**AIR RIGHTS DEVELOPMENT**
*Developing the Air Up-There*
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## PART I

### Introduction to "*Air Rights*"

In 30 out of 50 states, including Illinois and all other Midwestern states, the "Rectangular Survey System" is in effect. The Rectangular Survey System was adopted in 1785 to meet the needs of the Federal Government as it faced the challenge of dividing vast areas of undeveloped land lying west of the original 13 colonies. The system, developed under the direction of Thomas Jefferson, essentially divides the United States into rectangles measured in relation to lines known as Meridians and Base Lines.

Most people are conditioned to think of land in two dimensions: north/south and east/west. Descriptions of a parcel on a plat of survey typically refer to "a parcel of land X feet by Y feet" located in relation to an intersection or other identifiable landmark. When considering new development, people often picture the best place to locate their proposed building, parking, and drives. They think primarily in terms of land coverage for the type of building they want. If the parcel is larger than they need, they may consider subdividing the parcel to create two or more lots so they can sell or lease the excess land.

Once a parcel is "developed" it is natural to think of the parcel as being unavailable for further development unless the existing improvements are demolished. This can leave valuable land underutilized. Classic examples may include a single story commercial building at a prime urban location, a multi-deck parking garage or mid-rise building in a downtown development area, railroad tracks or spurs cutting across valuable urban land and, in some cases, even roadways and alleys.

Each of these examples represent, potentially, underutilization of valuable real estate. Finding a way to capture additional value by developing the "air" above can be like creating "money from thin air." The practice of utilizing the "space above" is often referred to as "air rights development". Air rights development requires thinking in three dimensions instead of two and requires serious design consideration and legal planning – but when land values are high and zoning permits, the economic return may be dramatic.

Many don't realize that virtually all of Chicago's downtown business district is a "*city in the air*". People tend to think of streets and street level entrances to buildings in downtown Chicago as being at ground level but, mostly, they are not. Many are located 12 to 22 feet above ground level, which is how Chicago has been able to build the an extensive network of lower level pedestrian passageways ("pedways") and streets in Chicago's central business district (aka the "Loop") such as Lower Wacker Drive, Lower State St., Lower Randolph St., etc. It also explains why during "the Great Chicago Flood of 1992", which flooded the Loop, few people saw any water as offices and retail buildings were closed and workers were sent home because of "flooding".

So called "air rights" are part of the "bundle of rights" constituting fee simple title to real estate. They comprise an interest in land, although not the surface of the land. The term *air rights* generally refers to the right of the owner of a parcel of land to use the space above the land. While the ancient common law doctrine that "ownership of land extends from the center of the earth to the periphery of the universe" has been limited to accommodate modern-world realities such as air-travel, the fundamental concept that land ownership includes the right to use and occupy the airspace above the surface of the land is well established.

As one of the bundle of property rights comprising fee simple title to real estate, air rights may also be "unbundled" and sold or encumbered separate from other rights in the bundle. From a legal standpoint, the separation and transfer of so-called air rights is not materially different from subdividing and transferring land pictured in only two dimensions. Instead of subdividing and selling off, for example, "the west 100 feet of Lot 1" as depicted on a plat of survey, the transfer of air rights subdivides and transfers a parcel based upon its vertical elevation. For example, one might subdivide and transfer "that part of Lot 1 lying above a horizontal plane located 100 feet above [some benchmark elevation].

In Chicago, the benchmark is Chicago City Datum ("CCD") which, for vertical elevations, represents *zero feet*. The Chicago Municipal Code (10-4-210) defines Chicago's City Datum as "a plane 17.640 feet below the benchmark cut on top of the bottom stone of granite base at the southeast corner of the Northern Trust Company Bank Building at the northwest corner of S. LaSalle Street and W. Monroe Street." A brass plaque facing Monroe Street memorializes the CCD benchmark.

By dividing a development parcel "vertically" it is often possible to "stack" uses in a mixed-use development owned by more than one owner in the same way it is possible to subdivide and develop side-by-side a horizontal surface subdivision. In some cases, without even developing the air above existing or planned improvements, it is possible to sell and transfer air rights to an adjacent property owner to allow construction of a taller building on an adjacent building site. Recognizing this potential can achieve a substantial economic windfall for a property owner underutilizing a valuable development parcel.

Air rights development is a combination of black letter real estate law and the applicable zoning code of the community in which your property is located. Because zoning codes are legislative pronouncements, they are subject to change as local municipal governments determine appropriate. For this reason, the current zoning classification for every project, and certainly for any project involving "air rights development", must be examined at the beginning of each transaction as part of the due diligence investigation.

*Part II* of this series describes hypothetical examples demonstrating how air rights development can be used to enhance development opportunities.