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Ownership is a Habit of Mind: How Community Land Trusts Expose Key Consensual Fictions of Urban Property

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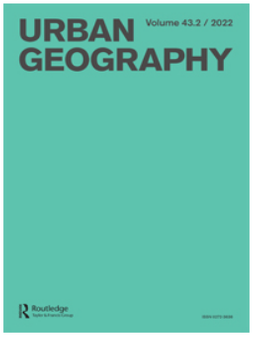

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Ownership is a habit of mind: how community land trusts expose key consensual fictions of urban property

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ABSTRACT

Community land trusts ("CLTs") have garnered attention as a novel, non-state organizational mechanism for enabling permanently affordable homeownership. In canonical form, they separate a home from the land upon which it sits, holding the land in trust and selling the home for its value without the land. Additionally, CLTs use ground lease restrictions to constrain the resale process and enforce long-term reproduction of affordability. Herein, we argue that given the "actually existing" character of CLT practices, the legal vocabulary CLTs use is not most directly nor most accurately descriptive. The nature of the present intervention is emphatically not to say that CLTs have acted in bad faith; rather, we identify a set of fictions about land and rights encoded into the law regarding real property. Our intervention highlights how the nature of these fictions theoretically constrains the power of canonical community land trusts to transform society and forces critical reflection on specific financial strategies CLTs may attempt.

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Introduction

The community land trust ("CLT") model offers a novel strategy for facilitating low- and moderate-income homeownership and community control in urban areas. At the core of the model is the idea that many urban residents cannot afford – and may in some cases even be relatively indifferent to – the speculative future development potential that comes along with a parcel of land when buying a new home. CLTs legally separate the land and any future development potential from the home, holding the land in trust and selling the home (minus the land's price) to a moderate-income buyer who otherwise could not afford it. In doing so, CLTs simultaneously facilitate purchases for a new economic stratum of homebuyer and sequester the speculative development potential (and its associated price increases) in order to enable "permanently affordable" housing. The emergence of CLTs in the United States has been driven by low-income communities seeking to exert control over the dynamics of neighborhood development and to avoid displacement.

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Leveraging reflections from an ongoing study of CLTs in Minnesota, USA, this article explores how the CLT model takes advantage of, and indeed in some particulars depends upon, a powerful fiction embedded in ideologies of real property in the United States and more widely the late-modern capitalist world. Straightforwardly, that fiction is that the relation of property is an intrinsic characteristic of the physical object called land, and that the relation survives even when the putative owner of the land (in this case, a CLT) retains no right of use, no residual power to exclude use, no power to develop or improve the land, and no unilateral power to change the terms of the agreement about the land.

Under these conditions, the property interest in land might seem quite attenuated. However, in the CLT community, the underlying asset (the land, but with nearly all rights to use or benefit from it unavailable) is typically conceptualized and booked on asset sheets as retaining and even gaining exchange value in the speculative land market over time, just as though the property was unencumbered. As discussed below, realizing the potential exchange value in CLT-owned land can (in principle) take decades or even centuries.

We argue that instead of conceptualizing the CLT transaction as the organizations themselves typically do, as the creation of a "booked" land asset distinct from the home, it is analytically more straightforward to characterize the transaction as separating various interests in the entire house-plus-land package–the metaphorical "sticks" in the "bundle of rights" that Blackstone (1765/2001) famously articulates in relation to property. Nearly all rights, including use and exclusion rights for the whole package of house-plus-land, go to the "homeowner." Rather than characterizing the remaining rights as being reserved to the CLT, however, we argue that in actual practice these other rights are most accurately understood as "buried." Rights to improve the land or use it commercially, for example, are in practice rendered unusable *by any actor* for as long as the land remains in the trust's portfolio. In the normal course of action, CLTs retain only a very marginal actually practiced interest in the land they supposedly own.

Despite the fact that the CLT pays a substantial sum of money for this strangely constrained asset (typically, approximately 30% of the total market valuation of house plus land), that residual asset has little "actually existing" exchange value to *anyone*. Notwithstanding this fact, however, CLTs act and are perceived by partners including banks and governments, as though their immobile property interest in the land is highly valuable. This includes accounting for these land assets at values that, because they are retained by the CLT as illiquid and non-exchangeable assets (to preserve affordability), are difficult to logically justify.

In the text that follows, we first explicate the various ways that real property is typically conceptualized, both in law and prior scholarship. We then trace in detail the financial model of the canonical CLT transaction, with notes about how that canon is most often altered. After considering the canonical explanation of the mechanics of the transaction, we offer our own alternative conceptual diagramming of the same financial process. We argue that our diagram better fits the "facts on the ground" about how use and decision-making regarding CLT-encumbered property actually proceed in the real world. Finally, we reflect on the implications of this better match both for CLTs and, more broadly, for other ongoing analytical and practical experiments in urban land governance.

We stress that in making this argument, our aim is not to characterize CLTs as somehow unethical, dishonest, or exercising malpractice in their actions. The authors

of this paper are, broadly speaking, advocates for efforts like CLTs to promote the affordability of housing and other land uses. CLTs follow the law and the common sense of the property market in establishing best practices. Rather than criticize these actors, we attempt to name the specific and precise way in which ideologies of property have obscured the "actually existing" nature of property in land to CLT staff, homeowners, and partners. Locating this obscuring or elision with precision in turn enables a more accurate discussion of the location of transformative political and economic potential in the CLT model.

Community land trusts, property, and land

The urban CLT model for affordable housing emerged in the 1980s as an iterative variation of rural agricultural land trusts and collective farms: for example, Fannie Lou Hamer's Freedom Farm Collective in Mississippi (Mills, 1994), and, crucially, the New Communities land trust in Georgia (Davis, 2010). These agricultural land trusts developed as part of the civil rights movement in the United States (Davis, 2010). Such agricultural trusts were in turn a specific variation in a long line of post-civil war attempts by Black Americans to secure land rights (and economically viable livelihoods) at intergenerational time scales (McCutcheon, 2011). The first durable urban CLT in the United States was formed by a group of Black community leaders in a depressed neighborhood near downtown Cincinnati, Ohio, who were seeking to maintain affordability and control in response to what they saw as encroaching downtown redevelopment (Davis, 2010).

While the CLT approach to separating ownership of the home from the land[1] can seem like a radical departure from the urban housing market, seeing it as an incremental evolution in this longer tradition of fostering community control through community land ownership emphasizes two key points that will be relevant below. The first is that the innovation at the heart of the CLT model – the separation of house from the land it sits upon, so that the land can be sequestered in trust – was not arrived at directly. Instead, it was an attempt to apply an existing rural and agricultural model for community control and decommodification of land to an urban housing context.[2] In the United States, the urban CLT model involved minor tweaks to the preceding rural one in two registers (rural to urban, agricultural to housing) in order to make the model function properly.

The second, related point is that the goals of community control and permanent affordability were in the foreground as the urban CLT model was initially articulated. Early urban CLT advocates focused on the plausible belief that community ownership would facilitate community control, in contrast to the imminent alternative of ownership by distant and uncaring landlords as well as profit-oriented property developers. The community that these advocates imagined was embodied in the CLT organizational board, including (among others) homeowners and non-homeowner community residents. These trusts were explicitly political vehicles acting to preserve community autonomy and influence in the context of rapidly evolving urban development debates. As a result, the ontological nature of land and property was not a prominent concern to these advocates; this has not changed over the intervening decades. Few in the CLT movement have had a strong incentive to examine the underlying concepts of land and

property that CLTs were mobilizing. These concepts seem to *work* toward important ends, which has been seen, in a practical sense, as sufficient.

But what is real property? Private, freehold ownership of land is at this point so central to the family and economic activity of residents of the United States – and so systematically integrated into contemporary ideology (Blomley, 2004, 2005, 2008) – that it can be hard to see this model of ownership as something contingent or constructed. Yet the more closely one examines conventional land ownership, the more strange the thing called "property in land" seems to be. Furthermore, there is a long history of tenurial systems which are grounded in very different principles of control than contemporary Western property regimes (Pierce, 2010).

Historically, property law in the West was grounded in the absolute authority of rulers, a position derived philosophically from the need for humans to sustain themselves and sanctified through a relationship with God. Locke (1823) writes:

> As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common. [. . .] God, when He gave the world in common to all mankind, commanded man also to labour, and the penury of his condition required it of him.

The intellectual justification for "modern" property in jurisdictions descended from English law are most systematically articulated by Blackstone (1765/2001), who describes the property right on land as the "sole and despotic dominion" of one person over a location on the earth. Blackstone metaphorically describes the rights associated with property as a "bundle of sticks" which can be individually assigned to others through (for example) lease agreements. These "sticks" include the rights of:

- exclusion (to prohibit others from using);
- use (to personally appreciate the character of the land as it exists);
- usufruct (to profit from the products of the land in a manner that does not permanently damage the land, e.g. agricultural products);
- improvement (to change the functional characteristics of the land by reshaping it or building upon it); and
- disposition (to transfer the property interest in the land to another as one chooses and in exchange for the interests one chooses).

Crucially, these "sticks" or "interests" in property, per Blackstone and as has been often rearticulated (Blomley, 2008; Lawton, 2013), are ultimately exercised singularly. That is to say, while an organization or group can own a property interest collectively, that collective must own property as a single unit, with only one non-contradicting "view" or decision about the exercise of rights over it. Take, for example, the right of exclusion: it makes no sense to say that two individuals *equally* and *separately* have a right to exclude. If one disagrees with the other regarding the decision to allow use by a third party but cannot enforce it, surely no right of exclusion is actually possessed. Thus, while a collective can agree on the rules (say, voting) by which it makes a single decision about an instance of exclusion, it must execute these decisions *as one* rather than individually. If rights are not exercised unitarily, private property becomes common property, subject to the various concerns about effective governance often shorthanded

as "the tragedy of the commons" (Hardin, 1968; Ellickson, 1993; though see Ostrom, 1990 for an alternative view on common resource management).

Blackstone's articulation of the property relation as a bundle of rights exercised singly has become a backbone of property rights discourse: it continues to be used as an explanatory framework today (Schorr, 2009; Sprankling, 2017). Real property – property in land – is distinguished from personal property in the law (personal property is everything *except* property in land). Property in land is special because of land's literal undergirding of all other actions, and indeed in the extreme case the very right to exist upon the planet. One can transport all other possessions *except* location. This gives real property rights a prominent role in the adjudication of many different realms of decision-making. Who can speak in public? Where may a public emerge? What kinds of commerce are practicable, either in the city or near it? Where will citizens be free to act in all ways that the law permits, and where will the law's permissions be subsidiary to some private actor's? In modern nations, these questions are all formally mediated through the law regarding property rights. Ely (2008, p. 1) calls property rights "the guardian of every other right." He highlights how rights to be in space, act in space, and change space underlay *all* human activity.

Of course, there are many ways that the rights to decide about being in space are formally held by groups. The most obvious is "public" or state-held space, in which rights are reserved to a citizen-public and exercised exclusively by the state. However, decisions about the terms of access to public parks or public roads are ultimately made through a legislative body and enforced through the singular acts of an executive (Crewett & Korf, 2008). There is also an extensive literature about common property governance beyond the state, both rural and urban (Blomley, 2008; Cheater, 1990; Cousins, 2007; Huron, 2015; Pierce, 2010). While rural/agricultural case studies have been especially visible in the geographical literature – such as ejido governance in Mexico (Perramond, 2001) or gendered cultivation in Kenya (Rocheleau & Edmunds, 1997) – urban scholars have also attended to forms of shared property or commoning (Bunce, 2016; Crabtree, 2008; Huron, 2015; Lawton, 2013; Thompson, 2015; Williams & Pierce, 2017). We highlight in these cases the necessary existence of an emergent executive body for collective decision-making: the co-op board, the condo corporation, the kinship/tribal council, or in our case the Community Land Trust (a not-for-profit organization). The necessity of exercising shared rights in unison is not the primary focus of this literature, which often emphasizes micropolitical democratic processes of deliberation. Nevertheless, entangled property rights (if exercised) logically require a mechanism for coming to a single action in the face of disagreement.

In the text that follows, we focus on the location of decision-making with regard to various aspects of the urban residential properties which CLTs work to make purchasable to lower-income households. In order to do so, we trace both the "properties" and the decision-making "rights" in them through the process of acquisition, partition, and disposition which CLTs contractually oversee.

A canonical CLT housing transaction

This paper emerges from a multi-year study of CLTs in Minnesota, USA. We examined eight trusts, focusing on the Minneapolis-St. Paul metropolitan area with supplementary

research in Duluth and Rochester. In 2015 and 2016, we conducted 124 interviews with staff members, other nonprofit and funding agency staff, public officials, and CLT residents about how CLTs function, as well as about experiences of participating in CLTs as homeowners. We also collected and analyzed news accounts, organizational documents, publicly available spatial data on parcels and buildings, as well as proprietary data from the CLTs about their property portfolios.

Despite the existence of a large body of technical support and common legal templates for CLTs to use as guides from best practice, every CLT uses a distinctive transactional and contractual model. Furthermore, the particular mechanics of the initial and resale valuations of house and land may be the area where CLTs vary the most. Nevertheless, here we attempt to trace what we characterize as the "canonical" or conventional CLT valuation process, based on guides from best practice, both as a home initially enters the trust and also (iteratively) in the resale phase. Our explication draws primarily on the "model" ground lease (National Community Land Trust Network, 2011) that is maintained by Grounded Solutions Network (previously, the National CLT Network); it is also informed by interviews with various CLT staff members in Minnesota and the specific ground leases and terms of sale that those organizations have developed.

Homes enter a CLT's portfolio in various ways (depending in part on restrictions associated with available funding): for example, through foreclosure sales, the CLT's identification of distressed homes in the conventional marketplace, direct transfers from land banks or state agencies, homebuyer-identified homes, and even new-build homes built "on spec" (i.e. speculatively financed) by the trust itself. Because CLTs typically assemble portfolios in lower-income neighborhoods, homes other than new-build most often require some kind of initial repairs in order to be in good working order and ready for a new buyer. These repairs vary from moderate to complete gut rehab; regardless of whether the property is new or acquired, there are capital costs associated with acquiring properties that go beyond purchase and which must be budgeted. CLTs choose to acquire properties that can be brought to market using a budget compatible with their available internal funding. In principle, the costs of these repairs are not linearly related to the market value of the home. A CLT could, for example, purchase a property for 60,000 USD; invest 40,000 USD in the property, and end up with a property appraised for 80,000 USD. In any event, once the home is in salable condition, the CLT will set a price.

Typically, a CLT seeks an independent appraisal at this stage to set the "initial value" or fair market price of the house plus land (what we will refer to hereafter as the "whole package") in the conventional fee-simple housing market. This initial value reflects the balance of the market's wisdom about the exchange value that others would pay for the whole bundle of rights and privileges associated with owning that property. In principle,[3] the CLT could now (if it wanted) sell the whole package back into the conventional housing market.

At this point, the CLT begins the process of legally separating the house and any other structures ("permanent improvements") from the land. First, the CLT establishes the size of the discount that it intends to provide to a prospective homebuyer compared to the initial value of the whole package. This subsidy is typically roughly 20–40% of the initial value of the whole package, but it varies based on an array of factors. Some CLTs may base the amount of the discount on an appraiser's evaluation of the value of the land before improvement. Others use a mechanistic standard formula (for example, 30% of the appraised initial value of the

whole package of land and improvements). Others adjust the discount based on what they believe the buyers who qualify under their organization's criteria can pay.

The interplay between initial value, available subsidy, and financial qualification results in a relatively narrowband of home values that can be sold using a conventional CLT model. For example, it is common for a CLT to have a policy setting an income cap for buyers as part of its mission to enable affordable homeownership for lower income citizens. Following the lead of key funding streams (e.g. federal CDBG and HOME programs), many CLTs use 80% of Area Median Income ("AMI") as their income cap; in this case, a CLT might calculate the maximum monthly payment that a borrower with a 2.5% down payment could pay and then adjust their subsidy so as to keep the subsidized price low enough that a purchaser whose income is 60–70% of AMI would meet federal mortgage guidelines of paying no more than 30% of their gross income toward housing. Regardless of the specific mechanism used to calculate the subsidy, the advertised cost of the house after this discount is called the "base price" by CLTs.

The base price is the price that a CLT asks prospective purchasers to pay. This price is a substantial discount on the initial value of the whole package, and this price gap drives market interest from lower income purchasers. However, because the home is a CLT home, what the buyer is purchasing is not the whole package of house plus land and all of the rights that usually pertain. Specifically, the buyer receives:

(1) the permanent improvements to the land (i.e. the house and any outbuildings); and
(2) a renewable ground lease that grants the buyer delimited use and enjoyment of the parcel of land under and around the house from the CLT for a nominal monthly fee.

Preparing prospective CLT buyers for the transaction can be a long process which we do not detail here. However, at closing, the buyer has typically arranged mortgage financing for the base price minus a small down payment. At closing the CLT, which until this point has owned both the improvements and the land, transfers ownership of the improvements to the buyer, now the homeowner. A number of technical details about the distribution of obligations vary between CLT implementations: the ground lease which permits use of the parcel's land by the homebuyer also describes the division of obligations for property taxes, various types of maintenance, and (crucially) sets the conditions that will apply should the owner seek to resell the home.

The period of time between the first sale and the second sale is, from the perspective of the model, quiet: the homeowner makes mortgage payments and slowly accrues equity in the house, as well as making the nominal (for example, 25 USD per month) ground lease payments to the CLT, while enjoying use of the home. When the homeowner wants to sell, the CLT typically has a window of time in which to set a resale price, either using a formula based on yearly increases to account for increases in AMI or through an appraisal-based approach.

The formula for establishing the new base price may be the most varied part of the CLT model; Grounded Solutions Network's sample ground lease includes no fewer than 10 subtle and substantial sample variations from which to choose, and CLTs further modify these in many ways. While many new CLTs use a simple formula increasing the home value by an interest rate tied to increases in AMI (e.g. 2% every year) rather than property market values, many CLT units in existence today are likely still valued using an

appraisal-based method. A common and basic variation of the appraisal-based approach follows. First – assuming for a moment that the value of the whole package of house plus land has increased – the size of that increase is calculated. The "base price" that a new buyer would need pay for the house without the land is set at the previous base price plus 25% of the increase in the appraised value of the whole package.[4] For example, if the prior base price had been 120,000 USD and the total increase in value of the house plus land is appraised at 10,000, USD then the new base price would be 122,500 USD. The new buyer is obligated to sign a new ground lease with the CLT (as landowner) which has the same resale terms. In this way, each sales transaction actually increases the proportional affordability of the home in comparison to the whole package; over decades, the relative home price will fall steadily in comparison to surrounding (non-CLT) home values, which of course include the rising, speculative future value of their land.

Several significant costs come out of the buyer's and seller's equity at sale. In the United States, a real estate seller typically incurs 6% of transaction price in agent fees. Additionally, the CLT is typically entitled to a transaction fee of roughly 2.5% of sales price.[5] Of course, the bank which financed the initial purchase receives the accrued interest on the property as well. A recent study based on 30 years of data collected by the Grounded Solutions Network shows that the average shared-equity homeowner in CLT and similar programs comes away with 14,000 USD in cash after selling their resale-restricted home (Wang et al., 2019).

Troubling the canonical explanation of the CLT transaction

Abstractly, CLTs explain that the model described above separates ownership of the land parcel from the improvements to the land. CLTs retain ownership of the land, much as a rural conservation land trust would do. They are thus free to lease specific rights to the homeowner upon the land (for example, the right to exclude arbitrary users from the property) while retaining others (for example, CLTs typically prohibit homeowners from adding new permanent improvements that would reduce the future affordability of the home).

It is of course the case, however, that the existence of the homeowner's perpetually renewable ground lease substantially complicates the trust's exercise of its abstract ownership interest in the land. If a more conventional rural conservation trust runs into financial difficulties – if they have liquidity issues because of tax rate increases, for example – in principle such a trust could sell individual parcels back into the conventional market in order to preserve the integrity of the overall portfolio. Similarly, a conservation trust can make strategic decisions to trade parcels if they seek to consolidate contiguous areas of protected land. CLTs do not have this luxury because use of the parcels they protect is contracted out to residents on renewable 99-year ground leases. Furthermore, while CLTs usually maintain a right of refusal to repurchase the home when an owner wants to sell it, that right is typically subsidiary to a right of the homeowner to transfer the home to immediate family members if the heir is within income limits. As a result, the exchange value of the land that CLTs carry on their books as assets is in principle indefinitely unrealizable without agreement from the residents and their descendants, for as long as the current American property rights regime continues to govern them. The state could condemn the house or exercise eminent domain in the

public interest, but the CLT is a private, contract-based nonprofit organization that has no such rights to revoke their agreements with homeowners.

We argue that while CLTs scrupulously obey the law in articulating their relationship with residents, the description of their transaction as dividing "ownership" of the house from the land requires a Herculean effort of contractual scaffolding that "shores up" the conceptual edifice of the property relation. There is no object over which the rights that constitute the relation of property in land can be solely and despotically exercised by the CLT. This is because, despite being legally plausible, the division of property between land and improvements that CLTs reify is an exceptionally awkward way to describe the relationship that CLTs, residents, and the property they govern together really share.

We begin from the position that that CLT stakeholders and homeowners care about permissions, rights, or affordances with regard to urban property; however, they are not as often (perhaps even not typically) centrally interested in land *per se*. "Land" in the context of urban financial transactions is mostly an abstract rather than physical thing: it is more a way of demarcating a relational context in space and place than it is the physical characteristics of an object made up of carbon, nutrients, etc. This is particularly the case if one is talking about land *without* the house or other improvements: the specific character of land, as long as it meets certain minimum characteristics with regard to the capacity to build upon it, is often of tertiary or quaternary concern. Its price is dominated by its character as a space with relational proximity in an urban context that homeowners most desire. "Land" meant this way – as space with relational proximity – is treated by CLT residents in the day to day as part of what they control. Homeowners in CLTs expect exclusive use, and they make non-structural changes to the appearance of the landscape at their whim. It is not land but *homes* or *housing* and their use that concern scholars, practitioners, and residents in urban real property markets (Lawton, 2013; Saegert, 2013).

In our own research in the Twin Cities, CLT homeowners were more likely than not to say that they act as though the land is theirs. Some of the residents we spoke to who were most enthusiastic about CLT participation also said that they didn't see the atypical relationship with the land as relevant or real in their everyday lives:

> I put in some landscaping. We put in lilacs and we put in hydrangea and we put in peonies. We planned some lilies and iris and hosta. I think after a while you just forget it's not technically yours. It's still part of your space. (CLT homeowner)

> Absolutely. Yup. Yeah. It's very much my yard. Yeah. And I think a lot of that just comes from being in it, seeing your kids play in it. I mean, that - that's your yard. Watching someone else's dog crap in it? Like, that's your yard. (CLT homeowner)

> It's mine because I'm the only one that cut the grass and shovel the snow. So it's mine. The dog pees on it every day, so it's mine. [. . .] You can't - if you want the land - I mean, what are you going to do on it? I have the house. Like, you still need my permission to be on the property. (CLT homeowner)

> I think the only time I ever thought about it was when we told somebody a little bit more about the program. They're like, "Oh, so, technically the land is not yours." And, like, yeah, but I don't really feel that way. I mean, I guess technically that is the way it is. But, I mean, the whole idea of the program is not to assert that they have ownership over the land. You know they're trying to get people in that, you know, respect and appreciate the space that

> they have. So, that's the whole idea of what they're - so, I mean, I don't really think about it much. (CLT Homeowner)

Homeowners sometimes characterized the CLT's role as that of a purchase assistance program, glossing over the shared ownership structure:

> What we did was we bought a house that was on the market. We had to qualify for it in terms of the mortgage based on our income and then they provided down payment assistance and fixed up the house. (CLT Homeowner)

Additionally, the high-level details of the relationship between ownership and rights were still ambiguous or confusing for many. For example, most CLT agreements prohibit major upgrades so as to maintain the long-term affordability of the home, but residents do not consistently understand the rules of the agreement or their justification. In a typical comment, one resident said:

> I get confused still about what I can do inside the house. Like if I renovate my kitchen, for example. I need to go through a process with them that I don't totally understand. So they're - I think it's - I think it's confusing. (CLT Homeowner)

In our research, the theoretically bright line between CLT ownership of the land and individual ownership of the house was, for homeowners, often quite muddled. What residents repeatedly reported was that they felt pride of ownership in the home, and that in practice, they felt and acted as though they owned the land, as well. Most often, what "felt" most real to residents about the CLT's participation is that it reduced the price of the property and constrained the resale price of the property. The land as a material object is often absent from these comments about the CLT's involvement; when used, it serves as a perfunctory, learned *label* for the CLT's participation in the property. Understood in this way, one can see that while CLT homeowners do talk about the land in relation to their CLT participation, land is much more of an abstract signifier of relation than a concrete and separate physical object. When they talk about the land as something they feel they control, their comments are much more concrete and physical.

Because land in CLT properties does not seem to function as though it is separately owned for participants in their day-to-day lives, we believe that there is a more apposite way of describing the actually existing function of land as it is practiced and experienced by CLT stakeholders. We propose that rather than thinking about CLTs as separating parts of a physical object – that is, separating the land from the house – actually existing CLT practice is instead better characterized as a novel distribution of the various sticks (or interests) in the property rights bundle for the house and land *together*. We articulate the distribution of five key interests in the whole property bundle package, drawn from Blackstone: *use, exclusion, usufruct, improvement, and disposition*. In this articulation, we consciously shift from the language typically used by CLTs, "homeowner," to the more general term "resident:" we do this so as not to prematurely foreclose the nature of CLT property relations with a linguistic assertion about what the resident owns aforethought.

Our explanation of the transaction

In a conventional CLT arrangement, *use* of the house and land – the whole package, as we refer to it above – is distributed entirely to the resident. The CLT staff have no right to use

the land around the house, nor do they have a right to assign use to any new party. The interest in *exclusion*, or in keeping others from using the whole package, is similarly invested entirely in the resident (though the CLT may inspect the land from time to time). With regard to these two categories of rights, participation in a CLT as a resident is functionally similar to participation in conventional market property ownership, although constrained by the ground lease contract. If a CLT homeowner defaults on their contractual agreement by failing to pay ground lease fees, for example, the CLT may (in the most extreme scenario) expel the resident from the land. Before this happens, the CLT can work with the bank to retrieve dues in arrears from the homeowner's escrow account. Therefore, the rights the homeowner has to use the land are based on compliance with the ground lease contract.

The interests in usufruct and improvement play out differently. As discussed in the literature review above, *usufruct* refers to the right to enjoy the fruits of the land in a way that does not permanently impair the land. In rural and agricultural settings, this is usually a literal reference: for example, it is possible to *use* a field of flowers by appreciating their beauty passively, but cutting and selling those flowers requires an additional right of usufruct – so long as cutting the flowers does not impair the land's capacity to grow flowers again in the future. In an urban setting, however, the "fruits" of the land are largely the rents that one can levy upon its spatial-relational context (Pierce, 2010). For example, the front yard of a house on a moderately busy secondary arterial street is a good place for a lemonade stand, while a house at the end of a quiet cul-de-sac is a terrible place for one. By leveraging the relational characteristics of a well-trafficked urban location, one can profit. Similarly, one can benefit from selective exercise of the interest in exclusion, described above, by leasing the house to a tenant in exchange for literal rent. In a CLT ownership situation, these usufruct rights – to profit from property's relational or material character – are reserved to the trust for both the land and the house. CLT ownership typically prohibits residents both from engaging in commercial activity and from residing elsewhere to rent the house to tenants, a restriction that applies to space both inside and outside of the house. However – and this will be important later – while these usufruct (profitable use) rights are reserved to the CLT, the terms of the typical CLT-resident agreement explicitly state that the trust will not exercise the usufruct interest they reserve in either the house or the land. Thus, while the CLT nominally controls the interest, in many cases, there is no party who may actually exercise it. Instead, the CLT has an obligation to guard against the exercise of this use. We posit then that this right is "buried" – at least for the duration of the ground lease – as we will define in more detail below.

In a similar manner to usufruct, the interest in *improvement* – transformation of the land through its permanent reconfiguration – is reserved to the trust, which again commits not to exercise its interest; the interest in improvement is thus also largely buried. The purpose of the land trust is to keep homes permanently affordable, and so while CLTs encourage responsible maintenance of the home and land, they usually prohibit substantial upgrades which reposition the home in the housing market and make it less affordable or more difficult to maintain for a future homeowner. CLT residents require permission to make any material upgrades to the home that go beyond repair and replacement, and CLTs are generally motivated by the goal of affordability to reject proposals that would have a dramatic impact on price.

The right of free *disposition* is perhaps the most complex of the rights in land-plus-improvements that is governed in a CLT transaction. Some aspects of the right of

disposition – including the choice of buyer (subject to generic CLT financial requirements) and the choice of whether or not to sell at a given time at all – reside with the resident. However, CLTs do typically reserve some specific aspects of the right of disposition to themselves. As mentioned above, many CLTs reserve a right of refusal at the specified sale price; nearly all reserve a right to capture a transaction fee from the new buyer as part of the sale process. However, while the resident/seller does not have freedom in setting the price for a sale, neither does the CLT. Instead, the CLT has a contractual obligation to manage a pricing process using outside appraisers or a predetermined yearly rate based on increases in AMI; the typical CLT ground lease contract does not reserve a right of price discretion for the CLT itself. Put another way, while the CLT has obligations in the process, neither it nor the resident is empowered to make independent decisions about the price of the property. For the entire future in which the property remains in the CLT portfolio, independent decision-making power about the price cannot be exercised, and the future price of the land-plus-improvements package is indexed according to a contractual formula for the surrounding urban property market or AMI.

In practice, the actions of residents are somewhat less restricted than the formal analysis above suggests because not all CLTs vigorously or consistently prevent residents from infringing upon the interests that CLTs legally reserve but promise not to exercise. Interviewed CLT residents report that CLTs do not consistently exercise their "negative" contractual duties to prohibit certain kinds of activity (such as room rentals to unrelated tenants or artists' sales offices). In general, CLT residents view this laxity positively – it means that they can treat their CLT home in a manner more similar to a conventionally owned one, and thus they see the CLT-mediated ownership arrangement as more attractive than if CLTs guarded their prerogatives more closely.

We believe it makes more analytical sense to describe the CLT transaction as the distribution of various rights in the entire land-plus-improvements package rather than a division of house ownership from land ownership because it comes closer to reflecting what stakeholders *actually do* and *actually believe* than the explanatory terms that CLTs typically use. Even CLT employees tend to diverge from their official literature when describing the nuts and bolts of their institutional process. For example, instead of talking about investment in the land, interviewed CLT staff often describe the sum of the money that they contribute to the buyer's transaction as a "subsidy" to the resident. This subsidy is an aggregate category that includes both the booked price of the land they "own" at the end of the sale process and any additional costs which are simply "lost." Because the notional exchange value in the land never comes back out of it in the normal course of CLT operation, the cost of acquiring this land does not function differently than (say) the costs associated with rehabbing the building before its sale. For the CLT, these costs all function as subsidies toward the provision of accessible, pleasant, affordable urban housing.

Can divided rights be "buried" and "disinterred?"[6] CLT asset sheets, pricing, and the conceptual hegemony of property

Analytically, we propose a new vocabulary for describing the rights in the land-plus-improvements that CLTs reserve to themselves but then by contract or charter forbid themselves from exercising. We describe these rights as "buried." Buried rights are those

which *no actor can exercise* in the normal course of action. As described above, while rights of use and exclusion in the land-plus-improvements are generally exclusively exercised by a CLT resident, rights of usufruct and material improvement are typically forbidden by all actors through combinations of contract, codicil, and organizational charter.

The reason we describe these rights as buried rather than destroyed is that there are a specific set of edge-case circumstances in which they can be (as we articulate it) "disinterred." If a CLT resident decides to sell their interest in the property, or they pass away and an immediate family member declines to exercise their contractual right to acquire their family member's interest in the property, then the CLT has the next right of refusal to repurchase the resident's interest. Under limited circumstances such as these, the CLT could legally reassemble the resident's interest in the property with the CLTs and sell the whole package back into the regular property market.[7]

How does one set an appropriate exchange value for a set of rights that can only be exercised contingently at unpredictable, periodic moments of transaction? In a rational market, one could in principle set a price that is based upon the probability that the property rights package would ever be reassembled and resold. This probability is fundamentally a wager; like any other action with regard to real property, it will never be partially actualized. One might discount the book value of the CLT's interest in the land-plus-improvements package by the carrying cost of the property (taxes, assessments, maintenance, etc.) over the average length of time it takes for a property to be transferred to a non-family-member. A more conservative (i.e. lower) valuation would involve a discount based on the observed likelihood that any property in a CLT's portfolio would be reassembled over the conventional economic "discounting period" (typically on the order of 30 years); this would yield a lower valuation. A still more conservative valuation might be based on the fact that in principle a CLT resident's family has a contractual right to maintain its interest in the property under the current terms without any expiration. Yet, CLTs nominally set an asset price for the land based on its "actual" economic value (at least at the time of purchase).

Even if it were appropriate to book the value of the land as though rights in the asset could be immediately exercised, the valuations themselves are also problematic. Even in cities – where, as discussed above, relational properties dominate land's value – the desirability of land's material and relational qualities still vary substantially. Does the lot have park access? River or stream access? A desirable but expensive-to-maintain hillside grade? Nutrient-rich soils? Solid subsurface rock upon which to build a foundation? An ideal relational location? These attributes ought, in principle, to shape the portion of a parcel's purchase price that is the value of the land as opposed to improvements. If the valuations of land owned by CLTs were really based on the economic value of the *land*, we would see considerable variation in the values assessed in CLT asset sheets, even as a percentage of the total land-plus-improvements value (rather than a standard percentage, as is common practice).

As we have tried to show, the narrative about the financial value of CLTs' property interest in the parcels with which they are involved relies heavily on unstated or implicit beliefs about the nature of property in land. Some CLTs estimate the value of the land they own (both at the time of purchase and in their ongoing accounting) as a standard percentage (say, 30%) of the appraised value of the land-plus-improvements package, regardless of the character of the land. Other CLTs instead estimate the value of the land based on some standard portion of the "subsidy" they put into the house; this is equally arbitrary and (possibly) even less clearly

related to the value of the "land" or the likelihood that any right to reassemble and resell the property will be exercised.

We stress throughout this paper that CLTs act both legally and ethically in conceptualizing their transactions as a division of house from land. One reason for insisting that this legal construction is analytically awkward is to enable a clearer understanding of how CLT organizations function and interact with community stakeholders and the state. But another (less academic) reason that this argument is more than simply semantic is that when the relationship between a CLT organization and homeowner is seen as a division of rights in a single asset rather than a division of assets, it emphasizes that the thing that the CLT claims to "own" is of much lower value than CLTs typically claim it to be, even though CLTs that book land as substantial assets act in good faith and in accordance with existing best practices. This fiction of land ownership has important implications (some of which we articulate below). Still, it bears emphasis that CLTs are not capable of somehow absconding with the notional value of this land; since they cannot actually sell their interests in the properties freely, the irrationally high valuations of their interests in these parcels are in general most relevant to these organizations' internal sense of value and financial stability.[8]

The model of pricing the subsidy using a consistent formula makes more sense if one proposes that the characterization of "land" in the CLT transaction is ultimately a fiction: it serves as an accounting method for a reliable subsidy that makes the model work by securing and burying a specific subset of rights while preserving others for the resident. Because the CLT is by its charter promising not to allow increased monetization of the land, the speculative value of the land for future intensified use is in the normal case impossible to realize. It is entirely possible that over the course of the CLT's institutional life, the organization's actual interest in many properties is really a debt of obligation, both financial and embodied, rather than an asset. The more effectively a CLT operates, the more deeply the speculative value of the land-plus-improvements package is buried away from realization.

Conclusion

The idea that CLTs function by burying land rights may have many implications. For example, CLTs' burying of some property rights effectively restricts future urban development possibilities, with more fraught political implications than we have seen articulated. Alternatively, the CLTs' assignment to residents of nearly all of a parcel's actually practicable rights restricts community governance possibilities and renders "community control" only meaningful in times of transition from one owner to another. For reasons of length, however, we will conclude this article by focusing on the way in which the hegemonic power of *property* as a discourse shapes how CLTs think of themselves and, therefore, how CLTs actually operate.

If property discourses are so hegemonic in the United States that they can make even relatively radical actors believe that buried property rights should be valued at the same price as those that can be freely exercised, is property too entrenched as an ideological tool to attempt to use subversively toward politically transformative goals? Our tentative answer based on our data is clearly "yes:" again and again, stakeholders were unmoved by the collective and fragmented nature of CLT homeownership, ignoring or eliding the

distinctive structural characteristics of the model and re-collapsing the idea of property to something that more closely resembles the simple freehold model that typifies modern conceptualizations of private property.

The primary question that arises is: what are CLTs trying to do with their transformation of property? If the goal of CLTs is to do some other thing with their land (almost always affordable housing), then the rhetorical device of "separating the improvements on the land from the land itself" is not a problem; it's just an instrumental use of that device. If the CLT movement, however, is about transforming people's relationships to and understandings of property – with the goal, as the first CLT's founders put it, to contribute to "the much-needed social and economic reconstruction of America" (Swann et al., 1972, p. xvi) – then the contractual separation of land and improvements is not enough and may be self-defeating.

While the separation of land from improvements does allow for enforcement of the ground lease and may indeed be necessary for the preservation of affordable homeownership opportunities within the United States legal system, the CLT homeowners and CLTs themselves consistently minimized the consequences of this separation in interviews. The CLT model was created to directly confront the idea of individual ownership of land (Swann et al., 1972), but the practical contemporary utilization of the model minimizes this confrontation. The dedication of nearly all land-and-house use rights to a homeowner on a single parcel reinforces individual property rights alongside values of individual homeownership (regarding homeownership, see Martin et al., 2020). This unfortunate outcome is not necessarily the sole fault of the legal arrangement itself, but could be due to a lack of political education and more transformative rhetoric that could accompany the invitation to join the CLT membership as a homeowner (see DeFilippis et al. 2018; DeFilippis et al., 2019; Williams et al. 2018).

The resulting legal arrangement without any commonly understood political meaning behind the separation of land and improvements, then, re-inscribes the dominant frameworks of property, and shrinks our political and intellectual imaginations by squeezing them into boxes that actively inhibit efforts for "the social and economic reconstruction of America." Thus, we find that the radical project of hybrid collectivity at the root of the canonical CLT model appears to be contradicted, and rendered not just palatable but banal, by the centering of property in land in the community's self-narratives.

Notes

1. We focus in this paper on what we call "classic" or "canonical" CLT transactions like these. Organizations called CLTs also engage in other kinds of landholdings, including (for example) multifamily and commercial rentals which are owned freehold by the nonprofit organization. For reasons of length and clarity, we do not explore the implications of these other kinds of transactions nor their implications for organizational form.
2. Other models such as Ebenezer Howard's Garden City were also intended to foster community control of land use and establish long-term affordable housing. The Garden City is rarely seen as an antecedent to CLTs, despite having structurally related mechanisms of community control (see Howard, 1902).
3. This possibility is rarely executed, both because of the nature of a CLT's charter and because the terms of the financing leveraged to obtain the property and/or repair the house are generally contingent on the home's entrance into the CLT portfolio.
4. Other models include indexing the change in price against change in area AMI; change in the CPI; and mechanistic non-benchmarked formulas, like a set percentage per year. See National Community Land Trust Network (2011) for examples.

5. CLTs might vary regarding whether this CLT transaction fee comes from the seller (as described in our text) or the buyer (in the form of a slightly higher purchase price). The overall mechanics of the model are not substantially changed by this choice, which trades the size of equity cash out at each transaction against the rate of purchase price appreciation over time.
6. The metaphorical terms "bury" and "disinter" used in this way are borrowed from Stephenson (1999), though used here in a very different, non-computational context.
7. Similarly, a CLT could simply gift their claims to a homeowner (via a quit-claim deed) so as to reunify the property rights in a parcel, though in such a circumstance, the CLT is not exercising those rights themselves, they are permanently transferring them to the homeowner.
8. In principle, these land valuations could be used as collateral to secure financing for other properties, or to secure better terms for such financing. We are not currently aware of any past or present instances of CLTs financially leveraging the land in this way; it would, as we understand the terms of their contractual obligations, be legal for many CLTs to do so.

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