

*Sterling Breeze Owners' Assn., Inc. v. New Sterling Resorts, LLC*, 1D17-1553, 2018 WL 4211801 (Fla. 1st Dist. App. Sept. 5, 2018).

### **First DCA Upholds That Florida Statutes Allows for Airspace to be Excluded From Condominium's Ownership**

In *Sterling Breeze Owners' Assn., Inc. v. New Sterling Resorts, LLC*, Sterling Breeze Owners' Association ("the Association") challenged the notion that New Sterling Resorts, LLC ("New Sterling Resorts") can own four ground-floor commercial parcels in fee simple if they are outside of the condominium form of ownership. The Association claimed that because the ground-floor parcels were airspace, they could not be privately owned in fee simple apart from the condominium and therefore the ground-floor parcels needed to be divested from New Sterling Resorts and given to the Association.

In 2008, a developer recorded a Declaration of Condominium ("Declaration") for a 22-story high-rise called Sterling Breeze. The Declaration stated that the building included 145 residential units and four ground-level associated commercial parcels ("ACPs"). The ACPs were retained in fee simple by the developer and the Declaration included an ACP easement and reservation agreement between the Association and the developer.

The Association claimed that Chapter 718 of the Florida Statutes requires that all airspace be included in the condominium's ownership. However, the Declaration in dispute subjected nearly all of the airspace to condominium ownership but excluded the ACPs for the purpose of outside ownership. The trial court determined that the Florida statutes do not require all the airspace to be owned by the condominium but rather, allows for some airspace to be excluded from the condominium's ownership. The First DCA agreed with the trial court's analysis.

The Association also based its claim on the notion that Florida's common law does not allow air space to be owned in fee simple separate and apart from the ground surface. The First DCA concluded that the common law theory would not prevail for three reasons: (1) common law must yield when it is inconsistent with state law; (2) the Declaration specifically identified and reserved the ACPs as a commercial space reserved for the developer; and (3) the Association signed an easement and reservation agreement acknowledging that the commercial space would be reserved by the developer. The First DCA agreed with the trial court's statutory interpretation and held that Florida law does not require divestment of the ACPs to the Association.