MCLE Self Study Article: Legal and Practical Differences Between Airspace Subdivisions and Condominiums in Vertical Mixed-Use Projects

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The last two decades in California have seen an increase in the development of urban, transit-oriented residential projects. The demographics of the new millennium favor housing closer or more convenient to business centers. Both aging baby boomers and the "echo boomer" population prefer living in urban cores, or near public transit that can take them there, as opposed to the suburbs where congested highway transportation is the only way to get around.[1] While this may change with time, there is undoubtedly a continuing trend toward vertical as opposed to horizontal development.

Components of urban mixed-use projects may include for-sale residential units, multi-family rental units, commercial offices, retail stores, hotel space, and parking areas, plus amenities such as fitness centers, tot lots, roof gardens, and plazas. These primary components are often intended for sale in blocks of airspace or land to be owned and operated by different interests or entities in cooperation with each other. A retail component, for example, may be sold to an investment entity specializing in retail ownership, while the multi-family residential component may be held and leased as apartments. Another portion of the mixed-use project may be sold as residential condominiums or spun off to a tax-credit investor or government-controlled entity for affordable housing.

Separating ownership within a single building requires subdivision of the airspace in which the building sits. This may be accomplished by one of two means: a vertical airspace subdivision or a condominium project. This article examines the legal and operational distinctions between these two means. It first summarizes the subdivision process for each. It then addresses practical considerations that may make one structure more appropriate than the other for a mixed-use project.

I. INTRODUCTION TO VERTICAL SUBDIVISIONS

In California, real property may not be legally sold, leased, or financed unless a final subdivision map or parcel map has been recorded, establishing a legal lot or parcel.[2] All subdivisions of land in California must be undertaken pursuant to the California Subdivision Map Act, California Government Code sections 66410–66499.38 (the "Map Act"). The Map Act allows two basic types of maps: (1) parcel maps, which, with some exceptions, are normally used for subdivisions of land consisting of four or fewer lots, parcels, or condominiums, and (2) final maps, which generally apply to subdivisions of five or more lots, parcels, or condominiums.[3] The final map process involves a more cumbersome procedure, wherein the applicant must submit and obtain approval of a tentative map as well as comply with various conditions of approval.[4]

The majority of basic subdivisions of land may be characterized as "horizontal." A horizontal subdivision is a

division of land shown on a two-dimensional parcel map or final map, depicting the boundary lines of the subdivided lots or parcels on the ground. The lots or parcels have no vertical boundaries and thus extend from the bottom of the earth to the top of the sky.[5]

Occasionally, however, a development is parceled vertically. A vertical subdivision is necessary when various separately-owned components of a project are to be contained within the same building or on top of a podium. A vertical subdivision is a three-dimensional division of airspace where one or more airspace lots or parcels exist above or below others. It establishes not only horizontal property boundaries, but also vertical property boundaries tied to elevations above sea level or, in the case of condominiums, to actual building components. In other words, it is a division of air as well as ground, and is therefore sometimes referred to as an "airspace subdivision."

In California, there are two statutory means by which airspace may be divided into legal, marketable parcels. One is by recordation in the official records of the county in which the real property is located of an approved final map or parcel map, subdividing an existing lot or parcel into three-dimensional "airspace" lots or parcels in accordance with the Map Act.[6] The other is by creation of a "condominium project" as shown on a "condominium plan" within the meaning of the California Davis-Stirling Common Interest Development Act (the "Common Interest Development Act").[7] The creation of a condominium project involves a two-step process under the Map Act and the Common Interest Development Act, as explained in Part II of this article. Both airspace parcels shown on a subdivision map and condominium units shown on a condominium plan, if properly created, constitute legal parcels of land that may be separately conveyed and financed under the Map Act.

II. SUBDIVISION PROCESS

A. Vertical/Airspace Subdivisions Shown on a Final or Parcel Map

The statutory authority for vertical airspace subdivisions is derived from the Map Act's definition of "subdivision." A "subdivision" under the Map Act is a division by a subdivider of "any unit or units of improved or unimproved **land, or portion thereof**, shown on the latest equalized county assessment roll as a unit or as contiguous units, for the purpose of sale, lease or financing, whether immediate or future."[8]

The Map Act, however, does not define "land." Rather, the term "land" is defined under the California Civil Code. Section 659 states that "land" includes "free or occupied space for an indefinite distance upwards as wells as downwards."[9] As such, while the Map Act does not state it specifically, it is generally recognized that lots or parcels may be legally divided under the Map Act either horizontally or vertically, or both.

The procedure for establishing a vertical or airspace subdivision on a parcel or final map is the same as that for creating any horizontal subdivision of lots or parcels, the exception being that the lots or parcels must be depicted on the map as three-dimensional, rather than two-dimensional, areas. Depending on the number of parcels to be created and other factors, the subdivider files an application for a parcel map or final subdivision map with the applicable local agency.[10] By way of example, any tentative or final map in San Francisco (as in other cities and counties in California) must, among other things, show the basis of bearings, units of measurement, and both **vertical and horizontal** datum.[11] The local agency or board then approves the tentative map, subject to conditions authorized under the Map Act. Once those conditions are satisfied, and all fees are paid, a final map is recorded in the county and the airspace parcels are thereby created.

An airspace lot or parcel may, subject to the requirements of the Map Act and local regulations, be further subdivided into smaller units, including condominiums. For example, this is done where for-sale condominiums comprise only a portion of a high rise building—such as the uppermost stories—with apartments or retail below. Therefore, a vertical airspace subdivision map may be a hybrid, depicting one or more airspace blocks to be improved with rental apartments, retail spaces, a hotel, or a garage, plus a discrete airspace block mapped for "condominium purposes." The parcel approved for condominium purposes could then become its own condominium sub-project within the overall mixed use airspace project, created as described in subpart B, below.

B. Condominium Projects

As an alternative to showing airspace lots or parcels on a final map or parcel map (or supplement, as described in the previous paragraph), the Map Act authorizes and regulates the creation of condominium projects.[12] The statutory definition of "condominium," however, is not located in the Map Act, but rather in the California Civil Code under the Common Interest Development Act. Section 4125(b) of the Civil Code defines "condominium" as:

> . . . an undivided interest in common in a portion of real property coupled with a separate interest in space called a unit, the boundaries of which are described on a recorded final map, parcel map, or condominium plan in sufficient detail to locate all boundaries thereof. The area within these boundaries may be filled with

air, earth, or water, or any combination thereof, and need not be physically attached to land except by easements for access and, if necessary, support.

Legally marketable condominiums are created by a two-step process. The first step is the recording of a locally approved final map or parcel map "for condominium purposes" pursuant to the Map Act.[13] A final or parcel map for condominium purposes is typically a depiction solely of perimeter boundaries of the lot or parcel containing the condominium project (which, as discussed above, may be an airspace or a traditional horizontal lot). A final or parcel map "for condominium purposes" need not show buildings or the manner in which buildings or the airspace shown on the map are to be divided.[14] The final or parcel map must, however, establish the maximum number of three-dimensional condominium units that may be created based on that map.[15]

The second step in establishing a condominium project is the recording of a "condominium plan" within the meaning of the Common Interest Development Act.[16] The condominium plan must contain (1) a survey map showing monumentation on the ground, and (2) a three-dimensional description of the condominium project, including vertical dimensions that may extend upwards or downwards a finite or infinite distance, in sufficient detail to identify the common area and each separate interest.[17]

III. TITLE AND OPERATIONAL DIFFERENCES BETWEEN AIRSPACE SUBDIVISIONS AND CONDOMINIUM PROJECTS

Both vertical subdivisions and condominium projects provide a means of creating legally subdivided parcels of property. There are, however, advantages and disadvantages to each. How title is conveyed and how the projects function operationally are the two most obvious distinctions. These differences come into play in establishing the legal easements and relationships among the airspace parcels or condominium units.

A. Boundaries

Unlike an airspace lot shown on a final or parcel map, a "condominium unit" may be legally described on a condominium plan by reference to **physical boundaries** of a building or structure, whether in existence or to be constructed.[18] Thus, the boundaries of a separately-owned condominium unit are often described as extending to "the interior unfinished surfaces of the walls, floors, and ceilings" of a particular area within a building. In that case, the structural portions of the building, including bearing walls, foundation, and roof, as well as the areas outside of the project building(s), constitute common elements of the project owned in fee by either (1) an owners' association or (2) the individual owners as tenants in common.[19] Alternatively, the boundaries of a condominium unit may extend to the exterior walls of the project building, or even to a surveyed line outside of the project building.[20] In this way, a condominium regime offers some flexibility in establishing title boundaries as between the owners and an owners' association, because the condominium plan can specify whether building walls are a part of the condominium unit or part of the common area.

As mentioned in the previous section, the boundaries of an airspace parcel shown on a final or parcel map are established by reference to vertical and horizontal survey benchmarks, not to portions of the project building or buildings themselves. The location of walls, floors, and ceilings of the project building are immaterial to airspace parcel lines. As such, building elements must conform as closely as possible to the mapped parcel lines rather than vice versa, and it is more difficult for engineers to draw separate lots or parcels depicting narrow building components such as walls, doors, and windows. This can also be somewhat inflexible in a new development, where elements of a building may be modified during the course of construction. Change orders and field adjustments can result in walls, floors, and other structural building elements failing to match the airspace parcel boundaries shown on the recorded map. Amending a parcel map is a difficult process, requiring local planning approvals and possibly, public hearings.[21] While minor encroachments of building elements between airspace parcels can be addressed with reciprocal encroachment easements,[22] the developer of a new vertical airspace project is, for the most part, committed to completing the project based on a design consistent with the recorded final or parcel map.

Condominium regimes offer greater flexibility for modifying project building designs, whether during original construction or later. Since the condominium plan is a separate instrument from the final or parcel map, it need not be recorded concurrently with the map. In fact, the condominium plan is typically prepared and recorded later, often after the initial framing (at least) of the condominium building or buildings has been completed. Recording the condominium plan after completion of the core of a project building allows the engineer to match the unit and common area boundaries on the condominium plan to the actual building elements and avoids discrepancies caused by field changes to the building plans during construction.[23] Also, even if discrepancies occur, modification of a condominium plan requires only the recording of an amendment or new condominium plan, executed by the owner(s) of the condominium project (at construction completion, usually just the developer).[24] No additional local

approvals are required, as long as the condominium plan complies with the original entitlements for the project.

While the condominium regime would, therefore, seem to be the most flexible for use in new developments, it must be understood that condominium units (whether residential, commercial, garage, or otherwise) are not legal parcels and may not be conveyed separately until the condominium plan is recorded in accordance with the Common Interest Development Act. Often in new mixed-use developments, the various investors/owners must, for any number of reasons, acquire their interests before construction of the building commences. This may be the case, for instance, where portions of the project are to be conveyed to an affordable housing tax-credit entity, which must acquire "eligible basis" in the elements of the building to be constructed within its airspace.[25] In these cases, a vertical airspace subdivision may be preferable and, in fact, necessary.[26]

B. Common Area vs. Easements

A condominium project is, by definition, a "common interest development" ("CID") under California law.[27] As stated above, it must include an area designated as "common area," at least a portion of which must be owned by the individual owners in undivided interests as tenants in common.[28] Often, a condominium project will include both association-owned common area and undivided interest common area. The developer may elect to have the structural portions of the condominium project owned by an owners' association (generally a non-profit mutual benefit corporation) in fee, ostensibly to insulate individual owners from premises liability that might exist if the common elements were owned directly by the owners as tenants in common. In that case, the required area of undivided interests might be drawn as a "cloud"—an unimproved, three-dimensional parcel of airspace situated well above the project improvements. In any event, a condominium project always includes common area parcels, whether owned by an association or collectively by the unit owners. These are often drawn on the condominium plan as being the structural portions of the project—those areas outside the interior unfinished surfaces of the walls, floors, and ceilings.

An airspace subdivision established on a parcel or final map, on the other hand, may, but is not required to, include a common area parcel. Each of the airspace parcels may be independent and self-contained. Neither the structural portions of the building nor any shared areas are required to be owned in common by the owners or by an association. In that case, areas of shared use, such as elevators, stairwells, exterior pathways and paseos, utility shafts, and parking are entirely contained within separately owned airspace parcels. Thus, since there is no separately owned common area, all rights to access and enjoyment of shared use areas would need to be established by reciprocal easements between or among the owners of the airspace parcels, as discussed in the following section.

C. Operation and Management

A condominium project must be created, operated, and managed in compliance with the Common Interest Development Act.[29] The Common Interest Development Act is an extensive body of law, primarily focused on large, for-sale CID projects, although the Act applies to any residential CID.[30] Under the Common Interest Development Act, the rights and responsibilities of the developer of the CID and the owners within the CID must be set forth in a declaration of covenants, conditions, and restrictions ("CC&Rs"), recorded against all of the lots or units in the CID project.[31] Those CC&Rs are required to establish an owners' association to oversee the operation of the common areas and other aspects of the CID.[32] The owners' association is typically formed as a non-profit mutual benefit corporation.[33] As such, the CC&Rs are usually accompanied by association articles and bylaws, which establish procedures for membership meeting, board meetings, elections, and similar administrative functions. The Common Interest Development Act establishes extensive and mandatory procedures for operation of the owners' association and its board of directors. These include, among other things: (1) election procedures for directors and officers of the association;[34] (2) procedures for amendments of the CC&Rs and other governing documents;[35] (3) operating rules and regulations for the association;[36] (4) transfer restrictions and disclosure requirements;[37] (5) project use and maintenance requirements;[38] (6) rules for establishment of budgets and financial records;[39] (7) guidelines for dissemination of information by the association board;[40] (8) assessment collection and enforcement procedures;[41] (9) insurance requirements;[42] and (10) alternative dispute resolution procedures.[43]

Airspace parcels created on a parcel or final map, on the other hand, are not necessarily CIDs.[44] If not structured as a CID, they are not required to follow the Common Interest Development Act, have CC&Rs, or be managed by an owners' association. The various requirements of the Common Interest Development Act regarding budgets, accounting, election of directors, and so forth do not necessarily apply, which makes airspace subdivisions more attractive where less centralized and less regulated management is sought. Still, no vertical division of improved property can exist without, at a minimum, reciprocal easements. It is obviously vital for owners of upper airspace parcels to have legal rights to entry, ingress, egress, utilities, HVAC, security systems, common recreational facilities, telecommunication systems, and, of course, structural support

of upper stories by the lower stories. In an airspace subdivision, these easements are generally established by means of a reciprocal easement agreement ("REA") recorded against some or all of the airspace lots or parcels. An REA may, of course, contain similar or even identical covenants and restrictions as might be seen in typical condominium CC&Rs, such as a system for project maintenance, shared expenses, shared insurance, and use restrictions. An REA may even include provisions for an owners' association or other centralized management of the overall project. Generally, however, procedures for the overall management of the project under an REA are less regimented.

While an owner's right to ingress, egress, and access to such owner's airspace parcel in an airspace subdivision is predicated on the terms of the easements set forth in the REA, a condominium owner's right of access to such owner's separate condominium unit is mandated by statute. In the case of a condominium structure, except as otherwise provided in law, an order of a court, or an order pursuant to a final and binding arbitration decision, a condominium owners' association may not deny a member or occupant physical access to the member's condominium, either by restricting access through the common area or otherwise.[45]

Notably, an airspace subdivision that is not a condominium project may still be a CID—and therefore subject to the lengthy requirements of the Common Interest Development Act—if it meets the definition of a "planned development." This can occur if the REA, in addition to granting mutual and reciprocal easement rights appurtenant to the airspace parcels,[46] establishes an owners' association that has the power to levy assessments enforceable by lien rights against the airspace parcels.[47] For this reason and others, REAs for airspace subdivisions often avoid an owners' association structure in favor of the appointment of a managing owner (usually the owner of a majority of square footage or individual units), a management committee, or some other form of joint management by and among the owners themselves. Alternatively, if the developer or the investor/owners believe that centralized management through an owners' association is appropriate or necessary, they avoid characterization of the project as a CID by not authorizing the association to impose liens against the airspace parcels for failure to pay assessments of for breaches of other covenants or restrictions in the REA.[48]

D. Voting

A condominium project is managed by an owners' association, which, whether incorporated or unincorporated, has the powers granted to nonprofit mutual benefit corporations under the Corporations Code.[49] These powers are exercised, with the exception of certain decisions requiring the vote of the owner/members of the association, by a board of directors elected by the owner/members under a detailed election procedure prescribed by the Common Interest Development Act,[50] and by corporate officers elected by the association board. Each owner in the project is a member of the association by virtue of that owner's title to a condominium. Membership in the association passes with title and may not be separated from title.

In any mixed-use project, allocation of voting power is a potential area of dispute. The interests of residential owners often conflict with those of retail/commercial owners. In a condominium project, the group that can elect and control a majority of the board of directors obviously has the advantage in passing budgets, collecting reserves, leveeing special or capital improvement assessments, establishing project rules and restrictions, and other important management decisions. The allocation of voting power can dictate the future of the project. While the Common Interest Development Act does not specifically address allocation of voting rights, for condominium projects containing for-sale residential units, the California Subdivided Lands Act and accompanying Regulations of the Real Estate Commissioner[51] provide that voting allocation should be on a one-vote-per-unit basis.[52] This may or may not work as a practical matter where retail, commercial, or garage units are significantly larger than the residential units, or have a greater economic interest in controlling management or ownership decisions. The California Bureau of Real Estate ("CalBRE"), which reviews applications for subdivision public reports under the California Subdivided Lands Act,[53] will allow some flexibility to developers in establishing a modified voting allocation (for instance, based on square footage) for retail, commercial, and other non-residential components, but will, as a policy, favor giving residential condominium owners voting control over many aspects of project management.[54]

Voting in an airspace subdivision that is governed by an REA can be far less formal. A single owner can often act as the managing owner on behalf of all owners, without a board or officers at all. Still, if the mixed-use project includes a residential for-sale component (usually a condominium sub-project), CalBRE will require that reasonable arrangements be made within the overall project to protect the interests of the residential purchasers. These reasonable arrangements would include a fair voting allocation as well as fair representation on a management board or committee.

IV. OTHER CONSIDERATIONS

A. Local Zoning and Building Codes

In determining whether to proceed with a vertical airspace subdivision or a condominium regime, local zoning and

building codes should also be taken into account. Some jurisdictions may impose setback requirements or building separation requirements that may apply to parcel lines but not to condominium boundaries.

The California Uniform Building Code prohibits openings along parcel lines, a restriction which does not necessarily apply to condominium separations. The Building Code does not distinguish between vertical and horizontal parcel lines. Obviously, a vertical subdivision will require openings along horizontal property lines for, among other things, elevator shafts, stairwells, and utility shafts. Applied literally, therefore, the Building Code would prohibit most vertical subdivisions unless legally structured as condominiums—a somewhat nonsensical result, since the purpose of the Building Code is to ensure safety and integrity of construction, not the legal method of subdivision. Fortunately, many jurisdictions in California will allow vertical subdivisions and apply the same building code standards as if the project were mapped as condominiums.[55] Some jurisdictions, however, are less willing to do so, and some interaction with the local building and planning department is advisable if a vertical airspace subdivision, as opposed to a condominium project, is being considered.

B. Application of the Subdivided Lands Act

The Subdivided Lands Act, contained in the California Business & Professions Code sections 11000–11200, provides that, with some exceptions, no person may sell or lease or offer for sale or lease interests in a subdivision of five or more residential lots, parcels, or condominiums without first obtaining a final subdivision public report from CalBRE and providing a copy of that public report to the prospective home purchaser.[56] When planning a vertical mixed-use project, the question often arises whether use of an airspace subdivision versus a condominium structure will impact whether a final subdivision public report will be required to convey the various components of the project.

In practice, the end result should be effectively the same for both. Any portion of a mixed-use project that is subdivided for purposes of sale as residential condominiums or residential airspace units will likely require a public report from CalBRE. Subtle planning differences, however, can impact whether a public report would be required for the overall mixed-use project. If the entire subdivision is structured as a single condominium project which includes residential for-sale condominiums along with other uses (with a single set of CC&Rs, a single condominium plan showing both the residential and commercial/retail condominiums, and a single overall budget), the subdivider would be required to submit for a public report on the entire project. If, however, the various components of the project are subdivided on a final map as a vertical airspace subdivision, with no common area and no centralized owners' association (thus avoiding being characterized as a condominium or planned development CID), the overall project can possibly avoid CalBRE public report requirements. In that case, the for-sale residential condominium component of the overall mixed-use project would be set up as a "sub-project," with its own CC&Rs and residential condominium owners' association. The owner/developer of the residential condominium component would be required to obtain a public report from CalBRE, but only for that component of the project.

That said, even if a residential condominium sub-project comprises only a small portion of a mixed-use vertical subdivision, the master REA or CC&Rs for the overall development are subject to review by CalBRE in the context of the condominium subdivider's public report application.[57] In its review, CalBRE will generally focus on provisions of the master REA or CC&Rs that impact the rights of individual condominium purchasers, including such matters as the voting rights of the condominium project in relation to the other project components,[58] procedures for establishing project budgets, limitations on increases in budgeted and special assessments affecting the condominium sub-project,[59] and other arrangements CalBRE considers subject to its jurisdiction. Even if the project as a whole is an airspace subdivision structured to be exempt from the Common Interest Development Act and the Subdivided Lands Act, the master developer should be encouraged to have the master CC&Rs or REA pre-approved by CalBRE **before** the owner/subdivider of the condominium component submits its application for a public report for the condominiums.[60]

C. Affordable Housing

Often, the affordable or inclusionary component of a mixed-use project is spun off to a single purpose entity, formed for the specific purpose of developing the affordable component to qualify for federal and state low-income housing tax credits.[61] The tax credit entity, in order to create "eligible basis" in the affordable housing improvements, must acquire title to the below market rate ("BMR") units in fee, which of course requires the legal subdivision of the BMR component of the building. In a private letter ruling, the Internal Revenue Service has acknowledged that a project may qualify for tax credit financing where the BMR low-income units in the building are owned by one entity and the market rate units are owned by another entity.[62]

Where, as is typically the case, units in a mixed-use project are to be rented as BMR apartments, the BMR component can sometimes be vertically subdivided from the rest of the project

as a single airspace block consisting of, for instance, one or more full floors of the building. More often, however, local agencies require that BMR apartment units be interspersed among market rate units in a checkerboard fashion and not segregated from other apartments. While this can be accomplished with either a condominium or airspace subdivision approach, the airspace subdivision is arguably the better choice.[63] To create eligible tax basis, the improvements designated as the BMR component must include structural improvements, which is atypical in a condominium project because the structural portions of the project building(s) are usually made part of the common area as opposed to part of the separate units. Also, it may be necessary for the civil engineer to create contiguity of the entire BMR component (i.e., making the BMR component a single parcel rather than numerous parcels or units) by "connecting" the BMR living spaces with hallways, stairwells, or utility shafts and thereby making the entire BMR component a single airspace parcel.[64] This is difficult to accomplish on a condominium plan, where walls and floors are, again, typically common areas. In any event, counsel for the developer of the mixed-use project should be prepared to address the eligible basis issue and, at the very least, provide a letter to the tax-credit investor (if not a full opinion) explaining California vertical subdivisions.

D. Insurance for Damage and Destruction

One benefit of the condominium/owners' association structure in a vertical subdivision project is the availability of a single corporate entity (the owners' association) that can obtain property insurance covering the entire building. Here, damage and destruction insurance claims and awards would be administered by the association board or an appointed insurance trustee. Where airspace parcels are created on a map, and where the parcel owners elect to manage the project through a management committee or other non-association structure, property insurance would need to be carried either by: (1) each individual owner, or (2) by one owner on behalf of all of the other owners, with a right of reimbursement for premiums paid. In a single building mixed-use project, it may be impractical or cost prohibitive to have each owner carry its own property insurance, where a fire or other casualty is more likely than not to affect more than one owner's portion of the building.

In either case, the attorney drafting the CC&Rs or REA should coordinate with both the developer's insurance representative and with counsel for the project lenders to be sure that the coverage and claims procedures are compatible with the financing requirements for each separately-owned component of the mixed-use project.

V. CONCLUSION

Airspace parcel/final maps and condominiums are each a type of "subdivision" under the Map Act. As such, an airspace/vertical subdivision and a condominium each constitute a means of creating separate legal units or parcels of real property, which can be separately conveyed, improved, leased, or financed under California law. Whether one or the other approach to subdividing a mixed-use project is appropriate or more beneficial will depend on all of the facts and circumstances. Counsel assisting with the creation of a vertical mixed-use project should be aware of, and discuss with his or her client, all of the nuances of each type of subdivision.

Endnotes

1 *The State of Housing in California in 2012: Affordability Worsens, Supply Problems Remain*, California Department of Housing and Community Development, Division of Housing Policy Development, www.hcd.ca.gov/hcd_state_of_housing_ca2012update0812.pdf (2012).
2 Cal. Gov. Code § 66499.30.
3 The general rule is that a tentative and final map are required for all subdivisions creating five or more parcels, five or more condominiums, a community apartment project containing five or more parcels, or the conversion of a dwelling to a stock cooperative containing five or more dwelling units, unless specifically excepted. Cal. Gov. Code § 66426. *See* Daniel J. Curtin, Jr. and Robert E. Merritt, *Subdivision Map Act Manual*, 7 (2000).
4 Cal. Gov. Code § 66426*; see also*, Cal. Gov. Code §§ 66452–52.25 regarding tentative maps.
5 Cal. Civ. Code § 659.
6 Cal. Gov. Code §§ 66410–13.5.
7 Cal. Civ. Code §§ 4000–70.
8 Cal. Gov. Code § 66424.
9 Cal. Civ. Code § 659.
10 Cal. Gov. Code § 66426.
11 *See, e.g.*, Department of Public Works, City and County of San Francisco, Subdivision Regulations, Art. V, § C(1)(n).
12 Cal. Gov. Code § 66426.
13 *Id.* § 66427(a) and (b).
14 *Id.* § 66427(e).
15 *Id.* § 66437(e)(1).
16 *Id.* § 66437(e); Cal. Civ. Code § 4285.
17 Cal. Civ. Code § 4285(a) and (b).
18 *Id.* § 4125(b).
19 The "common area" required to be held by the owners of a condominium project in undivided interests as tenants in common does not always include the structural building

improvements within a condominium building. *See* Part III.B. *infra*.

20 Whenever condominiums are contained within a building, the existing physical boundaries of the unit are conclusively presumed to be its boundaries rather than the metes and bounds expressed in the deed or condominium plan, if any exists, regardless of settling or lateral movement of the building and regardless of minor variance between boundaries shown on the plan or in the deed and those of the building. Cal. Civ. Code § 4220.

21 Amendments of final or parcel maps, or certificates of correction may be recorded without agency approval but only for the correction of patent errors or incorrect monumentation. The list of allowable corrections is contained in Cal. Gov. Code § 66469.

22 Sample language for an encroachment easement is: "There is hereby reserved and granted to each Airspace Parcel, as the dominant tenement, and each Owner of such Airspace Parcel, an easement over each adjoining Airspace Parcel, as the servient tenements, for any encroachment due to the actual physical location of structural elements of the Component comprising that Airspace Parcel built in accordance with the original design, plans and specifications for the Project, or caused by engineering errors, construction errors, field adjustments during the course of original construction, settlement, or shifting of a building, or similar causes."

23 The declaration of covenants, conditions, and restrictions for a condominium project will typically contain a reciprocal/blanket easements for encroachment of units over other units and common area, and vice versa, to deal with minor discrepancies between the depictions shown on the condominium plan and the actual building, where the discrepancies are due to construction errors or minor field changes during the course of development, or to shifting of the building over time. These encroachment easements, however, are limited to very minor errors as opposed to wholesale inaccuracies.

24 Cal. Civ. Code § 4295.

25 Qualification for tax credit treatment of low-income housing developments requires that the developer/owner of the low income units acquire eligible basis by funding that portion of the development. Internal Rev. Code §§ 42(d), 103.

26 *See* Part IV.D, *infra*.

27 Cal. Civ. Code § 4100(b).

28 *Id.* § 4125(a), (b).

29 Common interest developments that are exclusively commercial or industrial are governed by the less stringent Commercial and Industrial Common Interest Development Act, Cal. Civ. Code §§ 6500–24.

30 Commercial and industrial CIDs are governed by the Commercial and Industrial Common Interest Development Act, Cal. Civ. Code §§ 6500–24. "Commercial or industrial" refers to CIDs that are limited to industrial or commercial uses by law or by a declaration of covenants, conditions, and restrictions that has been recorded in the official records of the county in which the CID is located. Cal. Civ. Code § 6531.

31 Cal. Civ. Code § 4250.

32 Cal. Civ. Code § 4800.

33 Whether the owners association is incorporated or unincorporated, it may exercise the powers of a non-profit mutual benefit corporation as enumerated in section 7140 of the California Corporations Code, with limited exceptions. Cal. Civ. Code § 4805.

34 Cal. Civ. Code §§ 5100–25.

35 *Id.* §§ 4270–75.

36 *Id.* §§ 4340–70.

37 *Id.* §§ 4525–650.

38 *Id.* §§ 4700–90.

39 *Id.* §§ 5300–20, 5500–80.

40 *Id.* §§ 5310–20.

41 *Id.* §§ 5600–20.

42 *Id.* §§ 5800–10.

43 *Id.* §§ 5850–985.

44 They may be CIDs if they meet the definition of a "planned development." *See infra* Part III.C.

45 Cal. Civ. Code § 4510.

46 *Id.* § 4095(b).

47 *Id.* § 4175(b).

48 Another reason for developers to avoid creating an owners' association structure for new projects is that the existence of an owners association is viewed by some insurers as increasing the risk of construction deficiency claims. Whether actual or perceived, this can have an impact on premiums for builder's liability insurance.

49 Cal. Civ. Code § 4805(a).

50 *Id.* §§ 5100–25.

51 The California Subdivided Lands Act, contained in the California Business and Professions Code at sections 11000–08, as implemented in the Regulations of the California Real Estate Commissioner (Cal. Code Regs., Title 10, Art. 12, commencing at § 2790) establishes the obligation of persons or entities subdividing land into five or more lots or parcels to obtain a final subdivision public report from the California Bureau of Real Estate ("CalBRE") as a condition to selling or leasing lots or parcels in that subdivision. "Subdivided lands" and "subdivision" are defined to include condominium projects, among other common interest developments.

The Commissioner's Regulations set forth the procedures for obtaining a public report and identify "reasonable arrangements" that CalBRE will expect the subdivider and subdivision offering to meet in order to be eligible for a public report. A "substantially complete application" for a condominium project public report must include, among many other things, the existing or proposed CC&Rs, the condominium plan, and a detailed pro forma operating budget for the owners association. Cal. Code Regs., Title 10, § 2792.1(a). "Reasonable arrangements" include not only consistency of the governing documents with the California Davis-Stirling Common Interest Development Act, but also compliance with certain Commissioner's Regulations designed to protect public purchasers of residences in common interest developments. *See* Cal. Code Regs., Title 10, §§ 2792.4–92.28. The Subdivided Lands Act does not apply to the sale or lease of parcels or lots limited to industrial or commercial uses by law or pursuant to the terms of the CC&Rs for the project (Cal. Bus. & Prof. Code §11010.3(a)), but it does apply to mixed-use condominium developments to the extent that the subdivider intends to sell five or more of the condominiums for residential purposes.

52 Regulations of the Real Estate Commissioner, Cal. Code of Regs., Title 10, § 2792.18(a). The Regulations allow developers to hold three to one voting rights temporarily during the sale-out period of condominiums, but this weighted voting privilege must terminate within a specified period of time. *Id.* § 2792.18(b).

53 *See* Part IV.B, *infra*.

54 CalBRE, correctly or incorrectly, cites for this policy Cal. Bus. & Prof. Code §11018.5(d), which requires as a condition for issuance of a public report that reasonable arrangements have been made "for delivery of control over the subdivision and all offsite land and improvements included in the offering, to the purchasers of lots, apartments, or condominiums in the subdivision," the term "offering" being interpreted to be the offering of residential condominiums to public purchasers. This approach by CalBRE can be problematic in mixed-use projects where the residential condominium component comprises only a small minority portion of the overall project.

55 Most jurisdictions recognize that the Uniform Building Code does provide for some practical flexibility when its provisions could have an illogical result. In this regard, section 104.1 of the Uniform Building Code allows building officials to render interpretations and to implement policies and procedures in compliance with the intent and purpose of the Code.

56 Cal. Bus. & Prof. Code §§ 11010(a), 11018.1.

57 Regulations of the Real Estate Commissioner, Cal. Code of Regs., Title 10, § 2792(a)(7)(D).

58 *See supra* note 48.

59 Regulations of the Real Estate Commissioner, Cal. Code of Regs., Title 10, §§ 2792(a)(6)D), 2792(a)(7).

60 Cal. Bus. & Prof. Code § 11010.10. Pre-approval of master CC&Rs or an REA can be accomplished by submitting them to CalBRE along with completed BRE Form RE 610.

61 Internal Rev. Code § 42; Cal. Rev. & Tax. Code §§ 12205, 12206, 17057.5, 17058, 23610.4, 23610.5.

62 I.R.S. Priv. Ltr. Rul. 200601021 (July 8, 2005).

63 It should be noted that the Internal Revenue Service, in an official notice, has included in its definition of a "building" for which eligible basis can be created for low-income housing credit purposes only "residential rental property that is either an apartment building, a single family dwelling, a townhouse, a row-house, a duplex, ***or a condominium***." I.R.S. Notice 88-91 (emphasis added). While this definition appears to exclude improvements contained within a subdivided airspace parcel not characterized under state law as a "condominium," a legally subdivided airspace parcel containing low-income housing units should be considered the functional equivalent. I.R.S. Priv. Ltr. Rul. 200601021 (July 8, 2005).

64 A contiguous BMR component may be necessary in order to keep the total number of airspace lots in a project under five, so that the developer can apply for a "minor" parcel map rather than go through the tentative/final map procedure. Contiguity of the BMR component may also be required by the tax-credit investor, so as not to be obligated to finance multiple units.