



IAAO

SETTING THE RECORD STRAIGHT ON FEE SIMPLE



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I. INTRODUCTION

This IAAO paper addresses issues regarding the term *fee simple*, or more appropriately, *fee simple absolute*. “Although it is probably good practice to use the word ‘absolute’ whenever one is referring to an estate in fee simple that is free of special limitation, condition subsequent, or executory limitation, lawyers frequently refer to such an estate as a ‘fee simple’ or even as a ‘fee.’” (Bergin and Haskell 1984, 24) “The term ‘fee simple’ or ‘estate in fee simple’ is a generic term.” (*Jensen v. The City of New Albany* 2007).

Ongoing controversy regarding appraising the fee simple estate has prompted the need for further discussion on this topic. Specific issues arising from the term *fee simple absolute* include whether a property should be valued as if vacant, whether the term assumes any encumbrances on the property, and whether fee simple implies market rent. The fee simple estate is the foundation of what assessors in many jurisdictions are asked to examine, and clarifying this concept will assist assessors, appraisers, the courts, and others in the appraisal community in maintaining consistency, credibility, and uniformity in assessment and appraisal practices.

II. DEFINITIONS

A. Legal Definition

1. History of the Term

The term *fee simple absolute* dates to the early 1300s in England (Garner 2014, 733–734; Wolf 2009, 13–1). Estates arose from feudal law in England centuries ago and were carried over to the United States. The history of fee simple absolute and the other estates traditionally recognized in the United States is long. The likely first reference to fee simple in the courts in the United States was in a 1714 Maryland case, *Smith’s Lessee v. Broughton*. Current legal texts may not use identical terminology, but the definitions have similar meanings that emphasize absolute control, duration, and inheritability. “Today, the fee simple has the same formal characteristics as it had at common law after the enactment of the Statute of Wills in 1540; it is an estate of general inheritance—alienable, devisable, and descendible—and of potentially infinite duration.” (Moynihan and Kurtz 2002) The terms *fee simple*, *fee simple absolute*, and *fee* are used interchangeably to reference an estate in which the holder of the estate has complete control of the disposition of the property for a potentially infinite duration.

2. Definition

The definition of fee simple in the first *Restatement of Law: Property* is as follows:

An estate in fee simple absolute is an estate which has a duration potentially infinite, or if limited in favor of a natural person, would be inheritable by his collateral as well as by his lineal heirs (American Law Institute n.d.).

Similarly, *Black’s Law Dictionary* defines fee simple as,

An interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs; esp., a fee simple absolute. (Garner 2014, 733)

In *Introduction to The Law of Real Property*, fee simple is described as,

... the largest estate known to law. It denotes the maximum of legal ownership, the greatest possible aggregate of rights, powers, privileges, and immunities which a person may have in land. It is an estate of potentially infinite duration in the holder's successors who acquire the holder's interest in the property either by conveyance, devise, or inheritance. The three hallmarks of the estate are that it is alienable, devisable, and descendible. (Moynihan and Kurtz 2002, 34)

B. Appraisal Definition of Fee Simple

1. History

The appraisal definition of the term *fee simple* differs from the legal definition, but the change in the definition is relatively recent. Initially, the appraisal definition aligned with the legal definition of fee simple absolute; however, in the 1980s the phrase *unencumbered by any other estate or interest* was appended to the appraisal definition. That change marked the divergence from the legal meaning and created the confusion addressed by this paper. The following chronology describes the transformation of the definition in the appraisal industry.

- *Appraisal Terminology*, 1938. Absolute fee simple. The largest possible interest or estate in property, subject, however, to the limitations of Eminent Domain, Escheat, Police Power, and Taxation; an inheritable estate. (American Institute of Real Estate Appraisers 1938)
- *Appraisal Terminology and Handbook*, 1954 Fee simple. An absolute fee: a fee without limitation to any particular class of heirs or restrictions. (American Institute of Real Estate Appraisers 1954)
- *Appraisal Terminology and Handbook*, 1962 and 1967; *Real Estate Appraisal Terminology*, 1975, 1981, and 1984. Fee simple. An absolute fee; a fee without limitations to any particular class of heirs or restrictions, but subject to the limitations of eminent domain, escheat, police power, and taxation. An inheritable estate. (American Institute of Real Estate Appraisers 1962, 1967; Boyce 1975, 1981, 1984)
- *The Appraisal of Real Estate*, 1983. A person owning all of the rights is said to have fee simple title. Fee simple title is regarded as an estate without limitations or restrictions. (American Institute of Real Estate Appraisers 1983)
- *The Dictionary of Real Estate Appraisal*, 1984. Fee simple estate. Absolute ownership ***unencumbered by any other interest or estate***; subject only to the limitations of eminent domain, escheat, police power, and taxation. (American Institute of Real Estate Appraisers 1984)

- *The Appraisal of Real Estate*, 1987, 1992, and 1996. A person who owns all the property rights is said to have fee simple title. A fee simple estate implies absolute ownership ***unencumbered by any other interest or estate***. (American Institute of Real Estate Appraisers 1987; Appraisal Institute 1992, 1996)
- *The Dictionary of Real Estate Appraisal*, 1989. Fee simple estate. Absolute ownership unencumbered by any other interest or estate subject only to the four powers of government. (American Institute of Real Estate Appraisers 1989)
- *The Dictionary of Real Estate Appraisal*, 1993, 2002, 2010, and 2015. Fee simple estate. Absolute ownership unencumbered by any other interest or estate; subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat. (Appraisal Institute 1993, 2002, 2010, 2015)
- *The Appraisal of Real Estate*, 2001. The most complete form of ownership is title in fee. Such ownership establishes an interest in real property known as fee simple interest, that is, absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat. (Appraisal Institute 2001)
- *The Appraisal of Real Estate*, 2008 and 2013. The most complete form of ownership is the fee simple interest, that is, absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat. (American Institute of Real Estate Appraisers 2008, 2013)

In 1983, the American Institute of Real Estate Appraiser's definition of fee simple omitted the reference to inheritability and duration of the estate. The 1984 edition of *The Dictionary of Real Estate Appraisal* and the 1987 version of *The Appraisal of Real Estate* were the first publications to change from the long-established appraisal and legal definition of fee simple by adding the phrase *unencumbered by any other interest or estate* to the appraisal definition.

2. Appraisal Industry Definition

The current definition in *The Dictionary of Real Estate Appraisal* defines fee simple estate as,

Absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat (Appraisal Institute 2015).

As noted above, the appraisal definition no longer references inheritability and duration of the estate and now includes the phrase *unencumbered by any other interest or estate*. The final clause in the definition, which references the four powers of government (taxation, eminent domain, police power, and escheat), is simply an acknowledgment that all privately owned real estate, regardless of the estate in which it is held, is subject to those governmental limitations.

3. Unencumbered by any other Interest or Estate

Unencumbered by any other interest or estate is a problematic phrase that has moved the definition away from the emphasis on infinite duration and inheritability to an implication that unspecified interests and encumbrances will result in something other than the fee simple estate.

Interests and estates are somewhat generic terms and can be defined as,

Interest. “The Property Restatement, following general legal usage, uses the term ‘interest’ to designate any single right, privilege, power, or immunity or, generically, ‘varying aggregates of rights, privileges, powers, and immunities’” (Stoebuck and Whitman 2000).

Estate. “The amount, degree, nature, and quality of a person’s interest in land or other property; esp., a real estate interest that may become possessory, the ownership being measured in terms of duration” (Garner 2014, 664)

Regarding interests, a property held in fee simple may convey in a sale and transfer title encumbered with a lease or other interest without changing the fee simple estate. Although an interest encumbering the estate, such as an easement, a restrictive covenant, or a lease may lessen or enhance the value of the estate, it does not change the fact that a property is held in fee simple.

The courts also have noted the discrepancy between the legal and appraisal definitions of fee simple.

The distinction between “fee simple” and “leased fee” is one drawn in the context of appraisal practice. The appraisal industry uses the term “fee simple” to refer to unencumbered property—or to property appraised as if it were unencumbered. This distinction is not one recognized by the law, however. A “fee simple” may be absolute, conditional, or subject to defeasance, but the mere

existence of encumbrances does not affect its status as fee simple. (Meijer Stores Ltd. Partnership v. Franklin Cty. Bd. of Revision 2009; HIN, L.L.C. v. Cuyahoga Cnty. Bd. of Revision 2014)

As for the fee simple estate being encumbered by another estate, the concept is illogical.

A fee simple absolute estate cannot be encumbered by another lesser estate (life estate, fee simple determinable, fee simple subject to condition subsequent, and the like). It is either one estate or the other. In the case of a leasehold “estate,” the fact that a lease is present, regardless of whether it is identified as a leasehold interest, a leasehold estate, or fee simple subject to a lease, does not eradicate the underlying fee simple absolute estate.

A more likely interpretation of the *unencumbered* phrase introduced in 1984 is that the words *interest* and *estate* were used synonymously as is often the case even today. By interpreting those words as synonymous, they can be plausibly interpreted to mean that the fee simple estate cannot be encumbered by another freehold estate, such as a life estate, a fee simple determinable, a fee simple subject to condition subsequent, or any other estate. A leasehold interest is not a freehold estate and, thus a lease does not take away from the fee simple estate but rather provides the monetary benefit of income to the fee simple owner.

III. IMPLICATIONS OF THE APPRAISAL DEFINITION

A. Introduction

It is rare, if ever, that an appraisal assignment for property tax purposes or otherwise requests a value of an unencumbered estate. If fee simple absolute were to imply valuing an unencumbered estate, the appraiser would value the property ignoring utility easements (i.e., gas, electric, water, and the like), access easements, and restrictive covenants (i.e., deed restrictions). Whereas many appraisal assignments request a value of the fee simple estate, it is unlikely that the purpose of the appraisal is to value the property ignoring easements and restrictive covenants, among other

encumbrances. Thus, the appraiser is caught between conforming to the appraisal industry definition of fee simple (ignoring all encumbrances) and achieving the intended goal of the appraisal, which likely seeks a value considering utility and access easements and any restrictive covenants. This illogical result arising from the appraisal definition is pointed out in *The Appraisal of Real Estate*.

The complexity of real property ownership in the United States today suggests that a true fee simple interest seldom exists because nearly all properties are encumbered to some degree by easements, reservations, or private restrictions. ... Even so, many assignments call for the valuation of the fee simple interest.
(Appraisal Institute 2013, 111)

In sum, the important aspect to note is that the fee simple estate has nothing to do with leases, mortgages, liens, and deed restrictions or easements or any other encumbrance or distribution of property rights to others. The typical homeowner owns a home in fee simple absolute, and the deed reflects that estate. The existence of a mortgage does not mean the owner has less than a fee simple absolute estate. The home also has utility easements for water, power, and cable; however, the owner still holds the property in fee simple absolute. More specifically, the property is owned in fee simple absolute *subject to* the mortgage and the utility easements. And if the home is leased, then the property is owned in fee simple absolute *subject to* the lease. A fee simple estate or any other estate is not defeated by the existence of encumbrances, including a lease.

B. Fee Simple Absolute Estate and Leased Fee Interest

The existence of a lease and the separation of real estate rights between a landlord and a tenant does not destroy the fee simple absolute estate. *Leased fee* is a term defined by *The Dictionary of Real Estate Appraisal* as,

The ownership interest held by the lessor, which includes the right to receive the contract rent specified in a lease plus the reversionary right when the lease expires. (Appraisal Institute 2015, 128)

*The term is used by appraisers as a basis to estimate the lessor's value subject to a lease. It is based usually on the capitalization of net operating income (NOI) or the sum of the present value of the forecast NOI over a holding period and the present value of the reversion. **In reality, leased fee is synonymous with fee simple, subject to a lease** when possession but not the ownership is temporarily transferred to another. (IAAO [International Association of Assessing Officers] 2018, 9) (emphasis added)*

As noted, leased fee is actually a fee simple estate subject to a lease. (Any estate may be subject to a lease—life estate, fee simple on condition subsequent, and so on). Therefore, an appraiser may use leased fee properties as comparable sales when estimating the market value of a fee simple estate. A long-term lease may reduce a property's sale price because the contract rent is less than market rent at the time of sale. Another lease may increase the property's sale price because the contract rent is above market rent at the time of sale. In a jurisdiction where market rent is the criterion for the calculation of rental income in an appraisal, sales of leased properties can and should be used as comparables, provided economic adjustments are made for above- and below-market rents, but this is not a fee simple issue. Regardless, when the real estate sells, the owner transfers his interest in the fee simple estate to the new owner, who then receives the contract right to receive rent. The finite term of possessory interest (leasehold) remains with the tenant so long as the lease remains in effect. Ultimately, the possessory interest reverts back to the owner for an infinite duration, or until the owner chooses to convey the right temporarily in a contract.

C. Fee Simple and Vacancy

One of the significant controversies that has emerged from the ambiguous phrase *unencumbered by any other interest or estate* is the interpretation that a property encumbered by a lease is not fee simple, and that appraising a property in fee simple means one must assume the property is unencumbered by a lease, that is, vacant. This concept has come to be known as the dark store

theory. Under this theory of the fee simple estate, multitenant office buildings and apartment buildings would be appraised as vacant properties even if fully occupied.

Valuing the fee simple estate does not require valuing the property as a vacant building. Fee simple defines an estate. It is not synonymous with dark value or liquidation value. Fee simple estate is a property rights concept that has nothing to do with the status of occupancy. When a property transfers title, it still is considered to be held in fee simple whether the property is currently occupied, vacant, or under lease.

The interpretation of fee simple as meaning vacant, even when the property is not, assumes a condition that is contrary to what exists, a hypothetical condition. That is not to say an appraisal assignment cannot request a go-dark value or that the property be appraised as vacant. Unless such an analysis is part of the defined scope of work, however, the phrase *fee simple absolute* should not imply vacant when the subject property is occupied. The *Uniform Standards of Appraisal Practice (USPAP)* (TAF [The Appraisal Foundation] 2018) defines hypothetical condition as,

A condition directly related to a specific assignment, which is contrary to what is known by the appraiser to exist on the effective date of the assignment results, but is used for the purpose of analysis.

Comment: Hypothetical conditions are contrary to known facts about physical, legal, or economic characteristics of the subject property; or about conditions external to the property, such as market conditions or trends, or about the integrity of data used in an analysis. (TAF 2018, 4)

D. Fee Simple, Real Estate and the Bundle of Sticks

In an appraisal context, the fee simple absolute estate is sometimes described as meaning the holder of the estate has the complete bundle of rights or bundle of sticks. This description, although not incorrect, is easily misinterpreted. The bundle of rights or bundle of sticks metaphor originated as a description of real estate, not the fee simple estate. It depicts real estate as

containing a mixture of individual rights, such as the right of possession, right to sell, right to mortgage, right to lease, right to use the property, and so forth. (Smith 1956; Stoebuck and Whitman 2000, 6; Johnson 2007)

When fee simple absolute is described as the “entire bundle of rights,” the description means that, consistent with the legal definition of fee simple absolute, the owner has not transferred away any rights limiting the disposition of the property, that is, the estate still has a potentially infinite and inheritable duration. That infinite duration is what sets fee simple absolute apart from the other estates that include conditions that may result in the loss of the ownership of the property.

Of course, the fee simple owner may decide to mortgage his estate or incur it in various ways and while he would still be said to have a fee simple its utility would be greatly reduced. (Cribbet and Johnson 1989, 24)

An alternative to the description of fee simple absolute as all of the bundle or rights, is the metaphor of a pin cushion. The pin cushion is the estate, and the pins are interests. The existence or absence of certain pins does not detract from the pin cushion (estate). When a property transfers, the pin cushion conveys, but it may be subject to various interests like a mortgage or an easement. These pins may impact the property’s value positively or negatively, but none of these interests destroys the fee simple estate or changes it to a lesser estate.

E. Fee Simple is not a Value Concept

Fee simple is not synonymous with market value. Fee simple is an estate and a property rights concept, not a value concept, although some appraisers have mistakenly used fee simple to imply “at market.” Market rent or market value is precisely that, and fee simple should not be used interchangeably with those terms. The fee simple estate can be valued assuming market rents just as an appraiser can value the fee simple estate of a property assuming the rents in place and the

vacant units at market rent. The valuation performed is based on the scope of work and what is required by a taxing jurisdiction. More appropriately, an appraiser would define the scope of work accordingly, i.e., market value of the fee simple estate or fee simple estate assuming the subject property is vacant and available, if that is what is required. For the majority of taxing jurisdictions, what is required is fee simple absolute considering rents at market.

F. Property Tax is Typically Based on Assessing the Property to One “Owner”

One ubiquitous concept in property tax is that the property is assessed to one owner, irrespective of any fragmentation of the interests contained within the real estate. For example, if a property is held in a life estate along with a remainder interest, the life estate holder is assessed as though she owns the property in fee simple absolute. Likewise, if a property is leased, the holder of the underlying fee simple estate is assessed for both the interest held by the landlord (the leased fee interest) and the tenant (the leasehold interest). Similarly, the fragmentation of rights held by the mortgagee and mortgagor also is ignored.

Real estate is commonly split up into separate legal interests held by different persons—mortgagor and mortgagee, landlord, tenant, and subtenant, holders of various easements over the land, and so forth. Here, too, one would think, an allocation problem is presented; for if these legal interests are regarded as so many separate properties, must not the unitary value of the physically undivided land be apportioned among them? Contrary to expectation, the answer is that the general property tax ordinarily pays no attention to these divisions of interest and assesses the property as if it were owned in fee simple. Yet even the property tax stops short of totally disregarding the partial legal interests. (Bonbright 1934)

From this perspective, it is irrelevant whether the term *fee simple absolute* implies the absence of a lease. For property tax purposes, the appraiser ignores the existence of the lease and values the property to one owner, in fee simple.

Assessing the property to one owner does not mean to say that different ownership of a physically separate portion of the property should be treated as such. For example, where title to

the improvements and the underlying land are held by different owners, each should only be assessed for the portion they own.

IV. CONCLUSIONS

The appraisal industry is too closely associated with the legal industry and the general real estate industry for different definitions to exist among the three. Review of the real estate industry shows that brokers and real estate salespersons, real estate financing persons, real estate attorneys, and the courts all understand fee simple to have the meaning set forth by the legal definition, which has remained constant throughout the centuries. Statutes governing property tax can also be assumed to follow the legal definition. There is no rationale for the appraisal industry to create its own definition for a term universally understood by the other participants in the real estate industry. None of this is to say that appraisers can ignore statutory or judicial interpretations of fee simple or any other appraisal concept. However, often legislative bodies and courts look to the appraisal industry for guidance in these areas.

Once the definition of fee simple absolute is clarified, it is evident that fee simple is a property rights concept that does not mean vacant or unencumbered by a lease and it is not a value concept to be used interchangeably with market value. It is important to understand these distinctions so that the appraiser or assessor can properly define the appraisal problem. An appraiser can value the fee simple ownership of an occupied apartment building assuming leases in-place, market rents, or a lease-up period. The mere fact that there are renters in a commercial property does not detract from fee simple ownership. In other words, if that apartment building, whether occupied or vacant, were to convey in a sale, the deed would state that the property

transferred in fee simple. What is being valued is based on the scope of work of the assignment. Whether the appraiser or assessor considers easements or above- or below-market leases is defined by the appraisal assignment and, in the case of property taxation, by the jurisdictional requirements mandated by statutes and the courts.

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