>4</sup> The fee includes the interior surface walls of the apartment and the airspace enclosed by them.<sup>5</sup>

At first glance this stacked ownership of cubes of airspace within a building bears obvious resemblance to a subdivision. Instead of merely parcelling out plots of the earth's surface by vertical divisions, the developer has turned his subdivision on end, as it were, and sold off the developed airspace above the land along with an undivided interest in the underlying land. From the apartment owner's point of view, the similarity is reinforced by his fee ownership of his "castle in the air" as opposed to the exclusive right to use a particular apartment which he would receive in the conventional community apartment project.<sup>6</sup>

To a certain extent public interest in or concern with the impact of such a subdivision is similar to that involved in subdivision and im-

---

\* Member, Second Year class.

<sup>1</sup> Borgwardt, *The Condominium*, 36 CAL. S. BAR J. 603 (1961).

<sup>2</sup> *Ibid.*

<sup>3</sup> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 473 (3d ed. 1961).

<sup>4</sup> Comment, 50 CALIF. L. REV. 299, 301 (1962).

<sup>5</sup> *Ibid.*

<sup>6</sup> Barber, *Community Apartment Project*, 36 CAL. S. BAR J. 310 (1961); CAL. BUS. & PROF. CODE § 11004.

provement of a tract of vacant land. The quality and nature of the structure will have its effect on its neighborhood and will throw added burdens on community schools, services and transportation facilities like those imposed by an influx of population in a conventional subdivision. Also, there exists the problem of protecting the condominium purchaser himself, who is certainly as vulnerable to victimization as the subdivision lot purchaser. The consideration of taxpayer relief from expenses of new streets and connecting roads, which is an important factor in the control of conventional subdivisions,<sup>7</sup> may also be important in the erection of a condominium apartment building, unless the existing street grid is adequate to serve the increased population.

Whether or not the condominium should be classified as a subdivision seems to depend on the answers to several questions. Is it possible to create such an interest? If possible, does the project come within the language of the Subdivided Lands Act<sup>8</sup> and/or the Subdivision Map Act?<sup>9</sup> Are judicial interpretation and legislative amendments tending to restrict or enlarge the scope of application of these acts?

### *Property Interests in Airspace*

Horizontal, as well as vertical, division of land below the surface seems well established in California<sup>10</sup> and other states.<sup>11</sup>

While the more difficult concept of conveying a separate interest in airspace above the surface does not appear to have been decided precisely,<sup>12</sup> there are indications that it is possible. The property owner's rights in the airspace above the surface are well established, *at least to the extent that he can occupy or use the space.*<sup>13</sup> His right to reserve airspace above a certain level when conveying the surface<sup>14</sup>

<sup>7</sup> *City of Buena Park v. Boyar*, 186 Cal. App. 2d 61, 8 Cal. Rptr. 674 (1960).

<sup>8</sup> CAL. BUS. & PROF. CODE §§ 11000-11202.

<sup>9</sup> CAL. BUS. & PROF. CODE §§ 11500-11641.

<sup>10</sup> *In re Waltz*, 197 Cal. 263, 240 Pac. 19 (1925) (mineral rights, surface interest separated); *Graciosa Oil Co. v. Santa Barbara County*, 155 Cal. 140, 99 Pac. 483, 20 L.R.A. (N.S.) 211 (1909) ("land may be divided horizontally as well as vertically. . ."); *Callahan v. Martin*, 3 Cal. 2d 110, 43 P.2d 788, 101 A.L.R. 371 (1935) (oil rights separated from fee).

<sup>11</sup> *Cobban Realty Co. v. Donlan*, 51 Mont. 58, 149 Pac. 484 (1915) (virtually unlimited number of estates, perpendicular or horizontal, possible); *Caldwell v. Fulton*, 31 Pa. 475 (1858) (minerals, surface interest separated); *Texas Co. v. Daugherty*, 107 Tex. 226, 176 S.W. 717, L.R.A. (1917F) 989 (1915) (surface, subterranean strata may be separated); see Ball, *Division into Horizontal Strata of the Landscape Above the Surface*, 39 YALE L.J. 616 (1930).

<sup>12</sup> Ball, *supra* note 11 at 657.

<sup>13</sup> *United States v. Causby*, 328 U.S. 256 (1946).

<sup>14</sup> *Pearson v. Matheson*, 102 S.C. 377, 86 S.E. 1063 (1915).

and the right of separate ownership in the upper floor of a building<sup>15</sup> have been recognized.

Carrying the example a step further, a municipality's right to vacate an alley a certain distance above the ground was upheld in *Taft v. Washington Mut. Sav. Bank*.<sup>16</sup>

In California, conveyance of the second story of a building was held valid in two early cases.<sup>17</sup>

### *Subdivided Lands Act*

The Subdivided Lands Act,<sup>18</sup> as derived from a number of enactments and amendments from 1919 until the present, basically requires that the developer notify the Real Estate Commissioner concerning details of his proposed subdivision before the subdivided lands are offered for sale or lease.<sup>19</sup> Provision is made for subsequent investigation of the project,<sup>20</sup> for issuance of a public report by the commissioner,<sup>21</sup> and for delivery of a copy of the report to the prospective customer before he purchases or leases the property.<sup>22</sup>

From the earliest decisions applying the measure, the courts have found the purpose of the act was to provide protection and information for the individual members of the buying public<sup>23</sup> and to prevent fraud.<sup>24</sup>

In the first section of the act, it is declared that "[s]ubdivided lands' and 'subdivision' refer to improved or unimproved land or lands divided or proposed to be divided for the purpose of sale or lease or financing . . . into five or more lots or parcels. . . ." with exclusion of large tracts except in the case of sale for oil and gas purposes.<sup>25</sup> "Land" is defined elsewhere as "the solid material of the earth, whatever may be the ingredients of which it is composed, whether

<sup>15</sup> *Weaver v. Osborne*, 154 Iowa 10, 134 N.W. 103 (1912); *Piper v. Taylor*, 48 N.D. 967, 188 N.W. 171 (1922).

<sup>16</sup> 127 Wash. 503, 221 Pac. 604 (1923).

<sup>17</sup> *Thompson v. McKay*, 41 Cal. 221 (1871); *Galland v. Jackman*, 26 Cal. 79, 85 Am. Dec. 172 (1864).

<sup>18</sup> CAL. BUS. & PROF. CODE §§ 11000-11202.

<sup>19</sup> CAL. BUS. & PROF. CODE §§ 11010-11010.5.

<sup>20</sup> CAL. BUS. & PROF. CODE §§ 11014-11016.

<sup>21</sup> CAL. BUS. & PROF. CODE § 11018.

<sup>22</sup> CAL. BUS. & PROF. CODE § 11018.1.

<sup>23</sup> *Smith v. Bach*, 183 Cal. 259, 191 Pac. 14 (1920); *Barrett v. Hammer Builders, Inc.*, 195 Cal. App. 2d 305, 16 Cal. Rptr. 49 (1961); *Westbrook v. Summerfield, Roberts & McArthur, Inc.*, 154 Cal. App. 2d 761, 316 P.2d 691 (1957).

<sup>24</sup> *In re Sidebotham*, 12 Cal. 2d 434, 85 P.2d 453, 122 A.L.R. 496 (1938); *Cowell v. Clark*, 37 Cal. App. 2d 255, 99 P.2d 594 (1940).

<sup>25</sup> CAL. BUS. & PROF. CODE § 11000.

soil, rock, or other substance."<sup>26</sup> This definition appears to suggest that the condominium project, being in effect a division of the airspace, would not fall within the term "land." However, the courts have found that word sufficiently elastic to cover such diverse property interests as mineral rights,<sup>27</sup> oil and gas leases,<sup>28</sup> leasehold,<sup>29</sup> and even riparian rights.<sup>30</sup>

The words "lots or parcels" have been subject to broad construction, also. The California Attorney General's office has indicated that, as used in the section, they refer not only to the tangible surface of the earth but also to an estate or interest in real property.<sup>31</sup> Thus a grantee of a deed who received an undivided interest in real estate plus exclusive occupancy of an apartment was considered to receive a lot or parcel in the meaning of the code definition of a subdivision.<sup>32</sup>

### *Subdivision Map Act*

The Subdivision Map Act<sup>33</sup> provides that governing bodies of cities and counties shall control design and improvement of subdivisions<sup>34</sup> in line with other provisions of the chapter and with local ordinances.<sup>35</sup> Cities and counties are required to formulate such regulations under section 11525 of the Business and Professions Code. The chapter and ordinances also govern survey data of subdivisions, form and content of tentative and final maps and procedure to be followed in securing official approval.<sup>36</sup>

Two of the main purposes of the act, according to the courts, are to require the subdivider to do the original work of putting streets in proper condition before a city or county takes over maintenance<sup>37</sup> and to require installation of drainage systems.<sup>38</sup> General control of

<sup>26</sup> CAL. CIV. CODE § 659.

<sup>27</sup> *In re Waltz*, 197 Cal. 263, 240 Pac. 19 (1925); *McKeon v. Bisbee*, 9 Cal. 137, 70 AM. DEC. 642 (1858).

<sup>28</sup> *Standard Oil Co. of California v. John P. Mills Organization*, 3 Cal. 2d 128, 43 P.2d 797 (1935); *Callahan v. Martin*, 3 Cal. 2d 110, 43 P.2d 788, 101 A.L.R. 871 (1935); *Cowell v. Clark*, 37 Cal. App. 2d 255, 99 P.2d 594 (1940).

<sup>29</sup> *State v. Moore*, 12 Cal. 56 (1859).

<sup>30</sup> *Rose v. Mesmer*, 142 Cal. 322, 75 Pac. 905 (1904).

<sup>31</sup> 17 CAL. OPS. ATT'Y GEN. 79 (1951).

<sup>32</sup> *Id.* at 82.

<sup>33</sup> CAL. BUS. & PROF. CODE §§ 11500-11641.

<sup>34</sup> CAL. BUS. & PROF. CODE § 11525.

<sup>35</sup> CAL. BUS. & PROF. CODE § 11526.

<sup>36</sup> CAL. BUS. & PROF. CODE § 11526.

<sup>37</sup> *Evola v. Wendt Construction Co.*, 170 Cal. App. 2d 21, 338 P.2d 498 (1959); *Hoover v. Kern County*, 118 Cal. App. 2d 139, 257 P.2d 492 (1953).

<sup>38</sup> *City of Buena Park v. Boyar*, 186 Cal. App. 2d 61, 8 Cal. Rptr. 674 (1960).

design and development of subdivisions in relation to adjoining areas also is a basic purpose.<sup>39</sup>

The act defines "subdivision" as referring to "any real property . . . shown on the latest adopted county tax roll as a unit or as contiguous units, which is divided for the purpose of sale or lease . . . by any subdivider into five or more parcels within any one-year period. . . ."<sup>40</sup> Certain exclusions are provided in the same section which will be considered later.

The Act specifically provides<sup>41</sup> that definitions therein apply only to the provisions of the chapter. Accordingly, the qualification of a one-year period is applied to the act of subdividing or mapping, while the Subdivided Lands Act has no time limitation and must be complied with whether sales are made within one year or over a longer period.<sup>42</sup> Additionally, the courts have found that cities and counties have broad powers to adopt local ordinances supplemental to the Act<sup>43</sup> provided they are not in conflict with the measure.<sup>44</sup>

### **Precedents**

The general proposition of such public control of real estate development has been long accepted by California<sup>45</sup> and other courts.<sup>46</sup> Over the last twenty years California court decisions and legislation alike have tended toward broader applications of both Acts. The trend was particularly noticeable in *People v. Embassy Realty Associates, Inc.*<sup>47</sup> and its aftermath in the legislature the following year. At the time the case was decided, section 11000 of the Business and Professions Code declared that "[s]ubdivided lands" and "subdivision" refer to land or lands divided. . . ." This language was held to have no reference to improved city lots. In reaching this conclusion the opinion observed that state courts apparently had in mind the common meaning of the word subdivision as referring to division of a tract of unimproved land into smaller lots. However, in 1947, the legislature amended the definition to refer to *improved or unimproved*

<sup>39</sup> Kelber v. City of Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957); Taylor, *Current Problems in California Subdivision Control*, 13 HASTINGS L.J. 344 (1962).

<sup>40</sup> CAL. BUS. & PROF. CODE § 11535.

<sup>41</sup> CAL. BUS. & PROF. CODE § 11501.

<sup>42</sup> 5 CAL. OPS. ATT'Y GEN. 108 (1945).

<sup>43</sup> Longridge Estates v. City of Los Angeles, 183 Cal. App. 2d 533, 6 Cal. Rptr. 900 (1960).

<sup>44</sup> Kelber v. City of Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957).

<sup>45</sup> Miller v. Board of Public Works of the City of Los Angeles, 195 Cal. 477, 234 Pac. 381, 38 A.L.R. 1479 (1925).

<sup>46</sup> Euclid v. Ambler Co., 272 U.S. 365 (1926).

<sup>47</sup> 73 Cal. App. 2d 901, 167 P.2d 797 (1946).

lands with the apparent purpose of nullifying the *Embassy Realty* case and bringing improved city lots within the area covered by the Subdivided Lands Act.<sup>48</sup>

Six years later, a further step was taken to spell out the coverage of the act in *Bachenheimer v. Palm Springs Management Corp.*<sup>49</sup> That case involved a 38-unit development in which the individual "purchaser" received a ninety-nine year lease to his lot and ownership of a bungalow built on it in return for installment payments over a period of years. The court declared that it entertained no doubt that the project constituted subdivided lands under the statute.<sup>50</sup>

Meanwhile, in 1951, the office of the attorney general issued an opinion that the initial offering of units in a community apartment house project (in which the grantee received an undivided interest in the property and exclusive occupancy of an apartment) was within the terms of the Subdivided Lands Act.<sup>51</sup>

In 1955, the legislature added section 11004 to the Business and Professions Code,<sup>52</sup> making such projects specifically subject to the entire *part* of the Code, *i.e.*, both the Subdivided Lands Act and Subdivision Map Act. In a 1961 opinion<sup>53</sup> this construction was given to the section by the attorney general's office in finding conveyances of an undivided interest in a tract plus exclusive right to occupy a unit to be subject to the Subdivision Map Act. An earlier opinion<sup>54</sup> that conveyances of undivided interests in a tract did not come under subdivision laws was distinguished as applying to cases where only the undivided interest passed to the purchaser without the exclusive right to occupy part of the tract.

Along with these legislative and administrative developments, modifying and applying the regulatory statutes to new situations as they arose, court rulings emphasized the broad coverage of the basic statutes. In *Cowell v. Clark*,<sup>55</sup> the court held that the Subdivided Lands Act applied to the subdivision of an oil and gas lease. A similar result was reached in *People v. Gallinger*<sup>56</sup> where the subdivider executed assignments of parts of a forty-acre tract which he held under a lease from New Mexico.

<sup>48</sup> 17 CAL. OPS. ATT'Y GEN. 79 (1951).

<sup>49</sup> 116 Cal. App. 2d 580, 254 P.2d 153 (1953).

<sup>50</sup> *Id.* at 587, 254 P.2d at 157.

<sup>51</sup> 17 CAL. OPS. ATT'Y GEN. 79 (1951).

<sup>52</sup> Cal. Stat. 1955, c. 1013 § 2, p. 1924.

<sup>53</sup> 38 CAL. OPS. ATT'Y GEN. 125 (1961).

<sup>54</sup> CAL. OPS. ATT'Y GEN. No. 9020, November 13, 1933.

<sup>55</sup> 37 Cal. App. 2d 255, 99 P.2d 594 (1940).

<sup>56</sup> 37 Cal. App. 2d 261, 99 P.2d 597 (1940).

One of the late developments in the area came in February, 1962, when the attorney general's office issued an opinion<sup>57</sup> that a projected condominium was a subdivision within the terms of the Subdivision Map Act. In that project, the purchaser was to receive fee title to the unit purchased, from the top of the floor slab upward into airspace and from the center of the partition walls which would divide the units. The opinion concluded that such a unit did not meet the exclusion requirements of section 11535 of the Business and Professions Code.

In substance, to qualify a subdivision for exclusion under this section, the following conditions must be present: (1) the whole parcel before division must contain less than five acres; (2) each parcel created by the division must abut on a public street or highway; (3) no street or drainage improvements are required and (4) lot design meets approval of the governing body. Other exclusions apply to cemetery and agricultural land. Where all of the required factors are present the developer is required to submit a tentative map and thereafter to file a record of survey map.

The opinion takes the view that the condominium involved fails to meet all of the exclusion requirements on the ground, among others, that the parcels of airspace created by the division would not *abut* on public streets or highways.

### **Conclusion**

In view of the foregoing considerations there do not seem to be any insuperable barriers to the creation of the interests involved in a condominium.<sup>58</sup> It also appears to be a reasonable inference that the provisions of both the Subdivided Lands Act and Subdivision Map Act will be found to apply to condominiums. At any rate, evidence that would encourage a contrary view seems lacking. The strong current trend toward regulation may be supported in this instance both by express language of the statutes involved and their underlying purpose of public protection and information.

However, in the face of these tendencies, the attorney general's office warned in the opinion<sup>59</sup> last referred to that "[i]t is apparent that each project must be measured against the purposes of the statute in question and the intention of the legislative body in enacting it on a case by case basis."

---

<sup>57</sup> 39 CAL. OPS. ATT'Y GEN. 82 (1962).

<sup>58</sup> Ball, *Division into Horizontal Strata of the Landscape Above the Surface*, 39 YALE L.J. 616, 657 (1930).

<sup>59</sup> 39 CAL. OPS. ATT'Y GEN. 82, 85 (1962).