To be within the purview of §112.061, F. S., and to be compensated thereunder, state, county and municipal law enforcement officers who testify in any court of this state must be official witnesses who testify concerning matters arising as a direct result of their employment or duties as law enforcement officers. "Generally the duties of a public office include those lying fairly within its scope, those essential to the accomplishment of the main purpose for which the office was created, and those which, although incidental and collateral, serve to promote the accomplishment of the principal purposes." (67 C.J.S. 396, §110; Hall v. State, 136 Fla. 644, 187 So. 392, text 398). An official witness testifying concerning matters arising as a direct result of official duties of law enforcement officers, relates to the testifying concerning information by an officer in connection with his administration of enforcement of statutes and laws under which he operates. A sheriff would be an official witness as to all facts and circumstances coming to his knowledge or attention in connection with his enforcement and administration of the statutes and laws under his jurisdiction; the same would be true as to deputy sheriffs, constables, deputy constables, highway patrolmen, and other law enforcement officers. State travel pay is divided into three classes of travel, as defined in §112.061(2), (k)(l)(m), F. S., as amended in 1963. Class "C" travel is defined in paragraph (m) as "travel for short or day trips where the traveler is not away from his official headquarters overnight." Under class "C" travel no per diem is paid, but the traveler receives an allowance for meals as provided in §112.061(b), F. S.; however, "no allowance shall be made for meals when travel is confined to city or town of the official headquarters or immediate vicinity."

Public officers within the purview of §902.19(4), F. S., who are also within the purview of §90.141, F. S., who appear as official witnesses before grand juries and prosecuting officers authorized to file informations, are compensated under §112.061, F. S., as amended, and testify as to matters coming to their attention as a direct result of their being law enforcement officers. It is noted that said §90.141, F. S., also includes municipal officers who do not appear to be within the purview of said §902.19, F. S., and would be compensated under said §90.141. Payments made under and pursuant to §90.141, F. S., as implemented by §112.061, F. S., as amended, would be paid from the same fund as witnesses before grand juries and prosecuting attorneys are now being paid.

064-70—June 1, 1964

TAXATION

CONDOMINIUMS OCCUPYING AIR SPACE ELEVEN OR MORE FEET ABOVE GROUND—TAX STATUS—
§§711.04(1), 711.19; CH. 711, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:
Are condominium parcels, as defined in §711.04(1), F. S., in a condominium building constructed in air space above the surface of the ground by which it is supported, subject to separate taxation under §711.19, F. S.?

A condominium parcel, as defined in §711.04(1), F. S., "is a separate parcel of real property, the ownership of which may be in fee
simple, or any other estate in real property recognized by law.” It seems to follow from this provision in §711.04, F. S., that for a condominium parcel to be real property so that its owner will be vested with “an estate in real property recognized by law,” the condominium building from which the condominium is derived must likewise be an estate or interest in real property recognized by law. It appears from the file handed us with your request for opinion that each and every condominium parcel in the proposed condominium building will be conveyed by the condominium ownership to the condominium parcel owner by warranty deed. This brings us to the question of the status and nature of a parcel of air space, sufficiently described by metes and bounds, located eleven or more feet above the ground or earth, and whether it will constitute an interest in real property, so that condominium parcels conveyed therein will be owned by the condominium purchaser “in fee simple or any other estate in real property recognized by law,” within the intent and purview of §711.04(1), F. S., above referred to.

We appear to be here confronted with the question of the right and authority of an owner of a parcel of land, held by him in fee simple absolute, to convey to another “in fee simple, or any other estate in real property recognized by law,” that portion of his said real property extending from twenty feet, or other specified distance, above the ground level of his said parcel of land, upward for a specified distance, for the purpose of constructing, within said space from 20 feet upward, and maintaining therein a condominium, within the intent and purview of Ch. 711, F. S., and selling condominium parcels therein as contemplated by said Ch. 711. To conform to the requirements of said chapter such property must “vest in the purchaser a fee simple title or other estate in real property recognized by law,” so that the said purchaser will be able to convey to the purchasers of condominium parcels, as defined in §711.04(1), F. S., an estate “in fee simple, or any other estate in real property recognized by law.” (Emphasis supplied.)

The statement is made in 2 Tiffany Real Property, 3rd Ed. 624 and 625, §626, that “parts of a building may be owned by different persons in fee simple, as where an upper floor belongs to one person, and the lower to another, or separate rooms, or even parts of rooms, belong to different persons.” In 16 Am. Jur. 443, §9, it is stated that “a person who owns the entire estate in real property may sell and convey any part of it. It may be divided horizontally, perpendicularly, or in any manner according to the will of the owner, even to the extent of granting a freehold interest in a part of a building, although conveyances of the latter kind, like leases of apartments in buildings, must be construed according to the intention of the parties and with reference to the subject matter upon which they operate . . . .” In 26 C.J.S. 605, §15, the statement is made that a “grantor has the right to divide his holdings by horizontal planes or lateral lines.” (Emphasis supplied.)

It is stated in 1 Thompson on Real Property, Perm. Ed., 70, §63, citing Doe v. Burt, 1 Term Reports 701, text 703, that “in London different persons have different freeholds over the same spot; different parts of the same house are let to different people. That is the case in inns of court. Now, it would be very extraordinary to contend that if a person purchased a set of chambers, then leased them, and afterwards purchased another set under them, the after purchased chambers would pass under the lease.” Like

In 73 C.J.S. 194, §13, it is stated that a "landowner owns as much of the air space above the ground as he can occupy or use in connection with the land, and his right generally cannot be abridged. The owner of the surface of land has been said to own to the center of the earth, which ownership cannot ordinarily be interfered with but with respect to ownership below the surface, it has been held that the owner's title does not extend beyond a depth which the owner may reasonably use." It was stated in Walters v. Sheffield, 75 Fla. 505, 78 So. 539, text 541, that "by the common law also several sorts of estates or interests may exist in the same fee, as that one person may own the ground or soil, another the structures thereon, another the minerals beneath the surface, and still another the trees and wood growing therein." Permanent and perpetual easements have been recognized (28 C.J.S. 715 and 716, §51). They have been held to be freehold interests (28 C.J.S. 621, §1, note 16). Although perpetual leases are not favored in law, nevertheless where the intention to create one is clear and unambiguous, it will be deemed valid and enforceable. (51 C.J.S. 606, §61). In State v. Jacksonville Expressway Authority, Fla., 139 So. 2d 135, it was held that the Jacksonville expressway authority might acquire "easements through the air in perpetuity provided they are found to be adequate and necessary to accomplish the purposes authorized by the expressway statutes.

Where the real property in question is to be located 20 feet or more above the ground, as is contemplated by the above question, the question of ingress, egress and regress, from and to the property, would seem to become a material problem, especially if not provided for by the deed and contract documents by and between the parties to the transaction. Easements and rights necessary for the enjoyment of lands conveyed from an owner to a grantee are deemed by law to pass with the making of a conveyance of land (28 C.J.S. 708-711, §45). Stated another way, where real property is conveyed an easement of ingress, egress and regress necessary for the contemplated use of the property sold arises by implication (28 C.J.S. 695-699, §35). This is especially true where a grantor sells and conveys to a grantee lands entirely surrounded by other lands of the grantor. (28 C.J.S. 699 and 700, §35). It is a general rule that a conveyance of real property carries with it by implication all incidents rightfully belonging to, and essential to the full enjoyment of, such property, at the time of conveyance, including its contemplated use. (26 C.J.S. 902-905, §106). See also 1 Thompson on Real Property, Perm. Ed. 630, et seq., §§390-393; and 17 Am. Jur. 645, et seq., §§37-57.

From the above and foregoing authorities it is evident that
real property sells and transfers to another all his right, title and interest in and to that real property lying a specified distance above the level of the ground, for example, all his right, title and interest in said property lying 20 feet or more above the level of the ground, to be used for the construction of a condominium type apartment building, and the sale and conveyance of condominium parcels therein, under, in accordance with, and pursuant to Ch. 711, F. S., there arises an implied grant of a perpetual easement or right to build and install upon the lands retained by the grantor such foundations, footings, and other things necessary, including rights of way for ingress, egress and regress, to permit the construction of the contemplated condominium type apartment building, and its operation as such condominium type building in perpetuity. However, where the parties to such conveyance of real estate interest, lying 20 or more feet above the level of the ground, contract and make provision for such foundations, footings and other necessary things, to run and continue the life of the said conveyance of property lying 20 feet or more above the level of the ground, such agreement would seem to replace and supersede the said implied grant of a perpetual easement above-mentioned.

It is provided in §711.19, F. S., that “property taxes and special assessments assessed by municipalities, counties and other taxing authorities shall be assessed against and collected on the condominium parcels and not upon the condominium property as a whole . . .” The condominium building contemplated by the question herein considered, discussed and determined is within the purview and intent of said §711.19, F. S., so that the condominium parcels therein mentioned are subject to separate taxation under said §711.19, F. S. The above and foregoing question is answered in the affirmative.

064-71—June 4, 1964

REGULATION OF TRADE AND COMMERCE

SECTION 494.08(5), F. S.—RECEIPT OF COMMISSION, BONUS, OR FEE BY PERSONS NOT LICENSED AS MORTGAGE BROKERS—§§494.02(3), 494.08(5), 494.04(1), F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Is it violative of §494.08(5), F. S., for a licensed mortgage broker to pay the costs and fees for a real estate broker to attend a sales course and in exchange for the advancement of such costs, to enter into an agreement with such real estate broker whereunder the real estate broker agrees to refer a designated number of applicants for mortgage loans to the licensed mortgage broker advancing the tuition fee in behalf of the said real estate broker?

2. Is such mortgage broker prohibited from entering into an agreement with the real estate broker whereunder the real estate broker would receive either coupons, stamps, or “bonus points” in exchange for his referral of a mortgage loan transaction to the mortgage broker, where such coupons or bonus points are exchangeable for gifts by the recipient real estate broker?

Presumably, since the real estate broker is not permitted to