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CONDOMINIUM

A transformative innovation in property and local government

*Douglas C. Harris*¹

Condominium as legal form

Condominium is a form of land ownership. It has also come to describe built structures such as apartment towers or individual apartments, but this use derives from the legal form that enables separate ownership of individual units within multi-unit developments. Each *condo* exists as a distinct parcel of land that is individually owned and separately taxed. Owners of these parcels also have collective ownership of the common property and voting rights in an association of owners that is charged with managing and maintaining the common property and empowered to create and enforce rules relating to the uses of individual units and common areas. As a result, condominium combines private property with common property and democratic rights to produce a particular architecture of land ownership and of local government. Known in much of the world as condominium, this same combination of rights in multi-unit developments is variously labelled strata title, sectional title, unit title, divided co-ownership, horizontal ownership, jointly owned property, and apartment ownership (Van der Merwe 1994).

Condominium is a creature of statute. Beginning in continental Europe and then South America in the 1920s and 1930s, and spreading rapidly in the 1950s and 1960s, legislatures around the world inserted divisions into civil codes or enacted separate statutes to facilitate the creation of individually owned units in multi-unit developments. They did so with elements from property law and corporate law to create standardised templates for the packaging of private property, common property, and democratic rights into bundles that could be individually owned within communities of owners. The ostensible goal in most jurisdictions was to make the possibility of home ownership available to more people. Developers were also interested in a legal form that enabled the intensive and profitable subdivision of land. The details of the templates varied among jurisdictions—particularly in relation to the balance between individual and collective interests and to the power accorded to the governing association (Van der Merwe 2016)—but the packaging of private property, common property, and voting rights in the association was, and is, the shared and defining feature of condominium ownership.

Condominium is one form of common interest community or common interest development (Barton and Silverman 1994; Uniform Law Commission 2014). Other forms include cooperative and planned community, each of which create spheres of individual control and responsibility within communities of members or owners with

considerable self-governing authority. Cooperative produces an association that holds title to a multi-unit development and allocates exclusive rights of use to particular units to its members. Condominium produces units as separate parcels of land that are individually owned and whose owners also own the common property—a dualistic ownership structure (Van der Merwe 1994; Easthope 2019). Planned community is a general designation for common interest structures that are neither cooperative nor condominium, the most common of which is the homeowners association in which units are individually owned, but where the association owns the common property.

Condominium has also been described as a form of multi-owned or multi-title development (Blandy, Dupuis, and Dixon 2010; Johnston and Reid 2013; Easthope et al 2014), a designation that emphasises the separateness of each unit as a distinct parcel of land. However, notwithstanding this legal separateness, the private interests within condominium are inseparable from the common property and the governing association; the ownership interest in an individual unit cannot be detached or exist independently. Moreover, this packaging reflects a physical and political entwining: the individual units rely on the common property, which exists to support, shelter, provide access to, and as an amenity for the private property, and it is the governing association, in which each owner is a member, that is responsible for maintaining the common property. Condominium constructs a form of embedded property that depends on the common property and the political community within which it exists (Harris 2021).

Built with pieces from property law and corporate law, statutory condominium has proven, when measured by its proliferation, a remarkably successful innovation. Jurisdictions around the world have adopted variations of the condominium form (Lehavi 2016; Altmann and Gabriel 2018; Lippert and Treffers 2021), and, within most, any initial scepticism and uncertainty was soon swamped by its growing popularity. Take-off points differ, but it became apparent in many jurisdictions over the 1970s and 1980s that developers were keen to build, lenders were prepared to finance, and purchasers were ready to buy property, particularly residential property, within condominium. Most commonly, developments take the form of apartment buildings or townhouse complexes where individual units are physically attached, but in some jurisdictions the statutory condominium template also enables the subdivision of unbuilt land for detached buildings. Over the past half century, condominium has become the primary vehicle for the delivery of new parcels of residential land in many cities around the world.

This chapter describes condominium as an innovation in property law to facilitate the production of units that may be individually owned within multi-unit developments. It then argues that condominium is one of the most consequential property innovations of the past century, not just for its growing use and prevalence, but also because it is reshaping the nature of land ownership and the character of local government. The meaning of land ownership is shifting because of its location within condominium, and discussion of local government must now account for the governing power allocated to associations of owners. The chapter concludes with a

claim that condominium is integral to processes that define the past half-century. Indeed, condominium is a function of, and has facilitated, the influx of people into cities, the flows of capital into urban real estate, and the reconfiguring of private and public realms. In short, condominium is one of the defining institutions of our time.

Condominium as property innovation

More than any other substantive area of law, the law of property comes closest to mapping on a geological time scale. In the common law and civil law traditions that emerged in Western Europe, property law is understood as a set of enforceable rules that define relationships between people with respect to things, including land. Change has tended to come slowly to this body of law, which establishes basic social, economic, and even political relationships, at least in part because of doctrinal constraints on innovation. The *numerus clausus* principle, developed in civil law jurisdictions and adopted within the common law, inhibits invention by limiting forms of property to those that exist already, placing a 'damp on judicial activism' that might otherwise contrive new interests in land (Ziff 2005, 284). And if, as some contend, property law is more concerned with order and stability than with values such as justice or fairness (Gray and Gray 2009, 1098), then it contains a bias against the disorder of innovation. In short, the law of property has a long history, and is predisposed against change. Significant developments in property law, when they do occur, are most commonly statutory, not judge-made.

To describe statutory condominium as a rupture in the property law landscape may appear as overstatement, but this massively successful legal form is transforming understandings of ownership and rearranging local government. The earliest antecedent of the modern statutory condominium appeared in a brief provision in the French Civil Code of 1804 that described a formula for the distribution of shared expenses among the owners of individual storeys within multi-storey developments (Van der Merwe 1994). Many civil law jurisdictions included the same article in their legal codes in the nineteenth century, but it was not until the 1920s and 1930s that several civil law jurisdictions in Europe and South America introduced legislation to create standardised templates for what had come to be known as apartment ownership (Van der Merwe 2015). This process continued after World War II with new statutes in some jurisdictions and revisions of earlier statutes in others. Australia and the United States produced somewhat different models in the early 1960s and these spread around the common law world such that by the end of the decade, most had adopted statutory frameworks for condominium. England and Wales were outliers among common law jurisdictions and European nations, relying on long-term leasehold interests to achieve similar ends until 2002 when the UK Parliament introduced a variation on the condominium form labelled commonhold (UK Law Commission 2020). Countries in Eastern and Central Europe turned to condominium following the break-up of the Soviet Union and the privatisation of what had been public rental stock (UNECE 2003), and versions of statutory condominium have

appeared across Asia (Altmann and Gabriel 2018). Indeed, statutory condominium regimes are now ubiquitous in domestic property law regimes around the world.

Before the statutory interventions, the separate titling of units within buildings was possible within the common law, but little used because the legal structure was unstable. The necessary obligation that title-holders contribute to maintain the common property—a positive covenant—did not survive the transfer of title to a new owner unless the new owner voluntarily assumed the responsibility (Risk 1968; Sherry 2016). Except in the United States, where the law developed differently in the late nineteenth century, positive covenants did not run with the land at common law (Reichman 1981; Bennett 2011). Multi-title buildings were not viable without shared infrastructure, but the obligation to contribute to the maintenance of common property was unenforceable unless each successive owner agreed to be bound. In civil law jurisdictions, the *superfices solo cedit* maxim—whatever is built on the land belongs to the owner of the soil—acted as a similar obstacle to the creation of multiple titles within a single building (Van der Merwe 1994, 3). Condominium legislation removed these obstacles and provided a standard template for subdividing buildings into separately titled parcels of land.

The widespread adoption of condominium legislation in civil law and common law jurisdictions in the quarter century after World War II produced a set of templates for single-unit ownership in multi-unit developments. However, the creation of templates did not guarantee their use. Some contemporary commentators expressed enthusiasm about this statutory intervention, but others were incredulous that legislatures appeared to be detaching ownership of land from the surface of the earth, while yet others were cautious about making too much of condominium. After all, the legislation did not so much invent a new form of property as combine what seemed an unwieldy collection of elements from property and corporate law and remove some of the legal obstacles to the subdivision of buildings into multiple separate titles. In retrospect, that caution seems quaint.

The popularity of condominium legislation with governments around the world has been matched, in most jurisdictions, by the explosion of developments built around the legal form. Indeed, if the success of an innovation is measured by its proliferation, then condominium must rank among the most successful of property innovations.

The data at national levels are not precise and comparisons between jurisdictions are difficult, but the extraordinary rise of condominium is clear (FCAR 2021a; FCAR 2021b). As of 2020, there were as many as 142,000 condominium developments creating 11 million units and housing 30 million people in the United States (FCAR 2021c), 6.75 million residential condominium units in Japan (MLIT 2021), and approximately 340,000 strata schemes creating nearly 2.9 million strata lots in Australia (Easthope, Thompson, and Sisson 2021, 6). In Canada, there were approximately 1.9 million condominium units in 2016 (Statistics Canada 2017). In Spain, where apartment living in cities (85% of city residents) and home ownership (76% of the total population) are high by European standards (Eurostat 2020), condominium ownership is particularly widespread. In China, since the state

introduced privately transferable land use rights in the 1980s and then a basic statutory template for multi-owned developments in the 1990s, condominium development has soared to become the dominant form of commodity or privately owned housing in urban areas (Chen 2010, 4). These are but snapshots; condominium produces what, for the vast majority of people in most of the world, is the only attainable form of privately owned housing. Although frequently associated with upscale developments, governments in Latin America turned to condominium, beginning in the 1970s, to structure ownership within state-subsidised middle and low-income housing (Gomez 2018), a strategy that has been emulated elsewhere, including a massive state-sponsored housing program in Addis Ababa (UN-Habitat 2010; Woldeamauel 2020). Distributions are uneven across and within jurisdictions, with growth focussed in particular regions, and primarily in large cities where housing needs are acute and land values are high, yet the turn towards condominium is unmistakable. Worldwide, there are millions of condominium developments producing tens of millions of privately owned parcels of land inhabited by hundreds of millions of people, and almost everywhere these numbers are growing.

Condominium, ownership, and local government

In its short history, condominium has established itself as an extraordinarily successful innovation in the conservative domain of property law. The proliferation of statutory templates has been followed by their widespread use, particularly in urban residential developments. Beyond the numbers, condominium is also transforming conceptions of land ownership and has become an increasingly important site of local government.

Condominium and ownership

Each unit within condominium exists as a separate parcel of land that may be owned as any other parcel of land outside condominium. This is the starting point in most statutory condominium schemes. In common law jurisdictions, owners hold freehold or fee simple interests whether inside or outside condominium. Similarly, in civil law jurisdictions, parcels of land within condominium are owned on the same terms as those outside. The separateness of this ownership interest and its familiarity to those building, financing, and purchasing condominium units help to account for its proliferation. However, ownership within is different than ownership outside condominium. Most significantly, the ownership of a parcel of land within condominium is accompanied by a co-ownership interest in the common property and a right to participate in the governing association or organisation. These elements form what has been described as a 'threefold unity' of interests such that the private interest only continues to exist in combination with the common property interest and the voting rights (Van der Merwe 1994, 23). In most jurisdictions, the private interest is understood to be the principal or dominant interest, with the common property interest and the right to participate in the governing body playing supporting roles, but condominium constructs a form of private property that cannot be

separated from, and is dependent on, the other two interests. As a result, condominium creates an interdependence, or perhaps more accurately a relationship of dependence in which the private interest relies on and is therefore shaped by its location within condominium.

Some have suggested that placing private property in a relationship of dependence, and subject to the collective control of owners, strains and threatens traditional property rights (Reichman 1975, 275), and has the capacity to undermine the autonomy of residents (Sherry 2016, 33). Moreover, many have pointed to the capacity of condominium government to be overbearing, and rife with self-serving behaviour from those in positions of authority including the board or council elected from among the owners, as well as the developer (French 1992). They suggest that legislators and courts should pay close attention to the balance of individual and collective interests within condominium. Others have suggested that condominium has the potential to decentre 'individualized property ownership', even that the opportunity to create new forms of urban political community should be embraced (Randolph and Easthope 2014, 213; Easthope 2019).

Whether dangerous incursion on individual autonomy or opportunity to reimagine individual ownership, the embedding of property within condominium has forced legislators and courts to engage with, and even to change, incidents or elements that hitherto have been understood as central to the idea of ownership. This embedding may usefully be thought of as occurring spatially, politically, and temporally, and in each of these ways, condominium is changing what it means to be an owner of land (Harris 2021). Taken in turn, condominium facilitates a massive increase in the density of owners, enabling owners to be stacked in a vertical column many storeys high, as in an apartment tower, instead of spread in a single layer over the surface of the earth. The challenges caused by chronic anti-social behaviour—loud noise, threatening conduct, damage to property, refusal to follow rules—within this spatial reconfiguration of owners have prompted courts in some jurisdictions to order offending owners to vacate and sell their units, thereby imposing newly established minimum standards of personal behaviour to retain the status of owner (Harris 2016). The political embedding of property within condominium is apparent in the capacity of condominium governments to place limits on the uses of private property, including, in some jurisdictions, limits on the right to alienate that interest under a lease. Many jurisdictions have moved to allow associations of owners to prohibit short-term rentals, but others enable associations to restrict or even prohibit rentals entirely, thus removing what had been understood as a fundamental incidence of ownership. Finally, property is temporally embedded within condominium in the sense that the private interests depend on and exist only as long as the particular condominium development itself. In recent years, there has been a shift in many jurisdictions from a presumption that the dissolution of condominium requires a unanimous vote, and thus the consent of each owner, to a presumption that dissolution may follow a super-majority vote, thus allowing for neighbouring property owners to dispossess a minority of unwilling owners of their private interests (Ter 2008; Harris and Gilewicz 2015; Easthope and Randolph 2021). These examples, each

revealing a significant departure from established property doctrine, illustrate the pressure that condominium is placing on prevailing constructions of ownership.

Condominium and local government

Condominium constructs a form of private, democratic, local government. It is private in the sense that only the owners within a development have the right to participate; voting rights—typically one vote per unit—derive from ownership, not residency or citizenship as is commonly the case in public local government. As a result, owners, whatever their citizenship or place of residence, have a voice in the local government that condominium constructs, but residents who are not owners—principally tenants—live within a self-governing community without any say in its governing. In most jurisdictions, the governing body within condominium takes a corporate form with owners electing a board or council from among themselves that is responsible for ensuring that the corporation fulfils its responsibilities, including the maintenance and repair of common property. In performing their roles, board or council members are held to a duty of care—commonly borrowed from corporate law—to act in the best interests of the corporation. Some matters—changing the bylaws, introducing special levies, making significant modifications to the use of the common property, winding up the corporation—require majority or super-majority votes of the owners, or, in some instances and jurisdictions, unanimous approval.

As with business corporations, condominium corporations are separate legal entities with the legal status of a person, including the power to initiate, or to be the subject of legal proceedings. However, there are important differences. Limited liability, a defining feature of the business corporation, does not extend to the condominium corporation. Owners will be liable collectively for its wrongs. The absence of limited liability is based in another important difference. Owners within condominium have been described as analogous to corporate shareholders, but the assets of shareholders are shares in a corporation; owners within condominium hold property interests in land. As a result, it is the unit owners—not the corporation—that hold the principal assets. A condominium corporation will hold funds collected from the owners for matters ranging from regular cleaning and maintenance of common property to major capital repair and replacement, but, unlike a business corporation, it will typically hold few assets.

The central role of the condominium corporation is to provide owners with a structure of government. Indeed, common interest communities, including condominium, have been described as creating a fourth order of government, situated below federal and provincial or state governments, and alongside municipal governments. In most jurisdictions, municipalities derive their authority from statute, as do condominium corporations and other common interest communities, and there is considerable overlap in functions (Reichman 1975; Ellickson 1981). They are territorially defined entities that collect levies/taxes, employ bureaucracies, provide services and amenities, collect data, and create and enforce rules. Views on the proliferation of privately governed and serviced common interest communities,

including condominium, are mixed (Glasze, Webster, and Frantz 2006; McKenzie 2011). Some argue that they deliver services effectively and efficiently to their residents, that they provide consumers with an important degree of choice, and that a similar opportunity to create private local government should be extended broadly to those not living within a common interest community (Nelson 2005). Others consider common interest communities to be ‘profoundly undemocratic’ because voting rights are based on ownership, not residency (Barton and Silverman 1994, xii), and for their propensity to create homogenous enclaves of privilege (McKenzie 1994; Blakely and Snyder 1997; Franzese 2005).

Most of this analysis considers the larger category of common interest community, and thus includes the vast homeowners associations that have eclipsed public local government in parts of the United States (McKenzie 2011). In much of the world, condominium developments remain largely at the level of individual buildings or small clusters of buildings, and so operate on a more limited scale, although there are concerns, even with smaller developments, about their propensity to shift governing from public to private realms (Rosen and Walks 2013). Others have suggested condominium does not so much displace other forms of local government as it adds another such layer (McKenzie 2011). Moreover, the growing technological and organisational complexity of many modern condominium developments, and the professionalisation of the many required services—from realtors and lawyers to strata managers and building engineers—suggests that owners not only have a limited capacity to be properly self-governing, but that they are subject to myriad assemblages of power (Lippert 2019). The impact of, and degree of concern over, the order of government that condominium creates will depend on many factors, including scale, the power accorded to the association within the statutory framework, and the larger social, political and economic context, but the positioning of condominium as a level of government and an increasingly important site of governance is clear (Harris 2019).

The response of the Chinese state to the rise of condominium as a site of local democracy reveals its growing presence. The first privately owned, collectively governed residential complexes appeared in China in the early 1990s, but it was not until the *Law on Property Management* in 2003 that the central government created a standardised structure for the governing body—the homeowners association—and then the *Real Right Law* in 2007 when the government formalised the collective ownership among individual unit owners of the common areas within a development (Chen 2010). This combination of statutes created a form of commodity housing within condominium. The associations serve as governing bodies for owners within these developments and, as such, have attracted the attention of the Chinese state as increasingly important sites of democratic expression that require monitoring and supervision (Yip, Zheng, and Jiang 2021, 234). Through a series of statutory measures, most recently a revision to the *Property Management Act* in 2018, the state empowered urban Residents’ Committees, which occupy the lowest rung of the administrative state in Chinese cities and have been described as the ‘nerve tips of the party state’ (Read 2000), to oversee the operations of the associations (Yip, Zheng,

and Jiang 2021, 238). Once serving in a supporting role, Residents' Committees now have the capacity to control association budgets and to engage in a range of strategies—rallying owners who are party members to oppose activist associations, obstructing efforts among owners to mobilise, and replacing members of governing committees with party members—to exert influence and to maintain social harmony on the state's terms (Huang 2014, 80–1). In short, the Chinese state recognised condominium as an increasingly important site of local government that requires attention, and not just because of its impact on those who live within, but also for its capacity to destabilise the hegemony of the party state. Although responses elsewhere will differ, condominium creates a form of local government that affects and merits the attention of other levels of government.

Condominium as a defining institution

Condominium has proven a remarkably popular innovation. Jurisdictions around the world have adopted variations of the legal form, and the statutory templates have been widely adopted, primarily in the construction of multi-unit residential properties. In many markets, condominium development now accounts for the largest share of residential property construction. This growing prominence has coincided with, and contributed to, the extraordinary movements of people and money that mark the second half of the twentieth century and the first decades of the twenty-first. Disentangling the role of a legal form from other institutions is challenging, but there is little doubt that condominium is part of the urbanisation of the world's population, of the extraordinary flows of capital into urban real estate, and of processes that are reconfiguring public and private realms.

In 1950, 30% of the world's population—approximately 751 million people—lived in cities. A little more than five decades later, in 2007, that figure had risen to 50%, and urbanisation has only continued, with 55%—approximately 4.2 billion people—living in cities in 2018. In high-income countries, the proportion of urban dwellers is higher: 81% in 2018 and projected to rise to 88% by 2050. Middle-income countries show the fastest rates of urbanisation over the past decades, and while rates of growth are slower in low-income countries, one-third of their populations lives in cities as of 2018 (United Nations 2019). In the decades since World War II, we have become an urban species, and condominium is a part of this transformation, not the least because the explosive growth of condominium ownership has coincided with the rapid shift to living within cities. In many jurisdictions, condominium has become the preferred means for producing spaces of relative autonomy, as well as stability and security, for households in urban environments. Private ownership of a parcel of residential land, usually in the form of an apartment, is now possible for a great many more people because of condominium. Indeed, creating opportunity for homeownership was an oft-repeated goal when governments introduced statutory condominium templates, and it was hoped that the enhanced possibility of homeownership within cities would attract people to urban living (Harris 2011).

Condominium may not have been the catalyst for the shift from rural to urban living, but it is certainly an element in this extraordinary transformation of human society.

Just as people have been migrating to cities, so too vast quantities of money have been flowing into urban real estate. Cities have built up and out at astonishing rates and urban land prices have soared in many markets. Some have argued that the diversion of investment from other sectors of the economy into urban real estate—capital switching—is central to understanding processes of urbanisation in capitalist societies in the late twentieth and early twenty-first centuries (Harvey 1985; Christophers 2011). Many have understood and explained these processes in terms of gentrification and the building and re-building of neighbourhoods and cities ‘for progressively more affluent users’ (Hackworth 2002, 815). Some have highlighted the role of condominium in these processes as cities are remade and economies reorganised around investment in the built environment (Ley 1996; Lehrer and Wieditz 2009; Rosen and Walks 2013; Peck, Siemiatycki, and Wyly 2014). While condominium may have helped to meet a demand for home ownership (Lasner 2012), it is also clear that condominium packages land into parcels that are highly attractive to investors and that it has become a primary vehicle for delivering capital into urban centres. The proliferation of condominium is not simply, or perhaps even primarily a function of demand, but also of supply, as capital seeks out returns on investment (Easthope and Randolph 2018), and of manufactured demand to absorb that supply (Kern 2010a). Condominium packages real estate in a form that is attractive to developers, which can build, subdivide, sell, and build again, and to lenders and investors that perceive security in, and financial returns from, highly fungible parcels of land. Indeed, the phenomenon of pre-development sales characterises many condominium markets, facilitating the speculative investment in urban real estate before anything is built. As money pours into urban real estate and land prices rise, those residents with the capacity to become homeowners have little choice but to purchase land within condominium. In short, condominium may provide homeownership options, but it is also contributing to the escalation of prices in urban real estate markets.

The emergence of condominium has also coincided with a much-documented shift, most pronounced in economically developed, democratic countries, from policies intended to build the welfare state to those focused on deregulating markets and minimising state intervention in the lives of citizens. When the expansion of the welfare state stalled in the 1970s, government policies shifted towards an emphasis on individual responsibility and market-based solutions to social problems. Within this neoliberal framework, the state’s role was to facilitate the efficient functioning of markets in which people, understood primarily as consumers rather than citizens, could purchase the goods and services they wanted. In this context, condominium emerged as ‘an expression of neoliberal ideology’ in the housing sector (Kern 2010b, 2), creating an architecture of ownership intended to encourage the private provision of housing and the privatisation of elements of local government. Indeed, in the United States, condominium was championed during the Cold War as facilitating an appropriately market-based response in a capitalist society to the need for housing

(Cribbet 1963). Instead of building social housing, the state would produce a template for the subdivision of land into small, broadly affordable units that could be bought and sold in the market. The state would remain active, but primarily in creating tax policies to incentivise home ownership and in guaranteeing mortgage loans used to purchase residential units within condominium, and not in the building of social housing. Condominium governments also assumed responsibility for managing relations between neighbours, and, as a fourth order of government that operated alongside municipal authority, implemented land use rules, and raised funds to support the collective provision of services and amenities. Consumers could then choose among a variety of communities and bind themselves by contract, within parameters set by statute, to live within a private community's rule-making and rule-enforcing authority (Fennell 2004). As a result, whether understood as displacing municipal government or as inserting another layer of government, condominium features prominently in the reorganisation of public and private realms within cities (Barton and Silverman 1994, 304).

In cities around the world, condominium apartment buildings now challenge commercial office towers as the dominant physical edifices and city-defining structures (Smith 2016, 197). This prominence tends to obscure the fact that condominium, still a relatively recent innovation, is deployed to produce parcels of private property and structures of local government across urban and suburban space and for a range of income levels. It is the prevalence of condominium, not just its visual prominence, and its impact on the character of ownership and the form of local government, that marks it as among the most important innovations in property law of the past century. Its contribution to the principal demographic, economic, and political transformations in the past half century mark condominium as one of the defining institutions of our time.

Note

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