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## PROPERTY IN THE CITY: SPECIAL EDITION INTRODUCTION

DOUGLAS C. HARRIS & GRAHAM REYNOLDS

Cities concern themselves with the organization of space. Their principal work involves the mapping, zoning, regulating, taxing, developing, owning, protecting, patrolling, and servicing of land. Indeed, Mariana Valverde suggests that while “states rule mainly by governing persons”,<sup>1</sup> cities or “[l]ocal authorities are for the most part concerned with regulating space and activities and providing services to property.”<sup>2</sup> As a result, cities exert considerable control over the rights of use that property owners enjoy, but they also make many uses possible through the building of roads and other transportation infrastructure, the delivery of utilities and sanitation services, and the provision of emergency response. Moreover, while civic planning may restrict some uses of urban land, the restrictions can serve to protect and even facilitate other uses. In short, the business of cities is property, its development, its use, and its servicing.

However, the effects are not unidirectional; the institution of property is not simply inert clay in the hands of a city. Cities govern the actions of owners and, by extension, shape the institution of property, but this multidimensional institution is, in turn, a powerful influence on the shape and character of cities. Private property, common property, and state property—the trilogy of property forms—are not shapeless entities, but powerful organizing frames built around, on the one hand, the rights of an owner to exclude non-owners from private or state property, and on the

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<sup>1</sup> Mariana Valverde, *Everyday Law on the Street: City Governance in an Age of Diversity* (Chicago: University of Chicago Press, 2012) at 26.

<sup>2</sup> *Ibid* at 27.

other, the rights of individuals not to be excluded from common property.<sup>3</sup> The choices among these different kinds of property, and their deployment in the city, play a pivotal role in shaping the urban fabric, notwithstanding the extensive capacity of the cities to govern uses of land.

It is also clear that property relationships are implicated in some of the most pressing urban issues. The prevalence of homelessness, and the consequent conflict over the uses of common property between those who use public spaces as an adjunct to private living quarters and those who must live their lives only in the public spaces, is one prominent example.<sup>4</sup> In addition, a dearth of affordable housing in many Canadian cities, whether to rent or to own, is not simply a function of a lack of housing supply, but is also connected to a set of political choices that prioritize residential property interests as vehicles for investment rather than as a means to stable homes.<sup>5</sup> At another level, the search for reconciliation between Indigenous and non-Indigenous peoples in Canada and other settler societies requires not only revisiting the distribution and allotment of land, but also more foundational questions about the distribution and sharing of sovereignty.<sup>6</sup> Moreover, the pervasiveness of, and value in, property interests in intangible resources, including forms of expression, inventions, and the representations of business interests, requires us to abandon the land-based and land-biased imagery of “Blackacre” and to engage with intellectual property in urban

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<sup>3</sup> CB MacPherson, *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978) at 4–6. See Nicholas Blomley, “The Ties That Bind: Making Fee Simple in the British Columbia Treaty Process” (2015) 40:2 *Transactions* 168 (on the power of framing or bracketing).

<sup>4</sup> Jeremy Waldron, “Homelessness and the Issue of Freedom” (1991) 39:2 *UCLA L Rev* 295.

<sup>5</sup> Carol Rose describes a division in the purposes of property between preference satisfaction and propriety: Carol M Rose, “‘Takings’ and the Practices of Property: Property as Wealth, Property as ‘Propriety’” in Carol M Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Boulder: Westview Press, 1994) 48. See also Gregory S Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought, 1776-1970* (Chicago: University of Chicago Press, 1997).

<sup>6</sup> Douglas C Harris, “Property and Sovereignty: An Indian Reserve and a Canadian City” (2017) 50:2 *UBC L Rev* 321.

settings.<sup>7</sup> And whether our focus is property in tangible or intangible resources, the accelerating pace of technological change is challenging many social norms and established relationships, including long-standing understandings of ownership and of property.<sup>8</sup>

It is with an understanding of the constitutive power of property and of cities that we convened a workshop around the theme of “Property in the City” to investigate the relationships between them. In 2017, twenty-five scholars from eighteen different universities, six countries (Canada, United States, Israel, United Kingdom, Australia, and Italy), and a range of disciplines (including law, sociology, geography, planning, and criminology), gathered at the University of British Columbia’s Peter A. Allard School of Law to engage with property and cities. The presentations ranged as broadly as the participants in terms of subject-matter, geography, and disciplinary approach. Over two days, we discussed the work of community organizations to create temporary “parklets” in the metered parking spaces on city streets, the efforts of universities as land developers, the use of site-specific density bonuses in permitting processes, the changing character of the single-family home as built structure and zoning category, the pervasiveness of restrictive covenants that seek to stifle competition, the attempts to regulate the explosion of short-term rentals facilitated through the platform economy, the relationship between freedom of expression and intellectual property, the latent possibility of a “right to housing”, and much else besides. This special issue is a product of that workshop.

The student editors at the *UBC Law Review*, led by Editors-in-Chief Kai Ying Chieh and Catherine Wang, took the lead in reviewing submissions from the workshop participants, in steering the papers through double-blind peer review, and in selecting the four papers that appear in this Property in the City special issue. Their editorial work, including the

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<sup>7</sup> Rosemary J Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Durham and London: Duke University Press, 1998).

<sup>8</sup> See Stuart Banner, *American Property: A History of How, Why, and What We Own* (Cambridge, Mass: Harvard University Press, 2011) on the history of property law and technological change in the United States.

careful checking of sources and close attention to detail, helped each of the authors to improve their contributions.

Two of the articles in this special issue highlight the transformative power of technological change on the institution of property and, in varying ways, on the composition of cities. Teresa Scassa's "Sharing Data in the Platform Economy: A Public Interest Argument for Access to Platform Data" analyzes the capacity of the platform economy to produce and control data, and the challenges for municipalities that do not have access to this information about the city. Using Airbnb as a case study, Scassa opens a new window on the disruptive impacts of its platform-based business model with her focus on the corporate power to collect and, more particularly, to withhold data, thereby rendering invisible to cities and their planning processes the massive increase in short-term rentals that the platform economy facilitates. Scassa canvasses a number of municipal responses, and then evaluates a set of legislative changes as well as proposals from Airbnb itself to address this "data deficit". In doing so, she emphasizes that the lack of information about short-term rentals, while important to cities, is only one example of a pervasive challenge facing governments at many levels to secure access to the data that is necessary to enable transparent, accountable, and effective decision-making.

In "Pokémorials: Placing Norms in Augmented Reality", Elizabeth Judge and Tenille Brown confront the explosive popularity of Pokémon Go and, more generally, the impacts of augmented reality technology, in which users navigate the physical world mediated through a layer of digital representations, on cities and conceptions of property. They focus on the conflict that erupted when the digital representations of Pokémon characters led game players to historically significant sites, and to memorials in particular. The custodians of cemeteries, cenotaphs, commemorative monuments, and other memorial sites were soon asking Pokémon-chasing players to stay out. Judge and Brown interpret this response as an effort to protect established norms of decorum and solemnity in these places of worship, commemoration, or grieving, and they extend this analysis to argue that augmented reality has the capacity to disrupt place-based norms in many different spaces, not just memorial sites. In conclusion, they consider how location-based augmented reality technologies, which pay

little attention to place-specific norms, might better account for the normative conventions of individual places.

The other two papers in this special issue focus on condominium property. The first, Dorit Garfunkel's "High-Rise Residential Condominiums and the Transformation of Private Property Governance", flows out of her doctoral dissertation research involving extensive interviewing of those involved in constructing, managing, regulating, and living in condominium property in four different cities: Tel Aviv, Paris, Sydney, and Tarragona. On the basis of this research, Garfunkel finds a proliferation of "high-rise" condominium developments, which she defines not just in terms of height and numbers of units or residents, but also in terms of the capacity to produce "lifestyle" amenities and the need for advanced technological building systems. Moreover, Garfunkel argues that the high-rise condominium is intensifying a set of existing tensions within condominium property between resident-owners and investor-owners, between resident-owners and tenants, and between owners and managers. The proliferation of high-rise condominium developments is also creating strains between local authorities and condominium owners. The result, argues Garfunkel, is a blurring of public and private realms when it comes to the governance of private property.

In "Owning and Dissolving Strata Property", Douglas Harris analyzes the recent amendments to British Columbia's *Strata Property Act* ("Act") that enable 80 percent of owners within condominium property (or strata property as it is known in British Columbia) to force dissolution of a condominium development.<sup>9</sup> Dissolution involves cancelling the strata plan (the constituting document), winding-up of the strata corporation (the governing body), and terminating property interests in individual strata lots. Before the amendment, the *Act* created a presumption that all owners must consent to dissolution; after the amendment, the *Act* creates a presumption that supermajority approval is sufficient. Harris describes the non-consensual dissolution of strata property as a form of takings, instigated by a newly empowered supermajority and at the expense of a

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<sup>9</sup> *Strata Property Act*, SBC 1998, c 43, s 272(1), as amended by the *Natural Gas Development Statutes Amendment Act*, 2015, SBC 2015, c 40.

dissenting minority who have not consented to the termination of their property interests. He then argues that the courts, in reviewing condominium dissolution votes as required under the *Act*, must understand, first, that they are sanctioning a taking of property when approving a non-consensual dissolution, and second, that in deciding whether or not to approve dissolution they are making important choices about the nature of property and its social purposes. These consequences, Harris concludes, require heightened judicial scrutiny of the dissolution processes, and require particular judicial attention to the impact of non-consensual dissolution on the dissenting owners.

In various ways, each of these four articles engages with the character and scope of ownership, the tensions between private rights and public interests, and the mutability of property concepts over time and in response to technological innovation. They also reveal in different ways how the urban location matters; cities shape and are shaped by property.

As a final thought from us before the authors have their say, while this special issue marks the end of the “Property in the City” workshop, it does not signal the end of our desire to explore the relationship between property and cities. From hosting the first meeting of the Association of Law, Property, and Society (ALPS) to be held outside the United States in 2014, to the workshop in 2017, and most recently, to a day-long field trip/walking seminar with approximately 50 walkers along the 10 kilometres of a former railway line running through Vancouver’s west side, we plan to continue interrogating the many relationships between property and cities and making the Allard School of Law a prominent site for that work.

It is our pleasure to thank the Allard School of Law’s events manager, Michelle Burchill, who provided exemplary organizational support behind the scenes. Funding support for the workshop came from the Law School’s Franklin Lew Innovation Fund.