

## THE AIRSPACE UNIT – CONTRIVANCE OR FACT?

By Judith I. Johannsen

Ask the average person what comes to mind when hearing the word “airspace” and you’ll probably hear about astronauts rocketing into the heavens. Ask an astute real estate developer the same question and he or she will probably say “common interest community”.

Common interest communities are curious creatures of statute (the Common Interest Ownership Act - CGS §47-200, et seq.) (“CIOA”) in that they are legally created by recording a declaration on the land records in the town in which they lie and not by digging in the dirt, pouring foundations or hanging sheetrock.

In 2002, a difference of opinion regarding a commercial development plan arose when a developer applied for and subsequently received a zoning permit to construct a supermarket on a seven-acre parcel of land that was zoned for light industrial uses. The parties to this difference of opinion were a developer on one side (the plaintiff) and on the other, the town’s Zoning Board of Appeals (“ZBA”) and those who would be the neighboring residents of this project (together, the defendants).

Their dispute\* ultimately landed the parties in our state’s Supreme Court presenting two issues: 1) whether or not a common interest community could be comprised solely of airspace units, as opposed to actual units with floors, walls and ceilings; and, 2) whether a developer of airspace units was required to have subdivision approval before obtaining a zoning permit.

Here’s how the story unfolded. A real estate developer applied for a zoning permit for a supermarket project to be constructed on a ground lease, but because the project might have needed subdivision approval, he modified his plan and created a common interest community with three airspace units instead. The developer received a zoning permit.

The neighboring residents appealed the issuance of the zoning permit to the town’s ZBA who reversed the zoning enforcement officer’s approval. Now, the developer did not have approval. The appropriate place to appeal a decision of a ZBA is a trial court, so, claiming the ZBA was wrong when it decided he needed subdivision approval from the planning commission, the developer appealed the ZBA’s decision to a trial court. The trial court agreed with the developer, saying he did not need subdivision approval for airspace units, so the neighboring residents and the town’s ZBA appealed the trial court’s decision to CT’s Supreme Court.

The defendants argued that the common interest community the developer formed had been created improperly for two reasons. First, they claimed that CIOA doesn’t allow airspace units and, therefore, the developer’s airspace units (the defendants believed the developer was actually dividing the property into three lots) were simply a contrivance, a wild, made-up scheme, to dodge the town’s subdivision requirements. After all, how do you make a unit out of thin air?

The defendants’ second argument attacked the creation of the common interest community. When a common interest community declaration is recorded on the land records, typically, a certificate of completion certifying that all units were substantially completed in accordance with the plans at the time of recording must be included. It was argued that, in this instance, the declaration was not properly executed because all the units were not substantially completed at the time of recording. How can you complete a unit made of air?

The developer’s first argument was that a common interest community can be comprised of airspace units because CIOA defines a unit as “a physical portion of the common interest community designated for separate ownership or occupancy” and then defines real property as including “parcels with or without upper or lower boundaries, and spaces that may be filled with air or water.” Essentially and simply, the law allows airspace units.

The developer's final point was that because his common interest community was composed of airspace units and did not contain any actual buildings, he did not have to include the certificate of completion in the declaration because the airspace unit was substantially complete just as it was.

CT's Supreme Court agreed with the developer, holding that the proposed project that created three airspace units was neither a contrivance nor something for which this developer needed subdivision approval. Why? In order to prompt subdivision review, there must be a division of land, and here, there was no division of land - the developer's entire thirty-five acre parcel remained one lot and only the airspace above the land would be divided.

*\*Alvord Investment, LLC v. Zoning Bd. of Appeals, 282 Conn. 393 (5/15/07).*

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