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2021

### Embedded Property

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#### Citation Details

Douglas C Harris, "Embedded Property" in Randy K Lippert & Stefan Treffers, eds, *Condominium Governance and Law: Global Urban Perspectives* (Abingdon: Routledge, 2021) 29.

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## 2 Embedded Property

*Douglas C. Harris*

### **Introduction: private property, common property, and condominium<sup>1</sup>**

The institution of property arises in the tension between autonomy and community. It serves not simply to demarcate spaces of individual control and authority, but also to balance individual with collective interests. This balance swings, the weight shifting towards individual or collective, and the movement is perhaps most apparent across the space between private property and common property. To hold private property is to be recognized as the owner and to enjoy the benefits of ownership, including a considerable degree of control over the use of the owned resource. The emphasis, as William Blackstone's famous 'sole and despotic dominion' characterization announces, is on the owner, 'in total exclusion of the right of any other individual in the universe'.<sup>2</sup> On the other hand, common property establishes rights for members of a group to use and access resources, subject to collectively prescribed rules. Here the focus tends towards the decision-making of the group, not the individual, and, following Elinor Ostrom's influential work, to the institutions of collective action.<sup>3</sup>

Private property and common property emphasize individual and collective interests respectively, but the bifurcation may not be as stark as it appears. Common property suggests the prominence of collective control, but it also creates, in CB MacPherson's helpful formulation, an individual right not to be excluded,<sup>4</sup> and in democratically governed communities, an individual right to participate in governing the uses of common-pool resources. As a result, common property can serve an important role in protecting and securing individual interests, even if it is the collective, rather than the individual, with decision-making authority. Conversely, understandings of private property have tended to emphasize variations of an owner's right to exclude, but not untrammelled decision-making authority or even the absence of community. Indeed, many, including Blackstone, recognize 'sole and despotic dominion' as a caricature of the institution of private property, which is never absolute or entirely separate from, but instead always dependent on and supporting community.<sup>5</sup>

Condominium, as an architecture of land ownership, engages directly with the tension between autonomy and community by creating and combining private property and common property interests, and then by allocating democratic rights to the owners of these interests to participate in governing their uses. It is one among a number of legal forms, including cooperative and homeowners association, that are deployed in multi-unit developments to create spheres of individual control and responsibility within a self-governing community.<sup>6</sup> It is the legal separateness of the individual units that distinguishes condominium from cooperative, and the co-ownership interests in common property that marks condominium as different from the homeowners association. Cornelius van der Merwe describes condominium as embodying a dualistic approach to ownership in multi-unit developments to signal that each owner holds two distinct property interests: a separate title to a particular unit and a co-ownership interest in the common property, held in common with the other title holders.<sup>7</sup>

Condominium constructs separate titles to individual units, and these private interests are carefully mapped in a constituting plan that marks their boundaries. However, notwithstanding their legal separateness, the private interests are inseparable from the common property interests; their ownership cannot be severed from the accompanying rights to undivided shares of the common property. Moreover, this packaging of private with common property reflects a physical entwining: the individual units rely on the common property, which exists to support, to shelter, to secure access to, and as an amenity for, the privately held units. Indeed, the private property within condominium cannot exist without the common property, which exists in service of the private. The corollary of this entitlement is an obligation on the unit owners to share the costs of maintaining and, when necessary, replacing the common property. The owners of individual units, as co-owners of the common property, must contribute, in proportion to their shares, to its upkeep.

Democratic rights, usually conveyed in the form of shares in a condominium corporation, are the third element of ownership within condominium. Each unit is typically allotted one vote, but other arrangements are possible, including voting rights based on relative floor areas of individual units or the proportions of common property ownership.<sup>8</sup> These voting rights, which confer the opportunity to participate in the governance of the private and common property, are an integral part of ownership within condominium, but the binding that holds them to the property interests can be loosened in certain, albeit rare circumstances, to permit a tenant or a creditor to assume an owner's voting rights. Apart from these few instances where voting rights may be detached temporarily, and usually only partially, from the status of owner, the right to participate in a democracy of owners is part of the condominium package.

What I have described in the preceding paragraphs is an architecture of ownership that constructs a form of *embedded property*. Condominium binds private property with common property and democratic rights to lodge the private interests within a community of owners. The private interests are constructed by, and only exist within, condominium. One might point out, as many have, that private property is always embedded within community, that even outside condominium 'property is a sociable institution, depending on the recognition and respect of others',<sup>9</sup> or that 'property is not just an individual entitlement but a social institution involving many owners'.<sup>10</sup> However, condominium not only constructs private interests, but also the immediate community in which they are embedded. Moreover, it is impossible to disembed those private interests; the private property of condominium only exists within condominium.

In this chapter, I offer the concept of *embedded property* as a way of thinking about and understanding condominium property, and of explaining how ownership of land within condominium is changing the character of ownership. I do so in the next section by describing property within condominium as *spatially* embedded, *politically* embedded, and *temporally* embedded, and then by demonstrating how these different, albeit overlapping, modes by which condominium embeds property are forcing courts and legislatures to reconsider long-accepted and well-understood incidents or attributes of land ownership. In identifying the *spatial embedding* of condominium property and its impact on understandings of ownership, I review the judicial responses in the Canadian provinces of Ontario and British Columbia to the chronic anti-social behaviour of individual owners. To consider the *political embedding*, I turn to the legislative framework and judicial decisions from several Australian states and Canadian provinces involving disputes over the capacity of condominium corporations to restrict rentals, particularly short-term rentals. Finally, I describe and consider the *temporal embedding* of condominium property through a discussion of the shift in many statutory condominium jurisdictions away from a presumption that the dissolution of condominium requires the unanimous consent of owners, to a presumption that dissolution, and thus the termination of private property interests within condominium, may proceed on the basis of a supermajority vote.

The analysis reveals that the spatial, political, and temporal embedding of property is straining accepted understandings of land ownership, and judges and legislators are responding to this pressure by changing the character of ownership in land. Moreover, these changes are not simply modifications of doctrine and should not be discounted merely as technical changes; instead, they should also be understood as precipitating significant changes in the role and function of property. As Cathy Sherry has argued regarding Australian condominium legislation and case law, 'we must be conscious of the ways in which we are straying from orthodox rules of

property and the consequences of that divergence.’<sup>11</sup> In the concluding section, I suggest that the surge towards condominium as the preferred architecture of ownership in many jurisdictions around the world over the past 50 years is precipitating a transformation in the institution of property in land, and, not only for land within condominium. I also raise the paradox of condominium—that the embedding of property within condominium is also creating the capacity for communities of owners to disembed themselves from the larger public realm.

### **Embedded Property**

As an architecture of ownership that binds private property with common property and democratic rights to participate in a governing body, condominium produces property interests that are embedded within a community of owners. This embedding occurs in the creation of a condominium development, fixing the private interests within the legal form, but the embedding is also a process that continues to shape the nature and character of property and of ownership. The form of that embedding may usefully be described as occurring in spatial, political, and temporal modes. Within condominium, property is spatially, politically, and temporally embedded, and each mode of embedding is acting on the institution of ownership.

### ***Spatially embedded***

“Blackacre” has long served common law lawyers, judges, and scholars as the imagined parcel of land in innumerable property law hypotheticals.<sup>12</sup> The image that it conveys, or at least that I have always imagined, of a fenced rural acre, emphasizes the separateness and apartness of the land and its owner. Indeed, understandings of ownership built around Blackacre as the hypothetical object of property tend to identify a singular owner, “A”, and to prioritize variations of the right to exclude as the irreducible core of property.<sup>13</sup> Amnon Lehari has pointed to the limitations of what he describes as the “Blackacre Paradigm,” arguing that it suggests a detachment of property from community, a singularity of ownership, and a purity of private property that belie contemporary patterns of ownership.<sup>14</sup> Lehari and others have turned to common interest communities, with their packaging of private property, common property, and democratic rights as a principal exhibit in their efforts to shift some of the emphasis in definitions of property away from the individual and the right to exclude.<sup>15</sup>

However, Blackacre does more symbolic work that has yet to be noticed: it conjures an image of owners spread in a single layer or stratum over the surface of the earth, separated by a fence or some other boundary marker which can be represented on a two-dimensional map. Blackacre

suggests the possibility of a neighbouring Whiteacre or Greenacre on the other side of a fence. It is much harder to imagine a neighbouring, coloured-acre that occupies territory above or below Blackacre. Subsurface and airspace rights are possible, of course, but they usually appear as tangential to, or derivative of, the surface interest in Blackacre. As a result, this hypothetical object of ownership constructs a particular spatial arrangement of landowners, and this arrangement produces the imagined space in which the law of property and the institution of ownership have developed.

Blackacre does not work as the hypothetical parcel of land within condominium. To begin with, condominium requires a built structure, not open fields; the subdivision of land into smaller parcels within condominium is only permitted once the spatial boundaries of those parcels have been defined by the floors, walls, and ceilings of a building.<sup>16</sup> In addition, condominium transforms the spatial context of property by facilitating an extraordinary increase in the density of parcels and thus, of owners. This is most apparent in the condominium apartment tower. Where there was once a single parcel of land marked over a section of the surface of the earth, within condominium there may now be tens or even hundreds of parcels, stacked in a vertical column and sharing not only a fence line but also floors, walls, and ceilings, and much other infrastructure besides. The stacking of parcels enables the stacking of owners. Indeed, condominium facilitates a spatial reconfiguration of property interests and their owners, creating a previously unimaginable density and proximity, and this spatial embedding produces a dramatically different context in which the institution of ownership must operate. Not surprisingly, courts and legislatures have responded to the spatial embedding of property by revisiting and reshaping what it means to be an owner of an interest in land. This is evident in the judicial treatment of chronic anti-social behaviour within condominium.

### *Chronic anti-social behaviour*

Proximity creates challenge. In 2010, a court in the Canadian province of Ontario evicted an owner from her condominium unit and ordered that she sell it within three months because of her chronic anti-social behaviour.<sup>17</sup> The behaviour included

physical assaults on other unit holders, acts of mischief against their property, racist and homophobic slurs and threats repeatedly made against other unit holders, playing extremely loud music at night, watching and besetting other unit holders and using her large and aggressive dog to frighten and intimidate other unit holders and their children.<sup>18</sup>

The court concluded that the only viable remedy for the other 33 unit owners within the townhouse condominium complex was to expel the offending owner, and it found the authority to make such an order in the province's condominium legislation.<sup>19</sup>

Several years later, the courts in British Columbia arrived at a similar conclusion in a case involving a volatile relationship between a mother and adult son, and the impact of their behaviour on the other residents in a 132-unit condominium complex in the City of Surrey, a suburb of Vancouver.<sup>20</sup> In addition to frequent and loud altercations between mother and son, the adult son had abused and harassed other residents with foul language, obscene gestures, and intimidating behaviour. The behaviour had continued over four years, notwithstanding frequent warnings from the strata corporation, fines amounting to more than \$20,000, and court orders to cease. Eventually, the British Columbia Court of Appeal confirmed a lower court's eviction and sale order, but indicated that the province's condominium legislation only permitted such an order where an owner was in contempt of a prior court order to comply with the legislation or condominium bylaws.<sup>21</sup>

When I first wrote about these decisions in 2016, I counted ten reported decisions, including the two discussed above, in which Ontario and British Columbia courts had granted eviction and sale orders against owners within condominium for chronic anti-social behaviour.<sup>22</sup> Since then, there are two more reported decisions, one from each jurisdiction, in which the courts have concluded that an eviction and sale order is an appropriate remedy for those owners seeking relief from another owner's chronic anti-social behaviour.<sup>23</sup> Perhaps in recognition of the severity of such an order, the British Columbia Supreme Court in its most recent decision indicated that owners seeking an eviction and sale order against another owner must establish 'beyond a reasonable doubt'—the standard of proof in criminal law—that the offending owner was in contempt of a prior court order.<sup>24</sup>

In addition to these judicial decisions, the relatively recent overhaul of Ontario's *Condominium Act* included statutory direction about the appropriate use of permanent eviction orders.<sup>25</sup> Courts must only make such an order where a person's conduct 'poses a serious risk' to health and safety or damage to property.<sup>26</sup> Moreover, the conduct must demonstrate that 'the person is unsuited for the communal occupation of the property or the communal use of the property' and 'no other order will be adequate'.<sup>27</sup> The amendment makes no mention of sale orders and, although passed in 2015, has yet to be proclaimed into force.

By removing the immunity of an owner from eviction and forced sale for chronic anti-social behaviour, the courts have diverged from long-held and well-established conceptions within the common law of what it means to be an owner of an interest in land. Title holders outside condominium might face criminal penalty or civil sanction, such as liability in nuisance, for chronic anti-social behaviour, but not an eviction and sale order. The spatial dispersion of

property interests within the Blackacre paradigm serves to insulate owners from the behaviour of neighbours, and this has shaped a construction of ownership which does not include minimum standards of personal behaviour to maintain the status of owner. That this is no longer the case, at least in Ontario and British Columbia, is a fundamental change in the nature and quality of ownership. Ownership now includes access to a new remedy—an order to expel a neighbour from condominium for chronic anti-social behaviour. Ownership has also become more precarious, at least for some, because contingent on a minimum standard of personal behaviour.<sup>28</sup> This change in what it means to be an owner is, at least in part, a judicial response to the particular spatial embedding of property within condominium.

### ***Politically embedded***

One of the prominent figures in the body of thought that came to be known as liberalism, John Locke created a powerful illusion that private property might be acquired simply through the actions of individuals.<sup>29</sup> In his parable of the origins of private property, humans owned their bodies and thus the labour of their bodies, God had given the world to humankind in common, and an individual might, by mixing their labour with the things of the world, claim a property interest in those things. There were limitations to this labour theory of property, but the effect was that property interests might be understood as arising prior to society, and by extension, that the primary role of society, and ultimately of the state, was to protect those prior interests.

Although powerfully resonant in western societies and serving as an intellectual foundation for a ‘bottom-up’ origin story of property rights,<sup>30</sup> the assertion within Locke’s labour theory of property for a pre-social acquisition of property was only ever an illusion. Most minimally, the claim to property, and thus to an enforceable right, requires a community that is prepared to recognize and acknowledge—to be persuaded of, in Carol Rose’s formulation—something more than mere possession.<sup>31</sup> Jeremy Waldron goes further, arguing the individualist account of property fails to recognize that the private rights of property rely and depend upon on the public realm, such that the institution of property is ‘an artifact of the interaction of public law and private law’.<sup>32</sup> The private entitlements of property are never solely the product of private actions but always involve the public realm, something that Joseph Singer captures in his description of property as ‘a social and political institution and not merely an individual entitlement’.<sup>33</sup>

This characterization of property as the product of private and public realms speaks directly to condominium property. Indeed, whatever the strength of the Lockean illusion in providing a justification for private property, any pretence of private property as something that is separate from, or prior to, society is impossible to sustain within condominium. Condominium produces property interests and it embeds those interests



within a community of owners with the power to govern the uses of that property.<sup>34</sup> This political embedding is a function of ownership; residency within the community is largely immaterial. Tenants do not enjoy the right to participate; the democratic rights within condominium derive from ownership. Moreover, in many jurisdictions, the possibility of tenants, and thus of an owner's right to rent or lease their property, depends on the community of owners. Where the statutory framework permits, the community of owners may decide to restrict or even to prohibit rentals, thereby curtailing one of the means by which to alienate interests in land and limiting what has generally been understood as a fundamental incident of land ownership.

### *Short-term accommodation*

Short-term rentals prohibited. This was the decision of the owners in a 351-unit mixed residential and retail condominium development—the Watergate Apartments—in the Australian city of Melbourne when, at the first meeting of the owners corporation in 2004, they voted for a rule banning the rental of units for less than one month.<sup>35</sup> Notwithstanding the prohibition, one owner acquired 14 apartments within the development and, over a period of eight and a half years, arranged 3,500 bookings and hosted 10,500 guests in those units for periods as short as seven days.<sup>36</sup> In 2014, the owners corporation sought an order that the owner stop using the units in violation of the short-term rental prohibition. However, the Supreme Court of Victoria denied the order, ruling instead that the owners corporation had exceeded its jurisdiction in attempting to prohibit short-term rentals. At the heart of the decision was the court's view that such a substantial interference 'with lot owners' proprietary rights' required 'clear and unambiguous language' in the empowering legislation.<sup>37</sup> The power of the group of owners to diminish their individual rights as owners by restricting the power to lease their units was so significant an infringement of the rights of ownership that it could only occur under specific and explicit statutory direction.<sup>38</sup>

The strong protection in the state of Victoria for individual property rights within condominium, and for the right to lease units in particular, places the jurisdiction at one end of a spectrum in the balance between protecting the rights of individual owners and empowering the group of owners to place limits on those rights. Somewhere in the middle of that spectrum is the Canadian province of Ontario. In 1974, the Ontario Superior Court ruled that the province's condominium legislation did not permit a condominium corporation to prohibit the rental of individual units.<sup>39</sup> In doing so, the court drew on an ancient English statute to confirm the right of owners to alienate their property:

One of the fundamental incidents of ownership is the right to alienate the property that one owns. With respect to real property the right to freely alienate dates to 1290, when the Imperial Statute of Quia Emptores, 18 Edw. I, was enacted.<sup>40</sup>

The right of a condominium corporation to curtail such a long-standing and well-established incident of ownership required 'clear, unambiguous language' that, the court ruled, was not present in Ontario's condominium legislation.<sup>41</sup> However, just over four decades later, in 2016, the same year as the decision of the Victoria Supreme Court involving the Watergate Apartments, the Ontario Superior Court confirmed the power of condominium corporations to prohibit short-term rentals.<sup>42</sup> In doing so, the court ruled that the prohibition on rentals for periods of fewer than four months was 'not so overly restrictive as to completely negate or fundamentally alter the right of owners to lease their units'.<sup>43</sup>

At the other end of the spectrum is the Canadian province of British Columbia. When uncertainty arose in the courts in the 1980s over whether the province's condominium legislation enabled owners to prohibit rentals, the government re-wrote the statutory provision to confirm that strata corporations could restrict and even prohibit rentals.<sup>44</sup> This capacity extends to short-term accommodation, and in order that strata corporations might create effective sanctions to dissuade owners from short-term rentals, the province recently increased the maximum fine that a strata corporation might levy for a violation of a short-term rental bylaw from \$200 once every seven days, which was viewed by some as a small cost of doing business, to \$1000 for every day that an infraction continues.<sup>45</sup> Some municipalities in British Columbia have introduced bylaws that permit short-term rentals of principal residences only,<sup>46</sup> but owners within condominium may go further, prohibiting rentals entirely.

Property within condominium is embedded within a political community of owners with the capacity to make and enforce rules over the use of property. This political community is private in the sense that the right to participate flows from ownership; it is democratic in that owners have votes to elect a governing council or board and to set the rules.<sup>47</sup> The rules of these private, democratically governed communities can be invasive, and, in some jurisdictions, may extend the rules set out in the bylaws of public governments at the local or municipal level. In those jurisdictions that permit rental restrictions or even prohibitions, the political embedding of property within a community of owners empowers that community to curtail what has long been understood as a fundamental incident of ownership of land: the right to alienate.

### ***Temporally Embedded***

In common law jurisdictions, the doctrine of estates constructs time as the measure for possessory interests in land. In place of ‘the holistic ideas of *dominion*’ or ‘any overarching notion of ownership’ that exist in civil law traditions,<sup>48</sup> the common law, note Kevin and Susan Gray, employs the doctrine of estates to fashion the object of ownership as ‘a *slice of time* in the land’.<sup>49</sup> Within this temporal framework, the freehold estate known as the fee simple is the largest estate because it has the potential to last forever, an idea expressed in the often-cited and elegant passage from the early modern English courts:

[T]he land itself is one thing, and the estate in land is another thing, for an estate in the land is a time in the land, or land for a time, and there are diversities of estates, which are no more than diversities of time, for he who has a fee-simple in land has a time in the land without end, or the land for a time without end.<sup>50</sup>

The potential of a fee simple estate to last forever will not be realized if its current holder dies without heirs. In this circumstance, the doctrine of tenure—that all land is held of the Crown—operates to return the estate to the Crown through the ancient feudal incident of tenure known as *escheat*. In addition, property may be taken, usually by a public entity, for a public purpose, and with fair compensation, under laws, variously labelled, of expropriation, compulsory acquisition, or eminent domain. In many jurisdictions, the basic framework for the taking of property without consent is set out in constitutional provisions, reflecting the importance placed on the appropriate balance between private rights and public interests in land.

The private property interests that condominium constructs have the potential to last forever.<sup>51</sup> In common law jurisdictions, condominium creates separate freehold or fee simple interests in individual units, and the statutory condominium regimes declare these freehold interests to have the same character and quality as freehold interests outside condominium.<sup>52</sup> Similarly, the condominium form itself has the potential to last forever; as with business corporations, there is no natural or pre-determined end date for a condominium development and the corporation that serves as the governing entity. But just as business corporations may be wound-up, so too a condominium development may be dissolved. This involves the cancelation of the plan or other constituting document, and, most importantly, the termination of the private property interests that it created. Those interests depend on the larger form for their existence. The legal architecture of condominium creates them; without that structure, they cease to exist. In this sense, condominium embeds the property interests that it creates within its temporal frame. This temporal embedding means that the decision to dissolve a condominium development is also a decision to terminate the private property within.

### *Dissolution and collective sale*

Should we sell the building? At some point in the lifecycle of a condominium development, unit owners will confront the question of whether they, as a group, should proceed with a collective sale.<sup>53</sup> Indeed, unit owners in many condominium developments have reached this point already, a not unsurprising development given that condominium statutes are now more than 50 years old in most jurisdictions and an increasing number of developments that deployed the legal form require extensive and expensive renovations of the common property, including roofs, heating and cooling systems, elevators, exterior windows and siding, and more. Moreover, condominium developments exist within neighbourhoods, cities, and metropolitan regions that change, as do the zoning rules, turning parcels of land into enticing targets for redevelopment. A land developer's offer that includes a significant premium on individual unit values if the units are sold collectively is a common tipping point that prompts a collective sale.

The dissolution of condominium involves cancelling the constituting plan, winding up the condominium corporation, and terminating the private interests in individual units. In what is usually a transitory step to facilitate a collective sale, the former unit owners within condominium become co-owners of all the property, including that which they had owned individually. The decision to dissolve condominium, and thus to terminate individual interests in land, is probably the single most important decision in the lifecycle of a condominium development. For this reason, the process by which this decision is reached, and the required threshold of consent among owners, is crucial, not only for understanding the rights of individual property owners, but also for determining the character of ownership within condominium. Statutory condominium regimes around the world have generally adopted either a presumption that the dissolution of condominium requires unanimous consent (with an option to seek a court order to dissolve condominium if unanimity is not possible) or a presumption that dissolution may proceed with the consent of a supermajority of owners, usually 75 or 80 percent (with varying degrees of protection for the dissenting minority).<sup>54</sup>

In the last 20 years, there has been a significant shift among statutory condominium jurisdictions away from a presumption that owners could insist on their consent, to a presumption that the consent of a supermajority of owners is sufficient. Hong Kong introduced a 90 percent dissolution threshold in 1998,<sup>55</sup> and Singapore followed a year later, introducing supermajority thresholds of 80 and 90 percent, depending on the age of the building.<sup>56</sup> In the US, Florida adopted an 80 percent threshold in 2007,<sup>57</sup> and the following year the Uniform Law Commission recommended, through its *Uniform Common Interest Ownership Act*, that states adopt an 80 percent threshold, although it also suggested that residential common interest communities

should have the option to raise that threshold.<sup>58</sup> New Zealand adopted a 75 percent threshold in 2010,<sup>59</sup> and Hong Kong amended its legislation, introducing a tiered regime that lowered the threshold for some buildings to 80 percent.<sup>60</sup> Among Australian states, in 2014 the Northern Territory introduced a sliding threshold of 80 to 95 percent, depending on the age of the development;<sup>61</sup> New South Wales implemented a 75 percent threshold in 2017;<sup>62</sup> and Queensland is considering a similar proposal.<sup>63</sup> In the Canadian context, British Columbia introduced an 80 percent threshold in 2016.<sup>64</sup>

The title of the Hong Kong's legislation—*Land (Compulsory Sale for Redevelopment) Ordinance*—is revealing for its labelling of the shift to a supermajority threshold as a form of compulsory sale. As Nicole Gilewicz and I have argued elsewhere, the move to non-consensual dissolution is a shift that permits a form of private-to-private taking in which some owners may terminate the property interests of their neighbours.<sup>65</sup> The dissenting owners will be compensated for the loss of their interest, and the level of compensation for each owner in a collective sale will commonly exceed the sum that each owner would receive were they to sell their units individually, but nonetheless, their interests will be terminated involuntarily. Hazel Easthope describes this change to supermajority consent in order to dissolve condominium as challenging 'deep-seated ideals around the nature of home ownership, and particularly the assumption that ownership is associated with stability and control over what happens to one's property.'<sup>66</sup> Neighbours are empowered to take the property of neighbours, usually to maximize the exchange value of land for all owners, including those opposed to the sale, but at the cost of the loss of security, which has commonly accompanied, and been an important feature of, the ownership of land.

Condominium produces private interests in land that have the potential to last forever, but that will not survive the dissolution of the legal form that creates them. This temporal embedding of property within condominium places the longevity of property interests in the hands of the community of owners. As a result, the shift in many jurisdictions from a presumption that the dissolution of condominium requires the unanimous consent of owners to a presumption that a supermajority vote among owners is sufficient is not simply a technical change; it remakes the meaning of ownership.<sup>67</sup> The effect is to enhance the exchange value of property, by facilitating its redevelopment, but to undermine the security that comes with the right of an owner to insist that their property can be transferred only with their consent.

### **Conclusion: embedding and disembedding property**

In *The Great Transformation*, Karl Polanyi dangled an enticing metaphor in suggesting that the nineteenth century push among northern European states to construct self-regulating markets, animated by the principle of individual

gain and governed only by the price mechanism, served to disembed markets from society.<sup>68</sup> This disembedding of markets from social and legal constraints had contributed to the creation of great wealth, he continued, and was integral to a system that had, for a time, produced unprecedented peace and political stability in Europe, but Polanyi argued that it also caused horrendous working and living conditions and the devastation of natural environments. The consequences when the system collapsed in the late nineteenth and early twentieth centuries, argued Polanyi, were two world wars, the great depression, and the rise of fascism and communism.

Although I employ the metaphor differently, Polanyi's *embeddedness* provided the spark for thinking about condominium as embedded property.<sup>69</sup> Condominium constructs a form of ownership that embeds property in a community of owners. In this chapter I have outlined the spatial, political, and temporal modes of that embedding. Moreover, the effect of that embedding has been to precipitate a series of fundamental changes in the character of land ownership. Ownership within condominium may now require a minimum standard of personal behaviour to retain the status of owner (following the use of eviction and sale orders for anti-social behaviour), it may no longer have incidents that have been long associated with property (because of restrictions imposed by the community of owners on the right to alienate), and it may be terminated by neighbours without consent (where dissolution proceeds on the basis of a supermajority vote). The embedding of property is changing the character of ownership. Moreover, given the rapid rise of condominium as a prominent, and, if existing trends continue, soon-to-be dominant form of property within cities, then it will come more generally to define the nature of property in land. Condominium will be the paradigm for ownership of land, not simply a particular form among many.

However, the paradox of condominium property, to borrow from Joseph Singer,<sup>70</sup> is that the embedding of property imbues condominium owners with the collective capacity to disembed themselves from a larger public realm. Indeed, condominium shares with other forms of common interest community the capacity, perhaps even the propensity, to turn owner attention inwards, to the concerns and interests of the community of owners that these property regimes create. To some extent, this turning inwards is inevitable and necessary; the owners, as co-owners of the common property, have an interest in, and are responsible for, maintaining the common property on which their private property depends. But one consequence is to precipitate a disembedding of that community, and the owners within it, from the larger public realm.

There is a considerable literature, most of it drawing on studies of suburban homeowners associations in the US, that describes the capacity of private residential governments to enable groups of owners to secede and, by doing so, to exacerbate socio-economic and racial divisions.<sup>71</sup> Geographers who focus on condominium have turned their attention to this scholarship,

including Gilad Rosen and Alan Walks who argue that condominium is the principal mechanism fuelling the ‘expansion of privatopia to North America’s urban centres’.<sup>72</sup> Sociologist Randy Lippert has done so as well, although to argue that condominium is more usefully understood as a site of myriad governing regimes than as another level of government which might secede.<sup>73</sup> Legal scholars engaged with condominium should also be asking whether condominium, as an architecture of ownership that embeds property within a community of owners, facilitates a problematic disembedding of property and its owners from the larger social and political context, perhaps contributing to the placelessness that Nicole Graham has argued confounds contemporary property law.<sup>74</sup> If the embedding of property is changing the character of ownership, as I have argued here, then it is also important to ask how the potential to disembed a community of property owners might also change the character of ownership and what the effects of those changes might be. To begin to answer these questions requires an understanding of the institution of property as arising in the tension between individual and community, and of how it is being reshaped by its location within condominium.

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A revised version of this piece appears as a chapter in Randy K Lippert and Stefan Treffers, eds, *Condominium Governance and Law in Global Urban Context* (New York: Routledge, 2021) 29-44.

## Notes

<sup>1</sup> I thank Sarah Blandy, Chad Bush, Hazel Easthope, Alex Flynn, Anna Lund, Cathy Sherry, and the editors of this volume, Randy Lippert and Stefan Treffers, for their comments on earlier drafts of this chapter. This chapter also benefited from the comments of participants at the International Research Forum on Multi-Owned Properties, Stellenbosch University, South Africa, 17 January 2019, Nicole Johnston, convenor.

<sup>2</sup> William Blackstone, *Commentaries on the Laws of England*, vol 2 (A Facsimile of the 1<sup>st</sup> Edition of 1765-1769, University of Chicago Press 1979) 2.

<sup>3</sup> Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990).

<sup>4</sup> CB MacPherson, ‘The Meaning of Property’ in CB MacPherson (ed), *Property: Mainstream and Critical Positions* (University of Toronto Press 1979) 4-6.

<sup>5</sup> For a discussion of the complexity of individual and community interests in land within Blackstone’s *Commentaries* (n 2), see David Schor, ‘How Blackstone Became a Blackstonian’ (2009) 10 *Theoretical Inquiries in Law* 103.

<sup>6</sup> See Michael Heller, ‘Common Interest Developments at the Crossroads of Legal Theory’ (2005) 37 *Urban Lawyer* 329.

<sup>7</sup> CG van der Merwe, ‘The Adaption of the Institution of Apartment Ownership to Civilian Property Law Structures in the Mixed Jurisdictions of South Africa, Sri Lanka and Louisiana’ (2008) 19 *Stellenbosch Law Review* 298, 303. By contrast, van der Merwe describes a unitary approach to ownership in multi-unit developments as that where unit owners hold a co-ownership interest in the development (sometimes in the form of shares in an association, as in a co-operative), with an ‘ancillary incident’, such as a lease, that entitles possession of a

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particular unit. See the graphic illustrations of the two approaches in Hazel Easthope, *The Politics and Practices of Apartment Living* (Edward Elgar 2019) 4-5.

<sup>8</sup> In British Columbia, the default is one vote per strata lot, but some variation is permitted for non-residential strata lots: *Strata Property Act*, SBC 1998, c 43, ss 53, 247, 248.

<sup>9</sup> Carol Rose, 'The Law is Nine-Tenths of Possession: An Adage Turned on Its Head' in Yun Chien-Chang (ed), *Law and Economics of Possession* (Cambridge University Press 2015) 53.

<sup>10</sup> Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale University Press 2000) 31.

<sup>11</sup> Cathy Sherry, 'Lessons in Personal Freedom and Functional Land Markets: What Strata and Community Title Can Learn from Traditional Doctrines of Property' (2013) 36 *UNSW Law Journal* 280, 314.

<sup>12</sup> "black acre, n." *OED Online*, Oxford University Press, June 2020, [www.oed.com/view/Entry/19672](http://www.oed.com/view/Entry/19672).

<sup>13</sup> Thomas Merrill, 'Property and the Right to Exclude' (1998) 77 *Nebraska Law Review* 730, 740: "To illustrate, consider resources in land—the proverbial Blackacre. Let us start with the understanding that A has the right to exclude others from Blackacre."

<sup>14</sup> Amnon Lehavi, *The Construction of Property: Norms, Institutions, Challenges* (Cambridge University Press 2013) 3.

<sup>15</sup> See Hanoch Dagan and Michael A Heller, 'The Liberal Commons' (2000) 110 *Yale Law Journal* 549; Amnon Lehavi, 'Mixing Property' (2008) 38 *Seton Hall Law Review* 137; Gregory Alexander, 'Governance Property' (2011) 160 *University of Pennsylvania Law Review* 1853.

<sup>16</sup> Bare land or vacant land condominium is possible in some jurisdictions, allowing for what is described as the horizontal subdivision of land, usually to create lots for single-family structures, but is much less common than building condominium. For example, see *Strata Property Act*, SBC 1998, c 43, s 1 (definition of 'bare land strata plan').

<sup>17</sup> *Metropolitan Toronto Condominium Corp No 747 v Korolekh*, 2010 ONSC 4448.

<sup>18</sup> *ibid* [2].

<sup>19</sup> On the sources of the power to make such an order, and a comparative review across statutory condominium jurisdictions, see Douglas C Harris, 'Anti-Social Behaviour, Expulsion from Condominium, and the Reconstruction of Ownership' (2016) 54 *Osgoode Hall Law Journal* 53, 60-63. See Merwe, this volume, Neilson and Edlund, this volume, on responses in South Africa and Europe.

<sup>20</sup> *The Owners Strata Plan LMS 2768 v Jordison*, 2013 BCCA 484.

<sup>21</sup> *ibid*.

<sup>22</sup> The courts have generally used 'misconduct' to describe the behaviour rather than 'anti-social behaviour'. I follow a literature, most of it relating to disorderly conduct in rental housing, in using 'anti-social behaviour'. See the discussion in Harris, 'Anti-Social Behaviour' (n 19) 59-60.

<sup>23</sup> *The Owners, Strata Plan NW 1245 v Linden*, 2017 BCSC 852; *Peel Standard Condominium Corporation No. 984 v. 8645361 Canada Limited*, 2018 ONSC 4339.

<sup>24</sup> *Linden* (n 23) [37], [41].

<sup>25</sup> *Protecting Condominium Owners Act, 2015*, SO 2015, c 28, Schedule 1.

<sup>26</sup> *ibid* s 118 [not yet in force].

<sup>27</sup> *ibid*.

<sup>28</sup> The cases from Ontario and British Columbia suggest that it is owners with particular forms of mental disorder whose ownership has become more precarious. See Harris, 'Anti-Social Behaviour' (n 19) 83-85.

<sup>29</sup> John Locke, *Two Treatises of Government*, Peter Laslett (ed), (Cambridge University Press 1988), *Second Treatise*.

<sup>30</sup> Richard Epstein, *Design for Liberty: Private Property, Public Administration, and the Rule of Law* (Harvard University Press 2011) 99, cited in Jeremy Waldron, *The Rule of Law and the Measure of Property* (Cambridge University Press 2012) 25.



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- <sup>31</sup> Carol Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Westview Press 1994).
- <sup>32</sup> Waldron (n 30) 32.
- <sup>33</sup> Joseph William Singer, 'Democratic Estates: Property Law in a Free and Democratic Society' (2009) 94 *Cornell Law Review* 1009, 1010.
- <sup>34</sup> See Randy K Lippert, *Condo Conquest: Urban Governance, Law, and Condoization in New York City and Toronto* (UBC Press 2019) on the growing complexity, power, and ubiquity of condominium government. See Lisa Wei Gao, 'Homeowner Associations' Role in China's Condominium Governance', this volume.
- <sup>35</sup> *Owners Corporation PS 50139P v Balcombe* [2016] VSC 384, [13].
- <sup>36</sup> *ibid* [18].
- <sup>37</sup> *ibid* [1].
- <sup>38</sup> Since the decision, the state of Victoria amended its legislation to facilitate the capacity of owners corporations to regulate short-term rentals by increasing permissible fines against owners if guests cause unreasonable noise, create security risks, or inflict damage to property, but it did not extend the power to prohibit short-term rentals. See *Owners Corporation Amendment (Short-Stay Accommodation) Act 2018* (Vic).
- <sup>39</sup> *Re Peel Condominium Corporation No 11 and Caroe et al*, (1974) 4 OR (2d) 543.
- <sup>40</sup> *ibid*.
- <sup>41</sup> See the discussion of this case in Randy K Lippert, 'Governing Condominium and Renters with Legal Knowledge Flows and External Institutions' (2012) 34 *Law and Policy* 263, 273-278.
- <sup>42</sup> *Ottawa-Carleton Standard Condominium Corporation No. 961 v Menzies*, 2016 ONSC 7699.
- <sup>43</sup> *Ibid* [54]. A similar balance has been constructed in Western Australia following the decision of the Court of Appeal in *Byrne v The Owners Ceresia River Apartments Strata Plan 55597* [2017] WASCA 104 to uphold the strata company's bylaw prohibiting short-term rentals.
- <sup>44</sup> *Strata Property Act*, SBC 1998, c 43, s 141(2).
- <sup>45</sup> *Strata Property Regulation*, BC Reg 162/2018, s 7.1.
- <sup>46</sup> City of Vancouver, by-law No 12078, *By-law to amend Zoning and Development By-law No 3575, Regarding Short Term Rental Accommodation* (18 April 2018).
- <sup>47</sup> See Douglas C Harris, 'Condominium Government and the Right to Live in the City' (2019) 34 *Canadian Journal of Law and Society* 371.
- <sup>48</sup> Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5<sup>th</sup> edn, Oxford University Press 2009) 56 (emphasis in original).
- <sup>49</sup> *ibid* 58 (emphasis in original).
- <sup>50</sup> *Walsingham's Case* (1573) 2 Plowd 547, 555; 75 ER 805, 816-17.
- <sup>51</sup> Some jurisdictions permit the limited use of long-term leasehold interests within condominium. In British Columbia, leasehold strata property is limited primarily to public bodies, including municipalities, universities, and First Nations. See *Strata Property Act*, SBC 1998, c 43, ss 199-203; *Strata Property Regulations*, BC Reg 43/2000, s 12.1.
- <sup>52</sup> For example, see the *Strata Property Act*, SBC 1998, c 43, s 239(2).
- <sup>53</sup> See Easthope and Randolph, this volume.
- <sup>54</sup> Douglas C Harris and Nicole Gilewicz, 'Dissolving Condominium, Private Takings, and the Nature of Property' in B Hoops et al (eds), *Rethinking Expropriation Law II: Context, Criteria, and Consequences of Expropriation* (Eleven International Publishing 2015) 266.
- <sup>55</sup> *Land (Compulsory Sale for Redevelopment) Ordinance* (Cap 545, Laws of Hong Kong), s 3.
- <sup>56</sup> *Land Titles (Strata) (Amendment) Act 1999* (no. 21 of 1999), Part VA. See Kah Leng Ter, 'A Man's Home is [Not] His Castle—*En Bloc* Collective Sales in Singapore' (2008) 20 *Singapore Academy of Law Journal* 49; Kang Sood Teo, 'Collective Sales in Singapore' (2010) 22 *Singapore Academy of Law Journal* 66.
- <sup>57</sup> *Fla Stat Condominium Act* § 718.117 (2007).
- <sup>58</sup> National Conference of Commissioners on Uniform State Laws, *Uniform Common Interest Ownership Act* (Uniform Law Commission 2008), § 2-118 (a).
- <sup>59</sup> *Unit Titles Act 2010* (NZ), ss 98 and 187.

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<sup>60</sup> *Land (Compulsory Sale for Redevelopment) (Specification of Lower Percentage Notice)* (Cap 545A, Laws of Hong Kong), ss 3-4.

<sup>61</sup> *Termination of Unit Plans and Unit Title Schemes Act 2014* (NT) ss 4 (definition of 'required percentage'), 10-11.

<sup>62</sup> *Strata Schemes Development Act 2015* (NSW) pt 10, s 154 (definition of 'required level of support'). See also Laurence Troy, Hazel Easthope, Bill Randolph, and Simon Pinnegar, "'It depends what you mean by the term rights': strata termination and housing rights' (2017) 32 *Housing Studies* 1.

<sup>63</sup> Commercial and Property Law Research Centre, *Body Corporate Governance Issues: By-laws, Debt Recovery and Scheme Termination* (Queensland Government Property Law Review Options Paper Recommendations 2017) 73-75.

<sup>64</sup> *Strata Property Act*, SBC 1998, c 43, ss 272, 277. See Douglas C Harris, 'Owning and Dissolving Strata Property' (2017) 50 *UBC Law Review* 935.

<sup>65</sup> Harris and Gilewicz, 'Dissolving Condominium' (n 54).

<sup>66</sup> Easthope (n 7) 146.

<sup>67</sup> See the debate between Lee Anne Fennell, 'Fee Simple Obsolete' (2016) 91 *New York University Law Review* 1457, and Katrina M Wyman, 'In Defence of the Fee Simple' (2017) 93 *Notre Dame Law Review* 1, for an analysis of what might be gained and lost in expanding the scope of private-to-private takings.

<sup>68</sup> Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 1944/2001).

<sup>69</sup> The literature on 'embeddedness' is vast, but see Fred Bloc, 'Introduction' in Polanyi 2001 (n 68) xviii, xxiii.

<sup>70</sup> Singer, *Entitlement* (n 10).

<sup>71</sup> See the early and important work of Evan McKenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private Government* (Yale University Press 1994); Edward J Blakely and Mary Gail Snyder, *Fortress America: Gated Communities in the United States* (Brookings Institution Press 1997).

<sup>72</sup> Gilad Rosen and Alan Walks, 'Beyond Gating: Condo-ism as a Way of Urban Life', in S Bagaeeen and O Uduku (eds), *Beyond Gated Communities* (Routledge 2015) 156.

<sup>73</sup> Lippert, *Condo Conquest* (n 34) 223-226.

<sup>74</sup> Nicole Graham, *Landscape: Property, Environment, Law* (Routledge 2011) 5-8.