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## On Solid Ground: How *Sterling* Strengthened Airspace Ownership Rights in Florida

Nicolas Torres  
*University of Miami School of Law*

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# On Solid Ground: How *Sterling* Strengthened Airspace Ownership Rights in Florida

Nicolas Torres<sup>1</sup>

*No other form of property ownership is as synonymous with Florida as the condominium. While ownership of airspace was possible under common law, modern condominiums are more accurately described as creatures of statute. Although the Florida Condominium Act (FCA) expressly provides for fee simple airspace ownership of condominium property, it had been unclear if the Act could provide for fee simple airspace ownership of non-condominium property. Sterling Breeze v. New Sterling Resorts cleared up that ambiguity and found that the FCA can provide for fee simple ownership of non-condominium airspace. First, this note will review the development of airspace ownership rights as they relate to condominiums within both common law and statutory regimes. Next, this note will explain key provisions of the FCA as well as Florida case law relevant to airspace ownership. This note will then discuss Sterling Breeze v. New Sterling Resorts which tested whether, under the Florida Condominium Act, non-condominium airspace can be owned in fee simple if the non-condominium airspace was described in a condominium declaration. Adopting a contract-based approach that looks to condominium declarations governed by the FCA, the Sterling Breeze court affirmed that non-condominium airspace can be owned in fee simple if that airspace was described in the declaration creating the condominium. This note will then consider potential benefits of the contract-based approach to airspace ownership adopted in Sterling Breeze and briefly discuss the urban planning and land-use benefits that flow from including non-condominium airspace within the FCA's scope. This note*

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<sup>1</sup> Nicolas Torres is a third-year law student at the University of Miami School of Law. Nicolas would like to thank Professor Jessica Owley for her help with shaping and editing this paper.

*concludes with a consideration of how Florida common law may also provide for fee simple airspace ownership outside of the Florida Condominium Act.*

## I. INTRODUCTION

They dominate the skyline from Jacksonville Beach to South Beach, attracting an ever-growing number of homebuyers with the promise of luxury amenities and postcard vistas: condominiums.<sup>2</sup> Despite the economic uncertainty caused by the COVID-19 pandemic, condominium and townhome sales in Florida surged 117% year-over-year in the second quarter of 2021.<sup>3</sup> While condominium ownership is usually associated with retirees and foreign investors, the widespread adoption of remote work prompted by the COVID-19 pandemic is bringing an influx of new residents from metropolitan areas like New York City.<sup>4</sup> Although the availability of single-family homes is often cited as part of Florida's lure, dwindling supplies of single-family residences,<sup>5</sup> and the benefits of vertical developments may further spur demand for condominiums in the Sunshine State.<sup>6</sup>

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<sup>2</sup> See Case Comment, *Condominium Regulation: Beyond Disclosure*, 123 U. PA. L. REV. 639, 641 (1975) [hereinafter *Condominium Regulation*] (explaining that “[i]nstead of developing low-cost urban projects designed as primary residences for those who could not afford traditional forms of residency ownership, the surge of condominium development has been in the high-income market: as resorts . . . as second homes, and as primary residences in prestige locations.”); See generally Anna Jean Kaiser, *Report: Condo Inventory at Record Low in South Florida*, MIA. HERALD, Aug. 6, 2021, at 17A.

<sup>3</sup> QUARTERLY MARKET DETAIL – Q2 2021 TOWNHOUSES AND CONDOS FLORIDA, FLA. REALTORS (2021), [https:// archive.floridarealtors.org/ResearchAndStatistics/Florida-Market-Reports/Index.cfm](https://archive.floridarealtors.org/ResearchAndStatistics/Florida-Market-Reports/Index.cfm).

<sup>4</sup> See Michele Lerner, *Reverse Snowbirds Making Long-Term Moves to the South*, BARRON'S: PENTA (Dec. 14, 2020, 11:20 AM), [https:// www.barrons.com/articles/reverse-snowbirds-making-long-term-moves-to-the-south-01607962837](https://www.barrons.com/articles/reverse-snowbirds-making-long-term-moves-to-the-south-01607962837) (noting increased interest in moving to Florida among luxury residence buyers due to increased remote work caused by COVID-19 and Florida's low tax rates.).

<sup>5</sup> See generally Emily Badger & Quoctrung Bui, *Where Have All the Houses Gone?*, N.Y. TIMES (May 14, 2021), <https://www.nytimes.com/2021/02/26/upshot/where-have-all-the-houses-gone.html> (noting that homes for sale inventory fell nationwide to a multi-year low, with especially steep falls in major metropolitan areas, due to COVID-19 related factors, new housing starts that have trended below historic averages, and low mortgage interest rates.).

<sup>6</sup> See Katherine Kallergis & Jordan Pandey, *Buyers Shift to Condos as Waterfront Single-Family Luxury Inventory Dwindles in South Florida*, THE REAL DEAL: S. FLA., (Jan. 19, 2021, 5:30 PM), <https://therealdeal.com/miami/2021/01/19/buyers-shift-to-condos-as-waterfront-single-family-luxury-inventory-dwindles-in-south-florida/> (arguing that a 30 percent year-over-year jump in condominium and townhome

Condominium buildings present opportunities to house a growing population while reducing land use, bolstering energy efficiency, and cutting down more efficiently on traffic pollution by reducing commute times.<sup>7</sup> Condominium buildings and other forms of vertical development also present new opportunities to use and monetize airspace both inside and outside of buildings. Developing new approaches to airspace use present airspace owners with opportunities to monetize previously unused parts of fee simple estates.<sup>8</sup> Vertical development has attracted interest from environmentally minded residents and developers who recognize that condominiums and other multi-story developments offer greater energy efficiency than single family homes and stand-alone commercial properties while reducing total land use and lowering commute times.<sup>9</sup>

The pairing of residential and commercial units on condominium buildings—commonly known as mixed-used developments—offer a way to meet growing demand for condominiums and support local economic development while consolidating property users into more efficient vertical arrangements. However, bringing vertical development and fee simple ownership of resulting residential properties together requires that a fee simple estate in airspace itself be created, owned, and conveyed, separate and apart from any underlying land or structure. The unique geography and ownership structure of a condominium offer new ways to understand the fundamental elements of fee simple ownership. Moreover, these disputes provide practical guidance to condominium developers on how to ensure that non-residential units will benefit from the protections offered by condominium statutes.

In *Sterling Breeze Owners' Association, Inc. v. New Sterling, LLC*, the First District Court of Appeal of Florida rejected an attempt by a homeowners' association to gain ownership of commercial units located inside a condominium building but that were not owned by either the

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sales in Miami-Dade was caused by a “dwindl[ing]” supply of single-family homes as well as lifestyle and tax considerations.).

<sup>7</sup> See generally Jason Plautz, *Did Covid Lockdowns Really Clear the Air?*, BLOOMBERG CITYLAB (Dec. 21, 2020, 3:36 PM <https://www.bloomberg.com/news/articles/2020-12-21/what-covid-lockdowns-did-for-urban-air-pollution>) (noting that “[s]atellite monitoring and roadway data show that nitrogen oxides linked to automobiles were down worldwide after lockdowns began, sometimes by as much as 50% in certain locations.”).

<sup>8</sup> See Troy A. Rule, *Airspace in a Green Economy*, 59 UCLA L. REV. 270, 288–89 (2011) (noting that “vertical building designs are commonly viewed as relatively ecofriendly approaches to real estate development” because high-rise developments can lower energy consumption, allows more land to be used for green spaces, reduces the need for public infrastructure, and reduces traffic levels.).

<sup>9</sup> *Id.*

condominium association or a condominium owner.<sup>10</sup> The 22 story tall building housed 145 residential units along with four commercial units located on the ground floor.<sup>11</sup> All four units were owned and operated by New Sterling Resorts with one unit housing a wine bar, another unit housing a guest gym, a third unit housing a laundry facility and the fourth unit being used as a storage room.<sup>12</sup> While these commercial units were in a condominium building, the governing documents expressly provided that the units would be classified as commercial units and not as condominium units.<sup>13</sup> The condominium association argued that the Florida Condominium Act (FCA), which provides for fee simple airspace ownership and governs the creation and operation of condominiums only permits the ownership of fee simple absolute in airspace if that airspace is owned either by a homeowner as a condominium unit or by a condominium association as a common element like a lobby, hallway, or recreational area.<sup>14</sup> With no other statutes or opinions providing for airspace ownership, the association argued that the commercial units did not fall within the scope of the FCA and could not be owned by New Sterling.<sup>15</sup> The court rejected the association's argument and affirmed the lower court's finding that the FCA permits airspace inside a condominium building to be owned in fee simple absolute without requiring that airspace to be either a condominium unit or a common element as long as the excluded units and the condominium were created in compliance with the FCA.<sup>16</sup>

*Sterling* shows that Florida courts can extend key benefits of the FCA—especially, fee simple ownership of airspace—to units located in a condominium building even if those units are not condominium units or common elements. Moreover, the decision offers greater clarity on how a fee simple absolute in airspace can be created, conveyed, and owned under Florida law. In turn, the decision provides lawyers, owners, and developers with practical guidance that can be used to more precisely tailor ownership structures implemented in condominiums and vertical developments more generally. Given the economic and urban-planning benefits offered by vertical developments like high-rise, mixed-use buildings, *Sterling* may

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<sup>10</sup> See *Sterling Breeze Owners' Ass'n v. New Sterling Resorts, LLC*, 255 So. 3d 434, 435 (Fla. 1st DCA 2018).

<sup>11</sup> *Id.* at 435–36.

<sup>12</sup> *Id.* at 436.

<sup>13</sup> See *id.* at 435.

<sup>14</sup> See *id.* at 436.; See FLA. STAT. § 718.108(1)(a) (2021) (providing that a condominium's common elements include “condominium property which is not included within the units.”).

<sup>15</sup> *Sterling Breeze*, 255 So. 3d at 437.

<sup>16</sup> *Id.*

stake developer and owner interest in these developments by providing the necessary flexibility in ownership structures that can maximize occupancy in those developments.

First, this note briefly looks at the development of airspace ownership in the United States. The common law has long accommodated fee simple ownership of airspace separate and apart from fee simple ownership of the underlying land or a given building. Alongside the common law, Florida, like most states, has adopted statutes permitting fee simple absolute ownership of airspace when that airspace is part of a condominium.<sup>17</sup> This note provides a brief overview of the benefits provided to owners by the most common provisions found in condominium statutes. Next, this note details the benefits of Florida's approach to airspace ownership as embodied both in the FCA and the broad contractual freedom Florida courts have found when interpreting the statute. This note discusses how the *Sterling* court broadened the scope of "land" under the FCA to encompass airspace parcels that are excluded from condominium ownership and in a building dominated by condominium units. *Sterling* shows that the FCA provides for ownership of non-condominium airspace parcels as long as those parcels were created with an FCA compliant governing document.<sup>18</sup> By extending the FCA's protections to independent owners in condominium buildings, the *Sterling* court provided the clearest guidance yet that the FCA's protections can encompass all airspace parcels inside a condominium building.<sup>19</sup> More importantly, *Sterling* shows that the FCA's provisions can extend to all airspace parcels described in a condominium's governing document even if some of those described parcels will not be owned as condominium units or common elements.<sup>20</sup> Finally, this note will address the practical implications of the *Sterling* decision with an eye towards anticipating circumstances that could test the limits of *Sterling*'s holding.

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<sup>17</sup> Marlene Brit, *Terminating a Condominium or Terminating Property Rights: A Distinction Without a Difference* 45 Real Estate L. J. 200, 201 (2016) (noting that "[c]ondominiums are created by statute" which "means the existence of condominiums is only allowed by the granting power of a statute"); *Condominium Regulation*, *supra* note 2, at 639 (noting that, following an emended to the National Housing Act of 1961 that permitted mortgage insurance for condominiums, "most states subsequently approved enabling legislation providing the legal framework necessary to the development of" condominiums).

<sup>18</sup> 255 So. 3d at 436–37 (upholding the conveyance of four airspace parcels that were created through a statutorily compliant declaration but that were expressly excluded from the resulting condominium via that declaration).

<sup>19</sup> *Id.* (finding that the FCA's definition of land that facilitates fee simple absolute ownership of airspace continued to apply to non-condominium airspace parcels created via a declaration although those parcels were excluded from the resulting condominium).

<sup>20</sup> *Id.* (holding that title to non-condominium airspace parcels could be held by an owner other than either a condominium owner or a condominium owners' association).

## II. A HISTORICAL OVERVIEW OF COMMON LAW AND STATUTORY AIRSPACE RIGHTS

Condominiums are often associated with modern cities and surging urban development following in the middle of the 20th century.<sup>21</sup> However, vertically dividing the interior of a single building to create several distinct parcels has been a popular housing solution for centuries.<sup>22</sup> American courts often barred the recognition of fee simple absolute in airspace when the airspace owner did not own the terrestrial parcel.<sup>23</sup> With rapid population growth in American cities fueling housing demand, legislators stepped in to ensure that airspace could be owned in fee simple separate and apart from underlying ground and to assure developers, investors, and owners that the benefits of fee simple ownership would be consistently granted to airspace parcels.<sup>24</sup> This section will provide a brief overview of common law airspace ownership and key features of condominiums statutes that have been broadly adopted to provide for fee simple airspace ownership and to address the practical challenges that vertical developments can pose to an owner's right to use her fee.

### A. *Common law condominiums in Europe and America*

It is axiomatic that the holder of fee simple in a land also owns some portion of the airspace contained within and extended from her property. However, fee simple ownership of airspace, separate and apart from the underlying ground, is a relatively new form of ownership that was "virtually unknown to the American legal community before the 1960s."<sup>25</sup> While possible under the common law, airspace ownership is a creature of statute in North America as a general matter and specifically in Florida. Although the *ad coelum* rule is an ancient common law doctrine, ownership of different floors within the same building has been possible since at least the Middle Ages and perhaps as early as the First Dynasty in

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<sup>21</sup> See Charles W. Pittman, *Land Without Earth—The Condominium*, 15 U. FLA. L. REV. 203, 203 (1962) (noting that by the early 1960's, the "rush to the suburbs of the fifties [was] . . . reversed in many areas and people [began] returning to the cities.").

<sup>22</sup> See *id.* at 205 n.14 (noting that "the first widespread use of separate ownership of parts of buildings occurred in Germany" in the 1100s.).

<sup>23</sup> See *id.* at 206–07 (noting that "[i]n the United States the practice [of vertically dividing ownership interests] has not been commonplace" and that recognition of "separate ownership of parts of buildings" varied widely before the passage of condominium acts.).

<sup>24</sup> See *Condominium Regulation*, *supra* note 2, at 639 (noting that "condominiums were virtually unknown to the American legal community before the 1960's" saw a wave of condominium statutes enacted in the United States.).

<sup>25</sup> *Id.*; See also Stuart S. Ball, *Division into Horizontal Strata of the Landspace Above the Surface*, 39 YALE L.J. 616, 621–22 (1930) (recounting two English cases decided in the 1780s which show "support of the rule that a room can be separately owned.").

modern-day Iraq (ancient Babylon).<sup>26</sup> Multi-family residences in which owners held title to separate units along with a share in the building itself were common in Germany as early as the 1100s.<sup>27</sup>

While regulation of ownership in these proto-condos was accomplished “more by usage and tradition than by formal legal rules,”<sup>28</sup> some European civil codes dating back to the 19th century did address airspace ownership. The Code of Napoleon of 1804, for example, not only permitted the ownership of separate floors within the same building it also provided for how the physical boundaries of those estates would be determined and how expenses would be shared for common elements.<sup>29</sup> However, civil codes in France, Scotland, and Germany limited ownership of a building to the owner of the underlying land.<sup>30</sup> As the demand for new housing and development rose following World War II, these same countries began permitting ownership of discrete parts of a building.<sup>31</sup>

Unlike their European counterparts, U.S. jurisdictions were slow to adopt statutes expressly permitting distinct fee simple absolutes in airspace within a single building. Although some areas of law, including mining and aviation, supplied “indirect support for the legality of strata ownership of buildings.”<sup>32</sup> Examples of these subsurface and airspace statutes include the General Mining Law of 1872,<sup>33</sup> which permitted private citizens to purchase mineral deposits from the federal government, and the Federal Aviation Act which, by recognizing the “public right of freedom of transit through navigable airspace,”<sup>34</sup> implied an upper boundary to the fee simple estates below that airspace. As in Europe, growing demand for housing and commercial space in U.S. cities following WWII spurred legislators to encourage vertical development by

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<sup>26</sup> See William K. Kerr, *Condominium—Statutory Implementation*, 38 St. John’s L. Rev. 1, 3 (1963).

<sup>27</sup> Ball, *supra* note 21, at 638 (citing RUDOLF HUEBNER, A HISTORY OF GERMANIC PRIVATE LAW 172–73 (Francis S. Philbrick trans., Ass’n Am. L. Schs., Cont’l Legal Hist. Ser. No. 4, 1918)).

<sup>28</sup> Donna S. Bennett, *Condominium Homeownership in the United States: A Selected Annotated Bibliography of Legal Sources*, 103 L. LIBR. J. 249, 250 (2011).

<sup>29</sup> Kerr, *supra* note 22, at 3.

<sup>30</sup> *Id.*; See Ball, *supra* note 21, at 621–49 (describing Canadian, Scottish, French, and German laws and court decisions which permitted buildings to be divided into several estates each owned by a different person).

<sup>31</sup> William Schwartz, *Condominium: A Hybrid Castle in the Sky*, 44 B.U. L. REV. 137, 137–38 (1964) (quoting Herbert J. Friedman & James K. Herbert, Comment, *Community Apartments: Condominium or Stock Cooperative?*, 50 CAL. L. REV. 299, 299 (1962)).

<sup>32</sup> Charles W. Pittman, Note, *Land Without Earth – The Condominium*, 15 U. FLA. L. REV. 203, 207 (1963).

<sup>33</sup> 30 U.S.C. § 22.

<sup>34</sup> Federal Aviation Act of 1958, Pub. L. No. 85–726, § 104, 72 Stat. 737, 740 (1958).

adopting modern condominium statutes that permit fee simple in airspace as long as that airspace is enclosed in a condominium building.<sup>35</sup>

By the early 20<sup>th</sup> century “most common law jurisdictions recognized rights of ownership in the space both superjacent and subjacent to the surface of the soil.”<sup>36</sup> Before the widespread adoption of condominium statutes, ownership of a parcel inside of a vertical development could take two distinct forms. The first form would convey ownership of an airspace parcel that was bound by “the walls, floor and ceiling.”<sup>37</sup> This ownership model would convey a portion of the building’s physical structure—the walls, floors, and ceilings that surround the living space—and would then be “coupled with either an easement or possessory right relating to the space enclosed by the architectural boundaries.”<sup>38</sup>

The second form airspace ownership possible at common law was “a right of ownership . . . relating to the space enclosed as well as to the inclosing matter.”<sup>39</sup> In this model, the owner would own both the structures that surround the unit and the airspace enclosed between those structures. However, this second form of airspace ownership posed “a practical question” as to whether the owner was granted a fee simple absolute in airspace that would survive destruction of the building or if the owner was granted a fee that would be defeated if the building was destroyed.<sup>40</sup> If ownership “follows . . . the walls” the airspace owner’s fee would be defeated and “the owner of the [underlying] lot retains the fee to his sold land column.”<sup>41</sup> Several early American, English, and Canadian cases show courts considering disputes between owners occupying different stories in the same building.<sup>42</sup> Before condominium statutes codified fee simple in airspace, common law courts often found that the fee granted to the simple defeasible by a condition subsequent that would be “defeated by the destruction of the building.”<sup>43</sup> These defeasible fees created the risk that, if the building is destroyed, the owner of a lower

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<sup>35</sup> See Schwartz, *supra* note 27, at 137; See generally John E. Cribbet, *Condominium—Home Ownership for Megalopolis?*, 61 MICH. L. REV. 1207, 1212–13 (1963) (recounting how the Horizontal Property Act adopted by Puerto Rico in 1951 in response to a housing shortage was a model for subsequent statutes adopted by other American jurisdictions).

<sup>36</sup> Ball, *supra* note 21, at 616 (citing Stuart S. Ball, *The Vertical Extent of Ownership in Land*, 76 U. PA. L. REV. 631, 644 (1928)).

<sup>37</sup> *Id.* at 619.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 621–26 (describing cases heard by courts in England, Canada, and the United States during the 1700s and 1800s that found that owners of upper floors in multi-story buildings were only granted a fee simple defeasible by condition subsequent that was “defeated by the destruction of the building.”).

<sup>43</sup> *Id.* at 624.

floor could prevent the owner of an upper floor from rebuilding because ownership of the airspace would revert back to the lower floor owner who had conveyed the upper floor.<sup>44</sup>

Recognizing that multi-story buildings pose unique threats to an owner's right to use her upper floor fee, English and American courts strengthened the rights available to an airspace owner to use her fee. An early 20th century Supreme Court of Iowa case neatly illustrates the threat posed to an owner's right to use her parcel by the owner of an adjoining parcel located in the same building.<sup>45</sup> In *Weaver v. Osbourne*, Osbourne's predecessor in interest conveyed the upper-story of a two story building to Weaver.<sup>46</sup> The deed expressly conveyed "[a]ll of the 2d story of . . . [the] building commencing 13 ft. from the foundation."<sup>47</sup> The deed also contained a covenant permitting "either party" to rebuild his part of the building "[i]n case of fire."<sup>48</sup>

The building burned down, and Osbourne made plans to rebuild the first floor.<sup>49</sup> However, Osbourne wanted to prohibit Weaver from rebuilding the second floor.<sup>50</sup> Finding support for the conveyance of an interest in "a distinct part of a building may be made with covenants, agreements, or conditions creating rights in the grantee which will survive the destruction," the Iowa Supreme Court held that the covenant only controlled what each owner did *with his own* property. Because Osbourne only held title to the first floor, he could only decide whether to rebuild his portion of the building.<sup>51</sup> Weaver was permitted to rebuild, but the dimensions of the new structure had to conform with the dimensions of the previous structure.<sup>52</sup>

The grantor may rebuild, but he is not bound to do so. If he does rebuild, the grantees may rebuild the second story, but are not bound to do so. If this be the true interpretation of the contract, then, while the grantor may refrain from rebuilding and incur no liability to the grantees, he is not at liberty to rebuild and deny the grantees the exercise of

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<sup>44</sup> *Id.* at 621–26 (describing "numerous cases" in England, Canada, and the United States wherein courts "followed the rule . . . that the destruction of the physical premises was also a destruction of the fee.").

<sup>45</sup> *Id.* at 631 (citing *Weaver v. Osbourne*, 134 N.W. 103 (Iowa 1912)).

<sup>46</sup> *Weaver*, 134 N.W. at 104.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 105.

<sup>49</sup> *Id.* at 104.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 106.

<sup>52</sup> *Id.* (holding that the "appellants[] [can] exercise . . . their right to rebuild the second story to a length corresponding with that of the building destroyed.").

their “option” to construct the second story; nor can he, we think, be allowed to accomplish the same result by the indirect method of changing the dimensions of the new structure.<sup>53</sup>

*Weaver* is remarkable for two reasons. First, it shows that American courts recognized that not all airspace fees terminated when a building was destroyed. The court observed Weaver could have acquired a defeasible fee that would have only granted Weaver to ownership of the physical structure encompassing the three-dimensional space.<sup>54</sup> If the rebuilding covenant not been in place, Weaver would have only held “title to the second story of the building then in existence” and, once the second story was destroyed, “the instrument would have ceased to be of any legal force or effect, because the subject-matter of the conveyance had itself ceased to exist.”<sup>55</sup> Had Weaver acquired a defeasible fee without an optional right to rebuild, Weaver would not be able to “exercise . . . right to rebuild the second story to a length corresponding with that of the building destroyed.”<sup>56</sup> Instead, the court found the deed granted Weaver a qualified right to use the airspace that occupied the second story.<sup>57</sup> By limiting Weaver’s right to rebuild to the portion of airspace occupied by the second floor at the time of conveyance *Weaver* shows American courts recognized that airspace could be divided into fixed, discrete units just as land can be divided into parcels.

Second, the court’s deference to the plain language of the rebuilding option in the deed mirrors the contract-based approach contemporary courts, including Florida courts, and condominium statutes have adopted when determining an owner’s right to use airspace. While the *Weaver* court does not expressly permit fee simple absolute in airspace, the decision shows that a right to use airspace can survive the destruction of the surrounding building as long as an enforceable contract directly or implicitly granting that right is found.<sup>58</sup> The ample support the *Weaver* court found to enforce the rebuild provision shows that American courts had little trouble extending easements, covenants, and other use agreements to airspace.<sup>59</sup> Under *Weaver*, the owner of a unit in a multi-unit building could use contracts to enhance her right to use a defeasible

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 105.

<sup>56</sup> *Id.* at 106.

<sup>57</sup> *See Id.* at 106.

<sup>58</sup> *Id.* at 105.

<sup>59</sup> *Id.* (“[T]he authority of the owner of such property to burden it with easements and with covenants running with the title is so well established, it is unnecessary to dwell longer upon the point.”).

fee in an upper story but the deed alone would not convey a fee simple absolute.<sup>60</sup>

Engineering advancements that gave rise to skyscrapers and airplanes required American courts to reevaluate airspace ownership. The need to recognize airspace ownership under common law while accommodating new airspace uses was explained by the Supreme Court in *United States v. Causby*.<sup>61</sup> *Causby* was a unique takings claim brought by Thomas Lee Causby, a North Carolinian chicken farmer whose farm was located directly underneath a flight path used by a nearby Army base.<sup>62</sup> The Court held that the flight path was a taking under the Fifth Amendment and that Causby was entitled to just compensation.

The Court observed that “low altitude” “superadjacent airspace . . . is so close to the land that continuous invasions of it affect the use of the surface of the land itself.”<sup>63</sup> Because airspace use could interfere with an owner’s use and enjoyment of the underlying land, a landowner does “as an incident to his ownership, ha[ve] a claim to [the adjacent airspace] and that invasions of [the adjacent airspace] in the same category as invasions of the surface.”<sup>64</sup> While Causby’s ownership extended into the three-dimensional space above his farm, the Court was also careful to note that a growing need for airspace use to facilitate airplane travel requires that some “airspace, apart from the immediate reaches above the land, is part of the public domain.”<sup>65</sup>

As the Court observed, the *ad coelum* rule has “no place in the modern world” where new airspace uses require courts to be responsive to the rights of landowners and the public needs like national defense.<sup>66</sup> However, the Court declined to fix the “precise limits” of a landowner’s claim on the airspace above her land.<sup>67</sup> Moreover, *Causby* did not address whether airspace could be owned in fee simple apart from the underlying land nor did the decision establish a definitive upper boundary for a terrestrial fee simple.<sup>68</sup> Although cases like *Weaver* and *Casuby* recognize that airspace can be owned, fee simple absolute ownership of airspace required legislative action to overcome the common law’s unwillingness to break away from the *ad coelum* doctrine.<sup>69</sup>

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<sup>60</sup> *Id.* at 106.

<sup>61</sup> 328 U.S. 256, 265 (1946).

<sup>62</sup> *Id.* at 258–59.

<sup>63</sup> *Id.* at 265.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 266.

<sup>66</sup> *Id.* at 260–61.

<sup>67</sup> *Id.* at 266.

<sup>68</sup> *See id.* at 256–75.

<sup>69</sup> *See* 2A C.J.S. *Aeronautics & Aerospace* § 2 (2021) (noting that the “owner of property has air rights to so much of the superjacent airspace as the owner can use”); Herrin

*B. Condominium Statutes Codified Common Law Principals Permitting Airspace Ownership and Addressed Threats to an Owner's Right to Use*

Although condominiums were possible under common law,<sup>70</sup> condominium statutes clarified the uncertain status of fee simple absolute ownership in airspace at common law.<sup>71</sup> These statutes were primarily designed to resolve these uncertainties by codifying fee simple absolute ownership of airspace that is confined between walls but is owned separate and apart from underlying land. In turn, legislators hoped this codification would encourage condominium development and ownership by assuring developers, investors, and title companies that condominiums would benefit from the full complement of property rights and protections granted to terrestrial parcels.<sup>72</sup> Moreover, recognizing the proximity and structural interrelation of units in a vertical development, these statutes generally provide heightened protections to each owner's right to use her fee. The heightened protections these statutes offer unit owners are accomplished by two principal means: preventing owners from being able to force partition of shared elements like hallways and ingresses<sup>73</sup> and providing mechanisms for developers and condominium associations to force unit owners to permit reconstruction of surrounding units.<sup>74</sup>

The first—and for purposes of analyzing *Sterling* the most important—feature that all modern condominium statutes share is allowing and protecting “exclusive ownership of airspace, with essential concomitants of common ownership.”<sup>75</sup> The statutes, including the FCA, permit the partitioning of three-dimensional airspace into discrete units

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v. Sutherland, 241 P. 328, 332 (Mont. 1925) (citing Blackstone for the proposition that land “in its legal signification has an indefinite extent, upwards as well as downwards; whoever owns the land possesses all the space upwards to an indefinite extent; such is the maxim of the law”); *Butler v. Frontier Telephone Co.*, 79 N.E. 716, 718 (1902) (holding that, with respects to actions for ejectment, “space above land is real estate the same as the land itself” and that the “law regards the empty space as if it were a solid, inseparable from the soil” so that “an owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath”).

<sup>70</sup> Mark B. Davis, *Some Considerations in Establishing a Planned Community*, THE PRACTICAL REAL ESTATE LAWYER 71, 76 (1985).

<sup>71</sup> *Condominium Regulation*, *supra* note 2, at 640–41 (noting that, prior to condominium statutes, a fee interest in airspace could be constructed and paired with “an undivided percentage interest as tenant-in-common in the structural parts and other facilities” encompassed by a building).

<sup>72</sup> *Id.* at 641.

<sup>73</sup> *Id.* (noting that, at common law, “any one tenant-in-common could, at his whim, bring the tenancy to an abrupt end and destroyed the underlying legal structure.”).

<sup>74</sup> Davis, *supra* note 66, at 76.

<sup>75</sup> *Condominium Regulation*, *supra* note 2, at 640 (quoting DAVID CLURMAN & EDNA L. HEBARD, *CONDOMINIUMS AND COOPERATIVES* 2–3 (1st ed. 1970)).

that can all be separately held in fee simple absolute.<sup>76</sup> As *Causby* and *Weaver* show, American courts affirmed that airspace could be held either as part of a fee simple absolute in the underlying land or as a defeasible fee separate and apart from underlying land.<sup>77</sup> However, the lack of consistent, express rules permitting a fee simple absolute in airspace separate and apart from underlying land prompted legislators to adopt condominium statutes.<sup>78</sup> Condominium statutes grant airspace parcels the “attributes of real estate” so that the airspace can be “separately owned, conveyed, devised, inherited, and mortgaged.”<sup>79</sup> By expressly permitting fee simple in airspace, condominium statutes provided important assurances to early investors that the titles to the airspace would be enforceable.<sup>80</sup> Moreover, because owners are granted an “exclusive estate” in their units rather than defeasible fees in portions of a building, most condominium statutes ensure that the “unit owner’s interest in the cubicle of space described by his deed remains intact” even if the building is destroyed.<sup>81</sup>

Modern condominium statutes also provide condominium owners with strong protections of their right to use the airspace parcels by granting each fee holder an enforceable ownership interest in the shared elements of a building. Pairing fee simple ownership of separate airspace units with a tenancy-in-common to share ownership of a building’s common elements was likely possible at common law.<sup>82</sup> However, condominium statutes streamline what would otherwise be an “extremely complex” process of describing the tenancy-in-common’s property by

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<sup>76</sup> FLA. STAT. § 718.103(18) (2020) (providing that, for the purposes of the Florida Condominium Act, land “means the surface of a legally described parcel of real property and includes, unless otherwise specified in the declaration and whether separate from or including such surface, airspace lying above and subterranean space lying below such surface.”).

<sup>77</sup> *Condominium Regulation*, *supra* note 2, at 641 (noting that, prior to the enactment of condominium statutes, “[o]ne could construct a fee interest in airspace” under common law.).

<sup>78</sup> *Id.* at 640–41 (“Even in the absence of specific condominium enabling legislation, the common law provided the basic framework for individual ownership of apartment units” as well as a “free interest in airspace and . . . an undivided percentage interest as tenant-in-common in the structural parts and other facilities.”).

<sup>79</sup> Kerr, *supra* note 22, at 2.

<sup>80</sup> *Condominium Regulation*, *supra* note 2, at 641; Davis, *supra* note 66, at 76 (noting that “[t]he financial industry’s doubts about the enforceability of [using covenants to prohibit tenants-in-common from invoking the common law right to partition] were a practical impediment to the growth” of condominiums.).

<sup>81</sup> Curtis J. Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987, 1013 (1963).

<sup>82</sup> See Davis, *supra* note 66, at 76.

simultaneously granting individual owners a fee simple in the airspace comprising their units and a share in the tenancy-in-common.<sup>83</sup>

To further protect each owner's right to use both her unit and common elements, legislators favored a contract-based approach that requires owners and tenancy-in-commons to delineate the rights granted and restrictions imposed on the owners, the tenancy-in-common, and the association. The bulk of this regulatory work is accomplished through a condominium declaration.<sup>84</sup> A condominium declaration is a governing document that must meet certain criteria set out in a state's condominium statute.<sup>85</sup> These criteria typically include metes-and-bounds descriptions of all of the individual units as well as the common elements, a requirement that "[a]ll persons who have record title to the interest in the land being submitted to condominium owners . . . must join . . . the declaration," and a requirement that the declaration be recorded with a specified public office.<sup>86</sup> The declarations are not deeds, although they do describe the various parcels in a building.<sup>87</sup> The declaration is both the agreement that creates the condominium as a legal entity and the document that sets out the rights allocated to the owners.<sup>88</sup> Once the condominium is created, the property submitted to condominium ownership via the declaration will be governed by provisions in the declaration.<sup>89</sup> While the statutes do set out certain rules that cannot be modified by a declaration—for example, condominium statutes in New York and Florida only permit common elements to be owned by a tenancy-in-common—the statutes typically allow condominium statutes generally permit other provisions to be included in the declaration as long as those provisions are not inconsistent with other provisions of the state's real property law.<sup>90</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 73.

<sup>85</sup> *See* Kerr, *supra* note 21, at 22; *See, e.g.*, FLA. STAT. § 718.104(2)–(7) (2020) (explaining the information that must be included in a condominium declaration).

<sup>86</sup> *See, e.g.*, FLA. STAT. § 718.104(4)(a)–(e).

<sup>87</sup> *See, e.g., id.* § 718.104(4)(d) (requiring that a condominium declaration contain "[a]n identification of each unit by letter, name, or number, or combination thereof, so that no unit bears the same designation as any other unit.").

<sup>88</sup> Kerr, *supra* note 22, at 22–23 ("[R]ecording the declaration brings into effect all the provisions of the [FCA] as respects the building or project, the apartment and common elements.").

<sup>89</sup> *See, e.g.*, FLA. STAT. § 718.104(6) ("A person who joins in, or consents to the execution of, a declaration subjects his or her interest in the condominium property to the provisions of the declaration.").

<sup>90</sup> *See, id.* § 718.104(m) (permitting "[o]ther desired provisions not inconsistent with this chapter" to be included in an enforceable condominium declaration).

### III. “LAND,” AIR, AND PROPERTY RIGHTS IN THE FLORIDA CONDOMINIUM ACT

Despite the care modern condominium statutes take to advantage fee simple owners and diminish potential interferences with an owner’s right to use her airspace parcel, the rights available to unit owners and a condominium’s tenancy-in-common become less clear when a unit owner is *not* also a member of the tenancy-in-common. Condominium statutes, including the FCA, primarily contemplate an ownership structure wherein each fee simple owner is also a tenant-in-common in the condominium common elements and a member of the condominium association.<sup>91</sup> As the following overview of Florida’s Condominium Act and key Florida court decisions concerning airspace property rights will show, commonplace arrangements in vertical developments, such as mixed-use buildings, are not always clearly addressed either by Florida statute or common law. Disputes between condominium owners and owners of non-condominium airspace parcels, like the dispute in *Sterling*, force Florida courts to consider whether condominium statutes address all air space parcels located inside of in a condominium building or whether the FCA’s reach is limited to property that has been submitted to condominium ownership. As this note will show, *Sterling* offers a practical solution to determining whether a property is governed by the FCA that turns to the contractual agreements created by a condominium declaration. Moreover, *Sterling* demonstrates that Florida courts strive to preserve the Condominium Act’s strong protections of an owner’s right to use her airspace parcel when resolving ownership disputes involving condominium and non-condominium airspace parcel.

#### A. Key Provisions of The Florida Condominium Act

Like similar statutes, the FCA provides for the ownership of a fee simple absolute title in airspace and delineates the rights of owners, developers, and associations. Under the FCA, a condominium is a form of real property that is “comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements.”<sup>92</sup> Under Florida law, a condominium can only be created under the Condominium Act.<sup>93</sup>

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<sup>91</sup> See *id.* § 718.103(11) (defining condominium as a “form of ownership of real property created pursuant to this chapter, which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements”).

<sup>92</sup> *Id.* § 718.103(11).

<sup>93</sup> *Cohn v. Grand Condo. Ass’n, Inc.*, 62 So. 3d 1120, 1121 (Fla. 2011).

Rather than creating a fee simple absolute in airspace that is distinct from a terrestrial parcel, the FCA expands the meaning of land to encompass “the surface of a legally described parcel of real property and includes, unless otherwise specified in the declaration and whether separate from or including such surface, airspace lying above and subterranean space lying below such surface.”<sup>94</sup> As *Sterling* shows, this definition includes ground floor units located in a condominium building as long as those units are described in a condominium declaration.<sup>95</sup> While a condominium parcel refers to a unit “together with the undivided share in the common elements appurtenant to the unit”<sup>96</sup> each unit only encompasses the “property which is subject to exclusive ownership.”<sup>97</sup> For the purposes of the FCA, a unit owner is the “record owner of legal title to the condominium parcel.”<sup>98</sup>

On its face, the FCA seems to only address owners who are both the (1) legal title holder of a condominium unit and (2) owner of a share in the condominium’s tenancy-in-common. When all airspace units in a building are owned by a unit owner as defined in the FCA, this pairing of fee simple ownership and a share in the tenancy-in-common makes practical sense. In that situation, all the property in the building will either be owned by a unit owner or the tenancy-in-common. However, as the *Sterling* decision shows, it is not immediately clear whether the FCA’s scope includes airspace parcels that are not a part of a condominium, but that are in a condominium building, or that such a category could exist under the FCA.

Like most condominium statutes, the FCA requires that a deceleration be recorded to create a condominium and submit property to the FCA’s provisions.<sup>99</sup> Condominiums can either be created by a developer who “creates a condominium or offers condominium parcels for sale or lease in the ordinary course of business”<sup>100</sup> or by a cooperative association which elects to convert an existing residential cooperative.<sup>101</sup> The

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<sup>94</sup> FLA. STAT. § 718.103(18) (providing that, for the purposes of the FCA, a declaration can use the term land to also “mean all or any portion of the airspace or subterranean space between two legally identifiable elevations and may exclude the surface of a parcel of real property and may mean any combination of the foregoing, whether or not contiguous, or may mean a condominium unit.”).

<sup>95</sup> *Sterling Breeze Owners’ Ass’n v. New Sterling Resorts, LLC*, 255 So. 3d 434, 436 (Fla. 3d DCA 2018).

<sup>96</sup> FLA. STAT. § 718.103(12).

<sup>97</sup> *Id.* § 718.103(27).

<sup>98</sup> *Id.* § 718.103(28).

<sup>99</sup> FLA. STAT. § 718.104(2) (2020) (providing that a “condominium is created by recording a declaration”).

<sup>100</sup> FLA. STAT. § 718.103(16)

<sup>101</sup> *See id.* § 718.103(16)(b).

declaration must be joined by “[a]ll persons who have record title to the interest in the land being submitted to condominium ownership.”<sup>102</sup> The declaration must describe all units that will be “located in or on the land.”<sup>103</sup> Under the statute, a unit is “a part of the condominium property which is subject to exclusive ownership” including any “improvements, land, or land and improvements together, as specified in the declaration.”<sup>104</sup> The FCA also provides for “all exhibits and all amendments” appended to a declaration to be recorded “as an agreement relating to the conveyance of land.”<sup>105</sup>

The declaration must also fix the undivided ownership share each owner will receive in the condominium’s common elements.<sup>106</sup> Common elements include “property which is not included within units” as well as easements for utility equipment, an “easement of support in every portion of a unit which contributes to the support of a building,” and any other areas designated as common elements in the declaration.<sup>107</sup> If a condominium contains both residential and commercial units, the condominium is a mixed-use condominium for the purposes of the statute.<sup>108</sup> However, a mixed-use designation only subjects those condominiums to three special provisions, all of which relate to how authority and voting rights will be allocated in mixed-use condominiums.<sup>109</sup> Other than these special provisions, the FCA subjects both commercial and residential units created via a condominium declaration to the same rules and requirements. Thus, just like their pure condominium counterparts, developers, associations, and owners in mixed-use condominium buildings must use the condominium declaration, bylaws, and other written instruments to establish the rights,

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<sup>102</sup> FLA. STAT. § 718.104(2).

<sup>103</sup> *Id.*

<sup>104</sup> FLA. STAT. § 718.103(27)

<sup>105</sup> FLA. STAT. § 718.105(1) (2020) (providing that “[w]hen executed as required by s. 718.104, a declaration together with all exhibits and all amendments is entitled to recordation as an agreement relating to the conveyance of land.”).

<sup>106</sup> Fla. Stat. § 718.104(4)(f).

<sup>107</sup> Fla. Stat. § 718.108 (1)–(2) (2020).

<sup>108</sup> Fla. Stat. § 718.103 (23).

<sup>109</sup> Fla. Stat. 718. 404 (1)–(3) (providing that no commercial unit owner can be granted authority to veto amendments to a condominium’s governing documents as well as entitling residential unit owners to vote for the majority of the seats for a condominium board if the residential units account for at least 50% of “total units operated by the association” and establishing a per-square-foot formula to allocate ownership shares in common elements for mixed-use condominiums created during or after 1996).

benefits, and obligations that will be assigned to the residential and commercial unit owners.<sup>110</sup>

*B. Florida Courts Have Upheld Ownership of Airspace Rights in Non-Condominium Property*

Despite the popularity of condominiums in the Sunshine State, Florida courts have had few opportunities to consider whether airspace can be owned in fee simple absolute. While condominiums are now exclusively governed by the Condominium Act, Florida courts upheld property interests in airspace well before the FCA's passage in 1963.<sup>111</sup> Instead of barring property interests in airspace by strictly applying the *ad coelum* doctrine, Florida courts have generally upheld limited property interests in airspace on finding an enforceable agreement like an easement that grants party the right to use three-dimensional space that adjoins a terrestrial parcel. Three key state court decisions support upholding fee simple absolute ownership of non-condominium airspace parcels under Florida law. These three decisions address two of the primary issues that the Condominium Act also addresses: (1) the use of contracts to regulate ownership and use rights and (2) the existence of a property interest in airspace in separate and apart from the underlying ground. While the FCA codified both (1) the use of written instruments to create and convey ownership in airspace and (2) the ability to hold a property interest in airspace, these decisions show that, even if the excluded parcels had not come within the scope of the FCA, Florida common law can accommodate fee simple absolute ownership of airspace.

*i. Florida Courts Defer To Contracts When Resolving Real Property Ownership Disputes*

In *Legendary Inc. v. Destin Yacht Club Owners Ass'n Inc.* (1998), the First District Court of Appeal of Florida reaffirmed that Florida courts prefer to use contract principles when examining condominium agreements, including agreements that assign ownership rights to property that is connected to but that is not a part of a condominium.<sup>112</sup> *Legendary Inc.* owned an associated commercial parcel ("ACP") located in a

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<sup>110</sup> Richard C. Grant & Cheryl L. Hastings, *Mixed-Use Communities and Mixed-Use Buildings*, FLORIDA REAL PROPERTY COMPLEX TRANSACTIONS 9-26, 9-28 (Josine R. Blackwell et al. eds., 10th ed. 2020).

<sup>111</sup> Cf. Gary A. Poliakoff, *The Florida Condominium Act*, 16 NOVA L. REV. 471, 474 (1991) (stating that the Florida Condominium Act was enacted to recognize air rights).

<sup>112</sup> *Legendary, Inc. v. Destin Yacht Club Owners Ass'n, Inc.*, 724 So. 2d 623, 624 (Fla. 1st DCA 1998).

condominium building owned and operated by Destin Yacht Club.<sup>113</sup> The ACP housed two restaurants operated by Legendary and abutted a marina that was operated and maintained by Destin.<sup>114</sup> The ACP separated the marina from a nearby harbor.<sup>115</sup> Destin held a lease to the submerged land within the marina that was conveyed by the condominium developer.<sup>116</sup> An operating agreement between Legendary and Destin granted Legendary “certain marina expansion right” in the submerged land.<sup>117</sup> When Legendary wanted to construct a commercial dock the Destin homeowner’s association tried to thwart the project.<sup>118</sup>

Adopting a contract-based approach, the *Legendary* court limited its inquiry to four agreements that regulated each party’s right to use the disputed property: the condominium declaration, the ACP deed, an operating agreement between the parties, and an agreement that both governed Legendry’s use of the marina and assigned the developer’s submerged land lease to the association.<sup>119</sup> Turning to the agreements, the court found the operating agreement expressly permitted Destin to expand the marina even if the association declined to join the expansion project.<sup>120</sup> Because the deed and condominium declaration were subject to the operating agreement, the court found that Destin could pursue the dock construction even if the association did not join the project.<sup>121</sup> Thus, the operating agreement and the condominium declaration did grant Destin an enforceable right to use the marina to construct the dock.

*Legendary* establishes two key principles the *Sterling* court relied on to preserve the commercial owner’s ownership rights in that case: (1) property rights in property that abuts condominium property can be held by non-condominium owners and (2) Florida courts will look to agreements as well as the condominium declaration itself to determine the rights each party has in a disputed property. Notably, the contract-based approach allowed the court to resolve the dispute without turning to the FCA despite the condominium declaration being among the instruments the court examined. However, *Sterling* shows the *Legendary* court’s contract-based approach to property rights disputes between condominium and non-condominium owners can be used to resolve disputes that do implicate the FCA’s provisions. While *Legendary*

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 625.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

concerns riparian rather than airspace rights, the decision shows that Florida courts defer to contracts when establishing ownership rights in disputes between condominium and non-condominium owners. Moreover, the decision shows that Florida courts limit the scope of property right inquiries to the agreements spelling out each owner's right to use the disputed property.<sup>122</sup>

#### ii. Florida Courts Have Found That Certain Property Rights Do Exist In Airspace

*Ervin* and *Cloughton Hotels* show that landowners have the right to use and exclude others from airspace above their land.<sup>123</sup> Moreover, these cases show that Florida common law has recognizes at least some property rights in airspace that can be separated from surface ownership.<sup>124</sup> While the *Sterling* court limited its analysis to the FCA's and did not have to turn to common law principles, these two cases show that Florida common law recognizes ownership of airspace when that airspace is not part of a condominium.

In *State ex rel. Ervin v. Jacksonville Expressway Authority*, the Florida Supreme Court found that a fee simple owner has a sufficient property interest in the airspace adjoining her land to require a municipal agency to take an easement to use that airspace.<sup>125</sup> The dispute arose after the Jacksonville Expressway Authority (JEA) adopted a resolution to condemn an easement in airspace over Ervin's property.<sup>126</sup> The Florida Attorney General filed an information in quo warranto so the court could determine if the agency had the power to condemn airspace easements.<sup>127</sup> A realtor who challenged the resolution argued the statute authorizing the taking of an easement "requires [JEA] to acquire all property in fee simple" as opposed to severing an interest in airspace from the underlying land.<sup>128</sup> The statute creating the JEA permitted the agency to "acquire, purchase, hold, lease as lessee and use any franchise, property, real, personal or mixed, tangible or intangible, or any interest therein, necessary

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<sup>122</sup> *Id.* at 624 (finding that the lower court was in error when it admitted extrinsic evidence).

<sup>123</sup> See *State ex rel. Ervin v. Jacksonville Expressway Auth.*, 139 So. 2d 135, 138–39 (Fla. 1962); See *City of Miami v. Cloughton Hotels, Inc.*, 157 So. 2d 196, 198 (Fla. 3d DCA 1963).

<sup>124</sup> See *Ervin*, 139 So. 2d at 138–139 (finding that an easement in airspace could be condemned by a municipal authority); See *Cloughton*, 157 So. 2d at 198 (finding the city did not owe taxes for a portion of airspace above an easement it owned that was exclusively occupied by a hotel building).

<sup>125</sup> *Ervin*, 139 So. 2d at 138.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

or desirable for carrying out the purposes of the authority”<sup>129</sup> including “the power to acquire rights of ‘access, air, view, and light.’”<sup>130</sup>

The court found that the statute’s stipulation that JEA acquire fee simple, was “obviously intended to prescribe the requirement only in those situations where it is contemplated that the land itself, as distinguished from an appurtenance, is needed for the public use.”<sup>131</sup> Instead, the court found that when the JEA finds it ‘necessary or desirable’ the agency can acquire “by condemnation or otherwise, easements and interests less than a fee, except in those instances where it is necessary to use the land itself.”<sup>132</sup> However, the court found that under Florida law fee simple absolute “applies only to an estate in land itself, as distinguished from an appurtenance or easement of other incorporeal interest.”<sup>133</sup> Although the JAE could not take a fee simple in the airspace, the agency could condemn “easements through the air in perpetuity” that would grant the agency the right to use the airspace “to accomplish the purposes authorized by the expressway statutes.”<sup>134</sup> While *Ervin* does not affirm that fee simple ownership of airspace separate and apart from the underlying land was possible under Florida law prior to the Condominium Act, the court’s finding that a property interest in airspace can be separated from the underlying land provides a fundamental premise necessary to permit a fee simple absolute in airspace at common law.

In a second airspace easement case, a Florida court found that the size of an easement is diminished when airspace above that easement is being exclusively used by another property owner.<sup>135</sup> In *City of Miami v. Cloughton Hotels*, the titular hotel granted the City an easement so that a public sidewalk could pass through the hotel’s property.<sup>136</sup> A multi-story portion of the hotel extended over the sidewalk, enclosing a portion of the airspace above the easement.<sup>137</sup> When the City calculated its pro rata share of the property tax bill, it excluded the portion of airspace occupied by the hotel.<sup>138</sup> The Circuit Court found that City was still liable for the share of property taxes allocated to the occupied airspace.<sup>139</sup> The City appealed on

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<sup>129</sup> *Id.* (italics omitted).

<sup>130</sup> *Id.* at 138.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 138–39.

<sup>135</sup> *Cloughton*, 157 So. 2d at 198 .

<sup>136</sup> *Id.* at 197.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

the grounds that the damages ordered by the Circuit Court did not properly account for the airspace above the sidewalk being used by the hotel.<sup>140</sup>

The appellate court began from the premise that “[t]he owner of a parcel of land is entitled to the control and use the space above it, and such use may be of material value.”<sup>141</sup> The court found that a reduction to the City’s tax burden was appropriate because the hotel was still using the airspace above the first floor.<sup>142</sup> Citing *Tatum Bros Real Estate & Investment Co. v. Watson* for the proposition that contract law governs property agreements. The Court found that, under the agreement, “[t]he City controls and dominates the material property as to its surface use, and the company dominates it by using it as a base for a portion of its building in the superadjacent air space.”<sup>143</sup> Because the hotel retained exclusive use of that airspace, the burden of owning the airspace—in this case, a larger property tax bill that accounts for airspace being used by the hotel—were properly attributed to the hotel.<sup>144</sup> While both the hotel and City “shared in the use of the ‘sidewalk’” and each owner had “a degree of domination” over the sidewalk, ownership of the sidewalk and adjoining airspace could be divided between the hotel and the City for the purpose of assessing a property tax.<sup>145</sup>

As in *Ervin*, *Claughton Hotels* did not address whether airspace can be owned in fee simple absolute. Because the airspace was appurtenant to terrestrial parcels—both the City’s sidewalk and the hotel structure—the *Claughton Hotels* court did not have to grapple with ownership of airspace separate and apart from underlying land or building. Although the *Claughton Hotels* court did not proscribe a method for delineating the boundaries between the portions of airspace allocated to each property, the decision did clarify that a property interest in airspace can (1) be severed from the underlying land and (2) be divided into distinct units that can be owned by separate owners. Moreover, *Claughton Hotels* extended the deference shown to written instruments by *Tatum Bros.* to airspace ownership.<sup>146</sup> Following *Tatum Bros.*, *Claughton Hotels* shows that a written agreement can be used to regulate airspace use between owners of neighboring real property. The hotel’s right to exclude the City from a portion of the airspace was not challenged. The only issue for the court to

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<sup>140</sup> *Id.* at 198.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* (citing *Tatum Bros. Real Estate & Inv. Co. v. Watson*, 109 So. 623, 626 (1926)).

<sup>144</sup> *Id.* (finding that the hotel used a portion of the sidewalk because its building extended over adjacent airspace).

<sup>145</sup> *Id.*

<sup>146</sup> *See id.* (citing *Tatum*, 109 So. at 626 for the proposition that the benefits and burdens of ownership flows to the person with the legal right to dominate property).

decide was whether, under the terms of the agreement, the City's pro rata share of the airspace only included the airspace not being exclusively used by the hotel. Finding that the City's portion of airspace did not include airspace occupied by the hotel, the court recognized that airspace can be vertically divided among at least two owners. Although the City held an easement that included the airspace rather than an airspace fee simple, the decision suggests that Florida law could accommodate the vertical division of airspace among different owners prior to the Condominium Act's passage.<sup>147</sup>

While the FCA codified fee simple absolute in airspace, Florida law prior to the FCA's passage did not foreclose the possibility of a fee simple in airspace. As *Ervin* and *Claughton Hotels* both show, Florida courts had found that at least some property rights did attach to airspace at common law. However, as *Sterling* shows, there remain lingering questions about whether airspace estates expressly excluded from a condominium can exist at common law. The *Sterling* decision shows how broadly Florida courts can interpret the Condominium Act's scope to avoid ambiguities about common law airspace ownership and, in turn, uphold fee simple absolute in airspace that has been excluded from a condominium by an express provision in a declaration.

#### IV. STERLING BREEZE OWNERS' ASSOCIATION, INC. V. NEW STERLING: FACTS AND PROCEDURAL HISTORY

In 2008, declaration of a condominium was recorded for Sterling Breeze, a 22-story high-rise building located in Panama City Beach.<sup>148</sup> Sterling Breeze Condominium (the Association), a not-for-profit Florida corporation, was organized to operate and manage a condominium called Sterling Breeze Condominium located in Bay County, Florida.<sup>149</sup> The building is a 22-story high-rise with 145 residential units, common elements, and four alternative commercial parcels (ACPs) on the ground floor.<sup>150</sup> The ACPs accounted for 2.6% of all units in the building. Condominium property occupied "almost all of the airspace" in the building.<sup>151</sup> The developer excluded four Associated Commercial Properties (ACPs) from the condominium, retaining title to the ACPs, and

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<sup>147</sup> *Id.* (holding that, for tax purposes, the size of the City's easement had to account for airspace that was exclusively occupied by the hotel).

<sup>148</sup> *Sterling Breeze Owners' Ass'n, Inc. v. New Sterling Resorts, LLC*, 255 So. 3d 434, 435 (Fla. 1st DCA 2018).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 436.

then conveyed title to all four ACPs to New Sterling.<sup>152</sup> New Sterling managed a rental program that rented out units in the Sterling Breeze Condominium and managed rentals for 34 unit owners in the building.<sup>153</sup> The parcels were occupied by a wine bar, a gym, a commercial laundry facility, offices used for rental management and real estate sales, and a storage area for luggage carts.<sup>154</sup> The ACPs were described in the declaration and the association and developers also reached an easement agreement.<sup>155</sup> The four ACPs were assigned to New Sterling Resorts after the deceleration was executed.<sup>156</sup> New Sterling also entered an easement and reservation agreement with the association that provided for the ACPs to be used for commercial purposes and for New Sterling to pay for a share of common expenses like utilities and building maintenance.<sup>157</sup> The declaration permitted the ACPs to be conveyed in fee simple and also provided that the condominium's restrictions and covenants would not apply to the excluded parcels.<sup>158</sup> In August 2014, the Association brought a lawsuit seeking to nullify the developer's reservation of the four ACPs in the declaration and to have ownership of the ACPs transferred to the Association to be owned as common elements of the condominium.<sup>159</sup>

With respect to fee simple airspace ownership, the association sought a declaration that the ACPs were not recognized as fee simples under Florida law and, therefore, the ACPs were common elements of the condominium.<sup>160</sup> The Association sought a decree quieting title of the four ACPs in its favor and sought a declaratory judgement to establish its rights and ownership interest in the ACPs along with damages.<sup>161</sup> The Association argued that ACPs could not be owned in "fee simple apart from the condominium" under the FCA because the parcels had been expressly excluded from the condominium or under Florida law.<sup>162</sup> The Association also pursued an unjust enrichment claim to recover rent, condominium assessments, and unity costs associated with the ACPs.<sup>163</sup>

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<sup>152</sup> Plaintiff's Pretrial Legal Memorandum at \*1, *Sterling Breeze Owners' Ass'n, Inc. v. New Sterling, LLC*, 2016 WL 11698796 (Fla. Cir. Ct. Nov. 30, 2016).

<sup>153</sup> Defendant's Written Closing Argument at \*2, *Sterling Breeze Owners' Ass'n, Inc. v. New Sterling Resorts, LLC*, 2016 WL 11698796 (Fla. Cir. Ct. January 13, 2017).

<sup>154</sup> *Sterling*, 255 So. 3d at 436.

<sup>155</sup> *Id.* at 436.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 435.

<sup>159</sup> *Id.* at 436.

<sup>160</sup> *Sterling Breeze Owners' Ass'n, Inc. v. New Sterling Resorts, LLC*, 2014 WL 12930265, at \*1 (Fla. Cir. Ct. Aug. 11, 2014).

<sup>161</sup> *Id.* at \*1-\*2

<sup>162</sup> *Sterling*, 2016 WL 11698796 at \*1.

<sup>163</sup> *Id.*

Looking to the FCA, the Circuit Court found that “land within a condominium can be any combination of airspace, surface space, and subterranean space.”<sup>164</sup> Moreover, “the statute contemplates that airspace may be excluded while surface space is included” in a parcel.<sup>165</sup> The Circuit Court approvingly cited *Splash Owners’ Association, Inc. v. New Sterling Resorts*, which explained that the *ad coelum* doctrine had given way to the view that a “landowner is generally held to own only the amount of space he can reasonably use.”<sup>166</sup> Finally, the Circuit Court found that “[e]ven if the FCA is inapplicable, the Court [found] no authority prohibiting ownership in fee simple of airspace” under Florida law.<sup>167</sup> The Circuit Court held that the developer “validly excluded [the ACPs] from the condominium form of ownership” and had transferred fee simple title in the ACPs to New Sterling Resorts. After a bench trial, the court found in favor of the Association on the unjust enrichment claim.<sup>168</sup> Both parties appealed.

#### V. APPELLATE COURT FINDS FLORIDA CONDOMINIUM ACT APPLIES TO AIRSPACE PARCELS IN CONDOMINIUM BUILDINGS THAT ARE EXCLUDED FROM CONDOMINIUM OWNERSHIP

The Court of Appeals rejected the Association’s challenge to New Sterling’s ownership of the ACPs and found that airspace parcels excluded from condominium ownership and located in a condominium building continue to benefit from the FCA’s provisions permitting fee simple absolute in airspace.<sup>169</sup> Although the four ACPs were located on the building’s ground floor, the FCA applied to these units because all parcels inside a condominium building that are described in a declaration are considered land that is, in turn, governed by the FCA.<sup>170</sup> Instead, the court

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<sup>164</sup> *Id.* (discussing the definition of land provided by FLA. STAT. § 718.103(18) (2020)).

<sup>165</sup> *Id.* at \*2.

<sup>166</sup> *Id.* at \*2 (citing *Splash Owners’ Ass’n, Inc. v. New Sterling Resorts, LLC et al.*, No. 09–5231 (Fla. 14th Cir. Ct. 2012) (discussing the Court’s finding in *United States v. Causby*, 328 U.S. 256 (1946) that land ownership does include an amount of airspace adjoining a terrestrial plot but noting this vertical extension must have an upper boundary to accommodate other airspace uses like flying airplanes)).

<sup>167</sup> *Id.* at \*1.

<sup>168</sup> *Sterling Breeze Owners’ Ass’n, Inc. v. New Sterling, LLC*, 255 So. 3d 434, 435 (Fla. 1st DCA 2018).

<sup>169</sup> *Id.* at 437 (finding that “Florida law does not require divestment of the ACPs from New Sterling Resorts.”).

<sup>170</sup> *See* FLA. STAT. § 718.103(18) (2021) (providing that, for the purposes of the Florida Condominium Act, land “means the surface of a legally described parcel of real property and includes, unless otherwise specified in the declaration and whether separate from or

found that the definitions of condominium property and land provided by the statute do not “require[] that all of the airspace [in a building] be include within the condominium ownership.”<sup>171</sup> The court found that the FCA “contemplates that portions of airspace may be included or excluded” from the condominium form of ownership.<sup>172</sup> Therefore, the declaration can subject “most (but not all) of the airspace to condominium ownership . . . under the statute.”<sup>173</sup> The inclusion of the ACPs in the declaration was sufficient to keep the parcels within the FCA’s scope.<sup>174</sup> Because the ACPs remained within the FCA’s scope the parcels could benefit from both the FCA’s airspace-inclusive definition of land.<sup>175</sup> In turn, because the ACPs qualified as land under the statute, the parcels could be held in fee simple absolute as real property.<sup>176</sup>

The court found that the declaration complied with the FCA’s requirements and the disputed parcels were properly identified and reserved for “ownership separate from the condominium.”<sup>177</sup> Moreover, the Association had signed an easement agreement attached to the declaration acknowledging the parcels were being reserved for the developer to be used as commercial spaces.<sup>178</sup> Because the “disputed airspace . . . was identified and reserved via a declaration of condominium and associated agreement recorded [under the statute]” the ACPs remained within the FCA’s scope. Thus, although the ACPs were excluded from the condominium, the parcels continued to benefit from the statute’s codification of airspace fee simple because the parcels were described in the declaration.<sup>179</sup> Because the ACPs remained land for the purposes of the Condominium Act, the court turned to the statute rather than common law property doctrine to resolve the ownership dispute.<sup>180</sup> The appellate court

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including such surface, airspace lying above and subterranean space lying below such surface.”).

<sup>171</sup> *Sterling*, 255 So. 3d at 437.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *See id.* at 436.

<sup>175</sup> *Id.* at 436–437 (citing Fla. Stat. § 718.103(18) (2020) which defines land as “the surface of a legally described parcel of real property [that] includes [airspace]” for the purposes of the FCA.).

<sup>176</sup> *Id.* at 437 (finding that Florida law did not “require divestment of the ACPs from New Sterling Resorts.”).

<sup>177</sup> *Id.* at 436.

<sup>178</sup> *See id.* (finding that “irrespective of how the common law might have addressed separate owners of surface space and airspace, the disputed airspace in this case was identified and reserved via a declaration of condominium and associated agreement recorded under chapter 718, Florida Statutes, which specifically addresses airspace . . . . Resolution here thus depends on the statute.”) (citation omitted).

<sup>179</sup> *See id.*

<sup>180</sup> *See id.*

affirmed the trial court's statutory interpretation and upheld the grant of summary judgement on the declaratory and quiet title claims.<sup>181</sup> With respects to the unjust enrichment claim, the court found the Association could not pursue an unjust enrichment claim as a matter of law because the easement and reservation agreement that provided for utility and other expenses was an express contract that concerned the same subject matter as the quasi-contract, unjust enrichment claim.<sup>182</sup>

#### VI. ONCE "LAND," ALWAYS "LAND": WHERE DOES *STERLING* LEAVE CONDOMINIUM AIRSPACE OWNERSHIP IN FLORIDA?

*Sterling* addresses three concerns about how Florida courts might apply the FCA to airspace ownership disputes. First, the decision underscores the deference Florida courts give to written agreements when deciding ownership disputes involving condominium property.<sup>183</sup> Second, *Sterling* clarifies that any airspace parcel described in a condominium declaration will likely benefit from the FCA's codification of airspace fee simple<sup>184</sup>. Finally, *Sterling* suggests the potential outer limits of the FCA's scope more generally by affirming that an airspace parcel expressly excluded from a condominium is still subject to the at least some of the FCA's provisions.<sup>185</sup> This broad scope allowed the *Sterling* court to protect the ACP fees from the uncertain status of airspace ownership under Florida common law.<sup>186</sup> If the ACPs were not subject to the FCA, courts would have to look to the common law to determine ownership of these parcels. Although researchers and courts have noted that airspace ownership was possible at common law,<sup>187</sup> Florida courts have only considered a small number of non-condominium airspace disputes as discussed earlier in this note. Permitting non-condominium units located in condominium

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<sup>181</sup> *Id.* at 437.

<sup>182</sup> *Id.*

<sup>183</sup> 255 So. 3d at 436–37 (finding that the declaration, and therefore the FCA, controlled the dispute and not “common law property principles.”).

<sup>184</sup> *Id.* (holding that, because the non-condominium airspace parcels were described in a declaration, those parcels would continue to benefit from FCA provisions permitting fee simple absolute ownership of airspace despite the parcels being expressly excluded from the resulting condominium via the declaration).

<sup>185</sup> *Id.* (finding that non-condominium airspace parcels described in a declaration continued to benefit from a provision in the FCA permitting airspace to be owned in fee simple absolute).

<sup>186</sup> *Id.* at 436 (finding that, because the disputed property was “identified and recorded” in a declaration the FCA and not “common law property principles” controlled the dispute).

<sup>187</sup> See *Condominium Regulation*, *supra* note 2, at 641 (explaining that “[o]ne could construct a fee interest in airspace” at common law); See *Davis*, *supra* note 66, at 76 (noting that “a common-law condominium was always theoretically possible”).

buildings, like the excluded parcels at dispute in *Sterling*, to come within the scope of the FCA ensures these parcels can be owned in fee simple. Although *Ervin* and *Claughton Hotels* shows that Florida courts recognize some property interests in airspace, permitting the FCA to reach excluded parcels avoids subjecting these parcels to the uncertain status of fee simple airspace ownership at common law. However, had the excluded parcels not fallen within the FCA's scope, the contract-based approach to ownership adopted by the *Legendary* court and the recognition of limited airspace property interests in *Ervin* and *Claughton Hotels* support upholding an airspace fee simple under Florida common law that would permit the buying and selling of airspace parcels located in vertical developments like condominium buildings but that are not subject to condominium ownership.

*A. Sterling Underscores Florida Court Preference For Regulation of Airspace Use In Mixed-Use Condominium Projects Through Contracts*

In keeping with the contracts-based approach to condominium disputes adopted in *Legendary*, *Sterling* signals that Florida courts turn to the express terms of private agreements to regulate relationships between non-condominium owners—i.e. owners like *Sterling* who own units in a condominium building that have been excluded from condominium ownership—and condominium owners in a mixed-use building.<sup>188</sup> Like *Legendary*, *Sterling* underscores that the FCA grants condominium and independent airspace owners a great deal of flexibility to privately regulate the rights and burdens imposed on each owner.<sup>189</sup> In *Legendary*, use of the shared riparian property was regulated by a declaration coupled with other agreements. In that case, it was the operating agreement rather than the declaration that furnished the dispositive provision establishing the

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<sup>188</sup> See *Legendary*, 724 So. 2d at 625 (finding that a dispute concerning certain riparian rights between a marina operator and a condominium owners' association had to be resolved by looking to the terms of four agreements made between the association and the marina operator); 255 So. 3d at 436–37 (looking to the declaration and a fee-sharing agreement reached between the non-commercial airspace owner and the condominium owners' association to resolve both an ownership dispute and a dispute concerning fee-sharing for expenses such as utility costs and security attributable to the building as a whole).

<sup>189</sup> See *Legendary*, 724 So. 2d at 625 (finding that the declaration and written agreements controlled a riparian rights dispute); 255 So. 3d at 437 (finding that a the condominium owners' association could not pursue a quasi-contract claim for disputed shared building maintenance and utility fees because a quasi-contract claim “cannot be pursue[d] . . . if an express contract exists concerning the same subject matter.”) (quoting *Diamond “S” Dev. Corp. v. Mercantile Bank*, 989 So. 2d 696, 697 (Fla. 1st DCA 2008)).

commercial owner's right to use the riparian property.<sup>190</sup> *Sterling* shows that the condominium declaration can be used to grant an independent airspace owner an enforceable right to use property that adjoins condominium property.<sup>191</sup> Under *Sterling*, using a declaration to regulate ownership and use of airspace between condominium and independent owners has the added benefit of ensuring that the FCA's protections are available to all airspace parcels described in the declaration.

There are two obvious benefits to the contract-based approach taken in *Sterling*. First, this approach to property rights serves a protective function by deterring ownership challenges in vertical developers mounted by a dominant group of owners. In both *Legendary* and *Sterling*, Florida courts upheld the property rights conferred to non-condominium owners when those property interests were challenged by an association of owners<sup>192</sup>. *Sterling* shows that Florida courts will protect airspace owners from attempts by condominium associations to informally alter the burdens and benefits conferred by a condominium declaration to a given owner. Moreover, the contract-based approach taken in both *Legendary* and *Sterling*, show that Florida courts will limit ownership inquiries to the relevant governing documents and the statutory provisions animating those agreements.<sup>193</sup>

Ultimately, the *Sterling* court relied on the FCA's contract-based ownership regime because the ACPs were found to be within the FCA's reach.<sup>194</sup> However, as *Legendary* shows, upholding the right to use an airspace parcel granted to an ACP owner by a (1) condominium declaration and (2) by a conveyance of the parcels to the owner from the

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<sup>190</sup> *Legendary*, 724 So. 2d at 625.

<sup>191</sup> 255 So. 3d at 436–37 (holding that the owner of four non-condominium airspace parcels, who was also not a member of the condominium owners' association, did own those parcels in fee simple absolute because the parcels were created via a declaration and, thus, continued to benefit from the FCA's provision permitting fee simple absolute ownership of airspace.)

<sup>192</sup> *Legendary*, 724 So. 2d at 625 (holding that specific wharfing rights reserved via a written agreement in favor of a marina operator were not trumped by other wharfing rights conferred to the condominium owners' association); 255 So. 3d at 436–37 (holding that the owner of non-condominium airspace parcels did own those parcels in fee simple absolute and, therefore, the condominium owners' association could not claim title to those parcels).

<sup>193</sup> *See Legendary*, 724 So. 2d 623, 624 (Fla. 1st DCA 1998) (finding the trial court's admission of extrinsic evidence was improper because the governing documents alone were relevant to the dispute); *See Sterling*, 255 So. 3d at 436 (finding that, because a statutorily compliant declaration existed, common law property doctrines would not determine ownership of the excluded ACPs).

<sup>194</sup> 255 So. 3d at 436 (finding that, because the non-condominium airspace parcels were "identified and recorded" in a declaration the property was governed by the FCA and not "common law property principles.").

developer result could permit a Florida court to uphold the ACP owner's fee simple without reference to the FCA. However, because Florida common law has only recognized limited property rights in airspace, creating, excluding, and conveying airspace parcels that will adjoin condominium property should be carried out via declaration to ensure the parcels benefit from *Sterling's* extension of the FCA's provision to excluded parcels.

*Sterling* clarifies that the FCA's provisions are available to a larger pool of owners than only condominium owners or owners of residential units.<sup>195</sup> In turn, the decision signals to investors and commercial unit owners that Florida courts recognize the FCA can accommodate new preferences for organizing vertical developments. *Sterling* enhances the marketability of these parcels by assuring developers and prospective owners that potential common law limits on airspace ownership will not divest them of otherwise lawfully obtained real property. Permitting non-condominium airspace ownership offers developers another tool to maximize occupancy in vertical developments and entice buyers who otherwise would shy away from condominium ownership because of associated fees or a desire for more autonomy than co-ownership might allow. Moreover, as both *Sterling* and *Legendary* show, associations and developers can use written agreements appended to a declaration to either require non-condominium parcels to contribute general upkeep and maintenance fees or the association can exempt non-condominium parcels from those fees.<sup>196</sup> Ultimately, *Sterling* not only clarifies that any airspace parcel included in a declaration will benefit from the FCA's provisions, the decision also shows the high degree of flexibility offered by declarations under the FCA.

*B. Sterling Breeze Shows That Non-Condominium Air Space  
Parcels Located In Condominium Buildings Benefit From The  
FCA's Codification of Fee Simple Ownership of Airspace*

*Sterling* makes it clear that a non-condominium parcel can benefit from the FCA's codification of fee simple absolute ownership of airspace even if that parcel was described in the declaration only so that it could

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<sup>195</sup> 255 So. 3d at 436–37 (holding that an owner who is not affiliated with a condominium owners' association was able to own airspace located in a majority-condominium building).

<sup>196</sup> See *Sterling*, 255 So. 3d at 437 (noting that the ACP agreement that was appended to the condominium declaration "obligated the owner of the ACPs" to pay for "all expenses" for services and utilities connected to the ACPs See *Legendary*, 724 So. 2d at 625 (noting the marina agreement attached to the condominium declaration provided for the condominium association to be "responsible for maintenance and operation of the marina in accordance with the marina agreement.")).

excluded from the resulting condominium.<sup>197</sup> Because fee simple ownership of airspace is not well settled under Florida law, the application of the FCA to non-condominium airspace parcels in *Sterling* provides developers, owners, and associations with clearer guidance on how to use declarations and appended agreements to create different types of airspace parcels inside of the same building.

Under *Sterling*, the procedure used to create the airspace parcel is the dispositive factor that permitted the excluded parcel to benefit from the FCA's provisions.<sup>198</sup> *Sterling* found the FCA's silence on whether "all of the airspace" in a condominium building must be "included within condominium ownership" shows the FCA "contemplates that portions of airspace may be included or excluded" from a condominium.<sup>199</sup> *Sterling* suggests that once an airspace parcel has been created pursuant to the FCA is irrevocably transformed into real property that can be held in fee simple.<sup>200</sup> Given the permanence of this transformation, Florida courts will rarely have to look outside the FCA when deciding ownership disputes concern parcels within a condominium building. Neither the location of the parcels nor the uses to which the parcels were put factored into the court's analysis. Under *Sterling*, courts will only have to turn to the declaration to determine if an airspace parcel was properly described in that instrument and, therefore, is governed by the FCA.

With respect to mixed-use condominiums specifically, the *Sterling* decision shows that Florida courts will likely extend the FCA's airspace ownership provision to commercial units that are adjacent to condominium units and common elements even when those commercial units are not a part of the condominium. In *Sterling*, the trial and appellate courts affirmed that the FCA's benefits do extend to commercial parcels located inside of a condominium-dominated building.<sup>201</sup> Again, the process used to create the parcels was the most relevant factor to determine whether the parcels were subject to the FCA.<sup>202</sup>

However, as new airspace uses emerge, it is not clear under *Sterling* which owners would own the rights to airspace that was not described in

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<sup>197</sup> See *Sterling*, 255 So. 3d at 437 (interpreting FLA. STAT. § 718.103 (2020) and other provisions of the Florida Condominium Act).

<sup>198</sup> 255 So. 3d at 436 (finding that, because non-condominium airspace parcels were "identified and recorded" in a declaration that complied with the FCA the FCA, and not common law property principles, governed the parcels).

<sup>199</sup> *Id.*

<sup>200</sup> See *id.* at 436 (describing the Florida Condominium Act's airspace-inclusive definition of land).

<sup>201</sup> 255 So. 3d at 436–37 (finding that, because the commercial parcels were described in a declaration, the units were governed by the FCA despite the units being neither condominium units nor common elements).

<sup>202</sup> See *Id.*

the condominium and for which there is no other operating or ownership agreement that would permit a contract-based analysis in line with *Legendary*. Undescribed airspace would likely include airspace that abuts the exterior of the building, for example airspace over a rooftop or a structure constructed on a rooftop after the declaration has been filed, and that could be but is not currently being used. *Sterling* suggests the FCA governs any airspace parcel described in an enforceable declaration.<sup>203</sup> This requirement will likely always be met when the disputed airspace is located within a building. When airspace parcels are located within a building, those parcels must either be expressly described or the parcels may be implicitly described when the condominium parcels, common elements, and excluded parcels are delineated. However, it is not clear if the FCA will also reach exterior airspace that may have escaped attention when the interior parcels were being described. Given the well-settled principle established in *Casuby* that a landowner has a property interest in airspace adjoin her parcel, an ownership dispute concerning undescribed, exterior airspace would likely result in one party being granted at least some property interests in that airspace.<sup>204</sup> *Sterling* applies this principle to the interior of condominium buildings by rejecting the association's claim that its ownership extended vertically from the building's foundation and was only interrupted by the condominium units.<sup>205</sup>

As *Ervin* and *Claughton Hotels* demonstrate, Florida courts also recognize that a property interest in airspace flows to the owner of the adjoining land.<sup>206</sup> However, *Ervin*, *Claughton Hotels*, and *Sterling* do not resolve whether an individual unit owner, a condominium association, a developer, or a government entity would hold title to undescribed exterior airspace. Moreover, *Sterling* only clarifies that the FCA governs airspace parcels that are (1) located in a building's interior and (2) are described in

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<sup>203</sup> 255 So. 3d at 436 (finding that the FCA governed non-condominium commercial parcels because those parcels were described in a declaration).

<sup>204</sup> See 328 U.S. at 264 (finding that, in a dispute concerning airspace use over a residential parcel between a private landowner and the U.S. government, the "landowner owns at least as much of the space above the ground as the [*sic*] can occupy or use in connection with the land" and the fact that the landowner "does not occupy [that airspace] in a physical sense . . . is not material.")

<sup>205</sup> See Initial Brief of Appellant/Cross-Appellee at 17, *Sterling Breeze Owners Ass'n v. New Sterling Resorts, LLC* 255 So. 3d 434 (Fla. 1st DCA 2018) (No. 1D17-1553), 2017 WL 4438686, at \*1 (arguing that the definition of land under the Florida Condominium Act "is intended to be limited in scope to condominiums and the airspace contained within them and not to property explicitly excluded from the condominium form of ownership by the terms of the declaration itself.").

<sup>206</sup> 139 So. 2d at 139 (finding that the Florida Legislature intended to provide a property owner with "full compensation for any property" including an airspace easement "taken for the public use."); *Claughton*, 157 So. 2d at 198 (holding that the "owner of a parcel of land is entitled to the control and use the space above it").

a declaration. It remains unclear if undescribed airspace that is adjacent to a condominium building but located outside of the building (for example, airspace above a rooftop) would be part of the condominium's common elements. If all parcels in a building are owned by either a condominium association or condominium owners, it seems clear cut that the adjacent airspace above the building would constitute a common element because, under the FCA, common elements include any portion of condominium property that is not assigned to a unit.<sup>207</sup> However, in cases like *Sterling* where a condominium shares the same building as non-condominium parcels, neither the FCA nor case law provides a clear answer about how to assign ownership of undescribed, exterior airspace.<sup>208</sup> In these mixed-ownership cases, the broad freedom of contract granted to developers and associations by the FCA provides the most obvious solution to potential airspace ownership disputes. Given that Florida courts will enforce declarations that include elements not specially addressed in the FCA—for example, the creation of ground-floor, non-condominium commercial parcels in *Sterling*—developers and associations should consider addressing exterior airspace in governing documents so that airspace can be productively, and perhaps profitably, used in the future.<sup>209</sup>

To encourage airspace use, more clarity is needed on who owns non-condominium airspace that adjoins a condominium building and, therefore, who can and cannot use and convey interests in that airspace. For example, who would be able to sell easements permitting third parties to use airspace directly above a condominium building? Surely, use of adjoining airspace as a right-of-way from drones or to host vertical farming equipment<sup>210</sup> would generate income for developers or associations while reducing land use by consolidating multiple uses onto a single parcel. Under Federal Aviation Authority rules, drones can fly up to 400 feet above the ground or, if the drone is flying near structures, no

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<sup>207</sup> See FLA. STAT. § 718.103(8) (2021) (defining common elements as “the portions of the condominium property not included in the units”).

<sup>208</sup> 255 So. 3d at 437 (observing that “neither the definition of “condominium property,” nor “land” [as provided by the FCA requires that all of the airspace be included within condominium owners” and that “the statute contemplates that portions of airspace may be included or excluded” from a condominium via a declaration).

<sup>209</sup> See *Sterling*, 255 So. 3d at 437 (noting that the FCA “contemplates that portions of airspace may be included or excluded” as a general matter but finding no specific section that addresses non-condominium commercial parcels).

<sup>210</sup> See Nathalie N. Prescott, *Agroterrorism, Resilience, and Indoor Farming*, 23 ANIMAL L. 103, 107 (2016) (explaining that vertical farming uses hydroponic, aquaponic, or aeroponic equipment to grow crops in vertical layers instead of horizontal rows and noting that vertical farms are extremely efficient and productive, with some vertical farms being able to achieve the same yield as a conventional farm while using less than 1% of the square feet required for a conventional farm.).

more than 400 feet above a structure's highest point.<sup>211</sup> While the Federal Aviation Authority clearly has authority over airspace that is 1,000 feet above the tallest obstacle in high-congestion areas, 500 feet above ground level in uncongested areas, and landing and takeoff pathways, it remains unclear whether the FAA's authority reaches below those thresholds.<sup>212</sup> Because airspace ownership that is below the FAA threshold and adjacent to real property is a state-level property rights issue, states have been able to grant causes of action for airspace trespass by drones or interferences with airspace use in general.<sup>213</sup> In Florida, the state is responsible for drone regulation when federal regulations, authorizations, or exemptions do not apply.<sup>214</sup> Given the broad freedom of contract available to developers and owners under the FCA and the applicability of the FCA to non-condominium airspace parcels described in a declaration, creating, conveying, and monetizing airspace parcels above condominium buildings could present either developers or associations with new sources of revenue while promoting the adoption of new technologies like drones.

Vertical developments like high-rise condominiums can also help growing cities accommodate growing demand for housing and commercial spaces in urban centers while easing land scarcity.<sup>215</sup> Historically, vertical developments have been the go-to planning tool in cities, like New York, where developers and residents face high land costs and land scarcity.<sup>216</sup> With metropolitan areas across the United States growing at a far faster pace than rural areas, vertical developments can help meet to meet demand for both housing and commercial space in high-growth areas.<sup>217</sup> In turn, concentrating residential uses near commercial in

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<sup>211</sup> 14 C.F.R. §107.51 (2016).

<sup>212</sup> See Robert A. Heverly, *The State of Drones: State Authority to Regulate Drones*, 8 ALBANY GOV'T L. REV. 29, 38 (2015).

<sup>213</sup> See *id.* at 53–55 (noting that statutes passed in Georgia and Minnesota that grant landowners causes of action for interference with the use of airspace above their land and noting an Oregon law that “that specifically provides landowners and land possessors with a legal cause of action if an operator flies a drone over their properties at a height of less than 400 feet after having done so at least once before and after having been notified by the owner not to do so again”).

<sup>214</sup> FLA. STAT. § 330.41(3)(a) (2021).

<sup>215</sup> See MIR ALI & AJLA AKSAMAJA, TOWARDS A BETTER URBAN LIFE: INTEGRATION OF CITIES AND TALL BUILDINGS, in 4th Architectural Conference on High Rise Buildings (Council on Tall Buildings and Urban Habitat) 1, 2 (2008).

<sup>216</sup> See *id.* at 1.

<sup>217</sup> See Matthew Brown, *Takeaways from the US census: A slower growing but more multiracial society, as cities outpace rural areas*, USA TODAY (Aug. 12, 2021, 6:39 PM), <https://www.usatoday.com/story/news/politics/2021/08/12/takeaways-2020-census-rural-urban-population-divides/5493030001/> (explaining that U.S. census data shows that U.S. metropolitan areas saw an average growth rate of 9% over the last ten years while non-metropolitan areas grew by only 1%).

urban areas can help reduce the overall carbon footprint of a population-center by reducing the need for energy-intensive commutes.<sup>218</sup> Moreover, vertical development can help preserve arable land in areas where arable land is already scarce by constraining the growth of suburban developments.<sup>219</sup> In areas with both high population and economic growth, vertical developments like mixed-use high rises offer practical solutions to expand housing stock near commercial hubs and support economic development by providing more commercial space.<sup>220</sup> For example, mixed-use, high-rise towers have proven popular in Dubai to accommodate rapid economic expansion.<sup>221</sup> In turn, this consolidation frees up more space for residential, commercial, and recreational use in high-demand areas while potentially making each parcel more economically productive by allowing developers and owners to market units to a broader array of users.

Florida, in particular, has seen a surge of new interests from prospective residents and from business alike since the start of the COVID-19 pandemic and is now one of the top destinations for relocations in the country.<sup>222</sup> Demand for condominiums and townhomes was especially robust in 2021, with second-quarter 2021 sales in that category growing 117% year-over-year.<sup>223</sup> To meet this demand, developers have embraced mixed-use, high-rise buildings that host conventional condominium units as well as luxury amenities like spas and restaurants.<sup>224</sup> Under *Sterling*, fee simple ownership of airspace in a

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<sup>218</sup> See ALI & AKSAMIA, *supra* note 193, at 3; *cf. id.* at 15–16 (noting that Jakarta has faced “increased transportation problems and congestion” as high-rise buildings became “widely used for commercial and residential functions . . . to address the issues of land scarcity and enormous population . . .”).

<sup>219</sup> See ALI & AKSAMIA, *supra* note 193, at 2–3.

<sup>220</sup> See *generally id.* at 15 (noting that high-rise buildings in Jakarta help mitigate land scarcity issues while supporting three of the area’s primary sources of economic growth).

<sup>221</sup> See *id.* at 16.

<sup>222</sup> See *Almost 330,000 people have moved to Florida during the past year; migration is expected to continue through 2025*, ISLANDER NEWS (May 21, 2021), [https://www.islandernews.com/lifestyle/homes/almost-330-000-people-have-moved-to-florida-during-the-past-year-migration-is-expected/article\\_78860b40-aa7d-11eb-957d-1f0232e9d6d0.html](https://www.islandernews.com/lifestyle/homes/almost-330-000-people-have-moved-to-florida-during-the-past-year-migration-is-expected/article_78860b40-aa7d-11eb-957d-1f0232e9d6d0.html) (noting that several surveys showed Florida was a top destination for people looking to relocate in 2020); See also Trevor Wheelwright, *State of Moving in 2020: Moving Stats and the Impact of COVID-19*, MOVE.ORG (June 22, 2021), <https://www.move.org/2020-moving-stats-and-trends/#TopStatesWherePeopleMovedtoandFrom> (noting that Florida was the most moved-to state in 2020).

<sup>223</sup> *Fla.’s Housing Market Continues Positive Trends Through 2Q*, FLA. REALTORS (Aug. 12, 2021), <https://www.floridarealtors.org/news-media/news-articles/2021/08/flas-housing-market-continues-positive-trends-through-2q>.

<sup>224</sup> See *generally* Nicole Lopez-Alvar, *The tallest residential building south of New York City is coming to Miami*, LOCAL 10 (Mar. 29, 2021, 4:41 PM), <https://www.>

condominium building is available to seemingly for any type of use as long as that unit is described in the condominium declaration.<sup>225</sup> Given the benefits of consolidating multiple uses into a single parcel, *Sterling* provides opportunity for developers and prospective owners to consider mixed-ownership approaches that are more responsive to local needs without having to give up the benefits of fee simple airspace ownership available under the FCA.<sup>226</sup>

As *Sterling* shows, Florida law provides developers and associations with a broad freedom of contract that permits unique ownership arrangements as long as the declaration and appended agreements creating those arrangements comply with the FCA's requirements that parcels be particularly described.<sup>227</sup> However, while this flexibility permits novel arrangements that can maximize occupancy in a vertical development, both developers and associations will have to pay close attention to the rights they gain and relinquish when entering these arrangements. As both *Legendary* and *Sterling* shows, Florida courts prefer to resolve disputes between associations and non-condominium parcel owners by turning to declarations and related agreements formed under the FCA.<sup>228</sup> Thus, *Sterling* should serve as a warning to owners and associations alike that, once ownership rights are created via a declaration, Florida courts will be reluctant look outside the four corners of that document if an owner's title is challenged.

While ambiguity about airspace property rights may slow the adoption of airspace uses like vertical farming and drone transportation, this uncertainty also provides an opportunity for developers, owners, and potential airspace users to steer public policy towards a flexible, contract-based approach to owning and conveying property interests in airspace when the FCA's provisions have not attached to a portion of airspace.

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[local10.com/real-estate/2021/03/29/the-tallest-residential-building-south-of-new-york-city-is-coming-to-miami/](https://www.local10.com/real-estate/2021/03/29/the-tallest-residential-building-south-of-new-york-city-is-coming-to-miami/).

<sup>225</sup> 255 So. 3d at 436–37 (holding that a commercial operator that owned non-condominium parcels and that did not belong to the condominium owners' association was still able to own the parcels in fee simple absolute under the FCA).

<sup>226</sup> *Id.* (finding that a commercial owner that was not a member of a condominium owners' association can still own airspace parcels in fee simple absolute when those parcels are located in a majority-condominium building).

<sup>227</sup> See *Sterling Breeze Owners' Ass'n v. New Sterling Resorts, LLC*, 255 So. 3d 434, 436 (Fla. 1st DCA 2018).

<sup>228</sup> *Legendary*, 724 So. 2d at 624–25 (looking to the declaration and agreements referenced in the declaration to resolve a wharfing rights dispute between a marina operator and a condominium owners' association); 255 So. 3d at 436–37 (holding that, because non-condominium airspace parcels were described in the declaration the FCA controlled a property dispute between the commercial owner and the condominium owners' association and finding that a related fee-sharing agreement between the commercial owner and the condominium owners' association governed a dispute over those fees).

Although condominiums continue to be a popular ownership structure for both purely residential and mixed-used vertical developments in Florida, developers and owners will find that novel uses for airspace require Florida courts and the legislature to further delineate (1) whether there are non-condominium airspace parcels created under Florida law which are not subject to the FCA's provisions and (2) what, if any, protections does Florida law offer the owners and users of non-condominium airspace. While technologies like vertical farming equipment, drones, and flying vehicles were once the stuff of science-fiction stories, rapid development in all three of those spaces will undoubtedly have developers looking skyward to unlock value from the airspace above buildings.<sup>229</sup> As these airspace uses become more common, assigning ownership of adjacent airspace via a declaration or an agreement appended to a declaration should be considered to ensure that the benefits and burdens of new airspace uses flow to the correct owners.

#### VII. FLORIDA COMMON LAW WOULD PROVIDE THE *STERLING* COURT WITH ALTERNATIVE GROUNDS TO UPHOLD FEE SIMPLE IN THE EXCLUDED AIRSPACE PARCELS

Even if the excluded parcels had not come within the FCA's reach, Florida law would still offer courts the opportunity to find that airspace can be owned in fee simple absolute. First, the contract-based approach adopted in and *Legendary* shows that Florida courts will defer to agreements conveying the right to use property that is adjacent to condominium property.<sup>230</sup> Second, both *Ervin* and *Claughton Hotels* establish that a property interest in adjoining airspace does flow to the owner of the underlying land<sup>231</sup>. Finally, *Ervin* and *Claughton* show that an interest in airspace that adjoins real property can be severed and conveyed to a separate owner.<sup>232</sup> While Florida law has not expressly

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<sup>229</sup> See generally Paul Lienert & Ben Klayman, *Look, up in the sky—it's a flying Cadillac! GM unveils futuristic vehicle*, REUTERS, Jan. 12, 2021, <https://www.reuters.com/business/autos-transportation/look-up-sky-its-flying-cadillac-gm-unveils-futuristic-vehicle-2021-01-12/> (describing a driverless flying taxicab that is being developed by General Motors).

<sup>230</sup> *Legendary*, 724 So. 2d at 625 (finding that a written agreement between a marina operator and a condominium owners' association that was referenced in a declaration controlled a wharfing rights dispute between the parties).

<sup>231</sup> *Claughton*, 157 So. 2d at 198; 139 So. 2d at 139 (finding that a highway authority would have to pay a property owner "full compensation" for an easement in airspace condemned over the property owners' land).

<sup>232</sup> *Ervin*, 139 So. 2d at 138–39 (permitting a highway authority to condemn an airspace easement over private land); *Claughton*, 157 So. 2d at 198 (finding that a hotel was only

recognized fee absolute ownership of airspace, cases upholding airspace easements lay the groundwork for recognizing these fees common law.<sup>233</sup>

In *Sterling*, neither party contended that the declaration was defective.<sup>234</sup> Instead, the association's challenge rested on ambiguity about whether airspace can be owned in fee simple absolute under Florida common law.<sup>235</sup> While Florida courts had not expressly permitted fee simple in airspace prior to the FCA's passage, the contract-based approach to ownership taken in *Tatum Bros.* and adopted by the *Legendary* court would permit a court to uphold New Sterling's fee simple in the ACPs.<sup>236</sup> Under the FCA, a declaration and all appended agreements are treated "as an agreement relating to the conveyance of land."<sup>237</sup> Notably, the plain language of this provision does not limit this conveyance of land to either (1) land as defined in the FCA or (2) land that is under condominium ownership.<sup>238</sup> In *Sterling*, the ACPs were created by the declaration and were also described to the easement and cost-sharing that was attached to the declaration.<sup>239</sup> A Florida court could uphold the ACP fee simple by finding that an enforceable agreement conveying the right to use and enjoy was in place.

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obligated to pay for its pro rata share of property taxes for airspace the hotel used above a sidewalk owned by the City of Miami).

<sup>233</sup> *Ervin*, 139 So. 2d at 138 (permitting the Jacksonville Expressway Authority to take an airspace easement without taking the underlying real property); *See Cloughton*, 157 So. 2d at 198 (recognizing that the airspace above a parcel of land can be dominated and used by a party who does not own the parcel of land).

<sup>234</sup> 255 So. 3d at 436–37 (resolving the dispute by applying the FCA after neither party asserted that the declaration was defective).

<sup>235</sup> *Id.* at 436 (finding that "irrespective of how the common law might have addressed separate owners of surface space and airspace, the disputed airspace in this case was identified and reserved via a declaration of condition and associated agreement recorded under chapter 718, Florida Statutes, which specifically addresses airspace.").

<sup>236</sup> *Cloughton*, 157 So. 2d at 624–25 (finding four documents—a declaration, a deed to an alternative commercial parcel, an operating agreement, and a marina agreement wherein the deed and declaration were subject to the operating agreement—resolved the dispute over wharfing and riparian rights).

<sup>237</sup> FLA. STAT. § 718.105(1) (2020) (providing that "[w]hen executed as required by s. 718.104, a declaration together with all exhibits and all amendments is entitled to recordation as an agreement relating to the conveyance of land.").

<sup>238</sup> FLA. STAT. § 718.103 (18) (providing that land "means the surface of a legally described parcel of real property and includes, unless otherwise specified in the declaration and whether separate from or including such surface, airspace lying above and subterranean space lying below such surface. However, if so defined in the declaration, the term "land" may mean all or any portion of the airspace or subterranean space between two legally identifiable elevations and may exclude the surface of a parcel of real property and may mean any combination of the foregoing, whether or not contiguous, or may mean a condominium unit.").

<sup>239</sup> *See Sterling*, 255 So. 3d at 435.

A contract-based approach following *Legendary* could provide alternative grounds to upholding a fee simple for an excluded airspace parcel like the disputed ACPs in *Sterling*. Like the riparian land at issue in *Legendary*, the ACPs were both described in a declaration and were subject to certain burdens laid out in the easement that was attached to the declaration.<sup>240</sup> Just as the *Legendary* court upheld the riparian right agreements as a matter of contract law without reference to the Condominium Act, the declaration and easement agreement in *Sterling* provide the necessary basis for applying a contract-based approach to ownership. While the riparian land at issue in *Legendary* does not run up against the ambiguity of airspace ownership at common law, the strong freedom of contract evidenced in *Legendary* suggests Florida courts will look to the form of a property interest conveyance—whether that form be a title, declaration, or other written agreement—rather than looking to the type of property being conveyed<sup>241</sup>. If the strict contract-based approach made available to Florida courts by *Legendary* were adopted in *Sterling* the declaration and the attached agreement could provide sufficient grounds to find an enforceable interest conveyed by contract.<sup>242</sup> However, the uncertain status of airspace ownership under Florida common law may pose a hurdle to a pure contract-based approach.

Even if the ACPs no longer benefited from the FCA's codification of airspace fee simple ownership, *Ervin* and *Claughton Hotels* show that Florida law does recognize that some property rights can be held in airspace.<sup>243</sup> While those cases were limited to easements involving airspace, both decisions show that airspace is subject to at least some of the benefits and burdens imposed on real property under Florida law.<sup>244</sup> Moreover, these decisions demonstrate that Florida courts recognize that property rights in airspace can be divided among several owners.<sup>245</sup>

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<sup>240</sup> *Legendary*, 724 So.2d 625 (finding that because the rights assigned to the condominium owners and owners' association in the declaration were subject to agreements that defined the "respective rights and obligations in the shared use of the property" that those agreements controlled a dispute over wharfing rights).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*; 255 So. 3d at 436–37 (finding that the description in the declaration was sufficient to bring the non-condominium parcels within the scope of the FCA and that a fee-sharing agreement between the non-condominium owner and the condominium owners' association controlled a dispute concerning those fees).

<sup>243</sup> *Ervin*, 139 So. 2d at 139 (finding that a property owner would be entitled to payment from a highway authority that takes an easement in airspace over that land); *Claughton*, 157 So. 2d at 198 (finding that a hotel operating a building that occupied airspace above a city-owned sidewalk was obligated to pay its pro rata share of property tax attributable to that airspace usage).

<sup>244</sup> *Ervin*, 139 So. 2d at 139; *Claughton*, 157 So. 2d at 198.

<sup>245</sup> *Claughton*, 157 So. 2d at 198 (finding that, because a hotel was occupying and using airspace over a city-owned hotel, the hotel and not the City had to pay property tax

Recognizing property interests in airspace and permitting airspace to be divided among several owners are the two fundamental premises required for an airspace fee simple to be created at common law.

While the *Ervin* court did not permit the Jacksonville Expressway Authority to take a fee simple absolute in airspace, the court did recognize that the right to use airspace could be partially separated from an interest in the underlying land.<sup>246</sup> Moreover, the court found that JAE condemning the airspace easement would be a taking which requires “full compensation” under Florida law.<sup>247</sup> Although *Ervin* barred the creation of a fee simple absolute in airspace separate from the underlying land, the decision shows that Florida courts recognize a sufficient property interest in airspace to (1) permit the conveyance of a right to use airspace via an easement and (2) to require just compensation because the owner of the underlying land does have a right to exclude others from the adjoining airspace.<sup>248</sup>

*Cloughton Hotel* saw Florida courts move closer towards recognizing two distinct ownership interests in airspace when that airspace adjoins a single terrestrial parcel.<sup>249</sup> In *Cloughton*, the court affirmed that easement owner was only responsible for a pro rata share of property taxes that correlated to the owner’s partial access to and use of airspace above the easement.<sup>250</sup> The *Cloughton* court agreed that the hotel had exclusive use of airspace contained within the envelope of its building and that the municipality’s share of property taxes related to the easement should exclude amounts allocated to the airspace occupied by the hotel.<sup>251</sup> While the *Cloughton* court was considering an easement rather than a fee simple absolute, the decision shows that airspace can be shared among two separate owners under Florida. Moreover, the decision shows that Florida law recognizes that these separate interests can entitle one owner to a larger portion of airspace adjoining a single terrestrial parcel. In *Cloughton*, the hotel was permitted to enclose a portion of airspace with its building so as to have exclusive use of that airspace.<sup>252</sup> In turn, because the hotel was using a larger share of the airspace, Florida law required the hotel to

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attributed to that airspace use); *Ervin*, 139 So. 2d at 139 (finding that a highway authority could condemn an airspace easement over privately-owned land).

<sup>246</sup> *Ervin*, 139 So. 2d at 137–39.

<sup>247</sup> *See id.* at 139.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* (recognizing that airspace above a city-owned sidewalk had been enclosed by a building and therefore subject to the exclusive use of a hotel).

<sup>250</sup> *See Cloughton*, 157 So. 2d at 197.

<sup>251</sup> *See id.* at 198 (finding that a hotel’s exclusive use of airspace must be accounted for when calculating the proportional share of taxes to be allocated to an easement held by the city).

<sup>252</sup> *Id.*

assume a proportionate share of the burdens associated with that exclusive use of airspace including property taxes.<sup>253</sup> *Claughton* shows that the benefits and burdens of ownership associated with fee simples in land—in this case, property taxes and the hotel’s right to exclude the municipality from the portion of airspace occupied by its building—also attach to airspace under Florida law. Moreover, the decision shows that Florida law permits airspace to be divided among several owners who may each have exclusive use of that airspace.

While neither *Ervin* nor *Claughton Hotels*, expressly permit fee simple absolute airspace ownership, both decisions show that Florida courts acknowledge property interests in airspace and permit property interests in airspace to be conveyed through written agreements.<sup>254</sup> Far from foreclosing airspace ownership at common law, both cases establish that (1) property interests in airspace are recognized at common law and (2) property interests in airspace can be divided among several owners.<sup>255</sup> As *Claughton Hotels* shows, Florida courts recognized that the right to exclude and the right to use can attach to airspace. Moreover, *Claughton* shows that the extent of burdens imposed on airspace must correlate to the size of the benefits each airspace owner can derive from her parcel.<sup>256</sup> As in *Claughton Hotels*, the disputed airspace parcels in *Sterling* were contained in discrete units inside of a building.<sup>257</sup> Each of the *Sterling* parcels were conventional units separated from the condominium property by walls, floors, and ceilings. Like the hotel in *Claughton*, these architectural boundaries excluded neighboring airspace owners from using the ACPs.<sup>258</sup> Unlike the airspace easement upheld in *Ervin*, the hotel in *Claughton* and the ACPs in *Sterling* placed airspace under the exclusive dominion of the respective owners by creating physical barriers between that airspace and surrounding airspace parcels.<sup>259</sup>

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<sup>253</sup> *Id.* at 197–98.

<sup>254</sup> *See Ervin*, 139 So. 2d at 139 (concluding that the “property owner must be paid full compensation for any property, including easements, which is taken for the public use” by a municipal agency)

<sup>255</sup> *Claughton*, 157 So. 2d at 197–98 (resolving the airspace use and property tax dispute without turning to a statute); *Ervin*, 139 So. 2d at 138 (finding that an easement in airspace above privately-owned property could be created even if that airspace could not be condemned to create a fee simple absolute).

<sup>256</sup> *Claughton*, 157 So. 2d at 198 (finding that a hotel’s pro rate share of property taxes connected to its use of airspace above a city-owned sidewalk had to be determined by taking into account that both “the City was making no use of the building and should not be called upon to pay any portion of the taxes attributable thereto” and also accounting for the fact that both the hotel and the City made “some use of the part of the lot in question.”).

<sup>257</sup> 255 So. 3d at 435 (noting that the disputed parcels were four separate units that were used as a wine bar, guest gym, laundry facility, and storage room).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

While a strict application of *Ervin* would prohibit a fee simple absolute in airspace, *Ervin* and *Claughton* shows that Florida law does contemplate some forms of airspace ownership.<sup>260</sup> Recognizing a fee simple in airspace would have been a reasonable next step under *Claughton*. Moreover, even *Ervin* could permit non-condominium owners to own units in condominium buildings by relying on other fees like a fee simple defeasible. Condominium statutes were enacted in response to the common law's preference for finding that only a defeasible fee can be granted to the owner of an upper-story parcel in a multi-story building.<sup>261</sup> Although defeasible fees offer fewer protections of an owner's right to use her airspace if a building is destroyed, those fees would still permit owners of non-condominium parcels to enjoy the benefits of ownership without requiring a unit to come within the FCA's scope. Even if Florida law does not permit fee simple airspace ownership, the recognition by the *Ervin* and *Claughton* courts that the right to use and the right to exclude attach to airspace itself can provide non-condominium airspace users with key protections under Florida law.<sup>262</sup>

With the rights to use and to exclude others from airspace, the ability to sever airspace from the underlying land, and the permissibility of conveying at least some property rights in airspace through a written instrument all firmly established by Florida courts, the *Sterling* court had the necessary premises available to uphold the fee simples in airspace under Florida common law. As the *Tatum Bros.* court noted, under Florida law property ownership flows from a legal right to exercise dominion over a space.<sup>263</sup> While the *Tatum Bros.* court could look to the deed held by the landowner, *Ervin* and *Claughton* showed at least some property rights—the right to use and the right to exclude—can also attach to airspace through easement agreements. Permitting fee simple ownership of airspace in *Sterling* would have been in line with the recognition of key property rights in airspace by Florida courts and the general deference Florida courts grant contracts regulating ownership and use rights among several owners. Moreover, the very same public policy and economic interests that urged Florida courts to uphold certain property rights in airspace and also which spurred the nationwide adoption of condominium

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<sup>260</sup> *Ervin*, 139 So. 2d at 138 (finding that an airspace easement could be condemned over privately-owned land); *Claughton*, 157 So. 2d at 198 (allocating property tax obligations attributable to airspace usage based on shared and exclusive use of that airspace).

<sup>261</sup> *See* Ball, *supra* note 21, at 624 (noting a “tendency” among U.S. courts to find the “right of ownership [in airspace, occupied by the floor of a building or a room.] would be defeated by the destruction of the building.”).

<sup>262</sup> *Ervin*, 139 So. 2d at 138; *Claughton*, 157 So. 2d at 198.

<sup>263</sup> *See* *Tatum Bros. Real Estate & Investment Co. v. Watson*, 109 So. 623, 626 (Fla. 1926).

statutes could tip the scales in favor of airspace fee simple under Florida law.<sup>264</sup> Although the *Sterling* court was able to uphold New Sterling's fee simple in the excluded airspace parcels without relying on common law principles, Florida law does provide the tools necessary to permit fee simple in airspace if an airspace parcel is not within the Condominium Act's reach.

### VIII. CONCLUSION

The Florida Condominium Act provides three key benefits to owners: the codification of fee simple in airspace and the ability to regulate property ownership and use with contracts.<sup>265</sup> *Sterling* shows that Florida courts will extend the Condominium Act's provisions to airspace parcels that may, at first blush, seem to be outside of the FCA's scope. *Sterling* suggests that nearly any parcel described in a declaration can benefit from the FCA's provisions, including the ownership of a fee simple in airspace.<sup>266</sup> While, as this note shows, a fee simple in airspace may be possible under Florida common law, *Sterling* shows condominium developers and owners of excluded airspace parcels that the FCA's protections can be relied on despite lingering ambiguity about fee simple airspace ownership at common law.<sup>267</sup> Moreover, the decision shows that Florida courts will extend the contract-based approach to ownership articulated in *Tatum Bros.* and *Legendary Yachts* to mixed-use and mixed-ownership condominiums formed pursuant to the FCA. This contract-based approach provides condominium developers and owners with ample flexibility to privately regulate the benefits and burdens allotted to each owner while preserving the FCA's two most important benefits: the codification of fee simple in airspace and the ability to tailor usage agreements to the needs of all airspace owners who share the same

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<sup>264</sup> See *Condominium Regulation*, *supra* note 2, at 641 (explaining that builders, lenders, and title companies often relied upon newly enacted legislation to "assure the safety of their investments" prior to committing any financing towards development).

<sup>265</sup> *Legendary*, 724 So. 2d at 625–26 (finding that because the declaration was subject to an operating agreement between the parties the rights and obligations created by those agreements governed the dispute).

<sup>266</sup> 255 So. 3d at 436–37 (finding that identification of non-condominium parcels in a declaration was sufficient to bring those parcels into the FCA's scope).

<sup>267</sup> 255 So. 3d at 436 (making no finding on whether Florida common law permits airspace fee simple and finding that, "irrespective of how the common law might have addressed separate owners of surface space and airspace, the disputed airspace in this case was identified and reserved via a declaration of condominium and associated agreement recorded under" the FCA so ownership dispute depended on the FCA).

building.<sup>268</sup> *Sterling* should reassure condominium developers and owners that Florida courts will continue deferring to contracts that regulate land use in a condominium building. The strong protections extended to non-condominium airspace parcels and the contract-based approach taken by the *Sterling* court both signal that Florida courts have a flexible understanding of the FCA that accommodates both mixed-use and mixed-ownership buildings. Moreover, property interests in airspace recognized by Florida courts may provide a path to create fee simple absolute in airspace outside of the FCA. However, given the benefits of fee simple absolute, *Sterling* is an encouraging sign that Florida courts will extend the FCA's provisions to give owners of non-condominium parcels in condominium-dominated buildings the full benefit of a fee simple that can withstand common law challenges. *Sterling* shows that Florida courts are responsive to new developments in airspace use trends that have shifted towards mixed-use and mixed-ownership vertical developments. As new airspace uses emerge, *Sterling* signals that Florida courts will retain a contract-based approach that encourages private regulation of airspace use which can be precisely tailored to the needs of developers, residences, and commercial owners.

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<sup>268</sup> *Id.* at 437 (holding that a written agreement providing for fee-sharing between the non-condominium owner and condominium owners' association controlled a dispute over those fees).