Amnon Lehavi *Editor*

Private Communities and Urban Governance

Theoretical and Comparative Perspectives

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Amnon Lehavi
Interdisciplinary Center (IDC) Herzliya
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Israel

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Introduction

This book offers an interdisciplinary and comparative study of the complex interplay between private versus public forms of organization and governance in urban residential developments. Bringing together top experts from numerous disciplines, including law, economics, geography, political science, sociology, and planning, this book identifies the current trends in constructing the physical, economic, and social infrastructure of residential communities across the world. It challenges much of the conventional wisdom about the division of labor between market-driven private action and public policy in regulating residential developments and the urban space, and designs a new research agenda for dealing with the future of cities in the twenty-first century.

The genesis of the book was an international conference hosted by the Gazit-Globe Real Estate Institute at the Interdisciplinary Center (IDC) Herzliya, Israel, on June 14–15, 2015. The conference sparked an academic dialogue between the members of an exceptional group of scholars, underscoring the essentiality of an interdisciplinary and comparative approach to the contemporary study of private communities and urban governance. The book is consequently keyed to a broad audience of policy-makers, practitioners, academics, and general readers.

The book underscores a number of intriguing themes. First, it focuses attention on the current state of various types of common interest developments (CIDs), including planned-unit developments, large-scale condominiums, and housing cooperatives, which manage common amenities and spaces while also regulating the use of individual housing units. Much of the literature has referred to such CIDs as "gated communities" or a "secession of the successful," juxtaposing the ascent of such private residential communities with the apparent decline of the public sphere, and alleging that such privatization only harbors isolation and social stratification. While not entirely undermining such potential ill-effects, the chapters in this book attest to a much more complicated picture. In some developing and transitional societies, legal and economic reforms rely on such private forms of organization to create a hitherto nonexisting economic and social infrastructure for urban neighborhoods. In a country such as China, which is currently experiencing top-down planned mass urbanization alongside the legal introduction of private property, the

creation of organizations such as homeowner associations has proven essential for the evolution of bottom-up mechanisms that represent the interests of rank-and-file homeowners vis-à-vis powerful developers and local governments (Lei Chen). In other cases, such as in Russia, the decline of democracy and inability to construct a civic society may make CIDs the only viable alternative for effective governance of residential developments (Leonid Polishchuk and Yulia Sharygina). Latin American countries have been moving in different directions from Neo-Marxism to market economy, but there too, private forms of organization may prove essential for the creation of a genuine sense of community that does not necessarily seek to exclude others (Clara Irazábal). Western countries are also undergoing complex processes that do not necessarily point to a single direction in identifying the interrelations between private communities and urban governance. Inclusionary zoning requirements in the USA have at times succeeded in combining the institutional advantages of CIDs with attaining some level of social heterogeneity (Sharon Krefetz), as is also the case in large-scale condominium projects in Canada (Gillad Rosen). On the other hand, Germany, well-known for its broad commitment to social housing in the aftermath of the Second World War, is currently experiencing public-private collaboration in the gentrification of cities, which pushes poorer residents to outer urban circles (Susanne Heeg).

Second, questions of efficiency and fairness in the governance of neighborhoods and urban spaces implicate broader issues of public versus private finance and provision of services. Security is one such prominent issue, referring not only to the protection of physically enclosed developments, but also to the general organization of neighborhoods. However, the situation is not necessarily one of the competitions or tensions between private and public alternatives. In many cities in the USA, developers are actually required by the local government to set up CIDs as a condition for project approval, with local governments consciously looking to pass on the financial burden of providing traditional municipal services to the private sector (Evan McKenzie). The cycles of economic upturns and downturns, which have predominantly strong effects on the real estate market, make the built urban environment particularly sensitive to the current division of labor between the public and private sectors (Sergio Nasarre Aznar).

Third, the growing role of homeowner-based organizations in governing the built urban environment requires a more in-depth analysis of the internal governance structures of such organizations. Such analysis implicates the nature of property rights, legal personality of the governing bodies, decision-making rules, and other legal norms (Cornelius Van der Merwe). It also touches on the financial stability of such organizations. This is especially so because of the increasing number of cases in which CIDs and homeowner associations face massive financial liabilities, due to cataclysmic events, such as natural disasters or fraud schemes (Evan McKenzie), or to sharp economic downturns that result in large rates of debt default (Sergio Nassare Aznar).

Finally, the book offers an innovative analysis of the interrelations between legal design, collective action organizations, and cultural practices in the built urban environment. It demonstrates, for example, the key role that religion may play in

constructing the urban space, implicating both private action and public policy (Adam Shinar). It shows how the dilemma of heterogeneity versus homogeneity in the construction of residential communities implicates both public and private action. Unlike the conventional view of private residential communities as seeking to seclude themselves from the public sphere, in many cases, private forms of action may lead communities to seek to physically and ideologically reshape the broader public sphere (Amnon Lehavi). Moreover, the book demonstrates that preexisting cultural dimensions, such as societal views on individualism/collectivism, respect for power distance or hierarchy, and the level of social capital both within residential communities and in general society, play a key role in facilitating or, rather, hindering legal and economic reforms in constructing cities. Thus, for example, the privatization of the housing stock in economies such as Russia (Leonid Polishchuk and Yulia Sharygina) and China (Lei Chen), and the switch to condominium self-governance as the most prevalent form of housing organization, face major challenges in view of the cultural transitions that such societies must undergo. The result is often one by which the success or failure of legal and organizational innovations in the construction of residential communities cannot be measured on a nationwide basis, but must be evaluated differently across cities or otherwise viewed based on the ongoing cultural dynamics within particular privately organized residential communities.

These various dimensions of private communities and urban governance thus underscore the unique challenges that cities currently face and, accordingly, they shed a new light on the vibrant discourse about the role of cities as both a global and local space. Globalization is critical for the future of cities, but it offers no single blueprint for their physical and interpersonal structuring.

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Amnon Lehavi

The Changing Landscape of Condominium Laws and Urban Governance in China

Lei Chen

Abstract China, as a transitional economy, meets its challenges by devising private law reforms while considering their potential conflict with prevailing cultural orientations and institutional settings. The academic discourse shows the multiple benefits that homeowner associations (HOAs) can offer. Yet, all of these proposed benefits are contingent on HOAs functioning well. What kind of law should help avoid dysfunctional practices and resolve effectively the disputes in the Chinese condominium context? In order to answer this, the initial step is to identify the problems pertaining to condominium governance in the Chinese context. To this end, this chapter aims to depict the institutional design and operational implementation of condominium governance in China. First, it traces the evolution of condominium ownership in China. It then provides a general overview of the current statutory framework relating to condominium ownership. Subsequently, some practical difficulties are illustrated in respect of demarcation between individual units and common property, pre-sale of apartments, and allocation of participation quota. Furthermore, issues involving collective management of common property and the local government's role in shaping the property relations among stakeholders are addressed. A micro analysis of local condominium rules at the local level is highlighted to allay malpractice and developer overreaching. Finally, the chapter concludes on how to capture the dynamic property relations among key actors and between rules, norms, and cultural changes.

1 Introduction

Condominiums, the concept known in different jurisdictions as apartment ownership, are unique legal institutions with three prongs or elements, namely: (1) individual ownership of an apartment, (2) joint ownership of the common areas, and (3) membership in an owners' association. Hence, a purchaser of a condominium

L. Chen (✉)
School of Law, City University of Hong Kong, Kowloon Tong, Hong Kong
e-mail: leichen@cityu.edu.hk

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not only obtains exclusive individual ownership of a unit, but he or she also acquires joint ownership in the common property and gains membership in the owners' association, which deals with the administration of maintenance and management of the common areas of the building. This three-dimensional character of condominiums has been accepted explicitly in the Chinese Property Law of 2007.[1]

An important aspect of condominiums is that an owner of a unit automatically becomes a member of the management structure of the condominium. As the three-prong theory implies, the owner is not only entitled to use and enjoy exclusive interest in his or her unit but also bears many duties and obligations imposed on the owner since each and every owner shares in the collective interest of the common property. The owners also has to take part in the operation and management of the whole condominium community, attending the meetings of the owners' association, abiding by the by-laws of the association and paying dues to keep the common property in good repair and the association running well. Compared with the owners of traditional freestanding houses, the rights and obligations of condominium owners are multiple and therefore more complicated. Thus, it is safe to say that condominium ownership is an example of the recent trend in property theory that considers ownership to be defined as much by the responsibilities it creates as by the rights it bestows (Van der Merwe 1992).

Condominium ownership implies three elements, namely, homeownership, shared responsibility, and participation in community life. Among the factors that constitute community life, participation in collective management is particularly noteworthy (Yip and Forrest 2002). Douglass North stated that the performance of institutions is determined by "the motivation of the players, the complexity of the environment, and the ability of the players to decipher and order the environment" (North 1990). Condominium owners need to know the exact boundaries of their condominium ownership in order to know where their individual interests stop and where they begin. Without active participation in collective action driven by an awareness of "my property, my destiny," the effects of condominium legislation are questionable (Tomba 2005). Amnon Lehavi argues that condominiums, on its own category, demand cultural adjustments in order to facilitate the collective action, without aspiring for a full-fledged cultural transition across society. China, as a transitional economy, meets such a challenge by devising private law reforms while considering their potential conflict with prevailing cultural orientations (Lehavi 2015).

However, much of the previous discussion of Chinese condominium associations (Homeowner Associations or HOAs) focuses on the nexus between the emergence of HOAs and the rise of grassroots democratic governance from the perspective of rights (Heberer 2009; Read 2008). Some studies have examined the internal

[1]Article 70 of the Chinese Property Law of 2007 stipulates: "The owner has exclusive ownership with regard to his or her individual apartment and unit for commercial or another use, joint ownership with regard to the common property and all portions of the project other than the apartment, and is entitled to manage and maintain the common property."

governance of HOAs through case studies (Chen and Kielsgard 2014; Saich 2000). These studies show the multiplicity of the benefits HOAs can offer. Yet, all of these proposed benefits are contingent on them functioning well. There has been little work done to directly answer these questions: why do some HOAs succeed while others fail? What kind of law should help avoid dysfunctional practices and resolve effectively the disputes in the Chinese condominium context?

In order to answer these questions and test whether these theories hold in China, the initial step is to identify the current holes and problems pertaining to condominium governance in the Chinese context. To this end, this chapter aims to depict the institutional design and operational implementation of condominium governance in China. Section 2 traces the evolution of condominium ownership in China and then provides a general overview of the current statutory framework relating to condominium ownership. In Sect. 3, some practical difficulties are illustrated in respect of demarcation between individual units and common property, pre-sale of apartments, and allocation of participation quota. In Sect. 4, issues involving collective management of common property are presented. Section 5 deals with the local government's role in shaping the property relations among stakeholders, such as developers, condominium owners, and Homeowner Associations. This section also calls for a micro analysis of condominium rules at the local level. Local regulations are trending in compliance with national policies and laws to allay malpractice and developer overreaching. Yet greater efforts must be undertaken to shore up China's fledgling democracy, such as further advancing its legislation by providing greater drafting complexity. Finally, Sect. 6 offers concluding remarks on how to capture the dynamic property relations among key actors and between rules, norms, and cultural changes.

2 Historical Development and Statutory Framework

The Chinese Civil Code (1929–1931) recognized the concept of condominiums in two relevant articles. While article 799 dealt in principle with the cost of maintenance and repairs, article 800 drew on customary Chinese law and stated that an apartment owner had no exclusive use right of the main gate or entrance of his or her multi-unit building, which belong to all the owners unless local customs or specific agreements allowed the owner to do so (Wang 2001). The earlier Chinese condominium legislation seems to have adopted a minimalist approach and left much of the regulation of life in a condominium complex to the owners themselves. This corresponds with articles 234 and 235 of the Japanese Civil Code and is somewhat like an older version of article 664 of the French Civil Code (Cao 2004; Chen 1995). Although these provisions are unsophisticated and incomplete, they are significant in introducing and stimulating the concept of modern apartment ownership by clarifying the rights and duties of apartment owners in respect to the common property.

Since the People's Republic of China (PRC) was founded in 1949, social, political and economic conditions have been substantially altered. The law in general and property law in particular have been repealed without being replaced (Wang 2006). All land is owned by either the state in urban areas or is owned collectively in rural areas (Randolph and Lou 2000). Until 1988, the fundamental rule pertaining to all land in China was that there were no individual rights in land and no private ownership of land (Ho and Lin 2003; Wang and Murie 1996; Wang 2002). The burden of the government to provide enough housing for its citizens was seriously challenged by gradual urbanization and an exploding population (Kremzner 1998). To alleviate the tremendous financial burden imposed on the government to supply housing, in 1988 China embarked on a new economic policy based on the advancement of wealth through realizing housing marketization.[2] With this new economic policy, China amended its constitution in order to recognize privately owned transferable land use rights.[3] The recognition of this land-use right generated a building construction boom and an unprecedented level of commercial dealings in the condominium industry (Selden 1993).

However, while the state-owned land is beginning to be commercially transferable, the predominance of public housing was still characterized as a form of socialist well-being. Hence, China's lawmakers seldom paid attention to the condominium legislation in that period (Xia 2003). Then in 1994, the State Council adopted a ground-breaking nationwide housing reform policy by issuing the Decision on Furthering Housing Reform in Urban Areas.[4] The privatization and commercialization of the housing market has helped to relieve the government of the responsibilities for maintaining and managing buildings that were originally built to accommodate state employees as one of their major social benefits (Lee 2000). However, housing privatization usually proceeded without a proper legislative and institutional framework and therefore created many difficulties (Chen 2006).

It is clear that the non-market/welfare housing era in China is coming to an end. However, government-driven conversions to condominium buildings have been fraught with problems. Chinese lawmakers were not much concerned about the property management issues until 1998 when a departmental rule was issued

[2]In 1988 the State Council embarked on a multi-stage housing reform by adopting a Scheme of National Housing Reform in Urban Areas. This stimulated the government's initial efforts and provided a ten-year blueprint to expedite commercialize apartment property and reduce state subsidies of housing. See more details at Lee (2000).

[3]The commercialization of land-use rights was first tried in Shenzhen on 9 September 1987 and was formally adopted when Article 10 of the *Constitution* was amended on 12 April 1988 to permit the assignment of the right to use land. See more details at Ho and Lin (2003).

[4]The Decision on Furthering Housing Reform in Urban Areas of 1994, issued by the State Council.

pertaining to the management of privatized public housing.[5] By now, every province in China and sub-provincial cities have their own second-generation condominium regulations.

The Property Law of 2007 formally accepted the idea of condominium ownership. Prior to the Property Law, condominiums were regulated indirectly and awkwardly by a plethora of statutes, central governmental (State Council) regulations, ministerial and departmental circulars and scattered local norms. The sources of Chinese condominium rules are divergent and fragmented. Statutes pertaining to condominium ownership include, among others, the Urban Real Estate Administration Law of the PRC of 1994 and the Land Administration Law of the PRC (Amendment) of 1999. One ministerial circular that mistakenly referred to condominiums is the Measures Governing the Management of Urban Adjacent Housing of the PRC of 1989. This departmental circular was very outdated and rudimentary and did not cover many crucial aspects of condominiums such as the condominium's creation, the condominium's management structure, the by-laws of HOAs, and the owner's exclusive use right over certain common property. Only on 8 June 2003 the State Council enacted the first national level regulation about condominium ownership management. However, this regulation was heavily criticized immediately after its introduction. The main criticism is that its provisions are skeletal and cover little detail about day-to-day management practices. Another criticism is that the regulation pays considerable attention to its administrative nature and says little about the proprietary aspect of condominiums, such as the entitlement to parking spaces. It is apparent that provisions that indirectly or partially deal with condominiums are rudimentary and incomplete. There are very few provisions, if almost none, as to whether the national level or the local level should cover other important pillars of condominium law, such as the detailed rights and obligations of condominium owners and sanctions for non-compliance. Nevertheless, the most recent constitutional amendments of March 2004 have put private property on an equal legal footing with state-owned property, which now deserves better protection (Liu 2005; Wang 2004). Particularly noteworthy is that the Property Law institutionalized condominium law as one of its chapters.[6] Subsequently, in 2009 the Supreme People's Court issued a Judicial Interpretation concerning the "Application of Condominium Provisions in the Disputes over Partitioned Ownership of Building Areas." Thereafter, most of the provinces and major cities in China have promulgated a new generation of condominium management regulations.

[5]The Measures on Management of Maintenance Fund for Fixtures and Fittings in Housing Common Areas of 1998, issued jointly by the Ministry of Construction and the Ministry of Finance of PRC.

[6]The long-awaited Chinese Property Law has been passed by the National People's Congress on 16 March 2007. The main purpose of the Property Law is to define and specify property rights in detail and to improve the protection of private property rights. The final text of the Property Law consists of 5 sections, 19 chapters and totals 247 articles. Particularly noteworthy is that the Chinese Property Law has a separate chapter on condominium ownership (Chen 2007).

3 Addressing Vexing Issues on Condominium Ownership in China

3.1 Unit/Individual Property and Common Property

The Judicial Interpretation of 2009 provides that an individual housing unit must (1) have an independent structure and can be clearly identifiable; (2) be of independent use; and (3) be registered under the name of a specific owner.[7] In China, one departmental rule, namely the Provisional Measures on Calculation of Floor Areas and Allocation of Common Property of Commercial Housing, provides that a unit consists of three elements: cubic space, the floor area of unit walls, and the balcony floor area.[8] It further explains that there are two categories for unit walls. One is the interior wall within the boundaries of a unit which is for the unit owner's exclusive use and does not function as the bearing wall. The other is called a boundary wall which includes the common wall between adjacent units as well as the boundary wall between a unit and the common property. Another departmental rule stipulates that only half of the projected floor space of a balcony, whether enclosed or open, is counted as part of the floor area of a unit.[9] It can be inferred that in China, the horizontal boundaries of an apartment are the surface of the unfinished drop ceiling and the unfinished concrete floor slab while the vertical boundaries are the planes formed by the median lines of the boundary walls. The unfinished surface theory applies when a resale, insurance, or tax-paying for a unit are involved. This means that the boundaries are set as the unfinished surfaces of the floors and ceilings and the median line between walls. In essence, with title registration, a unit encompasses half the floor space of the dividing walls provided the walls are not bearing walls.

There is legal distinction between the common property for a multi-building condominium and the common property for a single condominium building. This is so because in China it is common to have a condominium scheme comprising of many high-rise buildings. In other words, there is a general management body for a multi-building condominium scheme developed by a single developer and usually operated and administered by a single managing agent.[10] Here, the common property for the whole block refers to common elements designed for all the high-rise buildings such as their boundary fences and the main gate as well as the central service installations such as the electric power, gas, air-conditioning, reservoirs, water tanks and pumps. The common property for a single building is

[7]Art. 2 of the Judicial Interpretation of 2009.

[8]Art. 6 of the Provisional Measures on Calculation of Floor Areas and Allocation of Common Property of Commercial Housing, issued by the Ministry of Construction on 8 September 1995.

[9]Section 3.0.18 of the Measures Governing the Calculation of Floor Areas of Construction Buildings, issued by the Ministry of Construction on 15 April 2005.

[10]Art. 9 of the Property Management Regulation of 2003 issued by the State Council provides that one property managing area should establish one management body.

easily understood under the conventional 'one building one condominium' model. It refers to the common elements designed solely for a specific building's use, such as its elevator, the staircase, and the roof of the building. In practice, it is very contentious to distinguish the two in order to clearly demarcate the common expenses for different buildings and different unit owners (Hu 2006). But it is necessary since unit owners' contributions should be limited to expenses associated with the operation and maintenance of the condominium in which they have an ownership interest. Thus, to ascertain the equitable common expenses of a multi-building condominium, the subdivision plan must be drafted carefully, otherwise many disputes will arise.

A multi-building condominium scheme consists of a number of adjoining but separately constituted condominiums. The multi-building condominium is usually created to limit the size of the common estate in order to better use scarce land resources. As explained above, some common elements are designed for a whole block's use and some common elements are only for a single building's use. Many Chinese local condominium regulations contain management of common property provisions for the multi-building condominium termed a property management area (物业管理区划).[11] Therefore, each condominium building in a block needs to be operated by a separate management body, or one association should operate all of the condominiums. However, it is more effective to establish a two-tier management system to administer the management and maintenance of common property in a multi-building scheme or a mixed-use condominium scheme. A two-tier management body has a main or master management body at the first tier and one or more subsidiary management bodies at the second tier. Every two-tier management body has at least one subsidiary management body representing the interest of a particular group of owners having a common interest, such as a group living in the same building.

3.2 Pre-sale of Apartments

Chinese law allows the sale of apartments before the buildings are substantially completed.[12] In other words, the substantial completion of construction is not a prerequisite for being able to sell individual units. In the case of a presale of an apartment, the developer must first apply at the pertinent public authority for an "Apartment Pre-sale Permit" to sell planned apartments.[13] After obtaining the permit, a contract of sale between the developer and the purchaser can be concluded

[11]See detailed references in Sect. 5.

[12]Art. 45 of Law of Urban Real Estate Development Administration of 1994.

[13]Art. 24 of the Regulation Governing Real Estate Development and Operation in Urban Areas of 1998.

on the basis of the subdivision plan before the construction is completed.[14] The Chinese procedures ensure as much as possible that the state examines the developer's ability to complete a pre-sold building and to administratively enforce the sales contract (Fu 2002; Gao and Huang 2002). But legal problems arise during the transitional period between the signing of a contract and the completion of construction. These problems first include whether the representations made to apartment purchasers in the registered presale contract actually correspond to the actual apartments produced. For example, there may be a misunderstanding or miscommunication over the numbering of units among the subcontractors. Consequently, some of the building's units inadvertently may have been numbered differently or incorrectly from the numbering of the parking units. Second, there may be confusion over when management rules are applicable to purchasers as well as when the initial general meeting of the HOA is held.

Furthermore, there is often confusion over whether or not the purchasers become members of the condominium management body before the completion of construction. Finally, there is an issue as to when the obligations of the developer are transferred to the purchasers. Besides the abovementioned management issues, the developer's liability for structural defects in this transitional period can also become an issue (Van der Merwe 1994). Typical Chinese purchasers are unsophisticated about the many complicated rules. Consequently they are unaware of the potential for abuse by the developer. For instance, the purchasers may be unaware whether a "sweetheart contract" was made between the developer and a managing agent prior to the occupation of the building by the purchasers.

3.3 Participation Quota

Allocating an apartment owner's interest in the following matters requires a participation quota: (1) the share of ownership in the common property; (2) the proportional contribution to the common expenses and the share of any common profits; and (3) the weight of a condominium owner's vote. Moreover, the participation quota is significant in the distribution of compensation received in the event that the property is expropriated or in the division of insurance money if the building is destroyed. In brief, the participation quota arises whenever the allocation of rights and responsibilities of common property is involved.

The most important function of the participation quota is the allocation of the owners' contributions to the maintenance and administration of the condominium and the right to share in common profits as well as the responsibility to assume a proportional share of the HOA's debts (Van der Merwe 1987). A prospective purchaser should pay particular attention to a development's common expenses. Financially, the entitlement to an undivided share in the common property and

[14]Ibid at Art. 28.

voting right is less significant than contributions to common expenses and sharing in the common profits. This is because some unit owners rarely attend the general meetings and seldom authorize their voting rights by proxy. In China, when the Property Law was enacted, a default rule was set to allocate the common expenses and to distribute the income generated. That is, where there is no agreement otherwise stipulated, these issues shall be determined on the basis of the proportion of each owner's exclusive floor areas to the total areas of the building.[15]

However, some hyper-egalitarian commentators prefer a conventional liberal democracy in the condominium world. This means that voting by unit owners is based on the principle of one resident, one vote (Walter 1975). This approach is derived from the private government theory (Liebmann 1995). A voting right based on property ownership is described as a 'plutocracy,' a regime inherently offensive in a liberal democracy (Frug 1982). However, in view of the ownership interests involved in a condominium community, a truly democratic formula based on a one resident, one vote rule is unacceptable (Foldvary 1994). More importantly, some Chinese local norms have already embraced the idea that one unit, one vote is suitable for residential apartments whereas for non-residential condominiums, the floor area formula should determine the weight of each and every vote.[16] Accordingly, the 'one unit one vote' rule is preferable in China, provided that non-residential projects and residential projects which are very diverse in size are able to adopt alternative and innovative participation quotas (Chen and Mostert 2007).

For a mixed development with commercial property owners and residential property owners, the pitfalls of the 'one unit one vote' rule are obvious, especially if the owners contributing more financially do not have more say in management and financial issues. The voting right should mirror the value of the property as well as the maintenance costs and therefore a vote by participation quota should apply. Fortunately, in China the vast majority of condominium developments are exclusively residential ones. Moreover, in a large number of these residential condominium developments, the difference in size and value within one condominium building is small. This is especially true in former welfare housings that were provided by working units before the implementation of the housing privatization policy. Thus, in order to encourage unwary and untrained owners to become involved in the management issues, at this point, the principle of one unit one vote would be more workable.[17] However, when framing a uniform condominium statute, alternative voting procedures still need to be provided for condominium complexes that have dramatically different sizes or mixed-use condominiums where commercial and residential interests have to be balanced.

[15]Art. 80 of the Property Law.

[16]Art. 9 of the Shanghai Property Management Regulation of 2004; Art. 10 of the Measures to Enforce 'Property Management Regulation' of Weihai Municipality of 2007.

[17]It is notable that the provision as to the adoption of voting rights can be conceived and settled differently in the declaration or sectional plan by developers under different circumstances.

It appears that a relative floor area formula may be more equitable for allocating shares for the common property than a formula based on a simple equality rule. Despite being mechanical, the relative floor area formula has advantages. First, it provides certainty and clarity by being simple and easy to implement. In addition, the floor area formula does not need a periodic reappraisal of the participation quota as is the case with the value-based quota. Moreover, it somewhat approximates the relative value of the units. At the same time, it avoids the complications arising from a value-based approach, such as a periodic reappraisal. Finally, the floor area approach has been used in China in residential condominium developments for years. At the maturation stage of condominium development, the floor area approach should be retained in order not to confuse apartment owners with any other complicated methods. In China, the purchase price of an apartment is based on square meters. The floor area of an apartment that is for sale includes the enclosed unit's floor area and its share of the floor area in the common property.[18] The new Property Law provides that contributions for common expenses should be determined by the unit's floor area in proportion to the aggregate floor areas of the whole building provided there is not an agreement to the contrary.[19] Therefore, unless the developer proposes an alternative quota, the floor area approach to determine an owner's cost for common expenses is the one that has now gained acceptance in China.

Nonetheless, the Chinese Property Law provision leaves the door open for a developer to determine the participation quota. In distinguishing between exclusive residential condominiums and non-residential or mixed-use condominiums, the developer's discretion is useful and necessary. Unlike exclusive residential condominiums, the mixed-use condominiums vary from each other greatly. Some mixed-use projects may be comprised of residential apartments for half of the floor area and shops for the other half whereas another scheme may allocate 30 % of the floor areas for offices and the other 70 % for apartments. Hence, it is difficult if not impossible to stipulate a uniform yardstick for calculating the participation quota for non-residential and mixed-use condominiums. In fact, This is apparent in the provision that only when there is no agreement on quotas, the floor area formula applies.[20] This means that when there is an agreement on the quota, the agreement controls. The agreement in this provision refers to the contract of sale which is drafted by the developers. This implies that the developer has the freedom to designate participation quotas subject to the consent of all the purchasers. Moreover, since Chinese law does not expressly mention a participation quota issue for non-residential or mixed-use condominiums, one could argue that it is the

[18]Art. 5 of the Provisional Measures on Calculation of Floor Areas and Allocation of Common Property of Commercial Housing of 1995.

[19]Art. 80 of the Chinese Property Law of 2007.

[20]Ibid.

developer's duty to deliberate and prepare a participation quota plan.[21] Therefore, it is advised that a sensible Chinese rule needs to give developers the discretion to design an equitable quota for non-residential and mixed-use condominiums.

4 Collective Management

4.1 Legal Personality of a Condominium Association

In many other jurisdictions, there is no doubt that the management body or HOA enjoys full legal personality (Van der Merwe 2002). Back in China in the early days, controversy surrounds the question as to whether a HOA is endowed with a legal personality. Because a condominium management body has very specialized functions, regulating its decision-making powers cannot be guided by general contractual and associational legal principles. The difficulty here is that in China, most of the HOAs are ill-established and their operation is chaotic. Some progressive Chinese legal scholars argue that it would be premature to endow a unit-owners' general assembly with full legal capacity since the country is in an early developmental stage.[22] Others argue that it is inappropriate to accord either an owners' general assembly or an executive council with a legal personality since this would contravene the existing practice that management bodies usually do not have a juristic personality (Xia 2003). Most importantly, when determining the nature of the HOA, the prime consideration should be that the condominium owners' interests are safeguarded, which will be discussed in Sect. 5 in the context of changes to local rules.

Although condominium litigation continues to increase, most courts initially were reluctant to grant a HOA the power to sue or be sued in the absence of statutory authority (Xue 2007). However, quite recently, some provincial courts have issued judicial opinions allowing the executive council of a HOA to appear in court as either a plaintiff or a defendant on behalf of the owners.[23] This has been well-received. But the Chinese Property Law did not provide a direct answer to this issue. An individual unit owner has little incentive to claim on behalf of other unit owners since any recovery goes to the HOA for common expenses. When the HOA has exclusive standing, defendants are protected from multiple and repeated suits of the same claim (Xue 2007). With the above advantages, the HOA's exclusive standing is an efficient way to resolve common property disputes.

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[21]Van der Merwe argues that it is a dereliction of duty by developers not to conceive a deliberate participation quota. See Van der Merwe, C.G. (2002) pp. 4–6.

[22]Chen argues that '… as to legal structure of management body, it is better to be circumspect, not adopting the "legal person" model at this stage, because the concept of legal personality of management body will not be fit with current Chinese special circumstances …' (Chen 1995).

[23]For example, the Opinions Concerning Trialing the Property Management Cases of the Beijing High Court issued by the Beijing High Court in December 2003.

The HOA's ability to sue and be sued is not the only consideration dictating the need for the juristic personality. If existing legal structures are already inadequate for group litigation, or cannot be made for a condominium context, there will be a greater need for the HOA to have a juristic personality. For example, a common seal is needed when the HOA signs an employment contract with a managing agent, or when the HOA provides receipts to owners who pay monthly contributions, or when it signs an insurance contract for the common property. However, since a general assembly of condominium owners has no legal personality in China, some local rules seem to grant corporate status to an executive council by providing that it should have a common seal.[24] Some provincial high courts have pronounced that the executive council may have a legal standing to sue and to be sued on behalf of unit owners.[25] This is inappropriate since an executive council is the standing committee of a HOA. It is at odds with the concept that the condominium's executive council is an executive organ while the HOA is a rule-making body. However, these provisions endow the executive council with such functions and powers that might undermine the role of the general assembly as the basic institution of the HOA. The legal personality should be therefore attributed to the general assembly of the HOA. In short, the justification for granting a HOA a juristic personality is greater than the arguments against it. To ensure an effective multifunctional HOA, its juristic personality is an important issue on the agenda for formalizing condominium law.

4.2 The Role of by-Laws

As the three-prong theory implies, the condo owner is not only entitled to use and enjoy exclusive interest in his or her unit, but also bears many duties and obligations imposed on the owner since each and every owner shares in the collective interest of the common property. The owners also have to take part in the operation and management of the whole condominium community, attending the meetings of the owners' association, abiding by the by-laws of the association and paying dues to keep the common property in good repair and the association running well. Compared with the owners of traditional freestanding houses, the rights and obligations of condominium owners are multiple and therefore more complicated. Thus, there is a need to work out a set of Management Covenants (by-laws) which usually regulate the day-to-day management of the complex. It may also provide some provisions on the manner in which a condo owner uses and enjoys his or her apartment and common areas. It seems that Chinese laws regard the adoption of

[24]Art. 13 of the Shanghai Property Management Regulation of 2004.

[25]Art. 7 of the Opinions Concerning Trialing the Property Management Cases of the Beijing High Court of 2003.

condominium by-laws as obligatory. This is because, it was made clear in the Property Law that all condo owners shall collectively formulate or amend the condo by-laws (management covenants). It is acknowledged that the by-laws not only bind condo owners, current and future, but all occupants in the area, including tenants and licensees. The legal nature of by-laws represents a conjuncture between a contractual right and proprietary right.

There are two ways to furnish the by-laws. The first way is through the developers and the second is done by the owners. In the former case, developers will prepare the provisional by-laws, which are modelled after the standard by-laws provided by a ministerial decree. If this does not occur in the transitional period before the condominium association was formally established, a preparatory group set up by the Sub-District Office (SDO) is responsible for drafting the by-laws that govern the conduct of condo owners and management procedures of the HOA.[26] The HOA, when established at a later stage, shall record the by-laws within 30 days from the date of its establishment by election at the SDO.[27] It is noteworthy that recording the by-laws, once it becomes effective at the SDO, is not the same as registration at the Property Registration Office. Under Chinese law, the by-laws need not be registered in order to be effective. Differently from some jurisdictions that require unanimous consent of owners to effect an amendment of by-laws, Chinese provisions stipulate that in order to amend the by-laws, a HOA needs to collect sufficient votes made by the owners who own more than half of the total floor area of the building, and who account for more than half of the total number of owners.[28]

In practice, model by-laws were drawn up for new HOAs to use, subject to amendments adapted to the characteristics and needs of a particular complex in a prescribed manner. A Chinese condominium complex needs to have model rules with more detail. First, the vast majority of Chinese apartment owners are not very knowledgeable about the internal governance of a condominium. In addition, the HOA is not usually very well experienced or capable in making rules. With model rules, apartment owners are provided a safety net that enables them to become acquainted with their rights and obligations. Furthermore, most Chinese condominium projects are conversions from former public housing and therefore are structurally homogenous (Xia 2003). The uniform guidelines provided by the model rules simplify the rule-making process. Moreover, the model rules statutorily present the rights and obligations of apartment owners. Since most condominium developments in China are multi-building projects, the time between the settlement

[26]Art. 15 of Provisions of Shanghai Municipality on Residential Property Management (amended in 2010).

[27]Art. 76(1) of Chinese Property Law.

[28]Ibid. at Art. 76(2).

of the first owner and the convening of the first general meeting can be quite long.[29] Consequently, the developer or preparatory group prepares provisional rules for the project[30] and subsequently, the first general meeting establishes the project's formal rules.[31] The certainty and predictability of model rules streamline this process and diminish developers' possible abuse of their rulemaking power. Finally, the setting of model rules is in tune with the legislative philosophy and practice in China. In 2004, the Ministry of Construction issued the Provisional Model Rules of the Unit Owners to provide guidance for developers nationwide.[32] Although such model provisional rules have no legal binding force,[33] it shows that a set of model rules would fit into the Chinese legislative environment and is likely to be accepted by the public. However, the model rules' approach is not without shortcomings. It can be argued that no uniform set of rules fits all projects. Rules should be tailored to the special features of each project: an exclusive residential project, a non-residential one or a mixed-use one all differ from on another. Differences exist also with respect to the size and location of the comdominium, or in its potentialuse for special classes of people. Nonetheless, this concern about a uniform set of rules is substantially alleviated if developers have the freedom to substitute, add to, and amend a set of model rules early on and later a general meeting of the condominium association can amend the model rules by unanimous or special resolutions.

HOAs have full and some might say almost unlimited jurisdiction to deal with condominium community matters such as pet restrictions or restrictions on noise caused by party-animals. The Chinese approach is largely association-oriented since it regards the adoption and the amendment of by-laws as integral to the internal governance of the HOA. Occupancy restrictions are less rigorous and fall under the jurisdiction of the executive board which determines such things as the maximum number of occupants allowed in a unit and whether tenants can keep pets. Almost all of the local property management regulations leave this kind of occupancy restrictions to be self-regulated by associations themselves. The Property Law provides that the HOAs have exclusive jurisdiction over disputes arising from infringement of the owners' legitimate interests, such as freely disposing waste,

[29]In order to better protect apartment owners' interests, some Chinese local norms set a time-table for the first general meeting. For instance, the Shanghai local rule stipulates that the first general meeting must be convened either when half of the floor areas of a project's units are sold and settled by the unit owners or two years after the first owner moves in. See Art. 7 of the Shanghai Property Management Regulation of 2004.

[30]Art. 22 of the Property Management Regulation of 2003 (as amended in 2007).

[31]Art. 76(1) of the Chinese Property Law of 2007.

[32]The Provisional Model Rules of the Unit Owners issued by the Ministry of Construction on 6 September 2004.

[33]The supplementary explanation of the Provisional Model Rules of the Unit Owners of 2004.

causing noise, having pets in violation of the relevant regulations, constructing illegal structures, blocking common passages or failing to pay management fees.[34]

4.3 Procedures at General Meetings

Under Chinese law, there are three types of general meetings. The law contains detailed convening procedures for each type of meeting. They types are: the first annual general meeting, annual general meetings, and special general meetings.

4.3.1 The First Annual General Meeting

The time to convene the first annual general meeting should be clearly regulated to ensure that unit owners immediately control the management of the condominium developments once it leaves the hands of the developer. For example, under the Beijing Property Management Regulations effective on 1 October 2010, developers are obligated to submit the necessary documents to the SDO for establishing the HOA when the occupancy rate reaches not less than 50 % or when two years has passed since the first owner moves in, whichever is earlier. Once more than 5 % of owners have requested, developers are obligated to apply to the SDO and district construction administrative office for establishing the first HOA meeting. Owners may also apply to set up the first annual general meeting when they own more than 5 % in total gross floor area or in total number of owners in support (Reg. 14). The SDO, local government and district construction administrative office must establish the preparatory group within 60 days of receiving the written request (Reg. 15). In a similar vein, the Shenzhen local regulations provides that the developers or the property management company shall notify the SDO *within 60 days* of fulfilling either one of the following requirements (1) not less than 50 % of the total gross floor area has been sold and in use or (2) two years has passed since the sale of the first unit.[35] Owners may also notify the SDO if they wish to do so. The SDO and district construction administrative office must establish the preparatory group to set up the first annual general meeting *within one month* of receiving a written request for HOAs.[36]

[34]Art. 83 of the Chinese Property Law.

[35]Art. 19 of the Property Management Regulations of the Shenzhen Special Economic Zone effective on 1 January 2008.

[36]Ibid.

4.3.2 Annual General Meetings

In order to ensure that unit owners can review the condominium affairs, in a timely manner, an annual general meeting should be convened no less than 15 months after the preceding annual general meeting. Nonetheless, it cannot be assumed that once the period has expired the annual general meeting could not be held in that particular year. If an annual general meeting is not called by the executive council within this time limit, unit owners should be able to request that the SDO summon the meeting.[37]

4.3.3 Special General Meetings

Different from the first general meeting and annual general meetings, special meetings are not required to be held within any specified period. These meetings should be held when necessary during the year. Today in China, when there is an emergency that needs to be dealt with, the executive council can hold a special meeting. However, if the executive council members breach their statutory duty to call a special meeting, the unit owners can apply to the SDO to order the executive council to call a special meeting. If the executive council continues to fail to do so, the SDO can call the special meeting.[38] The Shenzhen local regulations flesh out the details by stipulating that the executive council shall convene a special meeting when (1) more than 20 % of the owners request to hold a special meeting; (2) a major emergency incident takes place and needs to be promply dealt with; (3) the other situations stipulated by these regulations and the rules on the procedures of general meetings.[39]

In China, the original drafters of the Property Management Regulation of 2003 have not addressed the scope of issues on a meeting agenda. However, in the years since its adoption, numerous local property management rules have been enacted to address the matter in more detail than in a national legal framework (Xia 2003). The competence of general meetings need to be clearly stated by enumerating items. For example, the agenda of an annual general meeting consists of: (1) the election of executive council members; (2) a review and approval of the annual budget; (3) the confirmation of the minutes of the preceding general meeting; (4) an amendment, repeal, and addition to the by-laws in force; (5) a decision of whether a managing agent should be appointed, and if so, which executive council powers and functions should be delegated to the managing agent; (6) an adoption of the financial statement and accounting records for the past financial period; and (7) the consideration of other motions submitted by the executive council or unit owners.

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[37]Art. 12 of the Property Management Regulations of the Shenzhen Special Economic Zone.

[38]Art. 10 of the Property Management Regulation of 2003.

[39]Art. 11 of the Property Management Regulations of the Shenzhen Special Economic Zone.

5 A Micro-View on the Recent Developments of Local Condominium Rules

Trends in democratic governance in the PRC are increasingly growing and are reflected in its burgeoning real estate market and the developing laws governing the control of condominiums. At the national level, laws and regulations create greater local obligation amongst housing authorities and tighter controls on corruption. At the local level, regulations are structured in compliance with national policy to allay malpractice and developer overreaching. Yet greater efforts need to be undertaken to further fine-tune the legislative details by providing greater drafting complexity. In the national laws, this includes accounting for the issues directly impacting democratic control such as "double majorities," the future binding powers of developer-owned/run management companies, and more explicit norms binding transitions from developers to owner associations. The national legislation also needs to develop a more sophisticated approach to obstacles indirectly affecting democratic governance, such as improving efficiencies and allowing for two-tier management schemes, open-ended executive council membership and supermajorities on organic changes. Only with credible management will owner apathy evaporate, and the marketability of private property will persist. At the local level, though trends strongly favor earlier owner control (including fail-safe provisions to override developer machinations), other weaknesses continue to dog the legislation. These include double majorities, which can often delay owner control and/or thwart important resolutions after the owners have taken control of the association. Statutes such as the Nanjing measure, limiting the amount a developer may retain in a completed project, have also proven abortive or unpopular. Thus, an important recommendation calls for greater erudition in the drafting of the Chinese condominium laws at both the national and local levels.

Although the Property Law, and to a lesser extent, the 2003 Property Management Regulation, were designed to formalize the rules of condominium ownership nation-wide, many implementation issues remained largely unaddressed. Local regulations are intended to fill the gap. The breadth of local rules is as vast as the Chinese landscape, but insight into the evolution and statutory dynamics of local condominium law can be gleaned by an examination of local regulations' development. Thus, a historical-comparative methodology for statutory changes is adopted here. In order to provide a coherent framework, two localities have been chosen: Beijing and Shanghai. They were selected as representative of major metropolitan areas in the PRC. Moreover, these cities are among the first municipalities to enact local property management rules, and are top-tier Chinese cities in terms of economic development. They are also cities with high-density private condominium complexes (Jing et al. 2011). This survey considers three local regulatory issues: the regulation of the formation of the owners' associations; the regulation of the voting rights of homeowners; and the legal personality for the owners' associations. All three have a crucial impact on the democratic rights of the owners. HOA formation significantly bears on the ability of associations to act on

developer/local corruption. The regulation of owners' voting rights and legal standing issues determines the practical character of the democratic process and its enforceability. Local compliance can best be viewed by considering the changes to local regulations prior to 2003 (before the enactment of the national Property Management Regulation); between 2004 and 2007 (before the enactment of the Property Law); and after 2007. This model is intended to clarify how local authority has implemented the national law, regulation and policy.

Prior to promulgating the Property Management Regulations in 2003, local rules surrounding the establishment and operations of homeowners' associations in Beijing and Shanghai lacked uniformity and maturity. After the regulations of 2003 and the Property Law, these localities made significant changes. As seen in Tables 1 and 2, before 2003, Beijing required developers to notify the local housing authority after 50 % of the units were occupied (or two years from the occupancy of the first unit) and the housing authority would have six months to convene a homeowner association. Shanghai required 30 % of the square footage to be sold (not occupied) in existing projects and 50 % of the square footage to be sold in new construction (or two years from the sale—not occupation—of the first unit). None of the provisions called for double majorities (i.e. number of units and gross square footage).

After the national legislative initiatives of 2003 and 2007, local regulations substantially changed. Beijing switched from requiring *occupancy* of 50 % to *sale* of 50 %, triggering earlier developer notification requirements (to local housing authority). Additionally, a new mechanism was imposed to allow homeowners to by-pass the developer and notify the housing authority directly with only 5 % of owners (or 5 % of square footage) approval. Moreover, the housing authority had significantly less time to establish the HOA (from six months to 60 days). Shanghai changed to add, for the first time, a provision calling for time limits on the local housing authority to establish the HOA (including provisions for the first meeting). Though the local implementing legislation varies significantly from one city to another, in both cities the trend is toward earlier owner control of the association (and thus an earlier voice in the management of the association). Local legal initiative is also trending toward shorter time periods for the local housing authority to actually convene the HOA. Thus, the trend is for quicker owner management.

The significance of these changes centers on developer and local corruption. Often developers retain large blocks of condominium projects after the project has been completed, which can consist of commercial space, residential space, or both. This may be done in order to manipulate supply to drive up prices or to wait for a market property appreciation, as collateral for large credit lines and as an investment for lease income. Also, if developers retain a sufficiently large amount of the project, and prevent the owners' association from taking control, they can maneuver the association to contract with property management companies, maintenance workers, landscape services, engineers and mechanical contractors, accountants and other professionals etc., who work for subsidiary corporations or otherwise associated groups. Additionally, local authorities sometimes conspire with developers and/or management companies to delay owner control in exchange for political

influence or cash. This results in a delay or even a permanent denial of self-governance by the owners. Thus, legislative reform is essential in clarifying when the developer must relinquish control of the association. Indeed, in Nanjing Jiangsu Province in 2006, the local authority specifically addressed this concern by mandating that developers may not retain more than 5 % of any condominium development (News from Nanjing, 2006). However, several years later this rule was repealed.

The local rules in Beijing seem to be sensitive to the formation issue, as the legislation passed in October 2010 (in Table 1) provides an alternate route to forming an owner controlled HOA upon request of only 5 % of unit owners (or 5 % of square footage). It also helps to bar local corruption by mandating unambiguous terms for the housing authority to follow. Indeed, the time limits on the housing authority in both cities were shortened. In Shanghai, the local rule changed from no time requirement to 60 days before the housing authority was required to act. Under the pre-2004 rule, the Shanghai housing authority could have refused to form the HOA indefinitely. On the other hand, the establishment of double majorities could allow developers greater control. If they retain large blocks of property, developers could theoretically block the notification requirement on the basis of square footage. However, the local rules account for this possibility by incorporating a two-year statutory fail-safe in Shanghai and the 5 % owner override provision in Beijing. Moreover, the two-year fail-safe provisions in Shanghai were shortened so that they start running from the time of the first unit sale instead of the first unit occupation. In some developments, this difference could be many months or years.

In addition to HOA formation issues, local rules have substantially changed with respect to voting powers of the owners. In Beijing, prior to 2004 the owners had no statutory/regulatory right to vote. In stark contrast, present day owners have a vote on all resolutions (including the election of the executive council, the appointment of the management company and other significant contracts binding the association). Additionally, these residents can vote on matters involving organic changes to the property (e.g. change in land use). Like Beijing, Shanghai also allows for voting rights of the owners but both use double majorities requiring that the passage of routine resolutions consist of a majority of the units and of the square footage of the project. Both require 66.6 % of units and square footage for resolutions calling for organic changes to the development. Neither of these cities used double majorities for voting rights prior to 2007.[40]

These rules still provide for developer overreaching as double majorities allow greater latitude for developers to block an owner's initiatives. The passage of a resolution is naturally very difficult if a majority (or super-majority) of all owners are required to vote. The majorities are not of a quorum of a general meeting, but a majority of all units and square footage that could be hundreds or even thousands of

[40]Shanghai utilized intermediate legislation established in November 2004 providing for one unit one vote, but with a caveat that non-residential owners were limited to one vote per 100 m^2 of floor area.

Table 1 Local housing authority Beijing

Beijing	Establishing a HOA	Homeowners' voting powers	Legal personality of a HOA
Present: 北京市物业管理办法 (10.01.2010)	Owners *may* establish a HOA, but it is not obligatory (Reg. 13)	Prior to the establishment of a HOA, in times of emergencies (e.g. cessation of services) owners have power to hold meetings to handle the matter, with the assistance of the sub-district office and local government. (Reg. 13)	No definitions provided for a HOA or a HOA committee. However, the courts may revoke a HOA and a HOA committee's decisions when asked to do so by an aggrieved party. The party may ask for compensation for damages suffered as a result of the decisions (Reg. 44)
	Developers are obligated to submit the necessary documents to the sub-district office and local government for establishing a HOA when the occupancy rate reaches not less than 50 % or when two years have passed since the first owner moves in, whichever is earlier	An approved resolution in meetings of a HOA requires approval from more than 50 % of owners AND in gross floor area (Reg. 11)	
	Once more than 5 % of owners have requested, developers are obligated to apply to the sub-district office, local government and district construction administrative office for establishing the first HOA meeting	For decisions of the HOA committee relating to funding, restructuring or rebuilding facilities, approval is required from more than 2/3 of the owners AND in gross floor area (Reg. 17)	
	Owners may also apply to set up the first HOA meeting when they own more than 5 % in total gross floor area or in total number of owners in support (Reg. 14)	The preparatory group determines the election procedures and requirements for a HOA committee (Reg. 15)	
	The sub-district office, local government and district construction administrative office must establish the preparatory group *within 60 days* of receiving the written request (Reg. 15)	The opinions and suggestions made by members of the residential committee and the district construction administrative office shall be carefully considered at the HOA meetings (Reg. 22)	
Pre-2004: 北京市居住小区物业管理办法 (01.01.1995), modified on 01.01.1998	Developers shall notify the district residential authority when the occupancy rate reaches not less than 50 % or when two years have passed since the first owner moves in, the authority shall convene the first HOA *within 6 months* of receiving the notice	No mention of voting powers by owners	Reg. 9 states that the association represents and protects the legal rights of all owners and users
			It is notable that a judicial opinion, the "*Opinions Concerning Trialing the Property Management Cases*" of the Beijing High Court in 2003 allowed the executive committee of a HOA to appear in court on behalf of the owners

Table 2 Local housing authority Shanghai

Shanghai	Establishing a HOA	Homeowners' Voting Powers	Legal Personality of a HOA
Present: 上海市住宅物业管理规定 (01.04.2011)	Developers are obligated to apply to the sub-district office and local government for establishing a HOA *within 30 days* of fulfilling the following requirements: (1) not less than 50 % of the total gross floor area has been sold or (2) two years have passed since the first unit has been sold (Reg. 12 & 13)	An approved resolution in meetings of a HOA requires approval from more than 50 % of all the owners AND in gross floor area (Reg. 17)	The regulation does not give a HOA or a HOA committee a legal personality
	The sub-district office, local government and district construction administrative office must establish the preparatory group to set up the first HOA *within 60 days* of receiving a written request for a HOA (Reg. 14)	For decisions of the HOA committee relating to funding, restructuring or rebuilding facilities, approval is required from more than 2/3 of all the owners AND in gross floor area (Reg. 17)	Reg. 12 states that a HOA is made up of all owners. No definition is given for HOA committees
	The first meeting of a HOA shall be hosted *within 90 days* of the establishment of the preparatory group (Reg. 15) (while no longer requiring the supervision of government agencies, the preparatory group will now include government representatives)	The voting procedures and requirements for HOA committee members are determined by the preparatory group (Reg. 15)	
		The opinions and suggestions made by members of the residential committee and the district construction administrative office shall be carefully considered at the HOA meetings (Reg. 22)	
Pre-2007: 上海市住宅物业管理规定 (01.11.2004)	Developers are obligated to apply to the sub-district office and local government for establishing a HOA after the following requirements are fulfilled: (1) not less than 50 % of the property in an area has been sold or (2) two years have passed since the first unit has been sold (Reg. 7 & 8)	Each residential unit is allowed one vote. For non-residential owners: a vote is given per 100 m^2 owned. In the first meeting of the HOA, a single entity/person shall not hold more than 30 % of the votes	Definition of HOA: HOA is made up of all owners (Reg. 7). HOA committee is the executive branch of the HOA (Reg. 12)

(continued)

Table 2 (continued)

Shanghai	Establishing a HOA	Homeowners' Voting Powers	Legal Personality of a HOA
	The sub-district office, local government and district construction administrative office must establish the preparatory group *within 60 days* after receiving a written request (Reg. 8)	To approve resolutions, a HOA must have in attendance a number at least greater than 50 % of the owners and more than 50 % of all owners must agree (Reg. 11)	
	The first HOA meeting shall be convened *within 30 days* of establishing the preparatory group under the supervision of the sub-district office and local government (Reg. 8)	For decisions of the HOA committee relating to changing the contents of the mutual covenant, funding, restructuring or rebuilding facilities, approval is required from more than 2/3 of all owners	
		The voting procedures and requirements for HOA committee members are determined by the preparatory group (Reg. 15)	
		The opinions and suggestions made by members of the residential committee and the district construction administrative office shall be carefully considered at the HOA meetings (Reg. 11)	
Pre-2004: 上海市居住物业管理条例 (01.07.1997)	The district construction administrative office together with the developers shall convene the first HOA meeting for electing HOA committee when either (1) not less than 30 % in the total gross floor area of the communal/collective (公有住宅) units has been sold or (2) not less than 50 % in the total gross floor area of the communal/collective (公有住宅) units has been sold or (3) two years have been passed since the units were sold (Reg. 7)	All meetings of the HOA shall be attended by more than 50 % of the owners. All decisions made in these meetings shall be approved by more than 50 % in total number of owners (Reg. 8)	Reg. 6 defines HOA committee as a self-regulated *organization* for the management of property management representing all owners
		Reg. 9 provides a right of the HOA to elect its committee	A judicial opinion issued by Civil Law No. 1 division of Shanghai High Court in 2002 provided that the executive committee of a HOA may enjoy *locus standi* to sue or be sued on certain conditions

units and the requisite floor area. If the developer retains a substantial portion of the square footage, then it becomes even more difficult to obtain the (double) majority approval. In new construction, the developer formulates the initial contracts, often with subsidiary companies, which provides additional income. It is in the developers' best financial interest to prevent a HOA vote to upset those contracts and eliminate this income source. Therefore, even if the developer cannot prevent the formation of the HOA, it can unduly influence the HOA's activities by blocking a majority and thwarting the democratic process. This also highlights the importance of efficient condominium structure (in both national and local regulation) and the deleterious effect of owner apathy. Owners who refuse to take part in the voting process, based on the inefficient and cumbersome HOA structure, play into developers plans. Once owner apathy is taken into account, developers only need to retain a relatively small portion of the project to prevent a 50 % (or 66.6 %) majority and block any resolution. This is comparable to veto powers. Thus, despite the national legislation and the local implementation procedures, developer overreaching and locals facilitating these activities still occur as a consequence of flaws in the regulations. Double majorities play into this matrix as developers can make owners' associations powerless.

6 Conclusion

Taking lessons from jurisdictions with an established condominium law system lessens pitfalls and helps to avoid dysfunctional practices as well as to identify pertinent elements that can be dovetailed into an approach sensitive to Chinese values and its culture (Chen and Mostert 2007). It would be unworkable to transplant a whole body of law into a complete new environment (Legrand 2006).[41] Nevertheless, equally foolhardy is blaming legal culture for all of the difficulties involved in embarking on a path of legal borrowing. There has to be a willingness to borrow the most useful and pertinent mechanisms from foreign legal systems where condominium ownership is regulated and conducive to strengthening the real estate market. This would save legislative costs and therefore improve effectiveness of laws. After all, one can give prominence to culture, and at the same time carefully borrow ideas from long-standing and well running legal systems.

Law is a living entity. To discover law through comparative study is one thing, but to systematize it is quite another. Framing a condominium law should accommodate existing statutes and be compatible with correlate legislations, such as statutes on urban planning, real estate administration law and the mortgage and registration system. Drafters of this new legislation should anticipate possible judicial antagonisms. Moreover, training for lawyers and para-legal workers needs

[41]In this article, Legrand argues that "law-texts always and already speak culturally or traditionally."

to be strengthened to reduce dysfunctions in the condominium ownership system. Particularly noteworthy is to develop a well-coordinated system with institutional lenders, i.e. commercial mortgage providers who finance private housing.

Condominium owners need to know the exact boundaries of their condominiums in order to know where their individual interests stop and where they begin. At present, the lack of such a constitutive document is a bonanza for the developer. Not only is the developer free to alter the dimensions of a buyer's unit, but the developer can also hide costs from unit purchasers such as the cost of an additional charge for a parking space. Moreover, the occupancy restrictions also need to be disclosed to potential unit purchasers to ensure they are knowledgeable about what they can and cannot do in the condominium complex. Many potential disputes can therefore be averted.

In China, condominium complexes are diverse and vary greatly from one to another. A one-size-fits-all solution is not desirable. Some are mixed-use developments while others are exclusively residential ones. Some are public rental housing conversions while others are newly developed projects. Some have 300 units while others only have ten units. It is this diversity that makes it unrealistic to standardize condominiums with very diverse characteristics into a single document. A formal governance structure causes administrative costs and creates a possibility that an unfaithful agent seizes the reins. For a large and mixed complex, the existence of a formal HOA is necessary and gives rise to efficiencies. However, for smaller complexes, establishing a HOA may not be worth the bother (Ellickson 1991). When fine-tuning Chinese condominium laws, a balance needs to be struck between flexibility and standardization.

In general, the new local regulations have provided for a clearer demarcation of rights and obligations between the homeowners, its committee, the developers, property management companies and government agencies. However, some matters are still left unattended. The question of whether the HOA or its committee is a legal person remains unanswered. The ability to vote and manage the association is only as good as the ability to enforce decisions. None of the local regulations has explicitly provided for legal standing of HOAs but the local courts have made rulings that imply standing. In a 2003 Beijing judicial opinion,[42] the court implied the powers of standing of a HOA. In Shanghai, standing for HOAs was implied in 2002 in judicial guidelines.[43] In these cases local courts have found that HOAs may be sued, which indirectly presupposes standing as HOAs must be competent to put on a defense. Moreover, if they can defend themselves they must be able to counter-sue and thus initiate cases in their own names (Chen and Kielsgard 2014).

[42]Shi Fu Tian Qu Zhong Hai Ya Yuan Housing Management Committee v. Haidian District, Beijing Land Resources and Housing Authority (Beijing, Haidian District People's Ct., 20 November 2003). Available at http://cietac.chinalawinfo.com/newlaw2002/slc/slc.asp?db=cas&gid=33621767.

[43]Answer to Questions Concerning Adjudication on Housing Management Disputes (Shanghai High People's Ct., Mar. 19, 2002). Available at http://www.law110.com/law/difangsifa/law1102009difangsifa182.html.

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Gating in Russia: Exit into Private Communities, and Implications for Governance

Leonid Polishchuk and Yulia Sharygina

Abstract Gated communities are increasingly popular and visible in Russia, and the Russian experience with gating highlights heretofore little noticed causes and consequences of private communities in general. It shows that gating could be a social response to governance failures, when a society is unable to ensure government accountability and instead local communities take matters in their own hands. Such outcome reflects cultural traits in the society which preclude a "voice" response to governance failures and instead prompt apolitical "exit" into private communities. We argue that there is bilateral causality between gated communities and democratic accountability, so that dysfunctional municipal governance and private communities feed upon each other.

1 Introduction

Private communities, which separate themselves from the surrounding areas and provide certain services exclusively to community members, have become commonplace in urban and suburban landscapes around the world. More often than not such communities are surrounded by physical protective barriers preventing unauthorized entry, in which case they are known as gated communities (GCs); in what follows we use both terms interchangeably.

As part of GCs' proliferation around the world, they are increasingly popular and visible in Russia, especially in the nation's capital Moscow and other major cities. While gating *à la Russe* is of considerable interest in and of itself, we argue in this chapter that it also highlights heretofore little noticed causes and consequences of private communities in general.

L. Polishchuk (✉) · Y. Sharygina
Higher School of Economics, National Research University, Moscow, Russia
e-mail: lpolishchuk@hse.ru

Y. Sharygina
e-mail: j.sharygina@mail.ru

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The prevailing view of GCs, which goes back to the seminal work of Blakely and Snyder (1997), is that they are a *market* response to inadequate provision by municipal governments of local public goods and services, most notably safety and security. GCs are supplied by developers who sense a niche in the real estate market, and bundle housing with otherwise missing public services. Such services are made available exclusively to community members as "club goods." Developers provide necessary physical infrastructure (fences, security perimeters, utilities, public facilities, etc.), legal foundations (covenants, conditions, and restrictions—see McKenzie (1994), and managerial services necessary to run such communities in isolation from the rest of the surrounding (sub)urban space, and with reduced reliance on municipal governments. Essentially, developers hatch private micro-jurisdictions that outperform municipal governments and fill gaps and lacunae in public service delivery, albeit on the "members only" basis.

The Russian evidence reviewed below in the chapter conforms to such a view, but also shows that gating could be a *social* response to governance failures, when a society is unable to ensure government accountability and instead local communities take matters in their own hands and make do without underperforming governments, and with no attempt to discipline those. Viewed from this angle, gated communities could be considered, in the famous Hirschman (1970) dichotomy, as an "exit" into localized private solutions, as opposed to the "voice" option that would make use of democratic processes to improve municipal governments' performance.

Such social response can be observed even when GCs are offered "turnkey" by developers, since by accepting the offered package of housing and club goods homeowners reveal their preference for local private solutions (Le Goix and Webster 2008), and signal mistrust in broader governance and democratic process. These attitudes are expressed especially clear when localities and even standalone apartment buildings retrofit themselves with fences and gates—a pattern which is sweeping across earlier built middle-class bedroom communities in Russia.

Retrofitted gating requires a collective action of the involved residents. Accountable and efficient municipal governance which would render lower-level community jurisdictions redundant is also an outcome of collective action, albeit of a different kind and larger scale. Popularity of gated communities demonstrates feasibility of the former kind of collective action and *un*feasibility of the latter. This is an indication that social capital, understood as the capacity for collective action, exists mainly in the bonding form, when it is restricted to narrow groups defined by social class, locality boundaries, etc., rather than in the bridging one, in which case it could support broad societal coalitions (Putnam 1993). Furthermore, preference for "exit" into private communities is an indication of a lack of civic culture (Almond and Verba 1963), i.e. the sense of responsibility for the state of affairs in a political jurisdiction, trust in democratic institutions, and confidence in the ability to make a difference through the "voice" option. Civic culture is sorely missing in today's Russia, and bonding social capital usually prevails over bridging one. Such cultural

configuration explains both the observed inadequacy of government-supplied public services (Polishchuk 2013a), and the massive reliance on GCs as a remedy.

Culture and cohesion are common themes in the burgeoning GC literature (Roitman 2010; Manzi and Smith-Bowers 2005), but mainly in the context of CGs' hypothesized impact on cohesion and community ties. The above reasoning points to a causality that runs in reverse, whereby culture is a prerequisite, rather than outcome, of GCs. Seen that way, GCs illustrate a more general pattern of a society which fails to resolve the agency problem vis-à-vis the government, is unable to ensure proper performance of public servants, and resorts instead to various ad hoc alternatives to accountable governance, such as grassroots community initiatives, informal economy, patronage etc. (Menyashev and Polishchuk 2015; Shagalov 2015a).

Dissatisfaction with public services which gives rise to GCs is often ascribed to insufficient public funds due to fiscal austerity, or to preference polarization when the median voter does not represent wealthier categories of citizens who need and can afford higher levels of public consumption and make up by switching to "club goods" available within smaller and more homogenous communities. However, these are not the only reasons for inadequate public service delivery, which could also be due to corruption, embezzlement, negligence and other governance pathologies caused by a lack of democratic accountability. Such democratic deficit and its adverse impact on public sector governance are commonly observed in Russia, and the Russian case illuminates the importance of this factor for the popularity of the GC model.

In fact, the causality between GCs and democratic accountability runs both ways, which the Russian case also illustrates. Massive exit into private communities makes public service delivery by local governments less essential and relevant for people's everyday life, and diverts attention of the society from government performance. We bring to bear recent advances in the theory of governance and social capital and the Russian realities to argue that GCs could exacerbate the service delivery problems that brought up this residential model in the first instance. This means that GCs could be a linchpin of a spiral where dysfunctional municipal governance and private communities feed upon each other, which naturally leads to the question about co-evolution of gating and conventional provision of local public services (Woo and Webster 2014), and about ultimate sustainability of "club cities" (Le Goix and Webster 2006).

This chapter proceeds as follows. In Sect. 2 we present a brief literature review on causes, consequences and assessment of GCs, which sets a framework for the subsequent analysis of the Russian case. Section 3 describes trends and patterns of GCs in Russia. Section 4 addresses private communities in Russia from the "exit-voice" perspective, and relates the observed patterns of GCs to norms and attitudes in the Russian society. Section 5 deals with the link between GC and municipal governance. Section 6 concludes.

2 Social Economics of Gated Communities

Private communities emerge as a spontaneous response to excess demand for local public services due to insufficient supply of such services by governments. Missing services could be procured privately—either individually, such as education, health care etc.—see e.g. Epple and Romano (1996), or collectively, by a private community, in which case such services include, but not limited to, safety and security, parking, property upkeep, communal facilities, and internal rules governing public space—see e.g. Manzi and Smith-Bowers (2005).

GCs generate net efficiency gains for the involved parties, which are either split between developers[1] and community members, or accrue to community members only when such communities are self-organized. Proponents of GCs consider these gains as evidence of evolutionary process leading to improved delivery of local public goods (Foldvary 1994). Such optimistic view resonates with the evolutionary theory of institutional change originated by Alchian (1950) and Hayek (1973), according to which competitive selection produces superior institutions that outperform less efficient alternatives. In the case of GCs, such institutions involve private communities which step in where both market and governments fail (Bowles and Gintis 2002), and are arising at the intersection of market, state, and civil society (McKenzie 2003).

Private communities can be considered as micro-jurisdictions with their own membership, rules, governance, duties, taxes (maintenance fees) and exclusive benefits, and as such constitute de facto a new level of government. This metaphor is helpful inasmuch as it brings to bear the vast literature on national-subnational relations in exploring similar relations between municipal governments and private communities. One of the cornerstones of the above literature is the Decentralization Theorem (Oates 1972), which highlights inter-jurisdictional variation of preferences as the main argument for devolution of public goods delivery to lower level governments. Centralized provision offers to all jurisdictions a uniform package of public goods and taxes, whereas lower level governments can customize such packages to local needs and abilities to pay, which improves social welfare.

More detailed argument in support of GCs invokes, since Webster (2001), the advantages of club goods with controlled membership set at the level which maximizes net benefits for club members, preventing overuse (Buchanan 1965), and self-sorting into homogenous communities with similar preferences and income, which leads to efficient public goods delivery, impossible within larger jurisdictions where preferences and income are polarized (Tiebout 1956).

The above arguments lend significant normative support to GCs (Woo and Webster 2014), and explain why such communities attract more affluent households

[1]When developers have market power, bundling housing with local services allows de facto price discrimination and hence increases developers' profit (Adams and Yellen 1976).

with greater need of security and higher ability to pay for it, than the rest of the population. This agrees with the view of GCs as, until recently, as a predominantly elite phenomenon (Manzi and Smith-Bowers 2005).

However, revealed preferences for GCs expressed by residents and developers do not prove social efficiency of this model (Le Goix and Webster 2008). Less sanguine outlook of GCs raises concerns about external costs borne outside of private communities (and possibly external benefits) which are not properly taken into account by community members. Such costs could be due to the fragmentation and loss of public space, hindrance to moving about the city, segregation based on wealth and status, opting out of government delivery of public goods and public revenue collection, etc. (Low 2003).

An important example of external costs generated by private communities is crime spillover. Extra security for community members, which is the most common rationale for gating, displaces crime to other, less protected, areas, and such spillovers trigger a "race-to-the-bottom"—type competition between communities, which leads to an equilibrium where total security expenditures exceed socially optimal level (Hakim et al. 1979; Helsley and Strange 1999).[2]

The theory of federalism recommends devolution of public good provision when preference variation between lower level jurisdictions is large in comparison with the magnitude of inter-jurisdictional spillovers. This general principle is applicable to GCs as well, in which case it requires empirical estimations of the benefits of customized delivery of public services within private communities, and of the costs which arise when GCs' decisions are not coordinated with each other. However, such estimations alone would be of limited value, since the above normative arguments presume a "sterile" governance framework where public (communal) resources are put in the best use, subject to applicable rules and informational constraints. These assumptions are rather unrealistic, especially in developing and transition countries, including Russia, which are notorious for their governance pathologies, such as corruption, incompetence, and government capture.

A lack of performance by municipal (and upper levels) governments is another important reason for gating, independent of merits and demerits of club goods versus local public goods per se. GCs could be a pragmatic response to government failures reflecting the perceived inability to improve the provision of public services (such as law enforcement) by governments, and greater confidence in private communities as an effective alternative to underperforming governments. As argued in the Introduction, such apolitical "exit" into private communities reflects a certain social capital mix, which is characterized by a lack of civic culture and broad social cohesion. Instead, such traits are supplanted by bonding social capital restricted by

[2]A similar effect is observed in tax competition between jurisdictions for mobile resources, which leads to equilibrium tax rates below what is socially optimal. This effect is the main rationale for tax harmonization across jurisdictions.

class, wealth, status, race, and ultimately by private communities' physical boundaries.[3]

Culture and governance explain why GCs—initially an elite phenomenon—are becoming increasingly popular among the middle class, when GCs do not any longer signal status and/or reflect higher demand for security of wealthier households (Manzi and Smith-Bowers 2005). Of the three main types and reasons for gating—lifestyle, prestige, and security (Blakely and Snyder 1997)—only the third pertains to middle-class GCs, and normative Decentralization Theorem-type arguments do not any longer apply, since gating is chosen by "average" communities, which exhibit no significant variation among themselves in demand for security, but share dissatisfaction with protection provided by government. In this case even "… poorer neighborhoods [are] taking a defensive posture against lawlessness [and] vote to erect gates where there were none" (Le Goix and Webster 2008).[4]

When the reliance on GCs reflects, instead of economic fundamentals, culture and culture-related governance failures, such market solutions could drive the urban setup further away from social optimum. As part of these distortions, GCs could be replacing municipal governments in public service delivery well in excess of what is justifiable by broad societal needs. This runs against the expectations that locations of GCs are chosen in areas with better public services (Woo and Webster 2014), in which case GCs and governments would be complements. According to Bowles and Gintis (2002), communities complement governments under well-designed institutions, whereas when institutions are poor, complementarity turns into substitution. The experience of GCs agrees with these observations, and indeed GCs emerge in response to spending cuts by local governments and their withdrawal from public service provision by offloading such services onto private communities (McKenzie 1994; Roitman 2010).

An important outcome of gating is its impact on the fabric of society. It is commonplace in the literature that GCs lead not only to physical, but also to social fragmentation, as they disrupt social ties beyond GC fences and undermine cohesion of the broader population (Gottdiener and Hutchision 2000; Manzi and Smith-Bowers 2005; Woo and Webster 2014). However, gating could be expected to facilitate social interaction and cohesion within private communities, by creating clearly expressed common interest and collective responsibility for private community upkeep—community presumes "mutual responsibility, significant interaction, and cooperative spirit" (Blakely and Snyder 1997). Indeed, GCs meet all of Ostrom's (2000) design principles for successful community self-organization, including strong and tangible participation incentives; stable and compact group with clear boundary rules; opportunities for frequent face-to-face communication; the ability to set internal rules and elect governance bodies; and government recognition.

[3]Another explanation of the causal link between low cohesion and grassroots demand for GCs is the "fear of others" which leads to an exaggerated perception of insecurity and hence stronger need for gating—see e.g. Low et al. (2011).

[4]In addition, technological progress makes security perimeters cheaper and affordable to the middle class (Manzi and Smith-Bowers 2005).

According to Alesina and La Ferrara (2000), the overall impact of segregation on social interactions and group participation is negative—possible increase of interaction within segregated communities does not make up for depressed interaction across communities. Furthermore, the evidence of increased interaction and cohesion within private communities is sketchy at best (Blakely and Snyder 1997; Roitman 2010), in part because formal rules (usually pre-set without input from residents) often substitute for cohesion and personal communication (Blandy and Lister 2005).

While participation of private communities' residents in community affairs is a subject of debates in the literature, their loss of interest in municipal/urban affairs beyond the community walls is a predictable and firmly established outcome of gating. GCs cultivate civic disengagement and apathy (Low et al. 2011) and undermine democratic local governance and the sense of citizenship (Caldeira 2000; Roitman 2010). This could have far-reaching consequences for the efficiency and resource base of local governance. Political economists analyze the competition for loyalty and resources between official governance structures ("cities") and smaller groups ("clans"), and if clans take the upper hand, cities are turned into dysfunctional empty shells (Greif and Tabellini 2012). Private communities are similar to conventional clans, where ties are based on lineage and personal connection, in that both become alternative providers of vital public goods and as such supplant conventional governments.[5]

To the extent that GCs still communicate with local governments, the agenda of such communication is confined to the narrow interests of individual communities, rather than broader societal interests. Such narrow-mindedness and lack of "civicness" reduce the provision of public goods and erode democratic accountability (Nannicini et al. 2013). In its turn, opportunistic bureaucracy welcomes grassroots solutions of problems left unattended by governments, since such solutions reduce social costs of abuse of power, as "things are taken care of anyways," and enable even greater malfeasance. A theory developed by Menyashev and Polishchuk (2015) demonstrates that the capacity for private community-confined solutions adversely affects government accountability, and could leave the society worse-off, when the harm caused by political disincentives to supply public goods by governments exceeds the gains due to the availability of club goods supplied by private communities (for more on this see Sect. 5 of the Chapter). These general conclusions are vividly illustrated by GCs in Russia.

3 Gating in Russia: Trends and Patterns

The model of gated communities originated in the United States and subsequently spread around the world, sweeping Europe, Latin America, China and South-East Asia, Middle East, Latin America, etc. After the fall of communism GCs sprang to

[5]Co-evolution of municipal governments and private communities is discussed in Woo and Webster (2014).

life in the former Eastern Bloc (Stoyanov and Frantz 2006; Polanska 2010), including Russia. Proliferation of GCs was driven in part by emulation of a successful American model, spearheaded by globalization, foreign investments and expatriate settlements, and projecting the image of a global culture (Blakely and Snyder 1997; Lentz 2006). However, various countries had their own rationales for gating, reflecting both contemporary realities and histories of GC-like settlement patterns that were converted into more conventional private communities.[6]

In the Russian case, American-type GCs were first established by foreign developers in the early 1990s, at which time they targeted primarily international clientele who wanted to maintain their customary lifestyle, comfort and safety amidst a chaotic transition characterized by breakdown of governance, public services, law and order. Self-contained GCs offered a natural solution, which was promptly replicated without "re-inventing the wheel" (Lentz 2006). This trend is exemplified by one of the first modern GC in Russia, *Pokrovsky Hill,* built by a US investor primarily for long-term expat residents, and a few other similar properties, such as *Vorob'evy Gory, Serebryannyj Bor, Alye Parusa* that followed (Blinnikov et al. 2006; Zotova 2012).

The GC model quickly became a symbol of status and prestige and attracted domestic nouveaux riches, known as the "new Russians," most of them in the country's capital, who were notorious for their conspicuous consumption and were able to afford a lifestyle far beyond the means of ordinary Russians. They showed clear preference for suburban private communities, given the congestion and pollution in the city core, and hence GC developers targeted prime locations in Moscow's "Green Belt" (Blinnikov et al. 2006). Distance from the city—up to 50 km—provided further isolation, compounding massive physical walls with private security, closed circuit monitoring, etc. Due to remoteness of many locations and chronic traffic jams, contacts between private communities and the rest of the city were sporadic, and these communities supplied all the essential facilities and amenities of everyday life.

As it was elsewhere in the world, early GCs in Russia, in addition to copycatting international patterns of elite lifestyle, were a natural response of the powerful and wealthy[7] to a growing imbalance between personal wealth and private consumption, on the one hand, and the collapsing provision of public goods and services by governments of all levels, on the other. An additional strong reason for gating was a widespread perception in the broader society of the new economic order as fundamentally unjust and illegitimate (Frye 2006). The resulting insecurity of property rights required additional private protection, of which gating was an important part. As a rule, such GCs also guaranteed to residents uninterrupted access to

[6]Antecedents of GCs around the world reflect class structure and hierarchies, ethnic, racial and religious divides, legacies of colonial rule and civil conflicts, chronic failures to control crime and violence, etc. (see Le Goix and Webster 2008).

[7]In the 1990s business moguls, known as the oligarchs, wielded strong influence over public policies. In the next decade many public servants and their family members amassed significant wealth and joined business elites as residents of prestigious GCs.

utilities and maintenance, when those from municipal utility providers were prone to accidents and outages (Lentz 2006).

To be sure, gating and, more generally, isolated self-sufficient communities were nothing new in the post-Soviet Russia. Thus, there was a well-known and firmly entrenched pattern of gated and guarded residencies of Soviet political and administrative elites, known as *nomenklatura* (Voslensky 1984); see e.g. (Lentz 2006; Blinnikov et al. 2006).[8] Another type of Soviet-time predecessor of GCs were dacha cooperatives, also based in suburbs with some kind of enclosure, sometimes designated for particular groups and professions, such as intellectual and artistic elites. Gates and fences were also standard around residences of military personnel and their families, as well as around those working in so-called "closed cities" built around facilities and installations of the Soviet military-industrial complex. Yet another spatially isolated group comprised foreign diplomats and their families. These antecedents (see also Trudolyubov (2015)) have merged with the "imported" GC model, creating a mix of tradition and modernity observed elsewhere in the world (Blakely and Snyder 1997).

Russian GCs in the 1990s and well into 2000s were almost entirely market-driven and not subject to any master plan or other types of urban planning. Such spontaneity was symptomatic of and typical for the Russian post-communist transition in general, where reformers saw their role in laying bare foundations for free market, expecting that unleashed market forces would take care of the rest.[9] Evidences of this laissez-faire approach can be seen in the GC locational and development practices which showed little regard of public interest and were commonly upsetting fragile ecosystem balances and claiming heretofore public parks, riversides and other areas of high recreational and environmental value (Blinnikov et al. 2006; Zotova 2012).

In addition to GCs, Russian elites' spatial segregation from the rest of society was pursued on a parallel track of acquiring ownership in foreign real estate, often as a second home and/or a permanent residency for family members residing abroad. Foreign real estate ownership carried extra benefits of vacation property, asset diversification and capital flight vehicle, but otherwise the motivation and indeed trends of buying residencies abroad were similar to gating, both addressing

[8]Gates and fences were an essential part of the public perception of *nomenklatura's* lifestyle, as is illustrated by the following popular verse of the Russian poet Alexander Galich: "… there are fences in the suburb/and leaders behind the fences/… [where] there are manicured lawns/ and one can breathe easily/… and passersby are watched by snitches /from behind the fence".

[9]See e.g. Polishchuk (2013a, b). Legal foundations for GCs involve a development permit (*zemleotvod*) obtained from a local government, which delineates boundaries of a development project and enters the area in the national land registry. Such permit affords the usufruct right and allows the exclusion of others via enclosure by fences and gates. The national Land Code passed in 2001 requires a conversion of the above rights into full private ownership or leasehold. Russian practice of issuing development permits facilitates self-contained communities, since developers are often required by local governments to build local public facilities as a permit condition. This is another evidence of offloading governments' responsibilities onto private communities.

the same needs of security and quality of living commensurable with personal wealth, and unavailable for the general Russian population (Polishchuk 2015).

Steady economic growth experienced in Russia in 1999–2008 led to a real estate boom, including the upscale segments in the two main metropolises—Moscow and St. Petersburg, but also in other major cities. A majority of elite housing projects were undertaken in suburbs; thus by mid-2000s over 260 such complexes were developed within the 30 km range of Moscow, almost all of them with gates, fences and other kinds of security perimeters (Blinnikov et al. 2006).[10] Even of those few elite housing projects located in Moscow's core and tucked into a dense urban setting, almost 40 % were gated (Medvedkov and Medvedkov 2007). According to Zotova (2012), by 2010 Moscow and suburbs hosted over 500 such complexes, or more than half of those nation-wide. A third of these GCs residents were families of top managers of large (mostly state-controlled) corporations, a quarter—successful entrepreneurs, and more than 10 %—foreign business executives.

The economic growth benefits trickled down beyond the elite segment of the Russian society, and reached the emerging middle class with income approaching, and sometimes exceeding, the European level. As it happened earlier to the elites, rising personal consumption made the middle class in its turn acutely aware of the inadequacy of government services, which became a bottleneck on the way to higher living standards. The response of the middle class to this mismatch was similar, too—fences and gates penetrated and enclosed bedroom communities, usually surrounding the city core.[11] From mid-2000s onward, GCs in Russia ceased to be a purely elite phenomenon (Lentz 2006), and became a feature of middle-class living, at least in Moscow, and increasingly in other cities. In part this was an attempt to imitate, even with limited means, the upper class lifestyle, but more importantly, to enhance security and to supply privately some other amenities, such as parking, landscaping, and playgrounds (Zotova 2012).

Gates (operated by key-cards or manned by security personnel), fences, voice and video intercom and closed circuit systems are now standard features of new apartment building housing projects, positioned by developers as "premium," "comfort," "business," etc. Various estimates and real estate statistics and reports, including those produced by consulting and realtor firms, summarized in Sharygina (2015), indicate that at least 75 % of all new residential housing projects completed in Moscow in the recent years were advertised in the above categories. While promoting such projects, developers emphasize secure and secluded lifestyle and availability of gated public areas and various in-house amenities as valuable added benefits which differentiate a project from the "economy class." Therefore gating

[10]Security perimeters around such projects are formidable—"at the minimum, … guarded entry or checkpoint, … at the maximum, … 'close connection to the local police station and canine unit', '3-meter high concrete or metal fences along the perimeter', 'smart card entry/exit' and 'guards experienced in police and [secret service] methods'" (Blinnikov et al. 2006: 70).

[11]The middle class replicated the other above mentioned elite strategy—acquisition of foreign real estate. Russian ownership of housing units in Bulgaria, Spain, Latvia, China and many other countries run in the hundreds of thousands (Polishchuk 2015).

has become an essential (and indeed expected) feature of a real estate product for Moscow's middle and upper middle class.

Perhaps more tellingly, even earlier built residential complexes, initially with no gates and fences, are being increasingly retrofitted with those, forming "spontaneous" communities, as opposed to "planned" ones, supplied by developers (Lehavi 2009). Russian law allows for collective ownership by apartment building residents of the land surrounding the building. To take advantage of this provision, residents (represented by a condominium council or a management company) need to perform a cadastral survey of the area to be claimed, and have it approved by the municipal government.[12] Thus obtained collective property rights allow the exclusion of others—as stated in an applicable Moscow city bylaw, joint ownership enables the tenants to "… protect their rights to land and amenities and do not allow use of those by unauthorized persons." Moscow government considers fences and gates as such protected amenities.[13] Decision to erect a fence requires a simple majority of residents, and a fence design must be approved by emergency services, such as police, ambulance, and firefighters, to ensure their access to the building. Once such approval is secured, there are no further regulatory hurdles. If a newly erected fence obstructs movement and violates access rights of the neighbors, such conflicts could in theory be settled in courts, but in reality often remain unresolved.

The above procedure is not particularly onerous, especially in comparison with otherwise massive red tape typical of the Russian regulatory system. This is an indication that local governments welcome gating as a means to offload onto private communities some of the public services. This attitude was made clear by a recent decision of the Moscow government to subsidize barrier gates restricting non-residents' access to parking areas in a building courtyard. The decision was made in response to Moscow residents' protests against the expansion of pay parking zones well into the bedroom communities and fears that outside motorists, to avoid parking fees, will be illegally parking their cars in the areas surrounding apartment buildings and jointly owned by building residents. The offered subsidy, covering 70 % and more of the full cost, would support as many barrier gates as necessary to fully secure the protected area (Sharygina 2015). In other words, the city outsources to private communities the enforcement of parking rules through physical barriers at the cost of further segmentation of the public space.

As a result of the above processes, Russia's capital city is presently "plagued by fences which dismember the urban fabric and obstruct movement about the city" (Melnikova 2015). Gating becomes increasingly pervasive in the country's second largest city, St. Petersburg, and elsewhere in major urban centers (Zotova 2012). In the next sections we interpret these outcomes in the light of the general analysis of GCs presented earlier in this chapter.

[12]In newly built housing projects developers handle such formalities and pass collective ownership of the fenced area to would-be apartment owners.

[13]For more details and references to legal documents see Sharygina (2015).

4 Exit into Private Communities

Gating in Russian cities, especially the largest ones, is excessive and goes well beyond of what is reasonable and could be observed in better-organized urban environments. Direct costs of this practice include expenditures required to establish and maintain security perimeters around apartment buildings, duplication and missed benefits of the economy of scale in the provision of "club goods," and various losses due to physical fragmentation of the urban space. As argued below, there are also significant indirect costs due to the adverse impact of private communities on municipal governance.

Given the above costs, it is hard to find normative justifications for the scale and scope of this phenomenon. As explained earlier in the chapter, the Decentralization Theorem-type arguments do not apply to middle-class GCs, where there are no significant variations of means and needs across the urban space dissected by gating, and where largely identical groups of population residing in apartment buildings next to each other put fences around their properties.

Apparently, private communities in Russia arise, as it is often the case elsewhere in the world, and especially in developing countries, in response to local governance failures, perceived insecurity and "fear of the others" that public law-enforcement services cannot allay. "Guarded housing [in Russia] is a sign of the weakness of public administration and its inability to organize the supply of housing neighborhoods for the newly rich and the new middle class" (Lenz 2006). Russian urbanists associate gating with a "culture of fear and distrust," insecurity of property rights, uncontrollable migration, and other symptoms of poorly managed and disorganized public space (Melnikova 2015), which prompts residents to make up for a lack of the rule of law by physical barriers (Trudolyubov 2015). Russia therefore conforms to the general pattern described earlier in the chapter whereby GCs are substitutes, rather than complements, of institutions and services expected from governments.

In the course of the Russian post-communist history, the quality of its institutions and public sector governance went through some peaks and troughs, but remained low overall and was mostly declining over the last decade (Polishchuk 2013a). This decline overlapped, until a few years ago, with a period of steady economic growth (largely driven by high commodity prices), opening up a widening gap ("scissors") between income and private consumption, on the one hand, and the quality of institutions and public services, on the other (Fig. 1). Governments' underperformance was particularly evident for the general public at the local and municipal levels, where government is "closest to the people"—according to a 2012 survey, full trust in the federal government was expressed by 30 % of respondents, in regional governments—21 %, and in local governments—19 %.[14]

[14]Levada Center (2012).

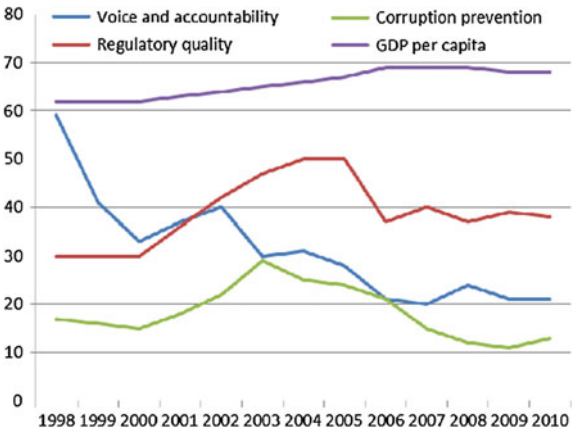

Fig. 1 "Russian scissors": income and institutional trends in 1998–2010 (percentage of global ranking). *Source* Polishchuk (2013a)

Higher private consumption cannot compensate for a lack of public goods—if anything, it makes the perception of public goods' deficit more acute.[15] The imbalance between private and public consumption is usually expected to be corrected by improved democratic accountability of the government as the primary supplier of public goods and services. Such expectation supports the view that economic growth and middle class strengthening tend to improve the quality of institutions and public sector governance, as predicted by the "development hypothesis" (Glaeser et al. 2004) and the closely related modernization theory (Inglehart and Welzel 2005). One explanation of the conjectured causality running from economic development to better institutions is that economically successful middle class has stronger demand for high quality public service and is better able to use democracy to further its needs and goals.

In Russia such a scenario did not materialize, and the Russian society instead "outsourced" public policy-making and institutional reforms to economic and political elites (Polishchuk 2013b). The custom of political apathy and low esteem of democratic institutions has set in early on in the Russian transition, when it was broadly assumed that the Russian society would not endorse radical market reforms, and the latter could be implemented only if government is not constrained by democratic accountability. Hence in the chosen reform strategy democratic procedures were formally observed, but in reality sidestepped and supplanted by political manipulations, spin-doctoring, and ad hoc bargains. As a result, democracy has been deeply discredited in the Russian public opinion, and fragile civic culture yielded to "survival values" (Inglehart and Welzel 2005), which ruled out meaningful political participation in democratic process.

Political consolidation of the Russian state, known as the "vertical power," which has occurred at the turn of the century, did not affect the habit and custom of political non-involvement of the masses. The Russian political system evolved in

[15]More technically, private and public goods are usually complements, rather than substitutes.

the direction of a hybrid regime, known as "competitive authoritarianism" (Levitsky and Way 2002), where elections ensure legitimacy of the regime without making it democratically accountable to the society. In an implicit "social contract" that ensued, loyalty was exchanged for stability and acceptable (and even rising for a number of years) living standards (Makarkin and Oppenheimer 2011).

This trend was concurrent with far-reaching political and administrative re-centralization of the Russian state, with concentration of fiscal resources in the federal budget and replacement of direct elections of subnational executives by appointments (and in particular by transferring executive authority at the city level from elected mayors to appointed "city managers"). In such a system local governments are accountable mainly to higher level authorities which control resources and appointments, rather than to city residents.[16] Such a system weakens the incentives of municipal officials to improve the delivery of local public goods and services, which is reflected in a widespread perception of public officials as indifferent to everyday needs of the population (in Moscow such opinion is shared by two-thirds of residents).[17]

As a result of the society's "outsourcing" of institutions and public policies to politically unaccountable elites, the latter have received a carte blanche over public decision-making, which was driven largely by elites' own preferences and immediate interests. Such preferences in economically polarized societies rarely favor "inclusive institutions" which deliver public goods for the society at large (Acemoglu and Robinson 2013). In fact, according to the previous section, elites pioneered GCs in Russia as exclusive arrangements, which afforded comfortable and secure lifestyle against the backdrop of poorly organized and maintained public urban space.

The middle class which eschewed "voice" as a response to a lack of public goods and services had no choice but to follow suit. Closing the "scissors" between private consumption and public services through democratic process requires civic culture, which was idled by decades of "survival values" and paternalistic attitudes to government. Civic culture is accumulating by historical experience of democratic self-rule (Putnam 1993; Persson and Tabellini 2009), which the Russian society quite obviously had little to none. As a result, both ingredients of the civic culture's dyad—confidence in using democratic procedures as means to tackle social problems, and the sense of personal responsibility for public affairs—are in short supply in today's Russia.[18]

In such a society "… private dominates over public every step of the way" (Trenin et al. 2013), which can be seen in the low radius of civic competence and

[16]This can be seen, for example, by a lack of correlation between social and economic situation in Russian regions and reappointments of regional governors for new terms (Reuter and Robertson 2012).

[17]Public Opinion Foundation (2013).

[18]While the average stock of civic culture in Russia is low nation-wide, it exhibits significant variations across the country (Menyashev and Polishchuk 2015), which are correlated with the quality of municipal governance—more on this in the next section of the chapter.

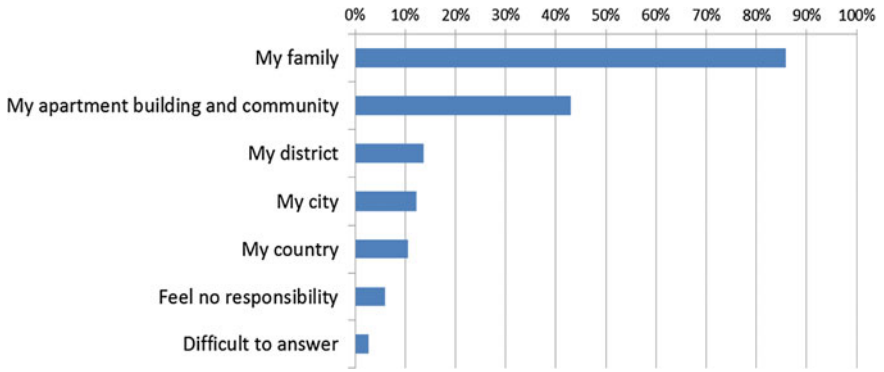

Fig. 2 Radius of civic competence in Russia (response to the question: "Do you feel responsible for what is happening around you?", %). *Source* Public Opinion Foundation (2014)

responsibility revealed by a recent public opinion survey (Fig. 2). It is noteworthy that over 40 % of respondents feel responsible for what is happening in their apartment building and immediate community, but less than one in seven feel the responsibility for their municipality and city. Naturally, such attitudes provide fertile social ground for private communities.

This and other surveys as well as anecdotal evidence (reviewed in Menyashev and Polishchuk 2015) point out to a significant capacity for self-organization and collective action in the Russian society, with two important caveats—first, such capacity is mostly apolitical and prompts initiatives directly tackling problems on the ground, instead of bringing such problems to government's attention and demanding a response, and second, collective actions are usually limited in scope and confined to like-minded individuals, neighbors, friends and colleagues, etc. In other words, social capital in Russia exists mainly in the bonding "do-it-yourself" form. Examples of collective action driven by such social capital include community efforts to repair crumbling infrastructure (roads, bridges, daycares etc.), grassroots provision of disaster relief, mutual help, informal business networks, etc.

Improvement of common areas around apartment buildings, which often includes putting up gates and fences, are prominent on this list. Such community initiatives are recognized by Russian law as "territorial community self-governance (TCSG)" (*territorial'noe obshchestvennoe samoupravlenie*), which can be limited to an apartment building, a group of buildings and houses, a residential community (*mikroraion*) or a village. This affords an official status to private communities, which could establish themselves as legal entities with bank accounts, internal governance etc., and which can enter into contractual relations with local governments and other parties.

Case studies presented in Shagalov (2015b) show that residents of traditional neighborhoods in Russian cities, built decades before the advent of gating, take advantage of the TCSG format to retrofit their newly privatized communities with gates and fences as a protection against otherwise rampant vandalism, damage to

buildings and parked cars, intrusion of undesirable outsiders such as alcoholics and drug addicts, etc. Those interviewed in the above studies invariably mention the failure of authorities to ensure safety and security, as well as to supply adequate public facilities, such as parking, playgrounds and well-kept recreational areas, among main reasons for isolating their communities as TCSGs.

While such studies confirm the general pattern of reliance on gating in response to governance failures to supply public services, which is a *demand-side* effect, they also shed light on the *supply-side* forces rooted in social attitudes. As noted in the introductory section of this chapter, retrofitted private communities, unlike those supplied by developers, require a collective action of residents, and hence reveal a stock of social capital of sufficient quantity and quality. Econometric analysis presented in Shagalov (2015a), which is based on a survey conducted in the city of Kirov in Central Russia, confirms that such social capital indeed makes feasible apolitical collective action (supported and even partially bankrolled by local governments), while ruling out a civic response—in other words, showing preference to collective "exit" over collective "voice" (Table 1).

According to the table, emergence of TCSGs is more likely when residents know and help each other, often communicate among themselves, and when there is sufficient trust in the community—all these are standard bearings of traditional social capital. In addition, residents should feel responsibility for an apartment building and surrounding area (which, as shown earlier, is not uncommon in Russia), but at the same time have another common attitude, i.e. the sense of impotence and helplessness in affecting the situation in the city at large. Yet another

Table 1 Factors of private communities emergence

Dependent binary variable: involvement of an apartment building in a TCSG (1—yes, 0–no)	
Degree of acquaintance of the respondent with neighbors and frequency of communication with them	0.29*** (0.05)
Trust among residents	0.27*** (0.06)
Mutual help	0.24*** (0.06)
Income level	0.21*** (0.05)
Civic incompetence ("I cannot influence the situation in my city")	0.44*** (0.12)
Local responsibility ("I feel responsibility for my building and surrounding area")	0.17** (0.05)
I seek collaboration with local authorities in solving community problems	0.34** (0.11)
Constant	−3.998 (0.34)
R square	0.125

Binary logistic regression, standard errors in parentheses. *$p < 0.1$; **$p < 0.05$; ***$p < 0.01$
Source Shagalov (2015b)

contributing social trait is the paternalistic habit of seeking direct government help with a local problem of the given community by entering into separate agreements, as per the TCGS legislation. As a result, communication between residents and local governments is conducted on the case-by-case basis and is fragmented to specific problems with narrow and clearly identified territorial boundaries.

The above discussion shows that private communities in Russia, apart from being a market response to a "scissors" between households' income and local public services, are also a social response to the same problem. The acute need in safety, security and key amenities is powerful enough to overcome the well-known obstacles to collective action, such as free-riding, and to come up with private community-level solutions.[19] The "voice" option requires a collective action of much larger scale and different nature, and is almost never entertained, reflecting a shortage of civic culture in the society. In the next section we discuss the consequences of such a coping strategy for the quality of governance and ultimately the quality of life in Russian cities.

5 Implications for Municipal Governance

The above discussion indicates that GCs in Russia clearly substitute for unavailable government-supplied public services, which implies causality, much discussed in the literature, from public sector governance to GCs. In this section we use recent developments in political economy to point out to another causality that runs in reverse—from gating to governance. It appears that GCs in Russia are not just patches fixing governance failures, but likely further undermine the quality of governance, leading to a vicious circle. At least three effects are at work driving such reverse causality, and all of them have to do with the democratic deficit in Russia.

First, the society normally communicates its needs and preferences over public goods to policy-makers through democratic processes. Since democracy in Russia has been disabled for most of the post-communist period, and public policies and institutions were outsourced by the society to the elites, it was elites' *direct* preferences over local public goods provision that mattered. As noted above, Russian elites have embraced GCs as a more "cost-efficient" way to ensure comfortable and

[19]It is noteworthy that the capacity to maintain and collectively operate private communities once they have been established is uneven across the Russian urban population. As shown in (Borisova et al. 2014), Russian condominiums are well-run when residents have sufficient "technical civic competence," i.e. take part in collective decision-making, monitor and control executive bodies of condominiums and the performance of management companies. Such skills are in relatively short supply in today's Russia and cannot be substituted by "parochial" social capital based on day-to-day communication and occasional mutual help. Without technical civic competence common property in Russian condominiums often falls into disrepair, and apartment buildings are poorly maintained.

secure lifestyle than universal open access delivery of public goods and services of comparable quality and quantity.[20] Therefore GCs have further divorced elites' policy preferences from those of the rest of society, making elites indifferent to the conditions outside of their private communities. Availability of elites' own club goods diverts public resources controlled by the elites away from social needs (Acemoglu and Robinson 2013; Polishchuk 2013a), and the supply of municipal public services suffers as the result.

Second, communication, if any, of Russian private communities' residents with local governments is restricted to matters specific to a community, such as cost-sharing, outsourcing of government's responsibilities, grants and permits, etc. As shown earlier in this chapter, the Russian law and practice provide numerous opportunities for such narrowly focused communication. Overall effectiveness of the local government (cost-efficiency, public service delivery, etc.) is not on the agenda of this interaction between government and society, when citizens are preoccupied with group-specific, rather than social, welfare—as argued earlier in the chapter, loss of interest in public affairs and weakened sense of citizenship are common features of GCs.

Nannicini et al. (2013) dub such political attitudes "uncivic" and show, theoretically and empirically, that a lack of "civicness" affords opportunistic bureaucrats greater freedom to appropriate public funds and enrich themselves at the society's expense. Intuitively, when voters only care about individual or group welfare, the government can play a divide-and-rule strategy, ensuring the necessary political support through targeted grants and subsidies. Ironically, selected beneficiaries of such patronage enjoy only modest benefits, because if their expectations and demands were unrealistically high, those left outside the "winning coalition" would bid down the price of political support.

Nannicini et al. (2013) conclude that provision of public goods in such socio-political configuration suffers, being replaced by clientilistic benefits. This is a yet another indication that Russian GCs—a response to a lack of local public goods provision—likely make matters worse.

Finally, Menyashev and Polishchuk (2015) argue that the capacity of a society to compensate at the grassroots for a lack of government's performance further weakens the incentives of the ruling bureaucracy to act in the society's interests—in short, quick fixes exacerbate the root causes of the problem. The intuition behind this conjecture is as follows: grassroots accommodation of underperforming government is a means of "damage control," and as such it reduces the social costs of government pathologies, including diversion of public funds and other forms of

[20]Public goods are supplied at the socially efficient level when total social benefits, enjoyed by all members of the society, offset (at the margin) the cost of public good provision. Full-fledged democracy is essential for achieving such outcome, where the interests of society at large are counted for and represented in public decision-making. Otherwise the smaller is a coalition that controls public decision-making, the less of public goods is delivered, and, at the limit, when only elites' immediate interests are factored in, public good provision is replaced by GC-like club goods.

Table 2 Payoff to "horizontal" social capital in Russian cities

	(1) Municipal government performance (Survey question: "Do local authorities understand and take into account the interests of people such as you?")	(2) Socio-economic outcomes (Survey question: "Are you overall satisfied with the conditions in your town?")
"Horizontal" social capital	−0.095*** (0.005)	−0.088*** (0.015)
Civic culture	0.124*** (0.004)	0.114*** (0.014)
Controls	YES	YES
Regional fixed effects	YES	YES
Observations	1822	1822
R-squared	0.296	0.280

Standard errors in parentheses. *$p < 0.1$; **$p < 0.05$; ***$p < 0.01$
Source Menyashev and Polishchuk (2015)

expropriation. As a result, the society with the same "pain threshold" tolerates greater abuse of power than it would have been without such accommodation. This prediction was tested on the 2007 survey data covering more than 1800 Russian cities and towns, and it is shown that apolitical "horizontal" social capital that proxies such capacity indeed significantly reduces the quality of local governance (Table 2, Column 1), whereas civic culture has a predicted positive impact.

Given possible damage caused by gating to the quality of municipal governance, one could wonder if residents of middle-class private communities are better-off than they would have been without this institution. To answer this question, one should compare two economic and political equilibria, in one of which private communities are present, and in the other—absent. On the one hand, for a given (presumably low) quality of governance private communities confer net benefits to their members—the latter explicitly reveal their preference for this form of housing by either buying into such communities or collectively setting them up. This is evidence of direct positive effect of gating for the quality of life. On the other hand, the adverse impact of gating on governance constitutes an indirect negative effect, and the overall impact of these two counteracting forces is a priory unclear. Econometric analysis shows that for the above sample of Russian cities the balance of direct and indirect effects of grassroots accommodation of local governance failures is *negative* (Table 2, Column 2)—direct benefits of such solutions are less than the damage they cause by giving bureaucracy the confidence that residents make do on their own and pick up where governments left off.

More in-depth theoretical analysis presented in Menyashev and Polishchuk (2015) shows that the net impact of private grassroots solutions depends on the composition of social capital and in particular on the proportion between civic culture and "horizontal" social capital. Payoff to the latter can be positive for very low levels of civic culture, when politically defenseless society "has nothing to

lose." However the payoff turns negative in the intermediate range of civic culture, when the society has some capacity to discipline the bureaucracy by democratic means, but such capacity is suppressed ("crowded out") by "horizontal" social capital. This conclusion also finds confirmation in data.

The above theories and empirical analyses do not pertain to gating per se, and describe consequences for governance of a more general pattern, of which gated communities are a part. Additional corroborating evidence that such conclusions are valid for GCs proper can be found in the fact that municipal governments in Russia, as shown above, gladly support this model by various means—from enabling bylaws and regulations to cost-sharing. These attitudes reveal clear preference of municipal authorities for GCs, which is consistent with the logic presented in this section.

6 Concluding Comments

The common view of private communities as a market response that fills niches left by conventional government provision of local public goods and services conceals another important aspect of gating, highlighted by the Russian case, i.e. that widespread private communities could be a symptom of social, cultural and political anomalies.

It is certainly true that decentralization of public good provision does not have to stop at the municipal level, and could, when appropriate, be extended down to residential neighborhoods. However, the comparative advantages of club goods and self-sorting generate net efficiency gains for the society inasmuch as private communities are established in an otherwise efficient institutional environment with an accountable and adequately funded local governments and legal system protecting the rights of stakeholders inside and outside of GCs. Private communities could indeed be institutional improvements generated by an evolutionary process, but only to the extent that the necessary complementary institutions are in place and function properly. Otherwise market signals to which GCs respond could be distorted and, in agreement with the "second best principle" (Lipsey and Lancaster 1956), such innovations leave the larger society (and possibly even the private communities themselves) worse off.

The two-tier system of GCs in Russia—for elites and the middle class—reflects deep socio-economic inequality maintained by "exclusive" institutions for the elites, including physical barriers and "in-house" provision of what should be public amenities. That makes democratically unaccountable elites oblivious to the lack of such amenities for the general public, and the latter is left to deal with such problem on its own. Norms, values and attitudes prevalent in the society preclude it from exercising the political rights to resolve the accountability problem which is the root cause of insufficient quantity and quality of local public goods, and instead push the society to replicating the elite's solution on a larger scale. Such reaction of the disenfranchised society makes the prospect of improvement of government

provision of local public goods even more remote, and possibly leaves the society worse-off.

The Russian case demonstrates the importance of discussing GCs in a broader cultural and political context, where true comparative advantages of private communities could be properly separated from using gating as means to reinforce socio-economic divides and as an inferior adjustment to governance failures that impede, rather than facilitate, urban development.

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Rethinking Residential Private Government in the US: Recent Trends in Practices and Policy

Evan McKenzie

Abstract This chapter assesses the current state of national and state public policy regarding the operation of residential private governments in the United States. From the early 1960s to the mid-1990s, the emphasis was on promoting more condominium and homeowner association run developments. The mid-1990s saw a new emphasis on state regulation to protect consumers. But when the housing market crashed in 2007 governments and financial institutions sought to protect themselves from the risk that condominium and homeowner associations would become insolvent. Left unanswered is how homeowners are to be protected against those risks.

1 Introduction

This chapter assesses the current state of national and state public policy regarding the operation of residential private governments in the United States. From the early 1960s to the mid-1990s, the focus of public policy was on promotion of this form of housing, and during that time association-run developments went from being virtually nonexistent to becoming the predominant form of new housing construction. Then, from the mid-1990s to the housing market crash in 2008, the focus shifted to increasing regulation of the internal processes of associations. This appeared necessary because conflicts between associations and their members became commonplace and drew the attention of the news media. However, since the crash of the housing market in 2007–2008, policy makers became increasingly concerned about the financial strength of many associations. They began to adopt policies that address the risks posed by the fiscal fragility of associations, and this chapter focuses on that current concern.

Common interest developments (CIDs) with residential private governments have predominated in the new housing construction market across the United States

E. McKenzie (✉)
Political Science Department, University of Illinois at Chicago, Chicago, USA
e-mail: mckenzie@uic.edu

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Table 1 Community association data, US, 1970–2014

US community associations, housing units, and number of residents							
Year	CIDs	Housing units (millions)	Residents (millions)	Housing units US, total	Population US, total	CID % of housing units (%)	CID % of US population (%)
1970	10,000	0.7	2.1	68.7	203.2	1.0	1.0
1980	36,000	3.6	9.6	88.4	226.5	4.1	4.2
1990	130,000	11.6	29.6	102.3	248.7	11.3	11.9
2000	222,500	17.8	45.2	115.9	286.2	15.4	15.8
2010	309,600	24.8	62	131.7	309.3	18.8	20.0
2014	333,600	26.7	66.7	133.8	318.9	20.0	20.9

Source CAI (2014); US Census (1993, 2004, 2012)

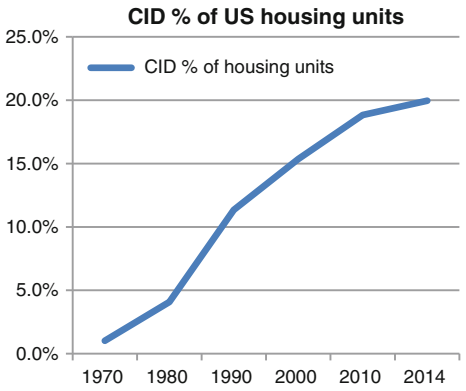

Fig. 1 CIDs as a percent of US housing units, 1970–2014. *Source* Community Associations Institute (2014); US Census (1993, 2004, 2012)

since the 1980s (Table 1; Fig. 1). These projects consist almost entirely of planned developments of single family homes in homeowners' associations, and condominium projects, many of them converted from apartment buildings, with housing cooperatives forming a small share of the total of CID housing in the United States. The CID share of the housing market varies from state to state (Table 2).

This revolution in the housing market is actually best viewed as a form of local government privatization that is the result of economic incentives impacting real estate developers and local governments. Developers find CID housing profitable, and local governments benefit from a tax windfall in that they receive full property tax payments from CID owners but do not have to provide them the same level of services and infrastructure as other residents. (McKenzie 1998).

A great deal of thought and planning has gone into the physical design of these private communities, but for many years little effort went into determining the best way to govern them, or how their private governments should be integrated into the overall system of public local governance. Since the mid-1990s a number of states

Table 2 US states ranked by percent CID population

US states–CIDs and population				
State	Number of CIDs	CID population 2014 (millions)	State population 2010 (millions)	Percent CID population (%)
Florida	47,100	7.9	18.8	42.0
Massachusetts	12,000	2	6.5	30.8
Colorado	9100	1.5	5	30.0
Washington	10,200	1.7	6.7	25.4
North Carolina	13,600	2.3	9.5	24.2
South Carolina	6700	1.1	4.6	23.9
Illinois	18,250	3	12.8	23.4
Arizona	9250	1.5	6.4	23.4
Minnesota	7500	1.2	5.3	22.6
Connecticut	4750	0.8	3.6	22.2
Utah	3300	0.6	2.8	21.4
California	43,300	7.2	37.3	19.3
Maryland	6550	1.1	5.8	19.0
Nevada	3200	0.5	2.7	18.5
Georgia	10,200	1.7	9.7	17.5
Virginia	8400	1.4	8	17.5
Oregon	3700	0.6	3.8	15.8
Missouri	5300	0.9	6	15.0
Michigan	8200	1.4	9.9	14.1
Wisconsin	5100	0.8	5.7	14.0
Texas	19,400	3.2	25.1	12.7
New Jersey	6600	1.1	8.8	12.5
Tennessee	3700	0.8	6.4	12.5
Indiana	4700	0.8	6.5	12.3
Ohio	8300	1.4	11.5	12.2
New York	13,400	2.2	19.3	11.4
Pennsylvania	6000	1.1	12.7	8.7

Source Community Associations Institute (2014), US Census (2012)

have begun to change that, and today there is an emerging model of CID regulation in the United States (McKenzie 2011).

However, the crash of the housing market in 2007–2008 precipitated the insolvency and financial collapse of condominium and homeowner associations. This highlighted the previously-unrecognized fragility of CID housing, which is ultimately based entirely on the resources of the owners. In some states, policy makers began to address the question of what to do when a residential private government collapses. Federal agencies involved in lending, and banks themselves, enacted a number of policy changes to protect themselves against these risks. Local

governments began to create special districts with taxing power, in case associations failed to perform their functions. Most recently legislative battles have erupted over whether associations should have "super lien" priority over first mortgages when trying to collect delinquent association assessments from an owner in foreclosure. The increased concerns about association finances highlight the extent to which the rapid spread of common interest housing has outpaced the public policy process, which is now trying to catch up.

2 Structure and Functions of US Residential Private Governments

The nomenclature for this housing sector is diverse to say the least, with various people using term such as "gated communities" to describe places that lack either gates or any sense of community. I prefer the term "common interest developments" (CIDs) to describe the housing developments, and the term "residential private governments" as a catch-all phrase for the institutions that run them. I coined the *portmanteau* word "privatopia" to refer to this housing sector as a whole, because it embodies a utopian belief that living in a neighborhood with privatized local government functions, including privatized corporate governance, is the route to a far better life than what is enjoyed by the rest of us.

Within the universe of American CIDs, there are three different institutional arrangements, all of which share some characteristics in common. The shared characteristics are:

(a) Some form of common ownership of real property, called "common areas" or "common elements," which is combined with an individual interest owned or occupied exclusively by one person or family unit.
(b) Private governing documents that derive their power from the deed and that are interpreted under the laws of contract. These usually include deed restrictions (so-called "CC&Rs," for "covenants, conditions, and restrictions"); articles of incorporation; association bylaws; and perhaps special sets of rules for architectural modifications, pets, pools, parking, and so forth.
(c) Automatic membership in an association that is viewed by the law as voluntary.
(d) A residential private government that has the power to regulate land use and behavior, collect and spend revenues, and act on behalf of all owners as a legal entity. This is typically a not-for-profit corporate board of directors.

There are three different forms of ownership that can be built on this set of common characteristics. Planned developments of single-family homes with *homeowners' associations* comprise an estimated 51–55 % of the nation's CIDs. *Condominiums* make up about 42–45 % of the total. *Housing cooperatives* are the least common, representing only about 3–4 % of total CIDs (CAI 2014), and most

of those are in a few large cities, such as New York City and Chicago. In many metro areas, cities began to require that all new housing construction must be in CIDs, in order for local governments to receive a tax windfall, with more property taxes and fewer services to provide (Siegel 2006).

In a homeowner association-run development, the association owns the common areas, which are typically streets, recreation areas, drainage ponds, golf courses, utility systems, and other infrastructure and amenities. Residents own the physical structure in which they reside, generally including a yard in front and back.

Condominium ownership is quite different, and it is nearly always used in attached or multi-family owner-occupied structures, including converted apartment buildings. The entire physical structure of the property, including buildings and land, is owned in a tenancy in common arrangement by all unit owners, each of whom has a percentage share of the property. That percentage usually corresponds to their percentage voting interest in the association. The condominium association does not own any real property, but manages all of it, meaning that everything outside of the inner painted or finished surface of the walls and floors is association-run. The individual interest is a legal fiction consisting of the "airspace" inside the unit and the painted or finished surfaces of the walls and floors, but not even including the walls themselves.

In a housing cooperative, people buy a share of stock in the cooperative and acquire with it a proprietary lease that entitles them to occupy the unit as long as they own the share of stock in the cooperative. Cooperators are in essence their own landlord. The cooperative, which is usually incorporated, owns all the property so that everything is common area, and the individual real property interest is simply the lease.

All these forms of CID housing require owners to operate a residential private government, and this is where many of the problems have arisen that have led to legislative action. During planning, construction, and the first few years of a project's life, the association board of directors is controlled by representatives of the real estate developer, who, as unit sales progress, is required eventually to turn over control of the board to directors elected by the unit owners. During the period of developer control, problems can occur, such as underfunding of the project's reserves funds, sweetheart deals and kickbacks involving property management firms and other contractors that are affiliated with the developer, defective construction of units or common areas, developer insolvency, denying unit owners access to association financial and administrative records, and fraudulent sales practices. There are laws in place in all states that are intended to protect the unit owners during the period of developer control, but if developers choose to ignore those laws the only remedy is private litigation by affected owners. This path is expensive and often ultimately fruitless in the case of financial issues, because the developer often files for bankruptcy protection.

After turnover, all the directors, or at least a majority, are elected by unit owners. The owners, through their corporate board of directors, henceforth will make all the decisions about finances, property maintenance, adoption and enforcement of rules

and regulations, running meetings and holding elections, legal action, and maintaining and enhancing their property values.

These are important collective decisions that affect people's lives in their homes and the neighborhoods where they spend most of their time. People can become angry, even violent, over decisions made by their HOA board. Every owner can be subjected to enormous financial liability because of board decisions. Yet, there are no qualifications for being a board member, other than being a unit owner, there are few reasonably-priced educational opportunities for new board members, and these volunteer boards operate virtually free of governmental oversight. As with developer mismanagement, the only remedy in most states is private civil litigation, in which the owner must fund his or her own case while also paying a share of the association's legal expenses.

The entire institution of common interest housing rests on the resources of individual owners—their money, judgment, loyalty, commitment, organizational expertise, and social skills. There is virtually no institutional support for them, except for the professionals they are able to hire to advise them and to carry out delegated tasks. Public local governments are supported in many ways by private and public institutions, but residential private governments are not (Table 3). Many associations, especially large ones, hire property management firms. These property managers are subject to a wide range of requirements such that in some states they must be licensed and satisfy certain educational requirements, while in others they need no license at all and are not held to any professional or educational standards

Table 3 Institutional support for CIDs and municipalities

Institutional support	CIDs	Municipalities
Financial support	General and special assessments, recreation fees—insurance proceeds in some situations	Taxes, fees, bonds, intergovernmental transfers and grants in aid
Bankruptcy	Extremely risky—owners ultimately responsible for paying debts of corporation	Chapter 9 of Bankruptcy code allows restructuring of debt
Training for community leaders	None required; expensive	Offered by national league of cities and other organizations
Professional support	Largely unregulated vendors organized through Community Associations Institute	Public Administration profession; academic journals; national and state level organizations
Government oversight	Minimal—judicial review in private litigation	Substantial
Media and public scrutiny of internal activities	Minimal—limited to colorful controversies–flags, pets, religious symbols, etc.	Substantial
Public availability of data on activities and finances	Almost nonexistent	Freedom of Information Act; sunshine laws; public availability of voluminous data

(IREM 2013). Association boards often find themselves in need of legal advice, and there are attorneys who specialize in what is called "community association law." These attorneys, property managers, and other vendors are organized in trade associations, the most important of which is the Community Associations Institute (CAI), which has its national headquarters in Virginia and many state chapters around the country. CAI offers training for its members and functions as an interest group that has substantial influence on legislation and court decisions (McKenzie 1994).

The vast bulk of law relevant to CIDs emanates from state legislatures and state courts. These laws regulate the internal procedures of CIDs, including assessments, elections, document amendments, insurance, reserves, access to association records, and myriad other matters. Some rules are found in the state not-for-profit corporation act and others are located in special statutes that cover CID housing in particular.

But the most important rules are in each development's governing documents. Developers and their attorneys draft these documents in a form of private law-making that has great significance for all owners long after the developer has sold out and moved on. The association is typically incorporated, which requires Articles of Incorporation. Every owner's deed is encumbered with a Declaration of Covenants, Conditions, and Restrictions (or similar appellation) that may be as much as one hundred pages or more in length. All the deed restrictions bind all owners from the moment of purchase, and they are usually only subject to amendment by vote of a super-majority of all owners, with 2/3 being the most common provision. In practice this is extremely difficult to accomplish. In addition, there will be a set of association bylaws that detail how the association will operate, and there may be special sets of rules for parking, use of recreational facilities, architectural modifications, and so forth.

The complexity of association governing documents, and the degree to which they intrude on areas of life that many people think should be matters of individual choice—such as what color to paint the house, whether to plant bushes, or whether to park one's car in the driveway—that an enormous body of state court case law has grown up, in which judges have interpreted the meaning of covenants, set rules for what is enforceable or not, and balanced the rights of individuals against those of the association, in the light of public policy considerations.

In most states, association decisions are reviewed in light of either the business judgment rule or the rule of reasonableness. The business judgment rule provides that judges will review the way a decision was made, and if it appears to have been made in an informed and good faith manner, with no self-dealing by association directors, they will not inquire further into the merits or wisdom of the decision. This is in essence a rule of judicial deference to the association's board of directors. The rule of reasonableness, by contrast, requires the judge to consider both sides of the decision and make a ruling on the merits (Hyatt and French 1998).

But judicial decisions are retrospective for the most part, resolving past disputes and establishing principles for the future that are open to further dispute over their proper interpretations. And, despite the recent spate of regulatory measures, the

public policy umbrella for common interest housing remains questionably sparse. This is especially true where the financial condition of associations is concerned.

3 Recent Crises in Residential Private Governance, and Public Policy Responses

There is an unstated assumption underlying this massive privatization of local government functions, which is that somehow the unit owners will be willing and able to perform in perpetuity all the duties necessary to maintain the properties. They will pay their assessments, set aside sufficient reserve funds to be ready for future repairs, volunteer to serve as directors and officers, vote and participate in private governments, and when trusted with responsibilities they will educate themselves and do a responsible job. A number of recent events have called these assumptions into question and raised concerns about the financial and organizational viability of CID private governments.

For this reason, trends in public policy since the housing crash have moved in new directions, albeit in a piecemeal, incremental, and self-protective fashion that reflects concern for local governments and financial institutions should private governments fail.

From 1970 to the mid-1990s, policies were promotional in nature, intended to make it easier for developers and local governments to bring more CID housing into the market. By the mid-1990s, the policy focus shifted in a number of states to a more regulatory emphasis. Nevada, Florida, California, and several other states enacted laws that specifically addressed how associations should handle their internal affairs, such as running meetings, maintaining records, disclosing financial data to existing owners and prospective buyers, making decisions about owner proposals for architectural modifications, amending their governing documents, and collecting assessments including the ultimate weapon of foreclosing on the delinquent owner (McKenzie 2011).

But then the housing market collapsed in 2007, followed in 2008 by the banking crisis, a recession, and high levels of unemployment. Developers were unable to sell their new housing units, so they filed for bankruptcy and left CID projects unfinished and partially occupied. Condominium and homeowners' associations either were never set up or were left too underfunded and understaffed to function.

Many existing CIDs across the nation saw their main revenue stream, monthly owner assessment payments, dry up. Many unit owners lost their jobs and could no longer make mortgage or assessment payments. Others had "subprime" mortgages that were designed to change from interest only payments to interest plus principal payments after a few years, a tool that made sense when housing prices were going up and houses were easy to sell, or at least to refinance. When the housing market

stalled, these owners could not sell at a profit as they had planned, and could not refinance, and instead they were forced to watch their mortgage payments increase on schedule. Suddenly they were living far above their means. Instead of being investor-owners, about to cash in on their home and move on, they were underwater and insolvent, and unable to sell or to pay their mortgage, their property taxes, or their homeowner association. Banks foreclosed, or owners simply abandoned their homes and walked away. Banks, forced to deal with unprecedented levels of "REO" (real estate owned) inventory, were unable to process and resell their stock of foreclosed homes in a dead housing market, so they left units vacant for long periods of time and did not pay assessments on the properties, even though the law required it. This forced associations to decide whether to spend their dwindling income on hiring attorneys to sue major banks, a process that can take years of expensive civil litigation.

Losing a substantial part of the assessment stream quickly becomes disastrous for associations, especially small ones, because the burden of paying for the association's common operating expenses and reserves falls on fewer people. Assessments must be increased to compensate for the units from which no income is being received. This in turn increases the likelihood that some of the remaining owners will be unable to handle the increased assessments, and so it goes—a spiral of greater burdens falling on fewer people, with more and more of them giving up on the effort. The result in many neighborhoods was a large number of empty houses or condominium units and a defunct HOA.

These events found their way into the press and came to the attention of policy makers. State and local governments were concerned about what would happen if associations failed to do what was expected of them. An institution that had been treated as if it could be counted upon to last forever was suddenly exposed, and it became clear to many observers that governments and lending institutions needed to protect themselves against the possibility that associations would become insolvent or simply cease operating.

Yet, this eventuality had in fact been foreshadowed earlier. The institutional weaknesses of CID private governments—financial fragility, untrained directors and officers, and an owner culture of non-participation—became apparent before the housing crash, in the wake of natural disasters and in shocking examples of mismanagement, fraud, and embezzlement.

4 Crumbling Condos and California Earthquakes

Many condominiums and homeowner association-run developments have had to deal with the need to perform major repairs to common areas and units. Often these problems are due to defects in the original construction of the project. In other situations, it is simply a matter of building components such as decks, roofs, and

streets wearing out over time. And occasionally the need for repairs stems from a major natural disaster.

At 4:31 A.M. local time, on Monday, January 17, 1994, the San Fernando Valley area of southern California was struck with an earthquake measured at 6.7 on the Richter scale. The earthquake was centered 32 km west-northwest of Los Angeles near the city of Northridge, a densely populated area with many condominium buildings. 57 people died and 5000 were injured, and the structural damage was enormous, with 112,000 buildings being damaged, many of them collapsing entirely, and 20,000 people rendered homeless. The total property damage was estimated at $20 billion, making the Northridge earthquake the most expensive earthquake in US history up to that time, and the second costliest natural disaster, exceeded only by Hurricane Katrina (Martinez 2014).

Many condominium buildings suffered damage that ranged from minor to catastrophic. Volunteer boards of directors were forced to deal with insurance companies and contractors in order to finance and carry out complex and expensive repairs. The legal aftermath of the Northridge earthquake played out in the California courts for several years. Ultimately, a great deal was revealed about the competence of residential private governments, and about the ultimate liability of owners for the costs of major repairs and for the debts of their associations in general.

Three cases in particular are instructive, all of which involved developments that are in or near Los Angeles, California. These cases involved the Le Parc complex in Ventura County, California, just north of Los Angeles; the Oak Park Calabasas project, also north of Los Angeles; and the Los Angeles Kingsbury Court condominium.

The Le Parc homeowners association board of directors became embroiled in litigation with ZM Contracting, a firm the board had retained to perform extensive repairs on the project. ZM claimed that the association had broken their agreement, interfered in ZM's relationship with subcontractors, and committed trade libel. Arbitrators awarded ZM $7.4 million in damages, which the association's insurance company said was not covered under their policy.

The association's board of directors refused to assess the owners to pay the judgment, and the members refused to vote to pay it. Instead, the association filed for bankruptcy. But the bankruptcy court refused to confirm a bankruptcy plan. The state trial court appointed a receiver who took control of the associations' affairs and diverted all the association's assessment revenues to pay the judgment creditor, ZM. This meant that the 264 residents of the project suddenly had no money in the association account to pay their operating expenses.

The utilities were cut off, the county health department closed the pool, and owners lost their homes in foreclosure because they could not pay a special assessment. The association set up a web page and begged for contributions. Fortunately an attorney who had extensive experience dealing with insolvent CIDs, James Lingl, brokered a $5 million dollar settlement that involved the insurance

company, the association, and ZM, with the insurer agreeing to pay the money out over a ten-year period (Peinemann 2000).[1]

Attorney Lingl then approached the California legislature with a proposal to prevent this from happening again in other uninsured judgments against associations. The legislature passed a bill [AB 1859, amending California Civil Code Sect. 1366(b)(1)] that shields a portion of association revenue from a judgment creditor and a receiver, so that an association's utility bills can be paid, with the remainder going to pay the judgment.

The Oak Park Calabasas Condominium Association also become involved in a dispute with a construction contractor. The project suffered serious damage in the 1994 Northridge earthquake, and retained ECC Construction to do the repairs, using money from a settlement with the association's property insurance company, State Farm Insurance, but the association and the contractor ended up in litigation. A six-month jury trial ensued in 2002 that resulted in a $7.1 million verdict against the association for breach of contract and fraud, including punitive damages.[2]

The association filed for bankruptcy protection, but once again the court refused to confirm a bankruptcy plan, finding that the association actually had assets to pay the judgment: the power to levy a special assessment on the owners and force them to pay or lose their homes in foreclosure.[3]

The net result, as in Le Parc, is that the owners are responsible for paying the judgment that was rendered against the association due to mistakes made by the board of directors. If they, or the board, vote not to specially assess themselves, the court will appoint a receiver who will do that.

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[1]In an interview with Mr. Lingl, he explained that Farmers Insurance company paid the negotiated settlement as a business decision, not because they agreed that the loss was covered by their policy. Defamation is an intentional tort and not typically covered by a liability policy and the same is true for breach of contract. However, the highly publicized plight of the Le Parc owners, who were without water or electricity, reflected badly on the insurer and on the CID housing sector, which was and is a lucrative source of insurance premiums because all associations are required to carry insurance. Farmers' business decision reflected a cost-benefit analysis in which ending the publicity about the situation weighed heavily. See also Le Parc Simi Valley Le Parc H.O.A. v. ZM Corp, Ventura County Super.Ct. Case No. CIV 159037 (1995–2000); Bankruptcy case—Central District of California Case No. SV 97-20190; AB 1859 Assembly Analysis, April 26, 2000.

[2]ECC v. Oak Park Calabasas Condominium Association, 118 Cal. App. 4th 1031 (2004).

[3]The association filed for a Chapter 11 reorganization, but the court refused to approve a reorganization plan because the creditor would not have done as well under the reorganization as under a Chapter 7 liquidation of the association's assets. The "best interests of the creditor rule" requires that the creditor must receive as much under the reorganization plan as it would have received in a liquidation. Under a liquidation, the court would have ordered the association to impose a special assessment on the members to pay the entire judgment, and held them in contempt of court if they did not comply. Although the owners were not directly liable to the contractor and could not be sued as individuals [ECC v. Ganson, 82 Cal. App. 4th 572 (2004)], they were indirectly responsible for paying the judgment against the association. See also "Memorandum of Opinion on Confirmation of Debtor's Plan," *In re Oak Park Calabasas Condominium Association*, US Bankruptcy Court, Central District of California, 302 BR 665; 2004 Bankr LEXIS 1636 (2003).

The association then proceeded to lose yet another lawsuit, when it sued State Farm Insurance under the directors' and officers' coverage, seeking to force State Farm to pay the judgment as if it were a liability of the association's board of directors. They lost this claim, with the appellate court saying that there was no coverage for breaching a contract, and also that the association was seeking unjust enrichment. They had already been paid for the property damage by State Farm, but chose not to pay the contractor, and lost that lawsuit. They could not now go back and seek more money from State Farm.[4]

The Los Angeles Kingsbury Court condominium project was also damaged in the Northridge earthquake. The association hired a private insurance adjuster, O'Toole, to help them deal with their insurance company over the proper dollar amount for repairs to their project. The Association agreed to pay the adjuster 10 % of the proceeds paid by its insurer. They received $1.4 million from the insurance company, but then refused to pay the adjuster his 10 %. O'Toole sued the association for breach of contract and won. The trial court ordered the association to impose a special emergency assessment to pay the judgment, but the association refused. The court then appointed a receiver to carry out the court's order.[5] Kingsbury Court appealed and lost. This approach was approved by the appellate court, and may be considered binding authority for similar cases in California.[6]

These cases and others illustrate certain uncomfortable facts about the potential liabilities association with owning a CID unit, and they are facts that very few members of the public understand.

- Owners are responsible for paying to maintain and repair their common areas. Insurance coverage pays for certain types of damage to the association's property, and their liability insurance covers them against slip and fall accidents and other sudden and accidental loss. However, there is generally no coverage for the cost of maintaining or replacing major building components that have simply worn out over time, such as roofs, streets, and swimming pools.
- Owners are also liable for other debts of the association resulting from acts of its board of directors, such as intentional torts or breaches of contract, and these are not covered by liability insurance.
- Special assessments for emergency losses, such as uninsured damages or lawsuit judgments, can be in the tens of thousands of dollars per owner.
- Attempting to bankrupt the association to protect the owners against having to pay these judgments will not work. One bankruptcy law scholar has characterized these efforts as a "death spiral" (Pinkerton 2009).

[4]Oak Park Calabasas Condominium Association v. State Farm, 137 Cal. App. 4th 557 (2006).

[5]O'Toole v. Los Angeles Kingsbury Court Owners Association, Superior Court of Los Angeles County, No. LC050749, Richard B. Wolfe, Judge (1995–2000).

[6]O'Toole v. Los Angeles Kingsbury Court Owners Association, 126 Cal. App. 4th 549 (2005).

- If owners do not pay court judgments, judges will appoint receivers who will make them do it, and they will take over the associations' monthly assessment stream and impose special assessments to do that.
- Owners who fail to pay their share of any such judgment will lose their homes in foreclosure.

Even for associations whose directors display more wisdom than those at Le Park, Oak Park Calabasas, Kingsbury Court, and the other places where horrendous decisions have exposed owners to draconian liabilities, there is the enemy known as time, and that can lead to the same outcome. Many associations are under-reserved because director-owners control their own assessment levels and decide not to set aside enough for future repairs that are both costly and inevitable. Their calculus is simple: why should I pay to build a roof in ten years, when I will have sold my unit and moved on and the roof will benefit somebody else?

An attorney and author who has studied this situation systematically has concluded that many CIDs are a fiscal time bomb and that reform is needed to prevent widespread CID insolvencies in the years to come. Nearly all the CID units in the United States were built during the last thirty years, and their main components will wear out at a fairly predictable rate. When the bill comes due for repair or replacement of major building components that have worn out, there will be little if anything in reserve, there will be no insurance coverage at all, there will be no responsible party to sue, a loan will be difficult if not impossible to obtain, and the owners will have no choice but to assess themselves tens of thousands of dollars to pay for it (Berding 2005).

It can be argued that somehow "the market" will solve this problem, on the assumption that fully informed buyers will not purchase homes in under-reserved developments or places in need of major repairs. This argument fails to consider the difficulties involved in buyers becoming fully informed. The condition of major components of a multi-unit building may not be visible or otherwise discoverable to ordinary scrutiny. Unless the board has hired an expert to perform a reserve study that estimates the time frame and cost of repair of major building components, there may be no association records that reflect the condition of the common areas. Prospective purchasers have no right of access to association financial information until after they have signed a contract to buy a unit, which ordinarily requires placing a cash deposit. Thus they are committed to the purchase before they are able to learn all the facts, and their ability to back out of the sale is determined by the language of the sale contract.

5 The Las Vegas HOA Takeover Ring

Earthquakes and construction defects highlighted the financial fragility of many associations, and illuminated the risks to which owners are exposed if their boards of directors make serious mistakes. Recently in Las Vegas, Nevada, a federal

prosecution of a massive HOA fraud ring showed how easy it can be for criminals to take over HOA residential private governments and use them to commit multi-million-dollar fraud.

There have been many cases of embezzlement and fraud where association officers, managers, or other employees have been convicted in cases involving tens or hundreds of thousands of dollars. The most dramatic example to date occurred in Las Vegas between 2003 and 2009, and it became the subject of what has been described as "the largest case of public corruption federal authorities have ever brought in Southern Nevada" (German 2015b). A ring of white-collar criminals, led by a construction contractor, took over eleven homeowners' associations by fraudulent means and used their powers as HOA directors to bilk insurance companies out of $10 million. *Las Vegas Review-Journal* reporter Jeff German has covered the case extensively. The allegations are summarized in a press release from the Federal Bureau of Investigation, following a jury trial in which three of the numerous defendants were convicted:

> According to the evidence presented at trial, from approximately August 2003 through February 2009, the defendants engaged in a complex scheme to direct construction defect litigation and construction repairs at more than 10 condominium complexes in the Las Vegas area to a law firm operated by a co-conspirator and a construction company, Silver Lining Construction, owned by Leon Benzer. In order to accomplish the scheme, the defendants and their co-conspirators identified HOAs for condominium complexes that had potential construction issues that could result in construction defect litigation and require repair. They then sought to take controlling interests on the identified HOAs' boards by purchasing units in the condominium complexes and running for election to the boards… To ensure that conspirators won the HOA elections, the defendants employed deceitful tactics, such as submitting fake and forged ballots, and hiring complicit attorneys to run the elections as "special election masters," who presided over the elections and supervised the counting of ballots.
>
> The evidence demonstrated that, once elected, the conspiring board members, including Ruvolo and Ball, met with Benzer and other co-conspirators in order to manipulate the selection of property managers, contractors, general counsel and construction defect attorneys to represent the HOAs. Gregory, an attorney licensed in Nevada, agreed to become the general counsel for two HOAs and to take direction from Benzer… Over the course of the scheme, more than $7 million in construction contracts were awarded to Benzer's company from a single HOA. Several million dollars in legal fees were also directed to another co-conspirator… On Jan. 23, 2015, Benzer pleaded guilty to one count of conspiracy to commit mail and wire fraud, fourteen counts of wire fraud, two counts of mail fraud, and two counts of tax evasion. He is awaiting sentencing (FBI 2015).

The fraud ring was raided and broken up by the FBI and local Las Vegas police in 2008 while the fraudsters were on the verge of expanding their scheme to many other associations. Almost 100 conspirators were identified, and to date 42 people have been convicted. The US Attorney's office lists eleven HOAs that were either taken over or were in the process of being taken over. It is claimed in sentencing documents that the actual losses were $10 million, representing money that was fraudulently obtained from insurance companies, but the intended losses, if all had gone as planned would have been $60 million. The conspirators included high-profile attorneys, several police officers, and a prominent Republican Party

figure (German 2015b). Two of the attorneys committed suicide before being charged, and a retired police officer and one of the other defendants also took their own lives (Murphy 2012). Steve Wark, the former chair of the Nevada Republican Party, pled guilty and was sentenced to 366 days in federal prison (German 2015a). Benzer was sentenced to 15.5 years in prison (German 2015c).

This prosecution is significant for several reasons. First, it illuminated how easy it can be for a committed group to take control of a CID private government. In many, if not most, associations, the majority of owners pay little attention to association activities or finances. A culture of non-participation exists, with people not voting in elections, not volunteering for board or committee positions, and generally behaving as if they lived in an apartment building where the landlord is responsible for everything.

Industry professionals have expressed concerns over this problem and have tried to find ways to create a more vibrant sense of community in associations and thus engender norms of participation and voluntarism (Overton 1999). However, this remains a challenge. Association directors and officers are not financially compensated for their work. Yet, if they are to do the job well they must devote a great deal of time and energy to educating themselves about the law and corporate procedures, learning about their association's social and economic condition, attending meetings, hearing people's complaints, and making often-difficult collective decisions about matters that may affect hundreds of people. Some people do all this, and well, but others do not. And in many associations, especially small ones, association leadership elections draw little interest and few volunteers. Consequently it can be relatively easy for a committed group of like-minded people to take over an association board of directors and make decisions that favor themselves or their associates. It is entirely possible that this can go on without most owners knowing it. Once in control, boards can obstruct member access to records and prevent anybody from penetrating the scheme.

Second, the Las Vegas takeover ring is a highly-publicized example of HOA-related fraud, which is a significant problem that is rarely prosecuted unless there are substantial monetary losses and an easily provable case.[7] Even so, there have been many other cases across the nation in which people used their positions as directors, officers, managers, or other related jobs, to bilk HOAs or those who deal with them. There are opportunities for people to embezzle money from HOA reserve or operating accounts, engage in sweetheart deals with contractors in

[7]In this case, the prosecution only came about because another local construction defect attorney believed he lost a chance to work with an association due to the activities of this ring. He and his law firm did their own investigation and turned the evidence over to the US Department of Justice. The case was handled by a special public corruption task force from Washington, DC, instead of the local US Attorney's office in Las Vegas. The local US Attorney's office withdrew from the case when a criminal investigation was started into whether inside information on the investigation was being leaked to one of the attorneys who was under suspicion (German 2013).

exchange for kickbacks, impose bogus fees on owners and prospective buyers, and (as in Las Vegas) make fraudulent insurance claims.[8]

Third, many of the Las Vegas HOA swindlers were established, well-known professionals who had been making their livings for many years serving HOAs. They had the necessary knowledge, the contacts, and the credibility to make this scheme work. This raises a question concerning whether there is adequate supervision and regulation of the lawyers, managers, and contractors who work for HOAs. If a scheme this enormous and brazen could go on for six years, in a state that has one of the most developed systems of HOA regulation, it suggests that industry self-regulation is insufficient, and there is a need for greater governmental oversight. It also suggests that the CID housing sector needs some institutional support other than profit-motivated professionals.

6 Condo Fraud, Chicago Style

As of yet there is no new legislation in Nevada or elsewhere aimed at addressing the problems highlighted by the Las Vegas HOA takeover ring. However, another massive condominium-related fraud in the state of Illinois did lead to enactment of a law that can be used to reorganize failed condominium projects. From about 2000 to 2007, the Chicago housing market was booming, and nearly all the new housing was in HOAs and condominium projects. Around the Chicago downtown area, north, west, and south, a ring of redevelopment sprouted, as former industrial buildings were carved up into trendy loft condominiums, and old apartment buildings were converted into condominiums. In such a hot market, banks and mortgage companies were eager to make loans, even based on questionable documentation, because they could sell the notes overnight on the secondary market, where they were securitized and sold as residential mortgage backed securities. Investors in the United States and other nations were eager to purchase units, sight unseen, acting on the advice of realtors and appraisers, in the hope of renting them out and holding onto them while the market value increased, waiting for the proper time to sell and reap a profit.

Enterprising but unscrupulous individuals saw the opportunity to set up fraud rings and take advantage of easy credit and absentee investors. Several of these groups, including slumlord apartment building owners, dishonest appraisers, employees of mortgage companies, and straw purchasers, did the paperwork necessary to convert hundreds of apartment buildings into condominium projects and obtained approval from the City of Chicago. They prepared beautiful advertising materials full of photos depicting marble countertops, hardwood floors, new appliances, and all the *accoutrements* of trendy urban condos and listed the units for

[8]I have reported on some of these numerous cases over the years in my weblog, *The Privatopia Papers*, at http://privatopia.blogspot.com, which can be searched for the fraud-related posts.

sale. Unfortunately, the photos were of not of the properties that were being converted, which were in fact the same slums they had been for decades, and were still full of low-income tenants. But crooked appraisers would certify the value of the units, and straw purchasers were paid to fill out loan applications supported by fake documentation. Lending institutions, sometimes by virtue of misconduct of their own employees as well, would cut checks to purchase the fictitious condo units, and the building owner would pocket hundreds of thousands of dollars for each unit, paying off the straw purchaser who would promptly disappears. In other situations, absentee investors bought these units without ever seeing them, only to later discover that their investment was worthless. Hundreds of millions of dollars went directly from banks into the pockets of criminals.

The US Attorney for the Northern District of Illinois prosecuted a number of these rings. In a press release concerning one of these many prosecutions, the US Attorney explained as follows:

> Seven defendants, including two real estate investors and three licensed loan originators, were indicted today for allegedly participating in a scheme to fraudulently obtain more than 20 residential mortgage loans totaling approximately $8.5 million from various lenders. The indictment alleges that the mortgages were obtained to finance the purchase of properties primarily in and around Englewood and West Englewood in Chicago by buyers who were fraudulently qualified for loans while the defendants allegedly profited. As a result, various lenders and their successors incurred losses because the mortgages were not fully recovered through subsequent sale or foreclosure… Since 2008, more than 200 defendants have been charged in Federal Court in Chicago and Rockford with engaging in various mortgage fraud schemes involving more than 1,000 properties and approximately $300 million in potential losses, signifying the high priority that federal law enforcement officials give mortgage fraud in an effort to deter others from engaging in crimes relating to residential and commercial real estate. (US Department of Justice 2012) [emphasis added]

These prosecutions were, of course, necessary to restore confidence in the Chicago condominium market, but they did not solve a residual problem that befell the City of Chicago, the low-income tenants who lived in the crumbling buildings, and anybody living in the neighborhood of one of these fake condominium conversions. That problem was simple: if the condominium conversion was fake, then there was certainly no association running the building, and since the former building owner had taken his ill-gotten gains and disappeared, or been arrested, there was nobody responsible for maintaining the building. Utility bills were not being paid, so water, electric, and gas service was disconnected. Tenants were patching into the electric lines of neighboring buildings and draping extension cords across gangways. Hazard abounded, including roof leaks, vermin infestation, and fire hazards from indoor burning of wood for heat. Banks did not bother to foreclose on the loans because the buildings were valueless and constituted nothing but a liability. There was perhaps no better illustration of what can happen when a condominium or homeowner association fails to function.

This crisis produced a unique response from the City of Chicago, the Illinois state legislature, and Community Investment Corporation (CIC), a not-for-profit lending institution led by affordable housing expert Jack Markowski, the former Housing Commissioner of the City of Chicago. CIC had a loan pool of some $400 million

derived from 31 lenders and other institutions, and it had long been actively involved in helping building owners obtain loans and expertise to rehabilitate existing structures and improve the quality of affordable housing. They worked closely with the Chicago city attorney's office, known as the Corporation Counsel, because problem buildings were cited for code violations and prosecuted in the Cook County Housing Court, which would in many situations refer the owner to CIC for assistance with a plan of action. This initiative is called the Troubled Buildings Initiative (Roeder 2010).

But as more and more of the fraudulent condo conversions began to come to light, the City Attorney and CIC realized that the normal approach for troubled apartment buildings would not work. There was no building owner to cite or deal with, and the condominium association did not even exist except on paper. Ownership of the units was spread across a bewildering array of absentee investor owners and mortgagees, because mortgages were being sold and resold constantly and even the lending institutions themselves were being purchased or going out of business.

CIC and the City of Chicago persuaded the Illinois State Legislature to pass the Illinois Distressed Condominium Property Act, which allows the city to go to Housing Court and ask the court to appoint CIC (or another organization) as a receiver who can go about the arduous task of locating all the property interests in the building and buying them for a fraction of their original loan value. Once title is unified, all the liens can be extinguished and the building is then de-converted, or turned back into an apartment building. The condominium is dissolved by court order, a new building owner is located, and loans are structured to put the property back in operating condition as an apartment building. The statute prescribes the conditions for appointing a receiver, and it is evident from this list that conditions in these buildings were dire indeed:

Sec. 14.5. Distressed condominium property.

(a) As used in this Section:

(1) "Distressed condominium property" means a parcel containing condominium units which are operated in a manner or have conditions which may constitute a danger, blight, or nuisance to the surrounding community or to the general public, including but not limited to 2 or more of the following conditions:

(A) 50 % or more of the condominium units are not occupied by persons with a legal right to reside in the units;
(B) the building has serious violations of any applicable local building code or zoning ordinance;
(C) 60 % or more of the condominium units are in foreclosure or are units against which a judgment of foreclosure was entered within the last 18 months;
(D) there has been a recording of more condominium units on the parcel than physically exist;

(E) any of the essential utilities to the parcel or to 40 % or more of the condominium units is either terminated or threatened with termination; or
(F) there is a delinquency on the property taxes for at least 60 % of the condominium units.[9]

CIC estimates that there are at least 250 buildings that may satisfy the criteria, scattered all over the city (Podmolik 2012). This program, which appears to be unique to the city of Chicago, is effective as a pragmatic solution to a serious problem.

It must be noted, though, that condominium ownership is at the root of the problem. Condominium units are sold in individual transactions to different buyers using different lenders, with no overall coordination. Once sold, each unit's mortgage can be resold many times, the owner can take out second mortgages, and eventually the ownership of the building is dispersed in ways that only an expert can track. With ownership goes control of the condominium association, and as can be seen from this saga, when the condominium association ceases to function enormous problems are created for local government, building residents, and the entire neighborhood.

Even where there was no fraud involved, the problem of "busted" condominium projects and HOA-run subdivisions has become such a problem that bar associations are offering courses to attorneys in how to deal with them. One of the leading authorities on workouts for such projects is Chicago attorney Brian Meltzer, who, in one of his instructional documents, describes typical problems situations that, he contends, often can only be solved only by starting with condemnation of the building and public acquisition through eminent domain.

> Building A is a new construction or gut rehab condominium building consisting of 30 units, 20 of which were sold to buyers who financed their purchase with high LTV [loan to value] mortgage loans and 10 of which were not sold and are now owned by a bank, the developer or a successor developer/investor. All of the sold units are "under water" and many of them are delinquent on mortgage payments, assessment payments and real estate tax payments and are in various stages of foreclosure. The unsold units are currently worth far less than the sale prices paid for the sold units and less than the replacement cost of the units… There is no unit loan financing or refinancing available for an owner/occupant and there is no readily available financing for an investor who desires to purchase units in either Building for use as rental units, further adding to the depressed value and lack of marketability of the units…Unless something is done to deal with these distressed properties, they will deteriorate and become a slum or worse (Meltzer 2012).

The solution of condemnation and public acquisition has in fact been adopted in a number of cases, including condominium developments that disintegrated into gang-ridden slums full of abandoned units (Berding 2005). However, it is conceivable that earlier public intervention, in the form of monitoring and oversight and regulation, could forestall such drastic and expensive action.

[9]Illinois Distressed Condominium Property Act (765 ILCS 605/14.5).

7 New Agency Policies in the Mortgage Industry

There are few federal statutes that regulate the governance of CIDs, but federal agencies involved in promoting homeownership and mortgage lending have adopted a number of significant policies.

Until recently, federal housing policy was focused on promoting the sale of new homes and increasing the homeownership rate. From the early 1960s to the present, the Federal Housing Administration has promoted the spread of CID housing, including drafting and disseminating model documents. Condominium housing was brought to the United States in 1961 when the FHA decided to ensure condominium mortgages, and required all states to enact condominium property acts that would allow for creation of these interests, that were unknown in the United States previously. The federal government also inaugurated a New Communities Program in the 1970s, providing financial guarantees for a number of large "New Town" CID developments with populations in the tens of thousands. Most of them were not financially successful and the program was terminated (McKenzie1994).

More recently, the Hope VI program, a $5 billion initiative that has begun in 1992 and pursued aggressively by the Clinton administration, provided for demolishing old public housing projects and replacing them with a combination of subsidized-rent apartments and condominiums. Although unpopular with the Bush administration, by 2004 the program had demolished or scheduled for redevelopment over 80,000 public housing units (Popkin et al. 2004).

However, following the crash of the housing market in 2007–2008, the federal policy focus shifted from promoting CID housing, and homeownership in general, to protecting the federal government from further losses. These policies emanated from the federal quasi-public agencies known as "GSEs" or "government sponsored enterprises," such as the Federal National Mortgage Association, or "Fannie Mae." They require standardized CID document provisions, and rate units and projects to determine if they qualify to have mortgages on those units sold in the secondary market, thus freeing up the original lender's liquidity to make more loans.

After the crash of the housing market, Fannie Mae reduced its exposure to risk of failed associations by stating that it would no longer purchase mortgages on homes in CIDs unless the association met certain requirements. In December 2008, the agency announced its concerns and imposed a new set of rules, including a requirement that "established condominium projects consisting of attached units have an owner-occupancy ratio of at least 51 % at the time the loan is originated (purchase or refinance) if the mortgage loan being delivered is secured by an investment property" (Federal National Mortgage Association 2008).

In order to address the new environment of risk in Florida, where the housing market collapse was severe, Fannie Mae inaugurated a special approval process for Florida condominiums to protect itself against risk. Fannie Mae announced, "Many established Florida condominium projects that initially met Fannie Mae's eligibility requirements may no longer be eligible, potentially limiting access to mortgage financing. Reasons why these projects may not currently meet Fannie Mae's project

eligibility standards include significantly weakened homeowners' association (HOA) budgets—association fees are not being paid by delinquent homeowners; unpaid common expenses including pest control, property insurance, water, pool service, and garbage collection; or increased vacancies and REOs, exacerbated by the length of time it takes to complete the foreclosure process".

Fannie Mae imposed new requirements nationwide that have been modified and can be expected to change. However, they convey a sense of how concerned Fannie Mae became about association solvency:

- No more than 15 % of a condo project's units can be more than 60 days delinquent on HOA dues.
- Fidelity insurance is required for condos with 20 or more units, ensuring that homeowner association funds are protected. No more than 10 % of a project can be owned by a single entity.
- No more than 20 % of a project can consist of non-residential space, meaning that mixed residential-commercial developments are disfavored.
- No more than 10 % of the units can be owned by the same entity, meaning that projects owned by investors who are buying up the units in a distressed property are not viewed as good risks.
- The association must have at least 10 % of its budgeted income designated for replacement reserves and adequate funds budgeted for the insurance deductible (Federal National Mortgage Association 2015).

The Federal Housing Administration also imposed a new set of requirement for issuing mortgage insurance:

- No more than 25 % of the property's total floor area in a project can be used for commercial purposes.
- No more than 10 % of the units may be owned by one investor.
- No more than 15 % of the total units can be in arrears (more than 30 days past due) of their condominium association fee payments.
- At least 50 % of the units of a project must be owner-occupied or sold to owners who intend to occupy the units (Federal Housing Association 2009).

While these provisions are salutary from the standpoint of the agencies that are charged with safeguarding public funds and protecting lending institutions, the owners of units in buildings that fail to meet the standards are placed in a difficult position. Prospective buyers of their units will be unable to qualify for a conventional loan—one that can be insured and sold on the secondary market—and this restricts the pool of purchasers for the most part to cash buyers. Public policies as of this writing do not protect the unit owners from the economic consequences of market forces that have been rippling through the US for many years. This must be seen as one of the perils of collective ownership of real property in the form of condominiums.

8 Lien Priority

When unit owners in CID projects become unable or unwilling to pay their debts, and their unit must be sold in foreclosure in order to pay those debts, conflicts arise concerning the order in which lien holders should be repaid. For example, there may be a first mortgage, a second mortgage, a lien for unpaid CID association assessments, and a property tax lien from the county. The law of lien priority is a matter of state law, but the US housing market is truly national in scope and the lenders and other institutions involved desire consistency. In the United States there are organizations that promote uniformity in state laws. The most influential of these is the Uniform Law Commission. They have promulgated a series of recommended codes on many subjects, including the law of common interest housing. Two of these proposed laws, which have been adopted by many states, directly address lien priority, and they reflect a concern for the financial wellbeing of CIDs. In most cases, once the first mortgage is foreclosed on, there is little or nothing left for any other lien holder. If there is, it will have already been paid out to satisfy a tax lien or a second mortgage. The condominium associations or HOA would end up receiving nothing.

Consequently, the ULC in its proposed state laws has tried to protect the financial health of associations by awarding them a "super-lien" that takes precedence over other liens, including the first mortgage, to the extent of six months of unpaid assessments. This was first placed in the Uniform Condominium Property Act of 1980 (UCA), and then in the Uniform Common Interest Ownership Act of 1982 (UCIOA). Presently, 21 states and the District of Columbia give some form of lien priority to the CID claim for unpaid assessments, nearly all of the using the six month standard. Eight UCIOA states do it, as do five UCA states and nine other states using their own version of super-lien protection (Lewis 2013).

However, lending institutions are understandably unhappy about this situation. Most notably, Fannie Mae has been active in challenging these super-lien provisions in court, and private banks with federally insured loans have also taken up the cause. The claim is that these state laws impermissibly extinguish a property interest of the United States government, and there are other legal issues as well. The validity of CID super-priority liens is currently before several state and federal courts. Notably, in 2014, the federal Court of Appeals for the District of Columbia ruled that the super-priority lien extinguished the first mortgage.[10] The shock waves from this and several other cases continues to reverberate through state and federal courts, and it is likely that one or more other federal appellate courts will render decisions on the matter. These cases pit banks against CIDs in competition for what can be salvaged from the wreckage when homeowners become insolvent. The stakes for the nation's CIDs are substantial.

[10]Chase Plaza Condominium Association v. J. P. Morgan Chase 98 A 3d 166 (2014).

8.1 Concluding Thoughts

The residential private governments that govern US CIDs are not islands of private local self-determination. They are inextricably, unalterably embedded at the intersection of two complex institutional networks—the housing market and government. The ebbs and flows of the housing market and the public and private agencies that participate in it directly impact the finances and fortunes of CIDs. The planning, taxing, spending, regulatory, and constitutive policies of public governments, especially at the state and local level, are of great importance to CID private governments and all unit owners.

Yet, if we examine the relevant post-housing crash policies, it appears that there is still a reluctance among policy makers to recognize the degree to which CID private governments have become not just guardians of neighborhood property values, but guarantors of the value of residential mortgage backed securities, and at the same time an increasingly important part of the intergovernmental system. Despite the mounting evidence that CID private governments are overly reliant on owner resources and lacking in institutional support, policy makers have favored self-protective steps to insulate public institutions from the risk of loss, rather than bolstering the private governments that pose that risk.

Such policies are an improvement over the reckless promotion and unregulated privatization that marked the rise of residential private government. At least we appear to have discarded the cavalier assumption that no institutional support or regulation are necessary. But what is missing, still, is a pro-active and forward looking approach. It is worth considering what such an approach might look like, because some of the moving parts are emerging in a few states.

First, it should be recognized that condominiums are the most fragile type of CID, because attached housing typically includes building-wide systems for electricity, water, gas, forced air, garages, elevators, roofs, and other features that are complex and expensive to repair. All owners are linked financially to each other and are obligated to maintain, repair, and replace these systems. Many if not most of them do not understand the nature and possible extent of these obligations, and the degree to which they are pledging their own resources to those ends. And the risks go up substantially when the condominium is a converted apartment building. These structures are often old and suffering from deteriorating infrastructure systems at the moment the new units are sold to the public. When condominium housing is made affordable for people of low to moderate means, the owners may have insufficient savings to contribute to a special assessment, and little or no home equity to borrow against. Any forward-looking policy must take these facts into account.

Second, there is, in general, insufficient institutional support for all forms of CIDs in the United States. The resource base of this institution is inadequate for the long term and in many cases, for the short term. Owners as a group cannot be counted upon to adequately fund CIDs beyond their monthly operating expenses. The notion that they will happily tax themselves today to build a roof for other

owners in ten years is fanciful. State laws should include minimum reserve requirements, regular reserve studies, and annual public disclosure of those studies and the actual reserves on account, for every CID. In the absence of such requirements we should expect that many associations will experience eventual financial crisis even if nothing goes wrong—no earthquake, mismanagement, fraud, or recession—simply because inadequate reserve are available to pay for inevitable failure of major building components.

Third, information on the operation of CIDs should no longer be regarded as private. States should be mandating not just disclosure of information on reserves, but comprehensive annual registration and data gathering on officers and directors, finances, disputes, and other basic information. If CIDs are going to carry out what would otherwise be local government functions, they should perform those functions to public standards, and that can only be determined if we have more transparency.

Fourth, there should be state-level oversight commissions for this type of housing, including managing an ombudsman or other low cost dispute resolution system, educating owners and directors on their responsibilities and rights, and undertaking studies on a state's stock of CID housing. This is already being done for cities, counties, school districts, and special districts.

Fifth, there need to be state laws, as there are in several states, that create clear and specific expectations for CID private governments concerning their internal operations. There should be an owners' "bill of rights" that states clearly what parts of their lives are off limits to association rules and regulations. This would reduce the conflict over flags, religious symbols, political signs, and other expressive conduct that wastes everybody's resources on litigation. Directors and officers, and owners generally, should be able to understand how to run meetings, handle records, prepare budgets, resolve disputes, rule on requests for architectural changes and exceptions to rules, collect assessments, and plan for the future.

Finally, state governments should re-introduce diversity into the new housing market by prohibiting municipalities from requiring CIDs in all new residential construction.

If the foregoing steps were taken, market forces and objective researchers would supplement public policies and improve CID housing. The public generally would be able to make informed decisions about where to shop for a home, instead of having to wait until they are bound by a contract. Academic and government researchers could perform studies that would enlighten all concerned, instead of the current situation, in which nearly all the data available are coming from self-interested professionals and trade associations. There is nothing improper about professionals advancing their interests in the press and through the policy process, but there is an enormous public interest in having a full understanding of what is going on in this privatize realm, and that will never come from private professionals who are making their living solving problems that could be prevented by more enlightened public policies.

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Condo-ism and Urban Renewal: Insights from Toronto and Jerusalem

Gillad Rosen

Abstract This chapter explores how condo-ism may be used to promote urban renewal and introduce inclusive planning principles, such as social mix and supply of public goods via linked developments. Four residential projects in the cities of Toronto and Jerusalem are discussed. It is demonstrated how despite some similarities in motivations and planning paths, the variances in local political aims, consumer preferences, and social values have had a very different impact on urban life in these urban environments. The analysis is based on findings from two independent research projects that explore urban growth, planning policies, and urban restructuring.

1 Introduction: Urban Transformation and Condo Development

The early twenty-first century is characterized by intensifying global flows of capital, services, and information. Equally important is the mass exodus of millions of people annually from rural areas to urban environments, from small suburbs to larger urban centers, and from less developed regions to rapidly growing mega-regions. Such movements are increasing economic and social pressures on urban environments. Cities must therefore upgrade their infrastructure systems, increase employment opportunities, and improve the range and quality of services if they wish to remain attractive places that offer safe and livable environments to their dwellers. Urban change, however, does not unfold uniformly across space. Some cities grow swiftly while other urban environments face the reverse processes of stagnation and even urban shrinkage (Martinez-Fernandez et al. 2012; Wiechmann and Pallagst 2012). A common dilemma, however, is the question of how to deal with disinvestment and neglect, which may lead to urban decline, decreasing property values, and negative neighborhood image. Old and decaying

G. Rosen (✉)
Department of Geography, The Hebrew University of Jerusalem, Jerusalem, Israel
e-mail: gillad.rosen@mail.huji.ac.il

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neighborhoods must be upgraded, and recycled back to the built-up tissue if prosperity is to continue.

Central to urban transformation is *condo-ism*, an urban phenomenon in which various actors, values and ideals, policies, and institutions alter not only the physical urban form, but reconstruct social relations, social boundaries, and urban networks (Rosen and Walks 2013). Condo-ism reflects and fosters the drive toward urban densification, gentrification, and the shifting of power dynamics from the public to the private sector via condominium development (Kern 2007, 2010; Lehrer and Wieditz 2009; Pow 2009; Lippert and Steckle 2014; Rosen and Walks 2015). It functions as a key mode of (re)development by producing new privatized and securitized ways of life in the city (Pow 2014). Condo development may also, however, heighten urban segregation, polarization, and social exclusion (Pow 2007; Rosen and Walks 2013), and provide elites with the opportunity to dominate the urban skies (Pow 2011; Graham 2015).

Condominiums, however, are not simply a construction style. They are in fact a legal regime in land tenure in which a parcel of property is divided horizontally and vertically into units that are each privately owned (Skaburskis 1988; Kern 2007; Lehrer et al. 2010). Common areas that may vary in scale and scope, such as the atrium and gardens, are shared and jointly managed by members of the condo corporation (or body corporate in those countries that prefer the term 'strata title') (Harris 2011). Homeowners in these projects may decide on internal rules and restrictions, which may in turn tighten control over common property and on community life (McKenzie 1994, 2011; Low 2003; Kern 2010). By now it is accepted that high-rise condominiums are a vertical representation of the more celebrated detached forms of common-interest housing and of their governance also known as club realms and economies (Tiebout 1956; Webster 2002; McKenzie 1994, 2003; Webster and Le Goix 2005; Low et al. 2012). In recent years, rapid growth of condominium construction and occupancy has had a powerful impact on cities in general and on neighborhoods located in and around the urban core in particular.

This chapter explores how condo-ism may be used to promote urban renewal and introduce inclusive planning principles such as a social mix and supply of public goods via linked developments (otherwise known as planning obligations and community benefits arrangements). Four residential projects in the cities of Toronto and Jerusalem are discussed. These represent different urban environments and diverse social settings. It has been noted that adopting an urban comparative approach (either in the form of most similar or most different analysis) enables researchers to investigate similar processes of urban restructuring, while remaining sensitive to the different geographical, cultural, and historical specific manifestations (Rosen and Grant 2011; Lees 2012). Specifically, I highlight how despite some similarities in motivations and planning paths, the variances in local political aims, consumer preferences, and social values have had a very different impact on urban life in these places. The analysis is based on findings from two independent research projects conducted in recent years. These studies explore urban growth and planning policies and examine the processes of condo-ism and urban restructuring.

The Toronto experience was studied between the years 2009–2012 by conducting 32 semi-structured interviews with major developers, planners, and politicians. The interviews were supplemented with a number of on-site visits, a review of relevant newspaper articles, and a geographic information system (GIS) analysis of an inventory of condo-buildings developed in the years 1970–2010. In Jerusalem, 27 semi-structured interviews were conducted in the years 2012–2014 with local developers, planners, politicians, and social activists. In both cases, local datasets of demographics and housing were examined. The knowledge gained during these two periods provides the foundation for this chapter.

I had been very fortunate to live in and study these two fascinating urban laboratories—the cities of Toronto and Jerusalem. Surprisingly, many similarities arise when looking at these two places. Both cities continue to grow demographically and economically. They are heterogeneous urban environments and highly attractive (for different reasons) to the inflow of immigrants and global capital investments. In addition, both cities share some common challenges including the need to manage growth and redirect development from outward spread to densification of exiting areas. Moreover, they are invested in promoting an urban renaissance and attribute special importance to attracting the "creative class."

2 Urban Renewal

With the progression of time, parts of the urban fabric age and deteriorate and become unable to serve the original purpose for which they were intended. Redevelopment is therefore needed to revive and reintegrate them as livable parts of cities (Jacobs 1961; Hamnett 1991; Wiechmann and Pallagst 2012). It is accepted to refer to three major phases of urban regeneration: the 'bulldozer area' of massive demolition and clearance programs; the social and physical neighborhood rehabilitation programs (also known as neighborhood renewal projects); and downtown revitalizations, which emphasize economic development and promote public-private partnerships (Fainstein 1994; Carmon 1997). Although the meaning of the terms "redevelopment," "renewal," and "revival" have evolved over time, they share a mutual goal to counter urban decline, promote reinvestment, and support physical and social change (Carmon 1999).

Urban problems today feature multi-dimensional characters, including such issues as deteriorating housing quality, poverty, unemployment, increasing levels of social polarization and exclusion, and in some cases, concentration of immigrant communities in ghetto-like environments. As a result, urban renewal policies attempt to follow more integrative approaches by applying a combination of strategies that promote physical and social change. For example, demolitions, renovations, commercial and cultural developments and historical preservation are implemented alongside attempts to encourage community participation and to develop socially diverse neighborhoods. Academic research, however, challenges

the efficacy of such policies (Alfasi 2003; Kleinhans 2004; Walks and Maaranen 2008; Graham et al. 2009).

A popular feature of urban renewal and one frequently considered a remedy for the socioeconomic ills plaguing society is the idea of a social mix (Wilson 1987). In theory, social mix occurs in neighborhoods of mixed tenures wherein relatively disadvantaged social housing renters are intended to live alongside homeowners and derive socioeconomic benefit from the geographic proximity between the two classes by means of enhanced social capital and more equitable distribution of resources and services (Schwartz and Tajbakhsh 1997; Arthurson 2008). Several studies have demonstrated the varying impact of mixed income and mixed tenure communities on certain factors, such as the social networks of adolescents (Andrews 1986), adult earnings (Galster et al. 2007), and social well-being (Graham et al. 2009).

Social mix is often conceptualized as an instrument of inclusionary zoning practices, especially under the current socio-political neo-liberal mindset where the return to significant state funding for public housing programs appears highly unlikely. Inclusionary zoning may represent attempts of urban governments to resist neoliberal reforms and address socio-economic inequalities of housing markets (Fainstein 2005; Newman and Wyly 2006). Alternatively, social mix is identified as a housing path that facilitates greater flexibility and the pursuit of various aims, such as enabling developers to increase their profits or allowing the municipalities to bypass existing development regulations. As demand for housing increases, neoliberal housing paths based on private-public partnerships (PPPs) are perceived as saviors and expected to advance urban revitalization and generate economic value (Brenner and Theodore 2002; Smith 2002; Hackworth 2007). Such partnerships often include public sector investment in planning and infrastructure development and in the allocation of land (or other public subsidies) as a means to attract additional private investment (Fainstein 1994; Devas 2008). These initiatives may also include development of public infrastructure through Built-Operate-Transfer mechanisms (Porter 2008).

It is important to note, however, that urban renewal is far from being politically neutral (Goetz 2013). Investment decisions are made by people driven by particular values and motivations who act based on specific political agendas. The bulldozing and redevelopment of existing built-up areas in the form of new high-rise condominium communities may generate economic opportunities and introduce a new and diverse clientele of urban dwellers. Simultaneously, however, the transformation might not occur without exacting a significant social price, e.g. extensive gentrification of neighborhoods, displacement of local communities, increased privatization, and gating and securitization of space (Catungal et al. 2009; Kipfer and Petrunia 2009; August 2014; Graham 2015).

3 Toronto: Harnessing Development to Produce Public Goods

Ontario is the most urbanized of the Canadian provinces. Its largest urban metropolis is the Greater Toronto Area (GTA) that forms the core of the Greater Golden Horseshoe, a mega-region reaching from St. Catharines-Niagara to Peterborough. The GTA is comprised of five regional governments—Toronto, Durham, Halton, Peel, and York (Frisken 2001; Frisken and Norris 2001). A major change to the governance of Toronto resulted from the 1998 amalgamation, where the previous governments of East York, Etobicoke, North York, Scarborough, York, the city of Toronto, and the regional municipality of Metro Toronto were dissolved to create the new (mega) City of Toronto (a single tier municipality). The impact of municipal amalgamation has created a very large jurisdiction and consequently provided greater autonomy and authority to local city leaders.

The Toronto region is a tolerant multicultural and an investment-friendly environment. It has been highly attractive for Canadian immigrants and entrepreneurs (Boudreau et al. 2009). In 2011, the new amalgamated City of Toronto had a population of over 2.6 million people, representing 43 % of the GTA's 6 million people. As the largest housing market in Canada, the GTA has undergone extensive economic restructuring since the 1950s, accompanied by the growth of socio-spatial polarization and gentrification of Toronto's inner city neighborhoods (Hulchanski 2010; Kipfer and Keil 2002; Walks 2001; Walks and Maaranen 2008). Within this context, condominiums have become a growing and integral ingredient of Toronto's housing stock (Lehrer and Wieditz 2009; Rosen and Walks 2013, 2015).

Among the initial catalysts of condo-construction has been the City of Toronto's ability to redirect growth by adopting intensification as a major planning principle. Intensification has become even more prominent after the 1998 metro-Toronto amalgamation and provincial legislation that further defined urban growth boundaries (e.g. the Places to Grow Act 2005 and the Growth Plan for the Greater Golden Horseshoe 2006). This legislation has produced a clear road-map for future development in the region including curbing sprawl, revitalizing downtowns, and improving housing and employment options. Consistent with the aims of this legislation, the City of Toronto identified specific areas for intensification while preventing others from being developed (Lehrer and Wieditz 2009; Lehrer et al. 2010). As part of these changes, several large-scale residential projects in Toronto's downtown have been underway (Rosen and Walks 2015). Two such flagship developments are taking form in the inner city neighborhoods of Regent Park and City Place. The following sections briefly explore these two cases.

3.1 *Regent Park: From Public Housing to a Mixed-Use Mixed-Tenure Neighborhood*

A chief example of Toronto's inner core rebirth is the renewal of Regent Park neighborhood, Canada's largest public housing project. Originally built in the 1950s, the neighborhood was home to about 7500 residents who lived in 2000 high and low-rise apartments and townhouse units east of downtown. Its development symbolized, at the time, progress and modernism. Soon, however, it became identified with the shortcomings of mid–twentieth century planning philosophy. Redevelopment was architected as a modernist, all-encompassing mega-project that radically changed the district's urban fabric. "Le Corbusier" style superblocks were erected and a segregated land use layout characterized the area. Ultimately, Regent Park represented an idea that failed to work and soon after its redevelopment, the area was labeled an outcast space (James 2010).

Regent Park's recent renewal efforts were promoted through a public-private partnership between the City of Toronto, Toronto Community Housing Corporation (TCHC), and the Daniels Corporation—a private developer. In 2007, a unique plan that has radically transformed the area has been initiated. A 69-acre area has been bulldozed (including all residential structures, faith-based and community buildings) and has been replaced with a mixed-income mixed-tenure community. Renewal efforts include demolishing 2000 social housing rentals and the extensive redevelopment of the area in higher densities via the creation of a newly built urban district with mixed land use and mixed tenure ownership. Most of the 2000 social housing rentals will be rebuilt within the boundaries of the district, while the rest (approximately 200 units) will be built in other areas across the municipality but according to the city's demand. Alongside the rental units, 5000 newly built private owner-occupied condominium units and other commercial development have been advanced. As explained by one of Daniels corporation leaders, the project attempts to foster social heterogeneity so there will not be an area that is "all rentals" or "all condo" (Interview 2010). Some scholars, however, are critical of this strategy arguing that the project in effect colonizes and gentrifies inner city space under the guise of supporting diversity and social mix, and essentially shifts the balance of political power away from tenants toward condominium owners. Such concerns echo community concerns that development will result in displacement of long-time rental housing residents and possibly relocate the problems of poverty in Toronto out to the suburbs (August 2008; Kipfer and Petrunia 2009).

A central mechanism to deal with such concerns has been the establishment of links and collaborations between local communities, the city, non-profit organizations (namely faith-based organizations), the business sector (led by Daniels), and the adoption of Community Benefits Agreement (CBA) as a mechanism to provide local communities with additional benefits. CBAs are collaborations that constitute a type of land use regulation for real estate development of projects of a certain scale. They are achieved through negotiations and/or contractual agreements signed by community groups and real estate developers. Developers are required to

provide the local communities affected by the new development with benefits such as local jobs, affordable housing, and community facilities in exchange for gains in public support of the project, aid in speeding up planning approvals, and financial support and funding for targeted projects (Wolf-Powers 2010). Hence, despite criticism, redevelopment of Regent Park has incorporated a range of community benefits programs and infrastructure developments. Daniels' vice president explains that effective redevelopment also involves "[ensuring] a lot of public influence…we push the city to have public consultations… [we are] creating new jobs and new opportunities for people who live here in social housing" (Interview 2011). As part of its redevelopment efforts, Daniels together with TCHC initiated a new Community Center, the Daniels Spectrum (a community cultural space for studios, events, exhibitions and for non-profit groups), a new Regent Park Aquatic Centre, a new Central Park for the area, and a local employment plan targeting 10 % of new jobs to residents (Galley 2015).

3.2 CityPlace: Global Capital Investment and Municipal Engagement with Inclusionary Planning

Another much celebrated mega-project is Concord's CityPlace neighborhood, one of the largest residential projects in Toronto's history. The plan includes a planned community of 20 high-rise residential towers (8000 newly built condo-units) and a community park on 64 acre of former vacant Railway Lands in Downtown Toronto. Once cut off from the city by expressways, this former brownfield industrial land is being rebuilt as a mixed-use area. It is predominantly a residential quarter linked to the downtown through the extension of existing roadways (Rosen and Walks 2015). Concord is one of the strongest brands in the industry, a transnational company originating in Hong Kong that began its venture into the Canadian market via Vancouver where a major residential condo project was built on the former Expo 86 World Fair site (Olds 1997, 1998; Harris 2011).

CityPlace falls under Toronto's Large Sites housing policy—an inclusionary zoning policy since 2006—in which the development of sites greater than 5 hectares (approximately 12 acres) is linked to the provision of a housing mix in both type and affordability. Given the drastic decline in funding and construction of new social housing (Walks 2006a, b), the City of Toronto depends on the large sites policy for meeting policy objectives related to affordable rental housing. According to this policy,

> …a minimum of 30% of the new housing will be provided in attached and multiple housing forms. In addition, when an increase in height and/or density is sought, the provision of 20% of the additional residential units as affordable housing will be the city's "first priority community benefit". The affordable housing may take these forms: the construction of units on or near the site, or elsewhere in the city; the conveyance of land on or near the site; and the provision of cash-in-lieu for developing affordable housing on or near the site (Wellesley Institute 2010).

Moreover, this policy has been designed to utilize the regulatory tools provided by Section 37 of the Ontario Planning Act. Under this legislation, the city is able to offer an increase in the permitted height and/or density in return for cash contributions, facilities, services and in-kind benefits from developers (this practice of *density* '*bonusing*' is also known as *bonus zoning*, *impact fees*, *planning gains* and *linked development*). This has become an important way for the city to encourage high-density forms of development through condo-development and enjoy additional public benefits paid for by private developers (Devine 2008; Moore 2012). Such a development path links the rise of condo-ism to the neoliberalisation of city policy by reconstructing the manner in which public goods are produced (Moore 2013a, b). The rise of public-private partnerships of this type, however, has a social price. Since redevelopment targets urban districts that can generate profit, only those areas that experience growth and that already enjoy reinvestment gain additional benefits, thus exacerbating socio-spatial inequalities (Hulchanski 2010).

Given that CityPlace falls under Toronto's Large Sites housing policy, Concord Adex relocated land (4 blocks out of 16 it had acquired) to the TCHC—a city agency for prospective affordable housing—in return for increased density. These areas are designated for development in the form of a range of land uses for the public's good. For example, TCHC developed Block 32 as a 41-storey, 427-unit family affordable rental apartment building that consists of 137 rent-geared-to-income units and 290 new affordable rental units with rent levels set at the Canada Mortgage and Housing Corporation (CMHC) average for the City of Toronto. In addition, the City of Toronto developed two public parks and a public library. The remaining undeveloped public land in the neighborhood (areas in block 31) is set to be completed by 2019 in the form of two schools and a new community center. The way in which the City of Toronto has implemented inclusive zoning policy has enabled the introduction of lower income residents into a newly built middle and upper class residential district. Moreover, Section 37 community benefits negotiations are required for every development in CityPlace that seeks density bonusing. For example, Block 22 at CityPlace that now houses Concord's headquarters and presentation center will be replaced with a mixed-use project containing two towers rising to 64 and 75 storeys from a 10-storey podium (roughly 1500 residential units), extensive commercial and office space, and a private park. Their development will require additional Section 37 negotiations.

4 Jerusalem: State Led Gentrification

Israel is a small country with limited land and growing population. Since the 1990s, massive immigration from the former Soviet Union, economic restructuring and changing consumer tastes favoring detached homes and the suburban lifestyle have increased development pressures on the country's shrinking land reserves (Orenstein and Hamburg 2009; Hananel 2010). In a context of land scarcity and increasing population, a major challenge is to plan, develop, and manage urban

growth while promoting livable neighborhoods. In 2005, the State of Israel approved a comprehensive national growth management policy, National Outline Plan 35. This statutory outline plan provides a road map for high and medium density development while attempting to preserve open space and land reserves for future generations (Shachar 1998; Frenkel 2004). Following the government's adoption of Outline Plan 35, multi-storey residential housing has become a key strategy for urban growth in Israel, particularly in the country's major urban centers (Frenkel and Orenstein 2012; Yacobi 2012; Margalit 2013, 2014; Charney and Rosen 2014; Alfasi and Ganan 2015).

More recently, Israeli housing prices and rent levels have soared dramatically. Driven by neo-liberal ideology, governments of the last decade have distanced themselves from social programs and have relied to a greater degree on market solutions (Carmon 2001; Rosen and Razin 2007; Werczberger 2007). In the summer of 2011, large-scale public protests erupted in cities across the nation that highlighted issues of social justice and housing affordability (Marom 2013; Alfasi and Fenster 2014; Fenster and Misgav 2015). Since then, housing has remained high on the national agenda. In the context of the current national planning policy, cities are expected to grow inwards and upwards, thus becoming denser. As the demand for housing increases, Israeli decision-makers promote a range of development paths, e.g. infill, densification, and demolish and rebuild developments as mechanisms of urban change. Such is the case with Jerusalem, Israel's capital and its most populous city.

The City of Jerusalem is in urgent need of new housing stock, specifically middle and upper-middle class dwellings, but also low-income units and affordable apartments. The cancellation of the *Safdie* Plan in 2006—a plan to enlarge the city's municipal borders and construct 20,000 new homes on Green-field areas west of the city (Shlay and Rosen 2015) and growing political limitations to build eastwards over the "Green Line" (Shlay and Rosen 2010)—leave Jerusalem little choice but to grow inwards, becoming denser rather than continuing to spread outwards. In many ways, the City of Jerusalem's growth trajectory has radically changed from a strong emphasis on urban expansion to intensifying development within the city's municipal boundaries (Charney and Rosen 2014). As demand for housing increased, the city initiated a new Master Plan for Jerusalem (more commonly known as Jerusalem 2000), which for (geo)political reasons has not been approved. However, the plan is being used as a compelling planning guide for all development in the city.

By the mid-1990s, Jerusalem had gradually adopted a neo-liberal approach towards urban redevelopment that for the first time in the city's modern history allowed and moreover encouraged high-rise development (Charney and Rosen 2014). This permissive approach was thought to better address pressing challenges such as a limited municipal tax base, a stagnating office industry, and the city's limited appeal to foreign capital investments. As an NGO representative explained, the pro-growth mayor Olmert was determined to change urban dynamics: "In the mid-1990s, the Mayor openly stated that the rules of the game had changed… Jerusalem would become a city like Manhattan" (Interview 2012). Making

Jerusalem more attractive to firms and investors has been further promoted by Jerusalem's current Mayor Barkat who has also placed emphasis on urban rebranding by attracting high-profile events to the city (e.g. Formula One Race and the Jerusalem Marathon) and pushing for large-scale upgrading of transportation infrastructure. Mayor Barkat has been recruiting global experts and high-profile celebrities (e.g. Michael Porter, Richard Florida and Michael Bloomberg) to assist local planners and policy-makers upgrade Jerusalem's competitive advantages, increase its global visibility, and strengthen its brand.

4.1 Foreign Elites Takeover Jerusalem's Inner-City Skies

Two major development projects around mass transit have structured the path and location of real estate development in Jerusalem's inner city. The first project, the Tel Aviv—Jerusalem fast rail, connects the city of Jerusalem to the Ben Gurion International Airport and to the City of Tel Aviv–the country's economic hub. The second, Jerusalem's Light Rail, serves as a mass transit system that improves internal linkage between neighborhoods of the city. While the official planning discourse is that such infrastructure improvements can increase the number of people living, working, and visiting the inner-city, in practice renewal is taking the form of an obsessive development path targeted at cashing in on highly-acclaimed inner-city space. The municipality of Jerusalem has thus been promoting the gentrification of its urban core through rezoning inner city land and increasing densities to allow the development of luxury high-rise condominiums (Yacobi 2012; Alfasi and Ganan 2015; Shlay and Rosen 2015).

The city's inner core areas have traditionally been highly desired lands for development as they are located in close vicinity to the Old City of Jerusalem, but they have been protected for almost a century by strict height regulations (Charny and Rosen 2014). For those readers not familiar with the geography of Jerusalem, the Old City constitutes the original core of the pre-modernized city and its centrality could be compared to that of New York's Central Park or to that of the City of Westminster in London. In recent years, new condominium towers have been rapidly proliferating in the inner-city and especially along the Jaffa Road transportation corridor. Many of these new residential condo-projects, including for example the exclusive projects of King David's Crown, King David Residence, Jerusalem's Tower complex, Jerusalem of Gold, and others cater explicitly to foreign investors. Many foreign Jews, particularly French and American Jews, have in the last 15 years been purchasing homes in Jerusalem. Some purchase homes in central Jerusalem and concentrate their purchases in particular neighborhoods including the German Colony, Baka, and Mamilla (Gonen 2015; Zaban 2016). Others have favored more exclusive newly built vertical gated communities that serve as second or third homes to their wealthy homeowners (Grant and Rosen 2009).

Alfasi and Ganan (2015) argue that the dominant mode of Jerusalem's inner city residential development in recent years has been fueled by foreign capital

investments. The city's growth-oriented agenda satisfies their preferences and demand by rezoning inner city land and actively promoting a planning deal. The city allows local builders to pursue high-density development in return for linked development, locally referred to as developers' planning obligations. This deal indicates a connection between granting a planning approval and imposing obligations on developers to carry out additional work alongside the development, or to pay for or provide some other form of benefit in return for development permits (Alterman 1990). Similar to Section 37 in the case of Toronto, for the Jerusalem arena this situation is sometimes referred to as *gentle blackmail* due to the growing dependency of the public sector on private sector investments (Alfasi and Ganan 2015). For example, for the Jerusalem Tower complex and Jerusalem of Gold project, adjacent linked development, including the conservation of historic buildings, was a requisite condition for the development projects to proceed, whereas for the King David's Residence complex, both conservation of historical buildings and development of a public garden were secured.

It is estimated that about 10,000 condo-units in the inner city are owned by foreign residents. The condos' high prices and their large volume have had a considerable effect on the Jerusalem housing market by increasing the price of housing, particularly within centrally located neighborhoods, and creating real estate bubbles in Jerusalem (Levirer 2007; Gonen 2015). The inner city sky has been effectively privatized and serves mostly the elites. Another negative impact has been the de facto production of thousands of *ghost apartments*, i.e. apartments which, apart from major holidays, remain empty for most of the year (Haramati and Hananel 2016). In some ways these ghost apartments resemble a post-modernist version of the British town houses, i.e. second resort homes of wealthy families in appealing locations. Today's vertical "town homes" are different, however, in their preferred setting. They are chiefly located in prime inner city locations and provide a perfect solution for the elites, not as a retreat of the polluted industrial city, but as a highly desired, amenity rich safe haven for wealthy households in today's urbanized centers. Instead of increasing the number of people living in the inner city, municipal policy has hollowed out the area from city dwellers, thereby advancing the development of the inner city mostly for profit and not for the people. Condo development in this area thus reflects the combination of capital investment, growing mobility of elites, and the demand for urban amenities.

4.2 Raze and Rebuild Projects of Former Public Housing

A second trajectory of Jerusalem's current housing development is massive redevelopment plans of former public housing estates. In certain parts of Jerusalem, private developers are offered a planning bypass route that overrides height restrictions and manipulates formal municipal outline plans and guidelines. Building heights are practically a negotiable product, as a municipal planner commented: "potentially, the sky is the limit" (Interview 2012). Height is a major

issue as the decision on the height of ad hoc buildings reflects private developers' profit-making needs and planners' attempts to balance between urban development goals and economic gains for the city. This agenda represents a major shift from a long tradition of state-led assistance programs for housing renovations, neighborhood renewal, and housing assistance programs for disadvantaged communities that were engineered to assist local residents (Carmon 1997, 2002; Lazin 1995). This new housing path is a disjuncture from the past as it promotes bulldozing rundown former public housing estates and their subsequent redevelopment at much higher densities for the upper middle-class strata.

This new policy promotes the replacement of social housing built between the 1950s and 1970s that were intended to house vast numbers of post-1948 immigrants. Over time these buildings were privatized and the tenure structure of many residents was transformed from renter to homeowner. Unfortunately, maintaining such sizeable buildings has been costly and many of their residents are socio-economically deprived. Such a combination has caused many buildings to deteriorate and has severely stigmatized these areas as ghettos of the urban poor. Jerusalem's municipality has advanced a new housing path that favors the demolition of thousands of old public housing stock and their redevelopment as high-rise condominium towers. However, as the cost and maintenance of such apartments are high, prospective tall buildings are most likely to attract the upper-middle class and wealthy; hence the major dilemma of whether providing new housing for upper-middle class families (those who can afford the high-rise lifestyle) justifies direct and indirect displacement of families currently living in these apartment blocks.

Central-government ministries and the Jerusalem Municipality tend to emphasize the virtues of transformation, i.e. larger new housing supply, neighborhood improvements, and the increase of property values (tenants will get larger and newly-constructed units with amenities they lack at present). It is clear that for planners and decision-makers the numbers (of housing units) count, but numbers are certainly not be-all and end-all. Notwithstanding the advantages of new construction, redevelopment tends to exclude and displace many families who are not able to afford living in these high-rises (Hackworth and Smith 2001; Lees 2008; Davidson and Lees 2010; Graham 2012; Chaskin and Joseph 2013). In the case of Jerusalem, some working class families may be able to take advantage of the increase in property values to sell their new apartments and move to less expensive neighborhoods elsewhere. This mechanism of state-led gentrification cashes in on increasing land values and on older and dilapidating public housing being replaced (i.e. displaced) with taller buildings and new populations. It is estimated that around 30 such projects are currently being advanced in the city, and thus add around 8000 new housing units to the existing housing stock.

5 Conclusions

Urban redevelopment is a powerful instrument that can induce significant change when used wisely. Revitalization may be used to intensify exiting built-up areas, upgrade existing infrastructure, rebrand declining neighborhoods, and reintegrate abandoned areas into the urban fabric. This chapter has explored four housing paths that reflect the interplay between condo-ism and urban revitalization in a context of two different urban settings—the cities of Toronto and Jerusalem. The analysis demonstrates that condo-ism is not a uniform experience and that it may cater to different policy aims. Even when housing paths are presented in a similar way, e.g. manipulating the mechanism of linked development and planning gains, they can produce different impacts on their cities.

In the Toronto case, local decision-makers value public housing. They take advantage of neo-liberalism and privatization by supporting private-public partnerships, facilitating large-scale development, and global capital investments, but they use Section 37 and community benefits agreements to also promote social justice. For example, one-for-one replacement of social housing is ensured, construction of new affordable housing units and other civic goods are advanced, and social mix at the project level is pursued. Condo-ism is also used to bring lower income residents into new middle and upper class developments. In addition, downtown revitalization is advanced with the incorporation of inclusionary planning principles. Nonetheless, socio-spatial inequalities may be increased by the uneven distribution of money allocated to the already fastest growing areas of the city that appeal to condo-developers. This also strengthens the links between condo-ism, neoliberalism, and the ways public goods are produced and redistributed.

In Jerusalem, on the other hand, the city seems to be fixed on mostly one side of the development equation, i.e. economic development and city branding with little interest being paid to social considerations. In the current context of a national housing shortage, increasing the housing supply and attracting capital investments has become a critical aim of local decision-makers. Housing development, either as luxury vertical gated communities in the inner city or as upper-middle class condo-towers built on the ashes of former public housing estates, provides a wealth of economic opportunities. Local builders are able to generate profits and the municipality enjoys a new source of revenue (derived from increased property taxation). The City of Jerusalem mostly deals with small-scale projects (a few hundreds of units for each project) as compared with the case of Toronto (where mega-master planned communities of thousands of units are constructed). It also suffers from limited experience with linked developments as a mechanism to produce public goods. This results in a limited use of development gains mostly in the form of historic preservation. It seems that in Jerusalem, condo-ism mostly encourages inner-city densification, fuels gentrification, and enables wide scale construction of (ghost) apartments for foreign elites. This dynamic may also be a result of the local political representation system. As opposed to the City of

Toronto, the local council members in Jerusalem neither represent a specific constituency nor hold any real power over the planning and development arenas. Development decisions and negotiations over local public goods remain fuzzy, while the idea of linkage between planning rights and benefits to local communities is at best, loose.

In many ways the challenges presented in this chapter are becoming the chief concern of many cities across the world: how to take advantage of development and reinvestments while considering the socio-spatial effects of redevelopment.

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Residential Communities in a Heterogeneous Society: The Case of Israel

Amnon Lehavi

Abstract Israel presents an intriguing case study for exploring the role of communities and private forms of spatial organization in urban governance. Unlike most western countries, the overwhelming majority of land in Israel is publicly-owned, meaning that the validation of community exclusionary practices would regularly require affirmative governmental backing. The evolution of urban and rural forms of settlement since the early days of Zionism shows how some types of private associations enjoyed such validation due to political clout. Contemporary Israel is much more heterogeneous and fragmented both ethnically and ideologically. This poses new challenges for designing the regulatory and legal framework of residential communities.

1 Israel's Changing Societal Landscape

At the end of 2015, a promotional video for a real estate project in the Israeli city of Kiryat Gat sparked a public outrage for its apparently discriminatory overtone. The developer *Be-Emuna* (literally meaning "in faith"), which caters to the national-religious sector, has been scorned for playing on perceived divisions between Jews of European descent (Ashkenazi) and those of Middle Eastern and North African descent (Mizrahi). The video features a national-religious family lighting Hanukkah candles, when two unruly neighbors barge into the apartment. Both neighbors speak in an exaggerated Mizrahi accent, one of them named "Abergil"—a markedly Mizrahi name. The two are apparently ignorant about the holiday's customs, mistaking the lighting of the festive candles to a bonfire, and taking over the event, to the family's dismay. Then, the narrator—who turned out to be *Be-Emuna*'s CEO–says: "Want the neighbors your heart desires? The *srugim* [a nickname for the national-religious sector —A.L.] have a new home. Join today the national-religious community of Carmei Gat

A. Lehavi (✉)
Radzyner Law School, Interdisciplinary Center (IDC) Herzliya,
Gazit-Globe Real Estate Institute, Herzliya, Israel
e-mail: alehavi@idc.ac.il

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[the new neighborhood in Kiryat Gat—A.L.]. In faith: building you a community" (Blumenthal 2015; Gravé-Lazi 2015).

Following the public uproar, the company quickly removed the link to the video from its Facebook page and apologized for its insensitivity, while denying any discrimination in the actual marketing of the project. The commotion did not end then, however. Because the company won a public bid to develop the new project on government-owned land, the Attorney General's office quickly issued a letter to the Israel Land Authority (ILA), the administrative agency in charge of managing government-owned land, requiring the abrogation of the bid's award to *Be-Emuna* if it turned out that the company engaged in discrimination. The company, on its part, insists that it markets the housing units to the Israeli public at large (Busso 2015). In early 2016, setting a precedent, the ILA fined *Be-Emuna* for the discriminatory ad (Yaron 2016).

Moreover, while the focus of public attention has been on the alleged ethnic discrimination (Ashkenazi versus Mizrahi), the company's self-proclaimed designation of the project for the national-religious sector raises yet another issue: can real estate developers distinguish between religious and secular Jews, especially in those projects constructed on government-owned land? Could a real estate company, or a private association that participates in ILA public bids for the self-organized construction of housing projects, limit entry to the project based on the level of religiosity, or specific type of Jewish religious affiliation? Put in broader terms, what type of group-based affiliation might be considered legitimate for purposes of establishing a residential community that would be able to engage in screening mechanisms, while also promulgating community bylaws that would govern ongoing rules of conduct and use within the development?

As this chapter shows, such questions are being addressed across all societies, including in leading western liberal democracies. In such countries, the current discourse tends to focus on two distinct—maybe even contrasting—types of residential communities. The first type concerns cultural minorities, such as members of indigenous groups, which seek affirmative assistance from the state in validating their territorial congregation, such claims being grounded in the state's duty to rectify past wrongs (Kymlicka 1995). The second type deals with private residential communities, typically referred to as Common Interest Developments (CIDs), which demand a hands-off approach by government, grounding their prerogative to set up their rules of admission and ongoing governance of member conduct in the liberty of private property (McKenzie 1994).

While these strands of academic discourse are not foreign to Israeli reality, the case study of Israel presents unique features that illuminate distinctive perspectives on the role of territorial or residential communities within the nation-state. These traits, introduced briefly in the following paragraphs and explicated on throughout the chapter, may offer intriguing insights for the theoretical discourse and public-policy considerations pertaining to residential communities.

First, in sharp contrast to other OECD countries, 93 % of the land in Israel is owned by the state or one of its agencies (Holzman-Gazit 2007). Statutorily defined as "Israel Lands," and comprising about 4,820,500 acres (Israel Land Authority

2013), such lands are subject to specific legal and regulatory rules, and are jointly managed by the ILA. It should be noted that the proportion of Israel Lands changes across regions, and is relatively smaller in high-demand areas, and particularly in the Tel Aviv metropolitan area, where the rate of private ownership is slightly over 50 % (Bank of Israel 2014). In addition, in 2009, the Israeli government implemented the recommendations of a public committee to enable the transfer of ownership in housing units in the urban sector, where long-term leasehold contracts have been capitalized (Hananel 2012). This in mind, the overwhelming majority of land is still government-owned.

The initial allocation of Israel Lands for residential development is done through public bids or other governmental measures that grant rights to developers, associations, or individuals. In so doing, the state may also control financial aspects of the development. In 2015, the government, seeking to meet the increasing demand for housing in view of Israel's rapid population growth, and to consequently constrain the steep increase in housing prices, announced that public bids for land would henceforth follow primarily a "Price to the Dweller" (*me-chir la-mish'taken*) model. Under this model, the state heavily subsidizes the market price of the land and awards the bid to the developer that undertakes to sell the housing units, under a predefined layout, to the end-consumers at the lowest price (Government of Israel 2015). This means that the state not only controls the supply of land for development, but also substantially impacts the price at which the housing units would be sold to eligible homebuyers. Therefore, whenever the state facilitates the allocation of land to a specific community or sector within Israeli society, and further aids in subsidizing its housing costs, it provides significant tailwind for such a sub-national group.

Second, there is a long pedigree of active support for certain types of residential communities by the State of Israel—and prior to 1948, by the leading Zionist institutions operating in Ottoman-ruled and later British-ruled Palestine, such as the General Trade Union of Hebrew Workers (*histadrut ha-ovdim*), the Jewish National Fund (JNF), and the Jewish Agency. The general effort by such institutions to purchase land, in order to promote the Jewish aspiration for a national homeland, has often relied on an active collaboration with private settlement associations. This was primarily the case with respect to the various types of agricultural settlements, such as the *kibbutz* or the *moshav*, which were provided with land and capital resources by the Zionist organizations, with the settlers providing the labor resources and assuming responsibility for the organization and management of the community (Sofer and Applebaum 2006). Operating as cooperative associations, these agricultural settlements enjoyed wide deference by the Zionist institutions, and later by the state, in holding their member selection procedures and crafting their internal governance norms. Moreover, although the economic and organizational blueprint of a settlement such as the kibbutz—originally a full-fledged socialist commune with no private property—never represented the lifestyle of most (urbanite) Israelis, these private agricultural associations were revered for realizing the ultimate Zionist ideal (Near 2008). Enjoying superior political clout at least up until the 1970s, these groups might have constituted a nominal minority of the

Jewish population, but were far from being considered as insulated cultural minorities. The cooperative associations of kibbutzim and moshavim were viewed, rather, as ideological elites.

These agricultural communities were not the only kind of groups to gain institutional support. Having recognized from early on the importance of urban settlements, the Zionist associations also supported the construction of urban residential developments designated to members of trade unions. Since the early 1930s, these residents' groups were able to formally organize as private housing cooperatives. The Zionist organizations gave a long-term lease on the land to the housing cooperative, which then granted long-term subleases in the housing units to its members. The housing cooperative held a member selection process, one that also applied to subsequent transfers of the sublease, although in practice, the selection procedures tended to be more lenient than in agricultural settlements (Rabinowitz 2003). The organizational structure of these urban cooperative associations resembled, therefore, the housing cooperatives that became popular in New York City in the early twentieth century (Hansmann 1991). But the explicit initial support by the Zionist organizations went further in affirmatively validating these private communities.

Third, the societal makeup of contemporary Israel is much more heterogeneous—ethnically, culturally, and ideologically—than it was during the days of the pre-independence Hebrew settlement (*yishuv*) and the first few decades of Israel. This is due to a large number of factors, including post-independence immigration waves, diverging birth rates across population groups, ideological turnovers, and economic developments (Mautner 2011). As of the end of 2015, about 75 % of Israel's 8.5 million residents were Jewish, 20 % Arab (most of them Muslim, with other notable sub-groups including Arab-Christian and Druze), and 5 % identified as "other"[1] (Central Bureau of Statistics 2015a). Within the Jewish population, the number of Israelis of Ashkenazi and Mizrahi descent can be divided roughly equally. As far as religiosity is concerned, about 10 % of Jews identify themselves as ultra-orthodox, 10 % as national-religious or orthodox, 36 % as "traditional," and 44 % as secular (Central Bureau of Statistics 2015b).[2] Most Israelis live in cities or smaller urban/suburban settlements, with less than 10 % living in rural settlements, such as kibbutzim or moshavim (Central Bureau of Statistics 2015c). These figures reveal, however, only part of the complexity of current Israeli society, which is further divided along economic, political, and other lines.

The potential contentions among different societal groups, alongside the broader tendency toward fragmentation, thus challenge the multiculturalism discourse that

[1]The group of "others" refers mostly to persons who were eligible to immigrate to Israel under the Israeli Law of Return as family members of Jewish immigrants, but who are not themselves recognized as Jewish. The Israeli Registry of Population regularly does not classify these residents as members of another faith.

[2]The lines between these religiosity-based groups are obviously not clear-cut, with further internal divisions existing among each one of these groups based on ethnic and theological lines (Deshen 2005; Don-Yihya 2005).

is typical of western liberal democracies. This scholarly discourse assumes the existence of a solid majority of "mainstream" society, whose values generally conform to the state's fundamental principles, alongside the existence of certain minority groups that claim autonomy or affirmative validation (Nielsen 2013). Israel's growing heterogeneity undermines, however, this majority-minority assumption (Kimmerling 2004). In a public speech in 2015, Israeli President Reuven Rivlin spoke openly about the fact that while in the past Israel consisted of a large secular Zionist majority alongside various minority groups, contemporary Israel consists of four "tribes" of roughly equal size: ultra-orthodox, national-religious, secular Jews, and Arabs (Rivlin 2015). One could engage further in internal divisions that have profound effects on Israeli society, including spatial ones. Thus, over the past few years, there is much popular discourse about the "State of Tel Aviv," portrayed as a liberal, secular, and economically-powerful bastion, which is gradually disentangling itself from Israel's outer areas (Soffer and Bystrov 2006; Amit 2016).

The growing heterogeneity of Israeli society carries obvious implications for the construction of residential communities and the demand of sub-national groups to be affirmatively validated. While not all segments of Israeli society explicitly seek to form their own territorial enclaves, questions of group identity constantly come up in the context of setting rules of eligibility and ongoing governance within residential developments, or of following certain group practices. As a matter of law and public policy, these issues require the legislative, executive, and judicial branches to address numerous issues, such as the allocation of government-owned land, the legal mandate for exclusionary group practices, the essence of urban and rural planning, and so forth.

As this chapter shows, the dilemma of residential communities in a heterogeneous society has highly dynamic features not only across regions/cities, but also within a given locality. One example concerns the city of Beit Shemesh, located about 15 miles west of Jerusalem. Starting as a small "development town" for new immigrants in the 1950s, Beit Shemesh absorbed immigrants from North America, the former Soviet Union, and Ethiopia as of the late 1980s, but began to grow dramatically as of the mid-1990s, when entire new projects were built for ultra-orthodox communities, which had to look for housing solutions outside Jerusalem (Steinberg 2015). Currently divided more or less equally among the ultra-orthodox on the one hand, and all other population groups on the other, the city is a hotbed for fiery sectorial conflicts, one of them having to do with the rapid growth of state-subsidized neighborhoods for the ultra-orthodox.

Fourth, the challenge of heterogeneity manifests itself not only in the allocation of land or in the admission or governance rules for the residential developments themselves. This challenge applies with equal force to inter-group struggles for control over the city's public spaces and its public sphere more generally. Here too, Beit Shemesh has been in the eye of the storm, with ongoing contentions between the ultra-orthodox and the city's other groups. These disputes deal, for example, with the sale of non-kosher meat products in shops across the city, separation between men and women on public transportation, or chastity dress codes and

gender separation on public sidewalks within the ultra-orthodox neighborhoods (Steinberg 2015). Some of these disputes have ended up in court.[3] These controversies gained national attention during the 2013 mayoral two-man-race, in which the ultra-orthodox candidate eventually won the election by a slim majority, following fraud allegations and a court-ordered new ballot (Yaacov 2014). Other religion-based struggles, dealing with opening businesses such as convenience stores during Shabbat and religious holidays, or with operating public transportation during these dates, are prevalent throughout Israel, including in Tel Aviv (Blank 2012).

Inter-group disputes about the city's public sphere, and their essential ties with the question of residential communities, are not unique to intra-Jewish religion-based issues. Such tensions are prominent also in Jewish-Arab 'mixed cities,' i.e., cities in which there is a significant representation of both populations, with the Central Bureau of Statistics placing the threshold at 10 %. These issues run from the daily language used and curricular choices made in the public school system to the identity-building function of street naming (Azaryahu 2012; Dvir 2012). More broadly, the production of public space, and the public sphere in general, by the government—whether national or local—may play a key role in facilitating or, rather, hindering the standing and viability of residential communities (Yiftachel and Yacobi 2003). The growing heterogeneity and dynamic process of inward migration of Jews to hitherto Arab-dominated cities, and vice versa, introduce yet more challenges for current law and policy (Sade 2015).

Building on these general observations, this chapter proceeds as follows: Sect. 2 examines three types of scenarios that deal with residential communities and urban/suburban governance. The first issue deals with the initial designation of entire cities or neighborhoods, established on Israel Lands, to a defined group or community. The second theme deals with the legal validation of admission and governance mechanisms employed by private residential associations in urban/suburban settlements located on Israel Lands. The third matter concerns group admission and governance mechanisms for real estate developments constructed on privately-owned lands. The order of discussion generally moves, therefore, from the macro-level to the micro-level, and from cases in which a certain group seeks the state's affirmative validation and special treatment, to settings in which the private group merely asks for a "hands-off" approach by the government.

Section 3 offers a normative analysis of the broader dilemmas that frame the discussion of residential communities in a heterogeneous society such as Israel. It offers some tentative principles for the future development of law and public policy.

[3]H.C.J. 953/01 Solodkin v. City of Beit Shemesh (2004) IsrSC 58(5) 595 (establishing constitutional parameters for a local government's decision whether to prevent the sale of non-kosher meat within its boundaries, based in general on the demographic features of the specific locality and in particular on its level of religious-based homogeneity); H.C.J. 746/07 Ragen v. Ministry of Transportation (2011) IsrSC 64(2) 530 (forbidding the religion-based gender separation on buses and other forms of public transportation, while leaving the door open for voluntary private arrangements).

These insights may also prove instrumental for the study of residential communities in other countries—such as in Europe—that may likely face substantial challenges in adjusting their built environments to societal changes.

2 Residential Communities in Context: Between Public and Private

2.1 Allocation of Public Lands to Designated Groups

Over the past few decades, the voluminous literature on multiculturalism in the liberal state has been dealing extensively with the claimed right of societal groups or communities to lead their distinctive lives, and the respective duty of the state to support such demands (Kymlicka 1995; Raz 1995; Shachar 2001). One of the main strands in the literature is anchored in the debate over the "right to difference," and whether the state should move beyond the dormant acceptance of different values, ideologies, and lifestyles of various sub-national groups, to actively promote diversity to expand the "range of imagined life experiences for the members of a society's core groups" (Alexander 2001). This approach has had its fair number of critics. Some have claimed that the "right to difference" discourse does nothing but entrench segregation and perpetuate discrimination against members of vulnerable groups (Ford 2005). Others argue more broadly against the alleged failures of state-sponsored multiculturalism (Joppke 1999). One particular point of contention deals with illiberal groups within a liberal state (Alexander 2002).

Territoriality and geography play a dominant role in this debate (Mitchell 2004). Calls to validate the distinctive lifestyles of indigenous groups and other cultural minorities often go beyond the state's general duty to validate their community practices—requiring the allocation of a specific territory within which the community can exercise its distinctiveness. In the context of indigenous groups in countries such as the United States, Canada, Australia, and New Zealand, these arguments have relied mainly on redressing historic injustices that were inflicted on such groups, and restoring ancestral lands these groups had traditionally occupied (Gover 2006; McHugh 2004; McNeil 2004; Waldron 2002). The case for restoring or otherwise designating lands for members of indigenous groups has also gained currency in the international arena. The 2007 U.N. Declaration of the Rights of Indigenous Peoples is one such milestone.[4] Other supranational instruments have also played a role in placing the interests of indigenous groups, as a specific subset of cultural minorities, within the corpus of international human rights law. Thus, for example, the Inter-American Court of Human Rights has issued a number of decisions, based on the right to property in the American Convention on Human

[4]United Nations Declaration on the Rights of Indigenous Peoples. U.N. doc. a/res/61/295 (13 Sep 2007). http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. Accessed 13 Jan 2016.

Rights,[5] ordering member states to restore ancestral lands to indigenous communities (Lehavi 2016). For such groups, territorial exclusivity is viewed as a matter of both historic justice and cultural survival.

As the following paragraphs show, the development of Israeli law and policy on the right of cultural minorities and other sub-national groups to the designation of government-owned land has been quite haphazard, touching base occasionally with the multiculturalism discourse.

2.1.1 Bedouin Cities/Neighborhoods

The first instance in which the Israeli Supreme Court explicitly reviewed the designation of government-owned land to a predefined sub-national group was in the 1989 case of *Avitan v. Israel Land Administration*.[6] As of the late 1960s, the state had established planned towns and cities designated solely to members of the Bedouin tribes of the Negev in southern Israel (Yahel 2006). The Bedouins, consisting historically of nomadic tribes that have moved across different regions in the Middle East, have long been in dispute with the State of Israel about the nature of their entitlements in different parts of the Negev, a conflict that goes back to Ottoman-ruled and British-ruled Palestine. This property conflict has had clear political implications, and as such, stirs much controversy in the public and academic discourse (Frantzman et al. 2012). Accordingly, those who critique the state's policy toward the Bedouins suggest that establishing the planned towns, while not legitimizing dozens of de facto settlements spread throughout the Negev, serves the state in unilaterally deciding the dispute (Yiftachel et al. 2012).

The *Avitan* case raised, however, a different kind of contention. The petitioner, a Jewish Israeli living in the southern city of Beer Sheva, applied to the ILA to lease a tract of land in the newly planned town of Segev Shalom, but was denied. The ILA reasoned that the town was intended for Bedouins only. Avitan argued that this government policy amounts to illegal discrimination, especially in view of the highly beneficial long-lease terms offered by the ILA.

[5]Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A. S. T.S. No. 36, 1144 U.N.T.S. 143. http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf. Accessed 13 Jan 2016.

[6]H.C.J. 528/88 Avitan v. Israel Land Administration (1989) IsrSC 43(4) 297. It should be noted that a few earlier cases dealt with ethnic- or religious-based separation, such as the decision in the matter of H.C.J. 114/78 Burkan v. Minister of Finance (1979) IsrSC 32(2) 800 that upheld a governmental policy against Arabs settling within the Jewish quarter in the old city of Jerusalem. But the *Ka'adan* case had to go further than preserving or upsetting an isolated status-quo. It had to deal with the upfront designation of government land for an entire new settlement. It should also be noted that the name "Israel Land Administration" was changed to "Israel Land Authority" in 2010.

The Court upheld the governmental policy, reasoning that:

> It is a matter of the Bedouins who, for many years, have lived nomadic lives, and whose attempts to settle in permanent locations were unsuccessful, often involving violations of the law, until it came to be in the state's interest to assist them, and thereby also achieve important policy objectives. The way of life and lifestyle of nomads lacking permanent, organized settlements, with all that it entails, is what makes the Bedouins a distinct group that the respondents consider worthy of assistance and encouragement, and special, positively discriminating treatment, not the fact that they are Arabs.[7]

The Court then refers to the unique cultural traits and lifestyle of the Bedouins as requiring distinctive planning considerations. It also points to the intra-Bedouin divisions into extended families or factions, as further demonstrating the particular sensitivities of planning the town's layout to minimize strife and, accordingly, as legitimizing the exclusion of non-Bedouins.[8]

The question of the legal validity of allocating government-owned land for specific groups rose again in two high-profile cases in 2000, in which the Court came to different conclusions. The first case dealt with the designation of an entire city/town or neighborhood for Jews (or Arabs); the second, with the designation of Israel Lands for an ultra-orthodox settlement. These two settings will be discussed separately, in this order, in the following subsections.

2.1.2 Jewish or Arab Cities/Neighborhoods

In March 2000, the Court decided the *Ka'adan v. Israel Land Administration* case.[9] The case dealt with the allocation by the ILA of land in the Eron valley region to the Jewish Agency, which, collaborating with a newly-established cooperative association, set up the settlement of Katzir (about 45 miles northeast of Tel Aviv). The land was not allocated through a bid, but was awarded, rather, to those admitted as members in the cooperative association. The association, on its part, granted memberships to Jews only, with the Jewish Agency citing its historic objective, since its establishment as a corporation in Britain in 1901, to settle Jews in the land of Israel.

The Court invalidated this allocation. Citing its previous decision in *Avitan*, the court held that the separate treatment of population groups cannot be justified in the case at hand. The Court noted, first, that there has been no parallel "request for the establishment of an exclusively Arab communal settlement,"[10] thus having a clear discriminatory effect. Second, the Court suggested:

> [T]here are no characteristics distinguishing those Jews seeking to build their homes in a communal settlement through the Katzir Cooperative Association that would justify the

[7]Ibid., p. 304.

[8]Ibid., p. 305.

[9]H.C.J. 6698/95 Ka'adan v. Israel Land Administration (2000) IsrSC 54(1) 258.

[10]Ibid., pp. 279–280.

> state allocating land exclusively for the Jewish settlement… In any event, the residents of the settlement are by no means a 'distinct group.' Quite the opposite is true: Any Jew in Israel, as one of many residents, who desires to pursue a communal rural life, is apparently eligible for acceptance to the Cooperative Association. As such, the Association can be said to serve the vast majority of the Israeli public. No defining features characterize the residents of the settlement, with the exception of their nationality, which, in the circumstances before us, is a discriminatory criterion.[11]

The *Ka'adan* decision has therefore ruled that Jews do not constitute, as such, a distinctive group so as to legitimize the designated allocation of government-owned land. The Court further held that the parallel establishment of Arab-only settlements would not have cured such a wrongful distinction. The decision has naturally sparked much public and academic debate, as it touches on the core questions of the identity of Israel, defined in its basic laws as "a Jewish and Democratic State" (Gavison 2001; Zilbershatz 2001). The question of spatial segregation between Jews and Arabs in Israel remains, however, a complex issue, one that is impacted both by formal policy and by practical modes of conduct on the part of public and private actors. Most fundamentally, current disputes between Jews and Arabs in Israel about land rights, spatial segregation, and resource allocation should always be evaluated against the background of the Arab-Israeli conflict, and the Palestinian-Israeli conflict in particular. This has been the case since the early days of the Zionist movement (Katz 1994; Tuten 2005), and it continues to be the case nowadays (Holzman-Gazit 2007). The cultural and ethnic dimensions of such land-based disputes cannot be separated from the key dimension of the lingering national conflict.

Two recent developments are noteworthy in this context. First, exclusionary practices may also take place when Israel Lands are initially auctioned in a public bid (unlike the *Ka'adan* case in which the land was allocated without a bid), but the winner then seeks to market the housing units to members of a specific group or sector. This is especially the case with private "Associations for Self-Construction" (*amutut le-bniya atzmit*), referring originally to bottom-up organizations of individuals, who compete jointly in the bid with the purpose of then engaging in the not-for-profit self-development of the housing units. Such associations are entitled to enter ILA bids and enjoy tax and other benefits as compared with regular developers. In some cases, however, professional companies enter the picture by organizing such groups and managing the bidding process and then the construction, for a profit, while trying to preserve the beneficial status of such associations. In such cases, these companies may add members to the group—which are essentially regular homebuyers–after winning the bid. The risk of potential abuse has led to some regulation of such associations (Ministry of Construction and Housing 2004), but their presence in ILA bids is overall on the rise. This, in turn, has led to open disputes about the potential role of such associations in promoting residential segregation between Jews and Arabs.

[11]Ibid., p. 280.

One such case came before the District Court in Tel Aviv in 2009.[12] *Be-Emuna*—already presented in Sect. 1 as a developer catering to the Jewish national-religious sector—won an ILA bid to develop a 20-unit residential building in the Ag'ami neighborhood in Jaffa (formally part of Tel Aviv), which is traditionally inhabited by Arabs. Local Arab residents petitioned to the court, arguing that the marketing of the housing units to members of the Jewish national-religious sector served mostly to exclude Arabs, and that the land should have served, rather, to solve the growing housing needs of the local Arab population in the neighborhood. The District Court judge denied the petition, reasoning that the *Be-Emuna* won an open bid, and noting that "I find no wrongdoing in the fact that individuals organize to live in proximity to one another, so as to engage in their favored way of life."[13] The judge further criticized the petitioners for their apparent double standard in seeking to secure the land for an Arab-only development.

The Supreme Court denied the appeal by the petitioners because the matter had already become moot, but noted in *obiter dictum* that the case otherwise raised significant issues of equality and discrimination in the allocation of government land to groups with distinctive cultural or religious traits. It further hinted that members of the Jewish national-religious sector might not count as a cultural minority, especially in the urban context, but did not rule on the merits.[14]

Shortly after the case, the ILA issued new guidelines, applying equally to professional developers and Associations for Self-Construction, which forbid ILA bid winners from engaging in "wrongful discrimination" in marketing the housing units.[15] This, however, did not end the controversy, with petitioners in subsequent cases arguing that ILA bid winners continue to engage in explicit and implicit forms of discrimination. In one such case, dealing with residential developments in the otherwise 'mixed city' of Acre, Arab petitioners argued that the Associations for Self-Construction that won the bids marketed the units to national-religious Jews only. The District Court in Haifa rejected the appeal, finding that the petitioners did not establish a concrete finding of an Arab or a secular Jew denied admission to the projects.[16] One can assume that such actual controversies will continue to erupt in the Jewish-Arab context.

Another recent development may shed new light on the potential gap between the Supreme Court's ruling in *Ka'adan* and the interface between formal public policy and spatial practices in setting up cities/towns or neighborhoods designated for Jews or Arabs. At the end of 2014, the National Council for Planning and Construction, Israel's superior planning agency, approved a land use plan (National

[12]A.P. (Tel Aviv) 2002/09 Sava v. Israel Land Administration (2010) (unpublished).

[13]Ibid.

[14]A.A. 1789/10 Sava v. Israel Land Administration (2010) IsrSC (unpublished).

[15]Office of the Attorney General, letter dated July 1, 2009. http://www.acri.org.il/pdf/beemuna010709.pdf. Accessed 13 Jan 2016 (Hebrew).

[16]A.P. (Haifa) 25573-03-12 Association for Civil Rights in Israel v. Israel Land Administration (2012) (unpublished).

Plan no. 44) to establish a new city on government-owned land in the Western Galilee region. The Council's decision explicitly stipulates that the plan was prepared by the "Ministry of Construction and Housing and the Israel Lands Authority to provide housing solutions, featuring urban high-level quality of life, for the non-Jewish population in northern Israel for about 40,000 persons, on lands that are mostly owned by the state."[17]

This planning decision was considered as setting a precedent, establishing the first Arab city since 1948 (except for the Bedouin towns discussed above). As such, it enjoyed general support from members of the Arab population in view of the rapidly growing demand for housing, especially among the younger middle class (Busso 2014). In addition, in early 2016, the National Council for Planning and Construction recommended to establish a new "Community Village" (discussed in Sect. 2.2 below) designated for the Druze, a population group that is ethnically Arab but which follows a distinct religion (Hudi 2016). It remains, however, to be seen whether the designation of the new Arab city and the Druze Community Village will be formalized in ILA bids or other modes of land allocation, and whether their establishment will trigger any sort of reconsideration of the *Ka'adan* ruling.

2.1.3 Ultra-Orthodox Cities/Neighborhoods

About two months after its decision in the *Ka'adan* case, the Supreme Court handed down its decision in May 2000 in yet another matter that dealt with the legal legitimacy of an earmarked allocation of Israel Lands for an entire new settlement. This time, the nonprofit organization, *Am Hofshi* (literally meaning, "a free nation"), which advocates the cause of secular Israelis, petitioned to the Court against the designation of a new city, Elad, located about 15 miles east of Tel Aviv, to the ultra-orthodox sector.[18] The petition also attacked the preferred financial terms awarded to homebuyers in the city, including a state-subsidized loan that was to have been converted to a grant. These financial benefits were not offered by the ILA or the Ministry of Construction and Housing to homebuyers in adjacent cities intended for the general public.

The Supreme Court struck down the beneficial financial measures for homebuyers in the city of Elad, viewing such differentiation as amounting to unjustified preferential treatment. At the same time, the Court upheld the designation of the new city to the ultra-orthodox sector.

Interestingly, when the ILA and the Ministry of Construction and Housing issued the bids, they attempted to somewhat blur the specific designation of the housing units to the ultra-orthodox public, by formally defining the city as intended

[17]National Council of Planning and Construction, Minutes of meeting no. 576, dated Nov. 4, 2014, p. 15 (Hebrew).

[18]H.C.J. 4906/98 Am Hofshi Association for Freedom of Religion, Conscience, Education and Culture v. Ministry of Construction and Housing (2000) IsrSC 54(2)503.

for a population "with a religious character." The Court held that the use of this vague and broad term is merely a guise for the actual purpose of designating the city to the ultra-orthodox, but it was the true intent of the government that actually made it constitutionally legitimate.[19] The court reasoned that:

> The allocation of land to a separate settlement for the ultra-orthodox population, so as to enable it to sustain and preserve its way of life, is permissible, and in itself is not wrongful. The possibility of allocating land resources for construction to members of one population group, whose needs justify separate construction, has already been recognized by this Court in regard to another population–the Bedouin population.
>
> Recognizing the possibility of allocating land and allowing separate housing for population groups with unique characteristics, according to their needs and aspirations, is integrated with the concept that recognizes the rights of minority communities, who so desire, to maintain their distinctiveness; it is a concept that represents an approach that is currently prevalent among jurists, philosophers, and education and social professionals, according to which the individual is also entitled–among his other rights–to materialize his affiliation with a community and its special culture as part of his right to personal autonomy.[20]

The Court's approach builds, therefore, on the type of multiculturalism discourse that advocates the right of cultural minorities to receive affirmative assistance by the state, including through the allocation or reinstatement of land. In so doing, the Court also accepts the explicit or implicit assumptions, by which the group at hand is a "minority" that can be contrasted with a prevailing "majority" of mainstream society, and that the minority group's culture and way of life would be endangered if it is unable to seclude itself territorially.

I suggest, however, that the spatial and societal dimensions of ultra-orthodox residential communities need to be crafted based on the dynamic processes that typify this population sector, and Israeli society more broadly—as already noted in Sect. 1. This means, among other things, that a static "majority-minority" discourse is not necessarily representative of the current features, preferences, and constraints of housing choices for the ultra-orthodox or other sectors. The framework for analyzing such residential communities should be based, rather, on the overall view of Israel as a truly heterogeneous society, one that no longer has a clear cultural or ideological core or mainstream, and that must constantly negotiate the potential benefits and harms of sub-national homogeneity or heterogeneity within a specific city or neighborhood.

Accordingly, the public policy on the allocation of government-owned land and the establishment of cities or neighborhoods must be attuned, on the one hand, to the bottom-up preference of persons for certain types of housing and local public amenities, as observed by Charles Tiebout in his model of a "market" for local governments and of "voting with one's feet" (Tiebout 1956). On the other hand, public decision-makers (legislatures, administrative agencies, and courts) must also make certain top-down policy choices in view of the multifaceted forms of externalities or conflicts that exist both within residential communities and across them.

[19]Ibid., p. 508.

[20]Ibid., pp. 508–509.

Consider, first, that the ultra-orthodox population is the fastest-growing sector in Israeli society due to particularly high birth rates. An ultra-orthodox family has on average 6.5 children, over twice the rate for most other population sectors in Israel (Hleihel 2011). With ultra-orthodox couples getting married at a relatively young age (typically between 18 and 21), the relative demand for new housing far exceeds any other sector in Israeli society. In the current general state of undersupply of new housing and rising real estate prices, young ultra-orthodox couples face particularly high pressures (Tocker and Nachum-Halevi 2011). Moreover, because most ultra-orthodox families are classified as poor or lower middle-class households based on their level of income (due to multiple reasons that cannot be elaborated here), ultra-orthodox households search mostly for cheap housing. This may create a conflict between the wish of such young couples to reside in traditionally ultra-orthodox neighborhoods—preferably in proximity to their own parents or within their particular denomination or 'rabbinical court'—and the lack of available options there, which drives these households to search for cheap housing elsewhere, including in currently non-orthodox neighborhoods or cities (Shechter 2014).

The migration of ultra-orthodox families into non-religious areas generates its own set of problems. Conflicts between ultra-orthodox and other residents may take place not only within a single condominium—for example, over the use of electric-operated amenities such as elevators during Shabbat and religious holidays—but these may also pour over into the city's public spaces.

For example, ultra-orthodox households have demand for certain types of public amenities that are much less typical in neighborhoods dominated by secular or even traditional Jews. Ultra-orthodox communities require an extensive amount of ultra-orthodox nurseries and schools, synagogues, and ritual baths (*mikvaot*). In a world of scarce resources, this means that other types of public amenities, such as parks, swimming pools, or music centers, will be undersupplied. Moreover, the struggle over the city's public space—and the public sphere more generally—may also result from the ultra-orthodox objection to certain uses or practices that they deem offensive: display of non-kosher meat in butcheries or supermarkets, liberal dress codes, or the opening of businesses on Shabbat and holidays. Even if members of the ultra-orthodox group would not themselves use such amenities, the community's leaders may fear that the exposure of their members, and children in particular, to such public forms of secularism would have an adverse influence on the community's character. As mentioned above, the City of Beit Shemesh has been the focus of such open disputes (Steinberg 2015). This might make the option of separate neighborhoods *within* the same city less viable, because of the inevitable need to share some city-wide public spaces. Such conflicts may also erupt among different factions within the ultra-orthodox population, whether based on different degrees of religious rigidity (Yanovsky 2015) or on school segregation between Ashkenazi and Mizrahi factions (Shoshana 2013).

What all of this means is that the dilemma of whether to allocate government-owned land to establish ultra-orthodox cities or neighborhoods must go beyond the paradigms of cultural minorities in the modern nation-state. It must also address the dynamic features of inter-sector relations in a heterogeneous society,

and the balancing of both deontological and instrumentalist considerations on sub-national spatial homogeneity versus heterogeneity. These considerations include, among other things, the varying features of land use planning intended for different population groups (e.g., what kind of public spaces and amenities would be provided); the fear of concentrated pockets of poverty that might emerge in ultra-orthodox-only cities (Nachum-Helevi 2011); and questions of justice that come up when scarce government resources are distributed in an unequal manner. These various considerations may often run at cross-purposes.

One current example concerns the planned City of Harish, located on Israel Lands about 45 miles northeast of Tel Aviv. Originally designated for the ultra-orthodox sector, this new urban settlement generated much interest among members of other population groups. The latter protested against this sectorial favoritism, especially because ILA bids will have been designed according to the subsidized model of the "Price to the Dweller." In 2014, the National Council for Planning and Construction and the ILA responded to such petitions by opening up the new city to all sector groups and, accordingly, by resetting the city's expected growth to 60,000 inhabitants until the year 2020 and 120,000 inhabitants until 2025 (Tz'ion 2015). ILA bids are currently awarded to various contractors or Associations for Self-Construction, which may practically market the developments to different population groups, meaning that the City of Harish will likely have a significant representation of secular, national-religious, and ultra-orthodox.

The increasing demand for housing and the calls for distributive justice in allocating government land have therefore tilted current public policy toward developing Harish as a heterogeneous city, which may still include some sub-local enclaves, but not as an overwhelmingly homogenous one. At the same time, such heterogeneity may result in the future in the type of religion-based tensions that currently typify the City of Beit Shemesh. Time will tell what lessons the City of Harish will offer for the allocation of government-owned lands.

2.2 Deference to Admission and Governance Group Rules—Public Lands

This subsection moves to examine forms of settlement that are established on Israel Lands, but managed by private settlement associations that engage in extensive private ordering mechanisms. These group norms may address both admission of members and ongoing governance of the residential community. In other words, whereas the previous subsection dealt with cities or neighborhoods that are designated for specific population groups but are otherwise run through conventional forms of public governance, the form of settlement discussed in the following paragraphs adds a substantial layer of private governance. Some private ordering mechanisms were noted in Sect. 1 in the context of agricultural settlements, such as kibbutzim or moshavim, on the one hand, and urban developments, such as urban

cooperation associations, on the other. This subsection focuses on a more recent phenomenon: the "Community Village."

The Regional Council of Misgav, located in the Lower Galilee region in northern Israel, is made up of 35 settlements, six of which are Bedouin villages, and the other 29—"Community Villages" (*yishuvim ke-hilati'im*), formed mostly during the 1980s and 1990s, and currently accommodating each a few hundred households.[21] Community Villages in Misgav were established on Israel Lands. This is the result of a close collaboration between governmental and other agencies—including ILA and the Jewish Agency, which sought to promote Jewish presence in the formerly Arab-dominated region—and private organizations of founding residents. While a few of these Community Villages were initially founded to promote a very specific goal, such as the practice of transcendental meditation (the Village of Harari), most Community Villages have otherwise sought to promote the general idea of a small-scale suburban settlement, which would enjoy the tranquility of the countryside while being close enough to urban centers of employment. Unlike kibbutzim and moshavim, Community Villages do not engage in agriculture and have no formal cooperative features. At the same time, these settlements present themselves as intended to promote an active community life (Lehavi 2005).

Up until the early 2000s, admission to such Community Villages was practically governed by internal practices of admission, set up by each private settlement association, with no clear policy issued by the ILA or other governmental entities. The land was not auctioned through bids, but allocated, rather, to the association, who would then facilitate the leasing of the plot to those candidates admitted to the association. This self-generated process of member selection was soon met with resistance by candidates denied admission for what they deemed to be discriminatory or otherwise arbitrary grounds (Ziv and Tirosh 2010). Following a number of petitions submitted by such candidates, the ILA established in 2003, and then in 2007, a set of guidelines for admission, which would in turn enable the long-term lease of plots to admitted members without a public bid. This process was applied both to Community Villages and to "Expansion Neighborhoods" in kibbutzim and moshavim that basically followed the same tenure model of Community Villages and were accordingly marketed as lifestyle suburban/rural communities (Charney and Palgi 2013). Legal controversies continued, however, to erupt, leading the Israeli Parliament (Knesset) to act.

In 2011, the Knesset passed the bill, commonly known as the "Admission Committees Law."[22] According to this law, admission committees in Community Villages and Expansion Neighborhoods in kibbutzim or moshavim located in the Galilee and Negev regions, if comprising up to 400 households, would be entitled to reject a candidate based on a limited number of factors. These criteria include,

[21]For a list of the settlements and the main features of each one of them, see www.misgav.org.il. Accessed 13 Jan 2016 (Hebrew).

[22]Law to Amend the Cooperative Associations Ordinance (No. 8), 2011, S.H. 683 (Hebrew).

among other things, the applicant's "incompatibility to social life in the community" or "incongruity to the social-cultural texture of the Community Village." The determination of social "incompatibility" of a certain candidate should be based on an expert opinion.[23] A rejection could be based also on "distinctive characteristics of the Community Village or admission requirements, if these are set forth in the cooperative association's bylaws."[24] At the same time, the law prohibits the discrimination of candidates based on "race, religion, gender, nationality, disability, family status, age, parenthood, sexual orientation, country of origin, or political affiliation."[25] The admission committee is made up of five members, dominated by representatives of the Community Village, with a right of appeal to a tribunal whose members are nominated by the Minister of Construction and Housing.[26]

The new law created controversy, with its adversaries pointing to the overbroad leverage granted to admission committees in light of the vague criteria of "incompatibility" or "incongruity," and the process in which a candidate must be interviewed and evaluated by both the admission committee and external experts. The contention was that such screening mechanisms practically enable discrimination against Arabs—especially because the law applies to the Galilee and the Negev, two areas with a delicate Jewish/Arab demographic balance—and others types of candidates considered undesirable by the Community Village (Khoury 2011).

A petitioned submitted to the Supreme Court and argued before an extended panel of nine justices was denied by the majority opinion, holding that the case is unripe because the petitioners did not (yet) present evidence of actual cases suspected of wrongful discrimination.[27]

The dissenting justices pointed, in contrast, to the vagueness of the "incompatibility" and "incongruence" criteria as practically facilitating "irrelevant differentiation" among candidates.[28] The minority opinion reviewed the history of admission procedures prior to the legislation of the 2011 law, pointing to the lack of "thick" community features of the villages on the hand, and the underlying motivation of admission committees to screen "undesirable" candidates, and particularly Arabs, on the other. The dissenting judges further suggested that any substantive community features could be consolidated and expressed in the written bylaws of the association, requiring candidates to formally adhere to such terms, without having to undergo the often-arbitrary process of admission committees. This would have allowed villages to differentiate between transparent and genuine community features and constitutionally-invalid exclusion.[29] Alternatively, per the dissenting

[23]Ibid., s. 6C(c)(4).

[24]Ibid., s. 6C(a).

[25]Ibid., s. 6C(c).

[26]Ibid, s. 6B(b)–(f).

[27]H.C.J. 2311/11 Sabach v. Knesset (2014) (unpublished) (Grunis, CJ).

[28]Ibid. (Jubran, J., dissenting).

[29]Ibid., para. 80.

justices, to the extent that the village features formal forms of economic cooperation, screening mechanisms such as interviews must be purely professional.[30]

What lessons can be drawn from the case of Community Villages regarding the degree of deference that should be awarded to private residential communities located on Israel Lands? As with the case of the designation of entire cities or neighborhoods to specific population sectors, I argue that the "cultural minorities" discourse has limited applicability, if at all, as a theoretical and conceptual framework for identifying legitimate forms of exclusion on Israel Lands. The practices of Community Villages and their admission committees hardly point to groups that view themselves as secluded minorities, ones that share a certain predefined, not to say immutable, trait that isolates them from mainstream society. These groups seek, rather, to establish a lifestyle community that would provide them with what existing members subjectively view as a generally pleasant experience, one in which neighbors generate self-perceived positive externalities on one another. Such a wish is not in itself illegitimate, but it must have strict limits when such groups seek to gain control over scarce public resources.

Accordingly, I suggest that the minority opinion offers a more balanced approach for establishing privately-designed residential communities on government-owned land. To the extent that the founding group is able to articulate affirmative distinctive features of community life that may distinguish such a Community Village from other settlements, it should be able to do so in written bylaws that could withstand a more transparent review. Such a common denominator, defining the "community" aspect of the village—be it a certain type of group activity or a preference for some types of public amenities that are not commonly provided—must be based on a criterion that is not otherwise prohibited as a ground for rejecting applicants (such as religion, family status, or political affiliation). The judicial review of any affirmative core of "community"—if defined in the association's bylaws—must ensure that such features are not merely a guise for pushing out members of "undesirable" groups. In other words, the onus of proof should be reversed. It is the association that should withstand the initial burden of showing that the distinctive features of its bylaws are legitimate and reasonable, with candidates typically required only to adhere to such written terms and to meet objective terms such as financial capability. Screening processes that require social "compatibility" evaluation should be reserved for exceptional circumstances of truly cooperative settlements, such as a kibbutz or moshav.

But the limits on any such forms of exclusion in admission procedures, and ongoing rules of governance, should not stop there. In a heterogeneous society such as Israel, what truly matters is whether sub-state homogeneity is truly required to avoid hard, ongoing conflicts within the Community Village (or any other type of settlement, for that matter). It is not a matter of majority and minority. It is not a matter of the government morally preferring one form of life over the other. It is a question of whether, all things being considered, intra-local heterogeneity will result in constant clashes that cannot be reasonably settled because of conflicting

[30]Ibid., para. 81.

values and practices of different population groups. Such an analysis cannot settle for a general observation. It must examine whether, in the particular circumstances of a planned city, neighborhood, or Community Village, heterogeneity will inflict damage for all parties concerned. The presumption should be one of heterogeneity and promotion of tolerance, and it should not be easily refuted.

2.3 *Deference to Admission and Governance Group Rules—Private Lands*

Prior to studying the development of residential developments in Israel, which are located on privately-owned lands and that function as "private communities," it is essential to place this phenomenon in its broader global context. The rapid growth of Common Interest Developments (CIDs), governed by Residential Community Associations (RCAs) or Homeowner Associations (HOAs), is a well-documented phenomenon across the world (Atkinson and Blandy 2005). In western countries, this phenomenon typically refers to a residential development constructed on privately-owned land, in which the developer designs private governance mechanisms, including bylaws, which are then run and further developed by the CID's institutions: the association and its governing board (McKenzie 1994). Private communities have been proliferating also in transitional and developing countries, such as China (Pow 2007) and across Latin America (Thuillier 2005). Many of these private communities are physically gated. Such gated-ness is usually justified in considerations of personal security—i.e., protection against crime—or in the need to restrict access to the community's amenities, such as sports facilities or recreational spaces, which are financed by the CID's residents (Blakely and Snyder 1999; Low 2006). Gated communities may also have, however, an implicit or explicit purpose of social stratification. In China, for example, gated communities in quickly-developing megacities such as Shanghai are said to have been playing a role in drawing a moral distinction between the "urban" and "rural" that revolves around moral discourses on civilized modernity (Pow 2007).

In the United States, 63.4 million Americans currently live in over 323,000 CIDs. Planned unit developments (PUDs) and condominiums share almost equally in this burgeoning market.[31] As far as admission is concerned, most CIDs do not usually have strict formal screening procedures, with the exception of cooperative buildings (co-ops) in New York City, which have become (in)famous for their intrusive selection procedures (Hansmann 1991). The deference to such procedures

[31]The condominium legal design typically applies to apartment buildings, with detached housing projects usually organized as PUDs. The underlying organizational features of these two forms are quite similar (Lehavi 2015).

is grounded in the co-ops' unique legal and economic structure.[32] Condominiums in NYC and elsewhere are also witnessing some intensification of their screening procedures (Rosenblum 2014). Otherwise, socioeconomic screening may be done informally or simply through the price mechanism. Calls to view CIDs as "state actors" so as to apply public law standards to their exclusionary practices have so far remained unanswered (Kennedy 1995).

An intriguing case involving formal screening procedures, one whose conceptual framework may be applicable for designing law and policy for private communities in Israel and elsewhere, is the New Jersey court decision in *Mulligan v. Panther Valley Property Owners Association*.[33] A CID association voted to prohibit individuals registered as Tier-3 sex offenders under New Jersey's Megan's Law from residing in the CID. This decision was challenged as allegedly violating public policy, by infringing the constitutional rights of Tier-3 registrants, and by de facto deflecting such persons to neighborhoods that have no institutional exclusion mechanisms.

The court addressed the "reasonableness" of the CID's governing documents. It held that the question whether such provisions "make a large segment of the housing market unavailable" to such persons, or expose those who live in the "remaining corridor to the greater risk of harm than they might otherwise have had to confront," is largely empirical. Holding that the burden of proof lies with the plaintiff, who has established no such record, the court declined to intervene.[34]

The normative evaluation by the court of the exclusionary norm for admission is one which may be conceptualized as "quantity makes quality." The screening of a single sex-offender is not considered legally wrong per se. But if too many private communities embrace the same norm, this may generate an excessive burden both for such persons (who need to live somewhere) and for neighborhoods where no explicit screening mechanisms are intact. Such an analysis might apply to other types of screening criteria that occupy a normative middle ground. Accordingly, the legitimacy of admission procedures in private communities should be evaluated by looking not only at the specific development, but also at the potential aggregate effects of such norms.

A similar type of analysis can be made in regard to limits or restrictions imposed by CIDs on certain types of habits or activities, which may have an indirect effect of screening applicants, or even of pushing out persons already living in the CID.

[32]In a co-op building, the cooperative association is the owner of the building and underlying land. The members are shareholders in the association, and are entitled by virtue of their shareholding to exclusively occupy a unit in the building for a long period of time (typically, 99 years). Most co-ops also borrow money secured by a blanket mortgage on the real property, meaning that each member must make periodic payments for her ratable share of the collective mortgage. The co-op board thus has a strong incentive to screen prospective members in order to ensure that members carry their share of the collective mortgage (Schill et al. 2007).

[33]766 A.2d 1186 (N.J. Super. Ct. App. Div. 2001).

[34]Ibid., pp. 305–307.

In *Villa de Las Palmas Homeowners Association v. Terifaj*,[35] the California Supreme Court upheld a majority-approved amendment to a condominium's governing documents, which established a no-pet restriction, applicable also to current homeowners/tenants. The court viewed such a use limit as "crucial to the stable, planned environment of any shared ownership arrangement." It read the California Civil Code as settling for simple majority for such amendments, reasoning that this is required to prevent a "small number of holdouts from blocking changes regarded by the majority to be necessary to adapt to changing circumstances and thereby permit the community to retain its vitality over time."[36]

Similar disputes have arisen in the context of amendments banning smoking in CIDs, which also have a retrospective effect on current residents (Toy 2011). The need to legitimize majority-based rules may be generally justified by facilitating collective action and mitigating the perils of deadlocks and holdout behavior. But such rules, which (re)define the substantive features of the residential community, have the effect of pushing out applicants or residents whose habits do not conform. Because smoking or possession of pets is not prohibited by law, and since smokers and pet owners have to live somewhere, the normative evaluation of exclusionary rules must consider their aggregate effects on such persons on the one hand, and non-CID developments on the other.

It is now time to study such private communities in the Israeli context, and to evaluate the legitimacy of their exclusionary norms, based on the distinctive features of Israeli society. The emergence of American-style CIDs—offering leisure/recreational amenities, a self-perceived sense of luxury lifestyle, and physical enclosure alongside detailed governance mechanisms—is a relatively recent phenomenon. It began to emerge mostly in the 1990s, relying on general social trends of privatization, neoliberalism, and legitimacy for explicit expressions of wealth. Many of the leisure communities located along the Mediterranean shore, or upscale urban developments, were structured as gated communities and marketed as enclaves of luxury (Rosen and Razin 2010).

One example is Savioney Ramat Aviv, an upscale enclaved development in Tel Aviv. A key-shaped brochure, distributed in 2004, was titled: "Private" and "Savoyney Ramat Aviv. Tel Aviv's Private Neighborhood." It further read: "This is what life in the private neighborhood of Savioney Ramat Aviv will look like… It will feature a spa club, fitness center, swimming pool, and a green park, serving only the project's residents." Similar language was used for marketing other projects in the 1990s and 2000s, promoting ideas of privacy and exclusivity (Lehavi 2005).

During that time, a number of real estate entrepreneurs also started to organize and market condominium developments as designated for members of particular professions, such as high-tech and capital market professionals, pilots, or doctors (Ben-Israel 2009; Hudi 2013). Over the long run, however, it seems that none of

[35]Villa De Las Palmas Homeowners Association v Terifaj, 90 P.3d 1223 (Cal. 2004).

[36]Ibid., pp. 1228–1229.

these projects embraced formal screening procedures to verify such affiliation. The identification of a certain condominium tower as "The Pilots' Tower," for example, served mostly as a marketing tool, harnessing the prestige of a certain profession to lure potential homebuyers. At the same time, developers might engage in informal screening procedures, ones that remain under the radar of legal scrutiny. At the end of the day, market price mechanisms have proven most dominant in sorting potential homebuyers.

A different private community, which stirred much public and legal controversy when it was established in the late 1990s, is the Andromeda Hill project, located in the heart of Jaffa, on land leased from the Greek-Orthodox Patriarchy, and overlooking the Mediterranean coast. Originally marketed mostly to wealthy foreign residents as a lifestyle community, the developer advertised the project as "a city within a city, surrounded by a wall and secured 24 h a day" (Lehavi 2005). With the project disentangling itself from its immediate surroundings, which are inhabited by Arabs of lower socioeconomic status, critics viewed the project as embedding exclusionary gentrification while also featuring ethnic-based seclusion (Monterescu and Fabian 2003). In a 2007 decision, the Magistrate Court in Tel Aviv ordered the developer to implement the project's land use plan by granting public access to the development's open spaces through two gates that would be opened daily between 08:00 and 22:00, following a security check.[37] Practically, however, the presence of such gates deters most neighbors and walkers-by from exercising their right of access, preserving Andromeda Hill as essentially a gated community.

Urban private communities have not become, however, the new norm in Israel's cities, including in the affluent parts of the Tel Aviv metropolitan area. Most luxury developments comprise single condominium towers (or two interconnected ones) and provide club amenities such as indoor pools or fitness centers, but do not purport to construct a distinctive substance of "community" beyond a general sense of luxury. Accordingly, the overwhelming majority of such developments do not feature formal admission procedures. The developer may engage in informal modes of sorting, but these do not last over time, as there are no organizational limits on resale or on renting out units. The composition of tenants is thus governed mostly by market mechanisms, meaning that whereas general socioeconomic attributes play a crucial role, other dividing lines take a backseat. Moreover, such luxury condominiums have not (yet) embraced use restrictions such as on pet possession or smoking in the housing units, as discussed above in the context of the United States. This is, of course, not to say that disputes do not arise in such condominiums over common amenities or other governance issues, but these conflicts have to do mostly with financial matters and general norms of orderly behavior (Groissman 2011), and less with principled struggles over distinctive community features based on religion, ideology, etc.

[37]C.M. (Tel Aviv) 200681/04 Jaffa for Human Rights Association v. Andromeda Hill Management Company (2007) (unpublished).

Two lessons can be drawn from the study of current urban private communities in Israel for the future design of law and policy on residential communities established on private lands.

First, the presence of self-perceived urban private communities tends to be sporadic and limited in scope. To start with, the overall amount of privately-owned land in Israel is limited (less than 7 %). Moreover, urban private communities largely remain inaccessible to homebuyers outside of the luxury market. This is due largely to the high costs of maintenance, including payment of insurance premiums for tort liability in common amenities, which make private communities a mixed blessing for middle-class homeowners (Nachum-Halevi 2010).

Therefore, to the extent that "quantity makes quality" in normatively evaluating certain types of exclusionary practices and norms of residential communities, it seems that urban private communities are still far from reaching a critical mass that should raise grave concerns about multifaceted social stratification. Unlike the case of residential communities on publicly-owned lands, urban private communities do not seem to explicitly engage in drawing boundaries along racial, ethnic, religious or other grounds that cut through society's different sectors. True, economic disparities may indirectly run along such lines in a society in which economic power is unequally distributed across different sectors. But to the extent that such a phenomenon has not yet infiltrated Israel's middle-class households, its overall societal impact is limited. Borrowing from the language of the New Jersey *Mulligan* case discussed above, luxury private communities do not "make a large segment of the housing market unavailable" to other homebuyers/tenants.

Second, to the extent that one can discern a visible impact on Israel's cities as a result of urban private communities, it seems to lie rather in the physical enclosure of such communities. Constructing walled communities in the heart of cities carries substantial externalities for other city residents, making cities less walkable, decreasing the number of open spaces, increasing traffic congestion, and otherwise diminishing the city's openness. This is especially true of a city such as Tel Aviv, which is otherwise a cultural and economic magnet for persons across Israel. A similar effect applies to the blocking of access to public beaches by leisure communities located along the Mediterranean coast. The physical effects of enclosure are, therefore, both quantitatively and qualitatively more significant than their aggregate effect on residential choices. Moreover, adequate regulation on the physical layout or other significant outward-looking dimensions of residential communities falls squarely within the government's police power, without broadly undermining the distinction between public and private property. This has been the case in just about every market-based economy that regulates land use. At this point in time, Israeli law and policy need not go, however, to the next level, seeing private residential communities as a quasi "state actor" in view of their overall effect on social stratification.

3 Toward a Principled Normative Analysis of Residential Communities in Israel

The future design of law and public policy on residential communities in a heterogeneous society such as Israel must move away from the paradigms of the multiculturalism discourse. Rather than seeking to identify "cultural minorities" and to juxtapose them with the nation-state as represented by a clear majority of "mainstream society," Israel requires a different type of balancing between a multitude of population groups, cutting across religious, ethnic, ideological, and economic lines. The Israeli Supreme Court may have had a different idea in mind when it identified the Bedouins in its 1989 *Avitan* decision, and the ultra-orthodox in its 2000 *Am Hofshi* decision, as cultural minorities, but this view is largely obsolete in contemporary Israeli society. Israel is now a truly heterogeneous society, in which no clear-cut "mainstream" can be identified.

Moreover, in a country dominated by government landownership, public decision-makers play a full-fledged role in identifying the existence of genuine group- or sector-level common denominators, and in deciding whether such distinctive features necessitate the earmarked allocation of land or the granting of group-level autonomy for admission and governance rules.

The law and policy on territorial homogeneity versus heterogeneity must combine moral and social principles with practical considerations. This means that public decision-makers at the national and local levels must, on the one hand, do everything within their power to prevent the exacerbation of social fragmentation and to use their formal and educational power to foster tolerance, respect, and to actively combat xenophobia and inter-group animosity. At the same time, decision-makers must also consider the nature and scope of inter-group tension that could arise in heterogeneous cities, towns, or neighborhoods, and whether the only way to mitigate severe, ongoing conflicts would be to facilitate some sort of territorial boundary-drawing.

I argue that the general policy rule should be one of heterogeneity, one that places the onus of persuasion on decision-makers and representatives of population groups that seek to validate sector-specific residential communities. Such an onus could only be lifted when those who advocate separation or group autonomy can demonstrate that the group shares affirmative community features rather than merely suspicion toward others; that such features are translated into ongoing collaboration and shared practices in both the residential structures and public spaces around them; that the allocation of land for such a residential community will not simply promote economic favoritism in a world of scarce resources; and that group rules on admission and governance would be narrowly tailored to promote community rather than merely exclusion.

These general normative criteria should be translated into a number of policy principles, which should be backed in turn by adequate legal rules, in designing residential communities.

First, any sort of government support for residential communities, whether in the form of allocating land for a predefined group, granting private associations with

substantial leeway in setting up rules of admission or ongoing governance in rural or suburban/urban settlements, or financially assisting in setting up a residential community, must be subject to norms of distributive justice or inter-group fairness in resource allocation.

This means, for example, that if the government decides to allocate land for a new ultra-orthodox city (assuming that such designation is otherwise considered legitimate based on the general criteria set forth above), any such allocation must spell out the housing needs of the ultra-orthodox sector, and make sure that other current or upcoming government plans would meet the demand for housing of other population groups—whether by earmarked allocation or projects intended for the public at large. The ruling in the *Am Hofshi* case, which struck down the financially-preferential treatment to homeowners in the City of Elad, must lead to a broader principle of proportionate allocation of land to population groups, based on demographic trends. The Court's language in *Avitan*, by which certain cultural minorities deserve preferential treatment, while implicitly assuming that other population groups would simply get along, cannot be sustained in a truly heterogeneous society, in which most lands are publicly-owned.

Second, the spatial choice between homogeneity and heterogeneity should not follow a single dimension or model. The question as to whether ultra-orthodox, Bedouin, national-religious, or secular communities, for that matter, should live apart or together may change across different regions and across time. As noted, time will tell whether the inter-group dynamics in the City of Harish will play out differently than in the City of Beit Shemesh, and if more attention should be paid to place-specific details before crafting a general strategy by which "it is better off to have towns and cities designated solely for the ultra-orthodox," or any other policy for that matter.

Moreover, in considering heterogeneity versus homogeneity, one could think about at least three potential models: (1) city-wide homogeneity—i.e., the designation of an entire city to a single population group, as is the case in Elad; (2) neighborhood- or block-wide homogeneity within a city-wide heterogeneity—i.e., the designation of different sub-local areas to specific groups, as is currently the case in Beit Shemesh; and (3) block- or neighborhood-wide heterogeneity—meaning that there are no group-specific allocations of public land whatsoever. As for the third alternative, one may further distinguish between a potential Singapore-style policy that affirmatively intervenes to ensure inter-group integration at the block or neighborhood level,[38] and a "hands-off" approach that does not

[38]Under the Ethnic Integration Policy (EIP) in Singapore—which, like Israel, is dominated by public landownership and the granting of long-term capitalized leases to individuals (Haila 2000)—public housing projects impose an ethnic integration within each block or neighborhood. This policy requires non-Malaysian households of Singapore Permanent Residents (SPR) to be within the SPR quota, set at 5 % as the neighborhood level, and 8 % at the block level. According to Singapore's Housing and Development Board: "The SPR Quota ensures that SPR families can better integrate into the local community. Malaysians are excluded from this quota because of their close cultural and historical similarities with Singaporeans" (Singapore Housing and Development Board 2016).

sanction the development of group-specific projects, while not intervening in market and purely-personal household choices.

In choosing among the different models along the homogeneity-heterogeneity spectrum, both normative and practical considerations come into play. I generally subscribe to the argument by which cities, and particularly big ones, should increase "the capacity of all metropolitan residents… to live in a world filled with those they find unfamiliar, strange, even offensive" (Frug 1999). In this sense, big cities are not only quantitatively but also qualitatively different from towns or other small-scale settlements. Cities play a key role in enabling heterogeneous societies to foster a civilized dialogue among different population groups, and to highlight potential commonalities that may nevertheless emerge across such groups.

Accordingly, to the extent that territorial differentiation is required to avoid conflict and to promote genuine group-level common denominators, it is presumably preferable to facilitate this in small-scale settlements or at the neighborhood-level within an otherwise heterogeneous city. There are also practical considerations for supporting neighborhood-level homogeneity over a city-wide one: cities are not only about residential projects. They are also centers of employment, commerce, and entertainment that become possible due to agglomeration effects. Having purely separate cities decreases employment opportunities and may increase economic disparities. Such constraints cannot be simply ignored by the wish for "seamless" interactions. True, those very common amenities and public spaces may themselves become places of contention. It could be that quarrels over the sale of non-kosher meat, public transportation on Shabbat and religious holidays, or dress codes cannot be resolved solely at the neighborhood level. The choice of designating entirely separate cities should be exercised, however, only as a last resort.

The normative case for heterogeneity seems to be particularly strong in the case of Jewish-Arab interactions. Despite their many challenges, 'mixed cities' in Israel have generally proven to be attainable, providing opportunities for some level of dialogue and bridge-building. One important example is that of bilingual schools, in which Jewish and Arab children study in Both Hebrew and Arabic, with the curriculum addressing Jewish, Muslim, and Christian holidays and other significant dates and events (Skup 2016). The potential for coexistence that can originate in such joint elementary education should be a major factor to consider in planning for new cities.

Third, to the extent that a private association wishes to engage in setting up rules of admission and governance in a settlement established on public land, such as in the case of Community Villages or Expansion Neighborhoods in kibbutzim or moshavim, it should be required to do so primarily through transparent written bylaws that spell out the distinctive nature of the residential community. The association should not be entitled to hide behind vague procedures that purport to measure "incompatibility" or "incongruity" to social life without holding existing members accountable to the same criteria. One may fear that spelling out distinctive community features in written bylaws may make societal discourse in Israel more blunt and divisive than it already is. I beg to differ. When such written bylaws are

concerned, many norms should be easy enough to handle by courts or public opinion. Rules that draw lines based on religious, ethnic, political and other grounds, explicitly prohibited by the Admission Committees Law, would not be there to start with. Other rules that try to indirectly attain such wrongful segregation through allegedly-neutral norms would also likely come under scrutiny.

Consider a hypothetical rule by which a Community Village defines itself as dedicated to the nourishment and collective enjoyment of classical music, and assume further that the love for classical music is not distributed equally across different population groups. To the extent, however, that such a rule is merely written down in the bylaws as a tactical move, it might quickly prove a mixed blessing. The founders may soon find out that lovers of classical music do not come only from a single population group, thereby undermining unfounded prejudice that the founders might have had toward "others." Moreover, such a commitment would have to be a credible one, requiring the group to show that it indeed invests time and resources to nourish classical music. Over the long run, the Community Village gets stuck with, well, classical music.

In this sense, Community Villages would fare similarly to CIDs that identify themselves as following a certain habit or activity, such as "golf communities." Indeed, statistically speaking, the love of golf may not be distributed equally across all population groups (Strahilevitz 2006). But such a criterion allows persons, who may not fit the stereotype, to opt into the group rather than being kept away from the community because of irrelevant, often immutable traits. At the other end, it requires CID members to continuously spend considerable amounts of money to maintain a golf course. Residents of a luxury CID probably may do so without much effort. However, these luxury CIDs should not be of much concern if our normative evaluation of such an exclusionary practice is one of "quantity makes quality." In contrast, such a financial commitment would probably make this common theme unattractive for middle-class developments that adopt such a criterion as merely an indirect mechanism for attaining segregation driven by religious, ethnic, or racial grounds. Residential communities should make members accountable to their self-defined commonality.

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European Condominium Law: Nine Key Choices

Cornelius Van der Merwe

Abstract The legal and institutional design of condominiums plays an essential role in the ability of apartment owners to engage in effective collective action to promote both individual and collective interests in and around residential buildings. This chapter identifies some of the key choices that legal systems across Europe have had to make in dealing with this increasingly prevalent form of private residential governance in Europe's cities. Policy choices for condominium law may have in turn long-term effects for Europe's most pressing social and political issues.

1 Introduction

A survey of 21 European jurisdictions on various aspects of condominium law revealed that every one of them has, at some stage, had to make several key choices. The first three choices relate to dogmatic matters. Should dogmatic rigidity give way to the social-political demands of providing homeownership to a greater segment of the population? Should there be a threefold legal relationship amongst unit owners, or a company law structure to accommodate the management of the common property? And is a unitary (monistic) structure preferable to a dualistic structure of condominiums?

The next two choices concern practical questions. Should a jurisdiction adhere to the requirement that floors, walls, and ceilings should form the boundaries between units and between condominiums units and the common property, or can artificial lines be accepted as such boundaries? Should the requirement of a building subdivision be relaxed to allow bare site condominiums or dockominiums, where not buildings but plots of land and water spaces are divided into condominiums?

C. Van der Merwe (✉)
University of Stellenbosch, Stellenbosch, South Africa
e-mail: cgvdm@abdn.ac.uk

C. Van der Merwe
Professor Emeritus of Civil Law, University of Aberdeen, Aberdeen, Scotland, UK

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All jurisdictions also had to battle with the issue of whether a unit owner acquires full ownership (freehold) of his or her apartment or unit or whether this right is scarcely more than a nebulous limited real right. Facing the choice between individual and community interests in a condominium, jurisdictions had to choose whether the interests of individuals would not allow the exclusion of any apartment owner from the condominium, or whether as a last resort and in the interest of a harmonious community, a chronic offender who makes life intolerable for his or her fellow owners can be forced to leave the condominium scheme.

Another choice facing the jurisdictions surveyed was whether self-governance by owners or management by professional managers was required for efficient management of a condominium. A final choice concerns the choice of whether the main management organ of a condominium, namely the general meeting, should be controlled by democratic principles or whether efficiency or the level of financial investment in the condominium should control matters such as the quorum requirement, the representation by proxies, and the weight of an owner's vote at the general meeting.

2 Condominium Law Choices

2.1 Dogmatic Rigidity Versus Social Need for Homeownership

The dogmatic rigidity of the Roman maxim *superficies solo cedit* (Meincke 1971; Schmidlin 1970; Biermann 1895) has for several centuries obstructed the development of the legal institution of condominiums. In terms of the maxim, whatever is built on the land belongs to the owner of the land (Van der Merwe 2008, pp. 301–302, 2015, pp. 9–10). Thus, although vertical demarcations of plots of land are permitted, horizontal division or, more correctly cubic division, of the land and the buildings thereon, and subdivision of the building into various apartments or cubic entities are not allowed.[1] The argument is that a building is inseparably fused to the land and that its subdivision into various units is an attempt to divide something that is by its very nature indivisible (De Wet and Tatham 1972; Mashaw 1962–1963).[2] Fragmentation of the ownership of a building would ultimately lead to the destruction of an

[1]Note that by contrast, English law recognized ownership in apartments since early times. See *Doe v Burt* 1 TR 701 99 ER 1330 (1787); *Fay v Prentice* 1 CB 820 ER 769 (1845); Coke (1832); Van der Merwe (2015, pp. 20–21).

[2]This idea of a composite entity which is in essence indivisible, stems from the Pandectist doctrine of components (*Bestandteilslehre*) under which certain entities lose their individuality when combined with other entities. This doctrine is to some extent based on the Stoic view entertained in classical Roman law that certain physical compounds like compounds produced by welding (*ferruminatio*) and building (*inaedificatio*) were compounds with a single essence or spirit like a horse or a stone. Since building materials lose their very existence by being merged with the soil, it

important economic asset (Yiannopoulos 2001). This view rests on the assumption that the purpose of the subdivision of an apartment ownership building is to physically divide the building into portions that can be removed, leaving what remains in a state unfit for human habitation.[3] Two arguments can be advanced against this view: First, apartment ownership statutes do not envisage physical division of the building but only juridical demarcation of units for exclusive ownership, leaving the building physically intact. Secondly, the land which forms part of an apartment ownership scheme is not—as argued by proponents of this view—put into cold storage devoid of any utility under an apartment ownership regime. Far from destroying the physical unity between the land and the building, apartment ownership statutes allow exploitation of the land and the building to its full economic potential by an intensified community of apartment owners.[4] In short, similar considerations as those which led to the individualization of plots of land on the earth today apply to the subdivision of a building into apartments in order to alleviate the desperate shortage of individual accommodation (Paulick 1952; Börner 1963; Hegelau 1954; Van der Merwe 1974).[5]

The dogmatic rigidity of the maxim did not provide a barrier to the practical necessities of everyday life. Whenever and wherever there is an acute shortage of residential accommodation near the centers of economic activity, doctrines such as this are either brushed aside or simply ignored to solve the problem. Thus, *superficies solo cedit* was not heeded when the people of North Africa had to create additional accommodation for their compatriots around their oases,[6] when the Lebanese businessmen wanted to provide more commercial units in the crowded *zouks* of Beirut,[7] and when the residents of the medieval European walled cities erected high-rise buildings on the limited space available and divided them into multi-floor ownership units referred to as *Stockwerkseigentum* (Van der Merwe 2015, pp. 17–18). The unsatisfactory working of *Stockwerkseigentum* in practice persuaded the creators of the Civil Codes of France (1804), the Netherlands (1838), Germany (1899) and

(Footnote 2 continued)

would be according to this view *contra ius naturale* to divide a building into its constituent parts (Kreller 1948; Sokolowski 1902; Kaser 1971).

[3]The Pandectists also discarded the Roman law notion that the owner of the building materials remain the *dominus dormiens* of the materials until the building is pulled down again.

[4]Note that the apartment ownership statutes contain safeguards against the destruction of the building by placing a positive duty on apartment owners to maintain their apartments in a proper state of repair, by creating statutory implied reciprocal servitudes of lateral and subjacent support and by structuring most structural parts of the building as common property maintained by the association of apartment owners.

[5]The demarcation of parcels of land on the crust of the earth did not lead to the destruction of the earth but to the creation of the most valuable entities that exist today.

[6]Possibly the oldest condominium deed records the transfer of part of a building by a husband to his wife in the Jewish Colony in Elephantine (ancient Egypt) during the fifth century, BC. Samuels (1963) notes that the deed is preserved in the Brooklyn Museum, New York.

[7]See Van der Merwe (2015, p. 10) for the recognition of separate ownership of individual storeys and apartments in ancient Islamic law.

Switzerland (1908) to include the maxim *superficies solo cedit* in their codifications,[8] which scuttled the institution of condominium. The creation of the French Civil Code was inspired by excellent commentaries on an Orléans *coutume* to include an exception to the maxim in the Code,[9] which would prolong the practice of building caterpillar-like multi-ownership buildings in the mountainous areas of the country whereby a separate entrance was provided for each unit owner. And, finally, when Greek civil war refugees and vast swathes of the European population were displaced by two World Wars, the legislators decided that it was time that the law should catch up with practical demands and provide the status of homeownership in order to promote social, economic and ultimately political stability. They thereupon promulgated special statutes on condominium to breach the principle of *superficies solo cedit* and to regulate the complex institution of condominium in more detail.[10]

2.2 Threefold Relationship Versus Company Management Structure

In most European jurisdictions, the condominium concept consists of three components (Van der Merwe 2015, pp. 5–7). These are (a) individual ownership of an apartment; (b) co-ownership (joint ownership) of the land and the common parts of the building; and (c) membership of an incorporated or unincorporated owners' association, which manages the condominium.[11] The purchaser of an apartment therefore acquires ownership of his or her apartment, a co-ownership share in the common property, and becomes a member of the apartment owners' association. Consequently, two of the components of the institution of condominium, namely individual ownership of an apartment and co-ownership of the common areas, pertain to the law of property, while the third element falls under the law of associations.

The tripartite structure is unknown to the English Commonhold and Leasehold Reform Act of 2002. Although the Act confers a freehold on each owner of a

[8]See for e.g. the German Civil Code §§ 93 and 94.

[9]Code Napoléon art. 664. This exception was also included in the Civil Codes of Poland (1808) art. 664; Italy (1865) arts. 562–564; Portugal (1867) art. 2335; Spain (1889) art. 396.

[10]Special condominium statutes were promulgated in Belgium (1924), Greece (1929), Italy (1935), France (1938), Austria (1948), Netherlands (1951), Germany (1951), Spain (1939), Switzerland (1963), Turkey (1965), Denmark (1965) Norway (1983), Croatia (1996), Estonia (2000), Slovenia (2002) and Catalonia Act (2007). The South African Sectional Titles Act 95 of 1986 s 2 caters for registration of ownership (title) or other real rights over units in a subdivided building, '[n]otwithstanding anything to the contrary in any law or the common law.'

[11]See e.g. Belgium: Civil Code art. 577-3 § 1 and 577-6 § 1; Croatia: Law on Ownership and Other Real Rights of 28 October 1996 arts. 66 and 9; Poland: Law on Ownership of Units of 24 June 1994 art. 3(2) and art. 6; Estonia: Law on Apartment Ownership of 15 November 2000 § 1 (1); Germany: Law on Apartment Ownership §§ 1 and 10; Spanish Civil Code art. 396 and Law on Horizontal Property of 21 July 1960 art. 3.

particular unit, the commonhold association (consisting of all the unit owners as members) owns the common facilities and common parts of the building on the basis of one share per unit. Instead of a *sui generis* or custom made commonhold association as under most European and Anglo-American statutes, the legal vehicle chosen for the English commonhold association is a company limited by guarantee to not more than £1.[12] The main advantage of this form of corporate structure over that of companies limited by shares is that it avoids the statutory provisions on raising and maintaining share capital (Crabb 2004). With regard to the liability of its members, the statutory form of the memorandum of association of such a company clearly states that "the liability of the members is limited."[13] The statute also provides that the amount of the guarantee provided by each unit holder is £1 in case such contribution is called upon in accordance with company law.[14] According to the principles of company law, this sum of £1 is the maximum liability of each unit owner in the event of the company going into liquidation (Boyle and Birds 2004). However, the accompanying status of the members of the limited company as owners of apartments in the commonhold is a threat to such limited liability. It has been suggested that any deficiency in the company's assets in the event of winding-up may be regarded as the result of insufficient charges being levied for services rendered to the flat-owners and that this deficiency can consequently be recovered from those owners (Crabb 2004). The limited liability of apartment owners has therefore been described as "fictional" and "an illusion of financial immunity" (Wong 2006; Smith 2011, 2013).

Consequently, it is difficult to see how the £1 limit on calls can protect unit holders from ultimate recovery of debts from them as individuals and which are owed by the commonhold association to third party creditors of the association (for example for the provision of services, insurance or management fees) (Crabb 2004; Smith 2011; Wong 2006; Van der Merwe 1994, 2015, pp. 5–6). It was therefore logical to allow the winding up of commonhold associations and with that the commonhold concerned, otherwise unpaid creditors could be left without security for re-imbursement, which would act as a significant deterrent from dealing with associations. Thus there appears to be nothing to stop a provisional liquidator in winding-up proceedings from levying unit holders for sums due to creditors,[15] including debts incurred on behalf of any of their predecessors in title. However, in the interests of fairness the liability of a unit owner should correspond to their share in the scheme (Xu 2011). This, coupled with other problems with the commonhold system, has resulted in the English population favoring the leasehold structure.

[12]S 34(1)(b) of the Commonhold and Leasehold Reform Act and Commonhold (Amendment) Regulations 2009 SI 2009 No 2363 substituting paras. 5 and 6 into Sch. 2 to the 2004 Regulations. On the (faulty) choice of this particular model see Keang Sood (2008), Xu (2011), Smith (2013). The English system seems to have been borrowed from the charitable sector.

[13]Commonhold Regulations 2004 (SI 2004/1829) reg. 13, sch. 1 para. 4.

[14]Commonhold and Leasehold Reform Act s 34(1)(*b*); Companies Act 2006 s 11(3).

[15]Commonhold and Leasehold Reform Act ss 50–54.

While it was once envisaged that 6500 commonhold schemes would be formed per year, in practice only 20 schemes had materialized by 2011.

2.3 *Unitary Systems Versus Dualistic Systems*

Condominium regimes across the world are generally divided into either unitary or dualistic systems (Van der Merwe 1994, 2015; Aeby et al. 1983; Givord and Giverdon 1987).

Under the former, primary significance is given to the owners' co-ownership in the common property. An apartment owner is in the first instance regarded as a co-owner of the land and buildings that comprise the scheme, and the exclusive right of use of an apartment accorded to each owner is merely regarded as an ancillary incident carved out of the co-ownership of the land and the buildings. Unitary systems, or nuances thereof, had been adopted mainly in legal systems that were unwilling to break completely with the maxim *superficies solo cedit* and considered their notion of co-ownership sufficiently flexible to accommodate exclusive rights of occupation (in particular apartments in a condominium building).[16]

Under a dualistic system, two autonomous species of rights, namely individual ownership of an apartment and co-ownership of the common property are combined to form a completely new type of composite ownership. Most dualistic systems regard individual ownership as the most important element of this new composite ownership.[17] This puts most dualistic systems at odds with construction techniques that regard the foundations, outside walls and roofs of the building as parts of the building without which the building cannot exist. Historical, sociological and psychological considerations have contributed to the perception that the individual apartment is the primary object of this new composite right of ownership (Van der Merwe 1994).[18]

[16]The Netherlands, Croatia, Norway and Italy have apparently adopted a unitary system. See for Italy: Bigliazzi et al. (1988); contra Terzago (2002).

[17]Note, however, that individual ownership of a unit and co-ownership of the common property is considered of equal importance in Spanish literature: Lacruz Berdejo et al. (2004). In Portugal, condominium is understood as a specific kind of ownership, where the owner of a unit has to put up with restrictions derived from the common property. Whether the restrictions imposed by Portuguese law could render condominium a dualistic system, where ownership of an apartment and the co-ownership of the common property are of equal importance, remains a controversial question in legal doctrine. See Mota Pinto (1971), Pires de Lima et al. (1987), Henrique Mesquita (1967), Menezes Cordeiro (1993), Santos Justo (2010), Carvalho Fernandes (2009), Passinhas (2002). In France in academic literature it is characterized as an incorporeal property right of a dualistic nature. See, for instance, Terré and Simler (2010). However, authors like Givord (1967) defend the unitary theory.

[18]French authors stress that the French want to acquire exclusive ownership of their apartments and would not settle for being just one of the co-owners of the whole building.

2.4 *Boundaries of Units: Floors, Walls, Ceilings Versus Artificial Lines*

Most European condominium statutes describe an apartment or a unit as part of a building which is intended for exclusive and independent use and some add that it must have a direct access to the public road or a common area leading to such road (Van der Merwe 1994).[19] The criteria of independence and exclusivity imply that the units must be isolated by walls floor and ceilings as expressly required in many American condominium statutes (Van der Merwe 1994, pp. 48–49).

However, this requirement was departed from in Germany, Austria, Catalonia and the Netherlands. In terms of the German statute, the parking spaces in the cellar of apartment buildings and in parking garages are recognized as independent units as long as their boundaries are clearly demarcated on the ground.[20] In Austria a parking space for vehicles consists of a clearly demarcated part of the surface of the ground which is solely intended and eminently suited for parking according to its size, location, and character.[21] This applies not only to parking spaces in parking garages and apartment buildings, but also to parking spaces demarcated on an unimproved plot of land. In addition the Austrian statute caters for so-called 'floating spaces' by equating a parking space consisting of metal used as a technical device to park as many vehicles as possible on top of another within a parking space demarcated on the ground (Lankhorst and Dahm 2010). In Catalonia schemes consisting of parking bays in a parking garage are often used to supplement storage and parking shortages in nearby residential condominiums.[22] In Portugal notaries accept public deeds of parking areas in the basement of condominium buildings, by allotting a separate description in the constitutive title of the condominium.

2.5 *Building Subdivisions Versus Bare Land Subdivisions*

Since the primary aim of condominiums is to provide homeownership to as large a percentage of the population as possible, the condominium regimes primarily focus on the subdivision of buildings into residential apartments. However, since nothing prevents the institution from being utilized for non-residential developments, some

[19]See for instance for Austria: Law on Apartment Ownership of 1 July 2002 § 2(2); Catalonia: Civil Code art. 553-2.1; Denmark Law on Owner Apartments of 8 June 1966 § 1 par. 2; France: Law on Apartment Ownership of Buildings of 10 July 1965 art. 1; Germany: Law on Apartment Ownership of 15 March 1951 § 3 par. 2; Netherlands: Civil Code art. 5:106 par. 3; Portuguese Civil Code art. 1415; Spain: Law on Horizontal Property of 21 July 1960 art. 3; Swiss Civil Code art. 712b par. 1. The German Law adds that the apartment or commercial unit must be isolated.

[20]Law on Apartment Ownership § 3(2).

[21]Law on Apartment Ownership § 2(2).

[22]On the basis of Civil Code art. 553-2.2.

European jurisdictions have relaxed the requirement that condominiums can consist only of subdivided buildings and allows unimproved plots of land to be subdivided into various forms of non-residential condominiums.

The Catalan Civil Code allows bare plots of land to be structured as parking condominiums, caravan site condominiums,[23] street market condominiums, graveyard condominiums and even dockominiums providing mooring spaces for yachts and boats on stretches of water in the sea, lakes and rivers.[24] Graveyard sites are structured as condominiums for the sake of enhanced maintenance of graveyards and graves.[25] These condominiums are governed by both the general provisions on residential condominiums and by-laws adapted to the specific nature of the kind of condominium concerned.

The Netherlands explicitly introduced the possibility of structuring caravan site condominiums and dockominiums consisting of mooring spaces for boats and yachts (Mijnssen et al. 2008), by amending the definition of "apartment right" in the Dutch Civil Code in 2005.[26] Prior to 2005 it was not possible to subdivide a bare plot of land into apartment rights because of the requirement that an apartment right must consist of part of a building. The Dutch Civil Code art. 5:106 Para. 2 now provides that the owner of land has the power to subdivide the land and the buildings on the land into various apartment rights. In terms of Para. 4 the apartment right includes the right to subdivide bare land into portions which according to their design and character are intended to be used as independent units. Caravan sites must therefore be clearly demarcated and closed off by a locking mechanism (Mertens 2006). Dutch practice also extended this amendment to ground covered by water to legitimize the subdivision of stretches of water into dockominiums consisting of clearly demarcated mooring spaces closed off by mooring posts.[27]

2.6 *True Ownership Versus "Nebulous Something"*

Most European condominium statutes provide that the purchaser of an apartment or non-residential unit becomes the owner (freeholder) of the apartment or unit which in principle gives that individual freedom to deal with the apartment or unit as they see fit.[28] The crucial question however is whether this right can genuinely be

[23]These are especially regulated in the Catalan Civil Code arts. 553-53–553-59.

[24]Catalan Civil Code art. 553-2.2.

[25]In England a cemetery may be structured as a commonhold if the units are specified in a Commonhold Community Scheme as one of at least two parcels of land (Commonhold and Leasehold Reform Act (CLRA) 2002 s 11(2) A unit need not contain all or any part of a building (s 11(4)).

[26]Dutch Civil Code art. 5:106 par. 4. See also new Suriname Civil Code art. 5:106 par. 4(b).

[27]See Explanatory Memorandum Suriname New Civil Code 5.9: 106.

[28]See Reid and Van der Merwe (2004) at 659: "In the tradition of the *ius commune*, ownership is still, at the beginning of the twenty first century, viewed as absolute, exclusive and abstract in

described as outright ownership in light of the numerous limitations on ownership in condominium statutes.[29]

The limitations on apartment ownership include the following: statutory reciprocal easements of lateral and subjacent support coupled with an obligation not to do anything in an apartment that could prejudice the stability of the building; an obligation on apartment owners to allow the management association on giving reasonable notice to enter the apartment to carry out repairs to the common property inside the apartment and to determine whether the rules of the scheme are being obeyed; strict enforcement of the tort of nuisance to avoid excessive noise and unpleasant smells emanating from an apartment; a positive duty on apartment owners to keep their apartments in a state of good repair; a prohibition on converting a residential unit into a commercial unit; a prohibition on the erection of washing lines on balconies; a prohibition on the keeping of pets without the consent of the management association; and general obligations on apartment owners not to impair the reputation of the scheme or the outside appearance of the building (Van der Merwe 2015, pp. 230, 239–241).

These multiple limitations on the entitlements of ownership have led to critics of apartment ownership statutes concluding that an apartment owner does not acquire civilian ownership of an apartment but only a "nebulous something" closer to the estate of an English law leaseholder (Van der Merwe 2008). The truth is, however, that the absolutist perception of ownership has to a considerable extent been hollowed out.[30] The emergence of new forms of ownership such as ownership of airspace, time-sharing, nature conservation areas and apartment ownership has led to a radical reconceptualization of the notion of ownership. It is recognized that ownership need not be autonomous and individualistic, but carries with it social obligations and must be capable of being broken down and rendered more amenable to comply with modern day requirements (Yiannopoulos 2001). This is accompanied by an understanding that the content of ownership is determined by the special characteristics of the object to which it pertains.

The principal distinguishing features of apartment ownership are the following: the object of apartment ownership is apartments forming part of a destructible building as opposed to indestructible land; the apartments in a condominium building are structurally interdependent as opposed to individualized parcels of land; the community life in a condominium is more intensified than can be said for a group of neighboring

(Footnote 28 continued)

nature. In principle it embraces the power to use (*ius utendi*), to enjoy the fruits (*ius fruendi*), to consume (*ius abutendi*), to possess (*ius possidendi*), to dispose (*ius disponendi*), to reclaim (*ius vindicandi*), and to resist any unlawful invasion (*ius negandi*)."

[29]The crucial question however is whether the condominium owner is in fact the master of his or her apartment which he or she could alter, decorate, keep as many pets as they like, hold noisy parties on his or her balcony every Saturday night and allow his or her hippy friends to reside in the apartment during the summer holidays?

[30]See, for instance, Grotius *Inleidinge*; Von Savigny *System des heutigen römische Recht I*; Yiannopoulos (2001).

landowners; and the community of condominium owners is more or less permanent in view of the strict requirements for its dissolution (Van der Merwe 1974).

In my submission, these peculiar features of apartment ownership justify more intensive limitations and restrictions on the powers and entitlements of condominium owners with regard to their apartments. I do not believe that this detracts from its nature as genuine ownership. Condominium ownership should therefore not be degraded to a lesser limited real right (like a lease or leasehold) or a "nebulous something," but should be placed on the same footing as the ownership of land.[31] In final analysis, the primary aim of apartment ownership is to satisfy the psychological and social need of private individuals to own their own home.[32] By placing apartment ownership on a par with land ownership, the goal of home-ownership becomes a reality for a greater sector of the population. Consequently, property developers and local building authorities should be encouraged to raise the standards for apartment ownership buildings and ensure that apartments are adequately isolated and insulated. Once a clear distinction is established between an apartment ownership building and a mere rental building, sectional owners will be more likely to regard their apartments as "their own."

2.7 *Individual Versus Community Interests*

The choice between individual and community interests is illustrated by the sanctions imposed by the various European jurisdictions for anti-social behavior on the part of a unit owner (Van der Merwe 2015). The real issue is in how far jurisdictions will allow community interests to infringe upon the individual freedom of owners and their right to pursue individual preferences.

Some jurisdictions use sanctions such as suspension of voting rights and a court injunction to prohibit further anti-social behavior but stop short of excluding the offender from the condominium community. The Portuguese Civil Code and the Dutch Model By-Laws allow the general meeting to fix penalties for non-compliance with statutory provisions, resolutions of the general meeting and decisions of the manager.[33] The French condominium statute and the Catalan Civil Code allows the unit owners to sue the offender in nuisance or on account of the abuse of law for any damage caused to the scheme and to seek an injunction to put an end to the anti-social conduct.[34] Most national reporters indicate that the obvious

[31]This is in line with the idea of Reid and Van der Merwe (2004).

[32]According to Weitnauer (1988) preface § 1 no 11a *in fine*, this was the most important reason for introducing apartment ownership in post-war Europe which suffered from a severe housing shortage.

[33]Portuguese Civil Code art. 1434; Dutch Model By-Laws of 2006 art. 41.

[34]France: Court of Appeal Paris 20 Nov. 1996 (Loyers et coproprie´te´ Mars 1997, no. 91); Cass. civ. 3e`me 30 June 2004 no. 03-11562 (Bull. civ. III, no. 140; D. 2004, 1134 obs. Giverdon and Capoulade, RTD civ. 2004, 753; Catalan Civil Code art. 553-40 read with Civil Code art. 7.2.

remedy in this scenario is injunctive relief based on abuse of property rights and the tort of nuisance for flagrant and persistent offensive behavior.[35] Failure to comply with a court order to stop offensive behavior will render the unit owner in question guilty of contempt of court.[36]

The majority of European jurisdictions have, however, introduced harsher remedies against offenders to protect the interest of the condominium community. Thus the German statute provides that an owner whose loathsome behavior is so intolerable that no apartment owner can be expected to live within the same condominium may be excluded from the condominium.[37] Once a special resolution has been adopted to exclude the offender, the offender is given three months within which to sell his apartment. If he does not succeed, the apartment is sold by means of a forced public sale.[38] The Danish statute requires that the warning given to the offender must be sufficiently accurate and explicit to serve as a ground for expulsion. The court will only expel the offender if there is sufficient evidence on the part of other owners that the provocative conduct of the offender constitutes a gross neglect of his obligations to the other owners.[39] Interestingly, in Estonia police reports may be used to provide evidence of extreme misconduct that would justify exclusion from the condominium community (Van der Merwe 2015, p. 383). Again, the exclusion is ultimately achieved through a forced sale of the offender's apartment. In Norway, the offender can be excluded from the community on the

[35]Austria: Civil Code §§ 364 and 523; Belgium: the tort of nuisance based on the definition of ownership in Civil Code art. 544 and the constitutional protection of ownership under art. 16 of the Belgian constitution; England: see Van der Merwe (2015) 383; Greece: Civil Code art. 1108; Dutch Model By-Laws of 2006 art. 2 par. 2; Slovenia: Property Code arts. 75 and 99 and Code of Obligations art. 133. Court proceedings on the ground of nuisance are, however, time-consuming and expensive because such actions normally fall under the jurisdiction of higher courts. Injunctions are also a blunt remedy, which, once granted, would not necessarily improve the harmonious co-existence of owners in a condominium.

[36]This is the position in Spain (Van der Merwe 2015, pp. 396–397).

[37]Some practical grounds for exclusion of troublemakers from the condominium scheme taken from Austrian case law are the following: unjustified violent verbal attacks and slander of other owners coupled with other intolerable conduct, such as the banging of doors; excessive noise as well as destruction of property within a period of one year; the odious smell of the excrement of pets emanating from the offender's apartment; and the pressing of unfounded criminal charges against a fellow apartment owner. An expulsion order was, however, not granted on account of the fact that an apartment was rented out to an immigrant worker or the constant noise caused by the grandchildren of the owner. See Hausmann (2002), Prader (2002). For German examples, see Abramenko (2012), Bamberger and Roth (2012).

[38]German Law on Apartment Ownership of 1951 §§ 18 and 19. In Austria persons who have a family or business connection with the offender are not allowed to bid at the auction. In Slovenian practice a similar provision in their condominium statute has not actually been used. In Croatia an offender can be excluded from the community on the strength of a majority or even a minority resolution (Van der Merwe 1993, 2015, pp. 377, 380, 394).

[39]Law on Owner Apartments 199 of 8 June 1966 § 8.

ground of a fundamental breach of his obligations towards the other owners.[40] In the case of persistent intolerable behavior, Polish unit owners may resolve to approach the court for an order that the offender's unit may be sold by a bailiff in execution proceedings. If this happens the offender will also lose his right to the alternative accommodation that is as a matter of law guaranteed by the local authority concerned (Van der Merwe 2015, p. 391).

Both Spanish and Catalan legislation, as well as the Dutch Model By-Laws, contain a less drastic sanction than the exclusion of an offending owner from the condominium. Under the Spanish statute, the president of the owners' community (on his own initiative or on the instruction of any owner or occupier) may demand that the offender stops behaving in an offensive manner, failing which he may instigate court proceedings. The appropriate proceedings would be an action of suspension (*acción de cesación inmediata de la actividad prohibida*) against him. The judge may then adopt provisional remedies, such as an order forbidding the offender from continuing to behave unacceptably, failing which he will be guilty of the offence of contempt of court. The final judgement may deprive the offender of his right to reside in the condominium for a maximum period of three years depending on the seriousness of the offence. The offender may also be required to compensate the members of the community that were adversely affected by his behavior.[41] This sanction is less severe because the offender is only temporarily deprived of the possession of his unit and he does not lose the other privileges of ownership, such as his right to let out the unit. If, however, the offender is a tenant, his lease will be forfeited, followed by eviction.[42] The Dutch Model By-Laws contain a standard clause that provides that an owner may be excluded from further use of his unit in the case of serious misbehavior, but only after less serious sanctions, such as warnings and fines, have been exhausted. This seems a sensible approach and is in line with the view that exclusion is very much a measure of last resort.[43]

[40]Norwegian Law on Owned Units of 1997 s 19(2). Section 27 makes provision for the direct eviction of an owner or other user whose behavior creates a risk of destruction or severe deterioration of the condominium property, or causes intolerable nuisance or annoyance. This sanction is resorted to in serious cases where it is not advisable to follow the process that leads to the eventual sale of the condominium unit (Van der Merwe 2015, pp. 390–391).

[41]Examples of activities forbidden by Spanish High Courts or the Courts of Appeal are use of apartments for prostitution or as if they were holiday apartments; instances of nuisance caused by persistent excessive noise; dogs barking throughout the day and night; and apartments kept in unspeakable squalor (Van der Merwe 2015, pp. 374, 396–397).

[42]Spanish Law on Horizontal Property art. 7.2; Catalan Civil Code art. 553-40.3.

[43]Several European jurisdictions sanction the prosecution of the offender for certain crimes and misdemeanors. Under the Spanish Criminal Code these include threats of physical violence (art. 169), coercion (art. 172), public slander (art. 208) and indecent exposure to underage or mentally handicapped persons (art. 185). Depending on the nature and gravity of the offender's behavior the activities in Italy could qualify as crimes of indecent public behavior, insult, libel, domestic violence or stalking. Besides a suit based on nuisance, and a claim based on insult to personality may also be filed in appropriate circumstances. See the Italian criminal code arts. 529, 594, 595, 610 and 612.

The jurisdictions that focus on the individual rights of unit owners view exclusion or suspension from the community as too draconian because of its radical interference with the personal life and financial investment of the offender and its disproportionate treatment of offenders. These jurisdictions regard expulsion as an unwarranted infringement of the sanctity and inviolability of the right of ownership.[44] They reject these harsh measures on both financial and dogmatic grounds. Prospective purchasers of apartments will be hesitant to purchase an apartment where their ownership is subject to forfeiture, while institutional mortgagees might not regard a title with such an inherent risk as adequate security. Dogmatically, the fact that the ownership of a condominium unit is in certain circumstances defeasible, raises doubts as to whether condominium ownership can in fact be regarded as genuine ownership. This does not pass constitutional muster (Van der Merwe 2014; Pienaar 2010).

By contrast, the majority of European jurisdictions that allow either permanent or temporary exclusion from the condominium community focus on the preservation of harmony in the condominium community.[45] They claim that the intensified community of owners within the same building requires a restriction of ownership in the interest of the condominium community and that this is warranted by the demand for a final mechanism to permanently settle disputes and restore the stability and social harmony in the condominium community. It should be noted that although the proceedings for expulsion are set in motion by the majority resolution of the owners in general meeting, the court must be approached in order to determine whether the stringent substantive and procedural requirements for such exclusion are met. It is also accepted that the sanction may only be used as a matter of last resort (*ultima ratio*) after all lesser sanctions have been exhausted. Commentators also point out that although this sanction is rarely used in practice, its deterrent value is significant (Bärmann et al. 2003).[46]

As regards constitutionality, the less drastic sanction of temporary exclusion from possession of the unit is, from a constitutional perspective, more acceptable. Although ownership is no longer regarded as an absolutely exclusive right, but rather as a privilege which must be exercised in the public interest, ownership is still a protected constitutional right which can only be radically interfered with in exceptional circumstances. As long as the ultimate substance of ownership is not

[44]The English rely on the sanctity of freehold while the French cites the inviolability of ownership rights and the fact that the French legislator had conferred equal rights on all condominium owners (Van der Merwe 2015, pp. 382, 384–385).

[45]According to Bamberger and Roth (2012), in the absence of the *actio communi dividundo* used to dissolve the co-ownership community in ordinary co-ownership relations, the remedy of expulsion is necessary to prevent the racking of the apartment ownership community by constant disputes and disharmony.

[46]In addition the offender is adequately protected by the stringent requirements for the sanction, the fact that he is allowed a period of grace to sell the apartment by private sale and if a forced sale is ordered that the highest bid will only be accepted if it is more than 50 % of the market value of the apartment.

infringed, temporary suspension of the right to reside in the apartment is not considered an unconstitutional infringement of ownership. The existence of a sanction for the temporary exclusion of a sectional owner in serious cases of misconduct would apply constant pressure on all the owners of a scheme to consider the consequences of non-compliance with the obligations imposed upon them. Therefore, its deterrent effect cannot be underestimated.

2.8 Self-governance Versus Professional Management

European condominiums generally have the choice between self-governance and professional management when it comes to implementing the decisions of the general meeting and dealing with the day-to-day management of affairs. Self-governance could either take the form of all the owners in smaller schemes managing the condominium collectively,[47] although in larger schemes it is more likely left to an executive board consisting mainly of members of the owners' association. Although most condominium statutes cater for both of these possibilities, most schemes have chosen to be governed by a professional manager in the form of a professional management firm.[48] Some jurisdictions which favor professional managers have opted in addition for an advisory council (*Verwaltungsbeirat*, *conseil syndicat*) consisting of unit owners whose functions are essentially advisory rather than executory.[49]

Arguments in favor of the daily management being undertaken by the executive board of the owners' association (consisting mainly of unit owners) is that such management would be more cost effective than employing a professional manager. Owners must perform the task without remuneration and can only recover their expenses in carrying out management activities. Moreover, dedicated owners would become personally involved in carrying out their functions. On the other hand there are several arguments against entrusting the task to owners. Their lack of professional knowledge, skill and experience especially in managing the financial affairs of a larger scheme could hinder the efficient management of the scheme. Furthermore, the limited amount of time in comparison with professional managers

[47]See for instance for Germany: Law on Apartment Ownership of 1951 § 21(1).

[48]See for instance for Germany: Law on Apartment Ownership of 1951 § 26; Greece: Law on Ownership of Storeys of a Building of 4 January 1929 art. 4 pars 1 and 2; art. 3 par. 4 and 5a.; Italy: CC art. 1129 par. 1; Catalonia: CC art. 553-15-16; Spain: law on horizontal Property art. 13.6; Portugal CC art. 1435(4); England CLRA of 2002 s 35(1) and Articles of Association art. 53; Norway: Law on Owned Units of 1983 s 41; Estonia: Law on Apartment Ownership of 2000 § 20(1).

[49]See for instance for Germany: Law on Apartment Ownership of 1951 § 29; France: Law on Apartment Ownership of Buildings of 1965 art. 17 par. 4 and Decree on the Implementation of Law of 1965 arts. 22–27; Netherlands: Civil Code art. 5:131 pars. 1–3. See also for Austria: Law on Apartment Ownership § 22 for the appointment of an owners' representative (*Eigentümervertreter*) to monitor the activities of the professional manager.

that could be devoted to the role and the fact that personal involvement could interfere with objective decision making could also give rise to problems. Additionally, a key disadvantage of self-management from the point of view of the remaining owners is that members of an owners' executive will only be liable for fraud or gross negligence.

Arguments in favor of being managed by a professional manager are that the professional managers would have the necessary training, knowledge, skill and experience to cope successfully with the daily management of especially larger condominium schemes. In addition, professional management firms would have more facilities at their disposal. Professional managers would also perform their duties in a more business-like fashion and would strive to avoid infighting between opposing owner groups in a condominium. Due to the fact that they would be remunerated for their services, they would as the official executive organ of the condominium be liable for damage caused by negligent administration of the condominium. The disadvantage of taking on a professional manager is that professional management firms are very expensive and prone to taking on too many schemes without devoting sufficient time and effort to any particular condominium.

The ideal solution therefore seems to have a professional manager implementing the decisions of the general meeting and performing the daily management of the condominium assisted by an advisory council of owners. Under the German Law on Apartment Ownership, the two main functions of the management council (*Verwaltungsbeirat*) are to support the professional manager (*Verwalter*)[50] and to audit the financial documentation of the professional manager (Drasdo 2012).[51] The auditing function means that the advisory council should check the budget (*Wirtschaftsplan*), payments (*Abrechnung*), accounting (*Rechnungslegung*) and estimates of expenses (*Kostenanschläge*) in addition to any comments on these matters before the general meeting makes decisions. German academic writers agree that it is not the task of the advisory council to check and control the daily management of the manager *unless* such a function is explicitly entrusted to him by the owners in the model by-laws of the condominium (Drasdo 2012).

[50] § 29(2) *WEG*. According to Drasdo (2012), the advisory council can support the manager on a range of matters. These include preparation of the general meeting and the agenda for the meeting, assistance in the implementation of resolutions, the enforcement of the conduct rules, the completion of repairs and maintenance work, the collection of quotations from maintenance contractors and the selection of the most suitable contractor to do the work, the management of the common funds and making information available to owners. However, the support cannot be forced upon the manager. The non-acceptance of support offered, does not amount to a violation of his obligations. In such a case he simply does not make use of the offer of support that the law provides.

[51] § 29(3) *WEG*.

2.9 *Democracy Versus Efficiency and Recognition of Financial Investment*

2.9.1 Introduction

The choice between democracy and efficiency is illustrated by the quorum requirement for general meetings, the provisions for the appointment of proxies to attend the meeting and the weight of the votes of unit owners at general meetings. If true democratic principles are followed the quorum required for making valid decisions should be as high as possible, use of proxies should be minimized and voting should be carried out on the basis of one vote per owner. This position is deviated from in favor of efficiency and the idea that recognition should be given to owners who have a greater economic interest in the scheme (Van der Merwe 2015, pp. 430–493; Smith 2013).

2.9.2 Quorum

In the interest of efficiency, a large number of European condominium provisions do not contain any quorum requirements. This means for instance that resolutions concerning the annual budget can be passed by a simple majority vote by those owners present at a meeting. However, in the interest of democracy all resolutions requiring an absolute majority of all the owners or a unanimous resolution must be attended by the number of owners required for the particular majority.[52] Interestingly, in Austria and Poland the required majority need not be attained at the general meeting itself but can be later supplemented by the professional manager canvasing absentees to the meeting for their vote until the required majority is obtained.[53]

Of the jurisdictions that do contain quorum requirements, the Italian Civil Code contains the strictest criteria. The meeting is validly constituted when the majority of the owners in number representing two-thirds of the share value of the entire building are present at the meeting.[54] An adjourned meeting must be convened within ten days of the first meeting, and is validly constituted by the presence of one third of the owners in number, representing at least one third of the total share value of all the owners.[55] The revised Belgian Civil Code allows for two possible quorums, namely (i) more than half of the owners representing at least half of the total share values or (ii) any number of owners representing more than three-quarters of the share value.[56] In the interest of efficiency the Belgian Civil Code only requires a

[52]These include Denmark, France, The Netherlands, Norway, Poland, Slovenia, Croatia and Sweden (Van der Merwe 2015, p. 433).

[53]Austria Law on Apartment Ownership of 2002 § 25(3); Poland: Van der Merwe (2015, p. 477).

[54]Civil Code art. 1136 par. 1.

[55]Ibid. at art. 1136 par. 3.

[56]Civil Code art. 577-6 § 5 pars. 2–3.

quorum at the beginning of the meeting which is not reviewed when certain owners leave the meeting (Timmermans 2010).[57] Furthermore at the adjourned meeting which must take place within 15 days of the inquorate meeting, the owners present will constitute a quorum without any reference to number or share value.[58]

The remaining jurisdictions accepted the traditional quorum requirement of a 50 % attendance in person or by proxy. Several jurisdictions require a 50 % attendance by owners both in number and share value (Belgium, Catalonia and Spain), whereas others simply require an attendance of 50 % by share value alone (Estonia, Germany, Greece, South Africa and Portugal) (Van der Merwe 2015, p. 433). However, a widespread lack of interest in attending general meetings, most notably in larger condominiums, has compelled many jurisdictions to adopt less strict quorum requirements in the interest of efficient management. The default quorum in England is thus one-fifth of the members of the association or two members, whichever is the greater, present either in person or by proxy. In Scotland, the default quorum for schemes comprising more than thirty units is 35 %,[59] while in South Africa the default quorum for schemes of more than 50 units is 20 %.[60] The adjourned meeting, which in Spain may be scheduled as soon as half an hour after the original meeting,[61] will be quorate irrespective of the number of owners and the share value represented (Van der Merwe 2015, p. 434). Note that only two jurisdictions require a quorum for the adjourned meeting. Italian law requires one third of the owners in number, representing at least one third of the share value of the building,[62] while Portugal requires the presence of a quarter of all the owners in share value for the adjourned meeting to be quorate.[63]

2.9.3 Proxies

A balance requires to be struck between efficiency and democracy, and this is particularly important with regard to voting by proxy. In order to maintain a sense of democracy, proxies should at least be directed or specific rather than undirected or general.[64] There are still limitations to this approach as it cannot cater for the fact that an owner may have been persuaded by the arguments for and against a motion if he had attended the meeting personally. Additionally, the number of persons that

[57]Ibid. art. 577-6 § 5 par. 2.

[58]Ibid. at art. 577-6 § 5 par. 4.

[59]Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009 rule 10.1.

[60]Annexure 8 (Management Rules) rule 57(2).

[61]Law on Horizontal Property of 1960 art. 16.2 par. 4.

[62]Civil Code art. 1136 par. 3.

[63]Civil Code art. 1432(4).

[64]See the Belgian Civil Code art. 577-6 § 7 par. 3. In the event that the chairman is not appointed by directed proxy, a vote by the chairperson can be challenged on the ground of impartiality (Van der Merwe 2015, p. 454).

may receive proxies should be limited in order to prevent a single individual effectively dictating the outcome of the voting process (Van der Merwe 2015, pp. 437–438). The overwhelming majority of European jurisdictions do not limit the number of owners that one proxy can represent, and allow one person (usually the chairperson or a member of the executive board) to agree to act as proxy for all the members who approach him with such a request.[65]

Only a select few jurisdictions limit the number of proxies one person can hold. The implementing provisions of the Italian Civil Code provide that if a condominium consists of more than twenty units, one proxy may not represent more than a fifth of the owners in number and share value (Van der Merwe 2015, p. 591).[66] Under the Belgian Civil Code and the French Law on Apartment Ownership of Buildings of 1965, the number of proxies that one person may have is restricted to three unless the total value of the votes of the proxy is no more than 10 or 5 % respectively of the total votes of the condominium (Timmermans 2010; Van der Merwe 2015, pp. 438, 596).[67] Arguably the most democratic of all is the Swedish regime which stipulates that if the matter is not regulated in the by-laws, an authorized representative is only allowed to represent one member (Van der Merwe 2015).[68] In Catalonia (Van der Merwe 2015, p. 493) and in Germany (Jennißen and Elzer 2010) the number of owners represented by one proxy may be limited in the by-laws and the constitutive agreement of a particular scheme respectively.[69] Finally, in Norway and Spain the rules on disqualification resulting from a conflict of interests apply to proxies as well as to owners (Van der Merwe 2015, p. 438).

2.9.4 Voting

The democratic nature of voting at general meetings concern two issues: first, whether a particular jurisdiction favors the principle of 'one owner, one vote' or the principle of 'one unit, one vote'; and second, whether the vote when exercised is calculated according to number or according to the share value of a particular unit (Van der Merwe 2015, pp. 436–437).

[65]This is the situation in terms of the Austrian, Catalan, Danish, Estonian, German, Greek, Irish, Dutch, Norwegian, Polish, Portuguese, Scottish, Slovenian and Spanish reports (Van der Merwe 2015, pp. 437–438).

[66]Article 67 par. 1.

[67]Belgium: Civil Code Art. 577-6 § 7 par. 5; France: Law on Apartment Ownership of 1965 art. 22 par. 3.

[68]Law on Real Estate Cooperatives 614 of 1991 Chap. 9 s. 14 and the Law on Cooperative Associations 667 of 1987 Chap. 7 s 2.

[69]Germany: BGH NJW 1993, 1329.

The German and Estonian legislation adopts the most democratic approach, allowing decisions to be made by virtue of a majority in number (on a show of hands) with each apartment owner having one vote regardless of the number of apartments that he owns.[70] Although the share values allocated to each apartment play a role in establishing a quorum, this is of no importance in the voting process. In Sweden the general meeting decides upon the manner of voting and voting usually takes place by a show of hands meaning that every shareholder has one vote irrespective of the economic value of his or her share.[71] The English, Irish and Scottish legislation also favor a more democratic voting process, envisaging two types of voting. The first is a show of hands, whereby each unit holder has one vote; the second is based on the principal of "one unit, one vote" and any owner of more than one unit, the chairperson (in Ireland) or the convener (in Scots law) can demand a poll in order to give effect to the second method.[72] The remainder of the jurisdictions favor the 'one unit, one vote' approach.[73]

The majority of the jurisdictions studied stipulate that the weight of the votes should not be calculated by number but either by share value alone[74] or by number and share value.[75] Some jurisdictions provide that some resolutions must be calculated by share value alone and others by number and share value.[76] All of this serves to highlight the fact that the law has chosen to favor persons with the greater share value, namely, persons with a greater financial investment in the scheme, at

[70]Germany: Law on Apartment Ownership of 1951 § 25 par. 2; Estonia: Law on Apartment Ownership of 2000 § 19(1) and Law on Apartment Associations of 1995 §11(1). The default statutory management rules applicable to large schemes in Poland provide that owners with a share value of at least one fifth of the total shares in the scheme may demand voting on the basis of one vote per owner (Polish Law on Unit Ownership of 1994 art. 23 s 2).

[71]Law on Real Estate Cooperatives Chap. 9 art. 14 and Law on Cooperative Associations Chap. 7 s 2.

[72]England: Model Articles art. 30(b); Ireland: Companies Act of 1963 s 137 and Sch. 1 Table A art. 59(a); Scotland: Title Conditions (Scotland) Act 2003 (Development Management Scheme) order 2009 rule 11.1 and 11.4.

[73]See for example for Norway (in exclusively residential condominiums) Law on Owned Units of 1997 s 37(1).

[74]See for example Belgium: CC art. 577-6 § 6; Croatia: Law on Ownership and other Real Rights art. 40(2); Denmark: Model by-Laws § 2 par. 3; Portugal: CC 1432.3; The Netherlands: Model Bylaws of 2006 art. 50 read with Van der Merwe (2015); Slovenia: Law on Housing of 2003 art. 25; Norway: Law on Owned Units s 37(1) (resolutions concerning mixed-use and commercial condominiums).

[75]See for example Catalonia: Civil Code art. 553-25.5; Spain: Law on Horizontal Property of 1965 art. 17(1) (installation of renewable energy equipment) and art. 17(3) (establishment of janitor, security and other general services); Portugal: Civil Code 1428(2) (reconstruction of a building that is less than 75 % destroyed).

[76]See for example France: Law on Apartment Ownership of 1965 art. 22 par. 2, art. 25 and Decree on Apartment Ownership of 1967 art. 17 (only by share value) and Law on Apartment Ownership of 1965 art. 26 (number and share value); Italy: Civil Code art. 1136 par. 2 (only share value) and CC art. 1120 read with art. 1136 par. 5.

the cost of scuttling the democratic principle of "one owner, one vote" (Van der Merwe 2015, p. 433).

Notwithstanding the above, there is certainly an argument for regulating social life in a condominium by the democratic principle of "one owner, one vote" rather than the weight of a vote being based on financial investment in the scheme. In condominiums, community interests should sometimes take precedence over individual financial interests and unit majorities. Voting by a show of hands should at least be prescribed for the election of the members of the management board and for the adoption of new by-laws concerning the use and enjoyment of units and the common property (Van der Merwe 2015, p. 433).

3 Conclusion

It is abundantly clear that the choices made by jurisdictions ultimately determine the role played by condominiums and other community schemes in providing urgent housing for persons who flock to cities in search of employment. In jurisdictions where condominium ownership is afforded status that is almost tantamount to detached housing, the institution flourishes. Equally, it is clear that recognizing outright ownership of condominium units is preferable to basing the scheme on subordinate real rights, such as leases and leasehold titles.

This, in turn, is closely connected to the important balance that has to be struck between individual interests and the interests of the condominium community as a whole. In order to maintain a harmonious community of owners, the condominium bylaws and house rules should be strictly enforced and it should be possible as a last resort to exclude a constant offender who makes life intolerable for his or her fellow residents. In taking this route, the particular jurisdiction should be aware of the fact that this could (albeit justifiably) undermine the security of title inherent in condominium ownership.

Furthermore, the selections made in a particular jurisdiction determine the use made of the condominium format for satisfying various non-residential needs in the form of business condominiums, office condominiums, caravan site condominiums and dockominiums. The question of whether a non-residential condominium will be an economic success in a particular jurisdiction is ultimately dependent on a number of factors particular to that jurisdiction. Thus condo hotels seem to thrive in Spain while experiments with the same institution in Hong Kong resulted in dismal failure. The Netherlands and its former colony Suriname are apparently the only countries where caravan site condominiums have been readily accepted. Dockominiums on the other hand are generally structured as part of a marina and the bays for yachts and smaller vessels are either attached to residential units as limited common property or as exclusive use areas or rented out occasionally to owners of pleasure boats and yachts.

The various selections made with regard to the management of condominiums are also of crucial importance. The management of condominiums appears to be regulated best when it is entrusted to a formal management corporation or

association with legal personality rather than to the community of owners with agents acting on their behalf. It further stands to reason that self-governance should be limited to smaller condominiums and would be entirely inappropriate for larger condominiums. Again the selection of a professional manager to run the daily affairs of the condominium seems to be preferable to a condominium whose daily affairs are managed by an executive board consisting of unit owners, although some sort of supervisory role could be entrusted to unit owners (as is the case in Germany). Personal participation in the management of condominiums depends on the majorities required for passing resolutions on particular matters, the quorum requirements for such voting, the number of proxies one person may hold, and the weight of the vote exercised by an individual owner in favor or against a particular resolution at the general meeting.

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Building for Urban Success? Project Development and Social Exclusivity in Germany Frankfurt/Main as a Case Study

Susanne Heeg

Abstract In the postwar era, homeownership in Germany has been the exception in big cities and renting the norm. This is changing nowadays. In this chapter, it is asked why this development takes place and what effects are triggered in this process. This requires an examination of the decline of cities in the 1980s due to deindustrialization processes as well as of answers to this development which consisted of building residential property for the upper middle class. In respect to the city of Frankfurt, the recent increase in transactions in condominiums and potential impacts are analyzed.

1 Introduction

Housing in Germany is organized in a different way than in most other countries. Homeownership is a form of housing which is prevalent in the countryside. But in cities where most people live, renting has been the norm up to now. Nonetheless, changes are noticeable. Endeavors to dismantle the welfare state and to establish an asset-based welfare state with property as the central asset to compensate individually for social risks are met since 2010 by exceptionally low interest rates. These interest rates make it possible even for many middle income households to consider buying into homeownership. In Germany, political parties of the right and the center (CDU/CSU, SPD and the Green Party) as well as representatives from the real estate lobby, mortgage and other banks as well as further financial organizations promote incessantly homeownership as a hedging against social risks. This has triggered a shift towards an acceptance of asset-based welfare which together with favorable financial and economic conditions fostered an increasing rate of homeownership.

S. Heeg (✉)
Department of Geosciences/Geography, Institute of Human Geography, Goethe University Frankfurt am Main, Frankfurt, Germany
e-mail: heeg@geo.uni-frankfurt.de

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In the postwar period until the end of the 1980s, the rate of homeownership did not increase dramatically. In 1950 only 39.1 % of all households lived in their own residential property. This share increased only to 39.3 % in 1987. A fundamental change took place in the period after German reunification. In 1998 the share of homeowners rose to 43.1 % and in 2010 to 48.8 %. Whereas the increase within the first 48 years of the Federal Republic of Germany (1950–1998) was only 4 %, the share was growing by 5.7 % within 12 years (1998–2010). Although it might be considered a low ownership rate compared with most other countries, it is considerable for a tenant-dominated country like Germany.

The goal of this chapter is to analyze the fundamental changes and consequences in the former "tenant society." The case study here is Frankfurt/Main. But why does it make sense to focus for this question on the urban and not the national scale? The rationale for this is that it is in cities where changes from renting to owning can be analyzed as if through a magnifying glass. First, up to now housing in cities was predominantly rental housing—in contrast to small cities and the countryside. So, cities stand out for analyzing these social changes. Second, the actors in the urban housing market changed fundamentally. Whereas municipal housing companies have been the most important player in housing politics and construction of rental houses in the postwar period, it is now private developers. These developers tend to sell the buildings to investors and individuals even before the construction process starts in order to recapitalize their business quickly. It is not tenants that guarantee the profit over a long period of time, but ideally the purchasers of the flats.

These changes contributed to an increase in homeownership. Before I examine in detail the spatial and historical pattern of residential property transactions in Frankfurt (Sect. 4), I sketch out the background for the change to homeownership which lies in massive deindustrialization processes and accompanying social problems in German cities in the 1980s (Sect. 2). In Sect. 3, I study urban answers to population loss, increasing poverty and disinvestment in the built environment as effects of deindustrialization and suburbanization of the middle class. This calls for examining the emergence of strategies to adjust cities to the demands of the upper middle class. Of great importance here are attempts to rebuild cities for this social group by fostering homeownership in order to "revive" cities. Finally, in Sect. 5 the effects and consequences of these developments are analyzed. The discussion focuses on social exclusivity and an increasing importance of owner associations in cities.

2 Urban Crisis and Answers to It

Since the 1970s, cities in North America and in Western Europe were struggling with deindustrialization. Manufacturing shifted to urban fringes, rural areas and the global South with the result that cities transformed from growth engines to places of plant closure, increasing rates of unemployment, social problems and lacking investments in the built environment. Cities—as a direct consequence of this

development—were confronted with increasing social and economic problems as well as decreasing tax bases. Thus, they lacked more and more the capacity to take countermeasures by investing in the urban infrastructure and social programs (Häußermann and Siebel 1987).

These fundamental changes in economic conditions were calling into question important cornerstones of urban governance in the postwar era. According to Harvey, local governments concentrated until the structural crisis on "the local provision of services, facilities and benefits to urban populations" (Harvey 1989). Cities were seen as transmission belts for national policy. Although the intensity differed from country to country (Heeg 1998; Wollmann 2006), local governments had overwhelmingly the task to put into practice social welfare and to provide infrastructure arrangements and facilities (housing, health, education, sports, traffic infrastructure, large-scale rehabilitation of neighborhoods and other public facilities as energy, water or green space). The superior goal was to create equal living conditions within the national territory. Cities functioned as a paternalistic distribution system which took care of administering solidarity and social balance.

This kind of urban governance was drawn into crisis when—with the erosion of the industrial base—the financial capabilities to deal with the problems dwindled. It triggered disillusionment in respect to the ability of governments to control and steer urban and social development (Pahl 1975). Soon a general consensus emerged that cities should take on an entrepreneurial stance to economic development in order to stimulate growth. In this context, more and more cities took up the task to proactively shape their economic conditions. Programs were developed to transform cities into attractive locations for consumption and economic activities in order to achieve a leading position within the competition between cities for command and control functions and well-off households. According to Harvey (1989): "[u]rban governance has thus become much more oriented to the provision of a 'good business climate' and to the construction of all sorts of lures to bring capital into town." Therefore, urban politics took on new features: instead of public housing provision, planning and financial incentives were given to private investors to develop housing (MacLeod and Craig 2012; Heeg 2008; Kerr 1998), to trigger revitalization (Häußermann and Birklhuber 1993) as well as city marketing (Mattissek 2008). The aim was to develop a new urban image. More and more cities focused on urban landmarks in order to become internationally visible as lively, thrilling and attractive places. According to Patsy Healy "[i]n the 1980s, the practice of spatial or territorial planning in many parts of Europe had deserted conceptions of the strategic development of cities and regions. Instead, the emphasis was on large projects of renewal and transformation of urban landscapes, justified through arguments about the need to break out of strategic spatial organizing ideas locked into the urban plans of an earlier era." (Healey 2004).

Thus, the entrepreneurial turn in urban governance includes a particular relation to the urban space, form, environment and population. The goal has been ever since to attract capital and upper middle classes as highly qualified labor force for the prospering service sector. Since the 1980s, market-obeying strategies have been means to this end by redirecting state intervention to be more market responsive and

to take on a more discreet role. Particular emphasis has been put on local strategies to restructure and revalorize urban space. Notably those places with the most marginalized populations have been targeted. Instrument to this are public-private partnerships where private actors take on the job to put neglected areas to new uses (Porter 2009). Task of the city is to provide land and planning. Whereas in these schemes the city usually takes on the risk-absorptive role, private actors realize the gains. Public land is used in this context to turn around the social composition of districts, neighborhoods and—in the long run—the whole city by targeting the built environment and land markets (Turok 1992). The rationale is to provide the office, service and residential space to attract footloose global capital and the "right kind of residents." In the long term, the city provides the built infrastructure for new uses, inhabitants and firms (for British cities see Jones 1996). In Frankfurt, it was Martin Wentz, head of the urban department for planning and building from 1989 to 2000, who proposed to use public land as a resource to provide for a turnaround (Wentz 1996a). With the slogan "Building for the future!" he interpreted the development of land and property as an essential prerequisite in order to regenerate the city and, thus, to initiate an urban renaissance.

3 Building for the Upper Middle Class

Within the last 20 years, many upscale housing projects have been realized in Frankfurt on public and private land. These projects are the result of an active supply side stance of the urban government in order to prevent the exodus of the middle class to the suburbs. The aim to make the city more attractive to this group was perceived to hinge in particular on housing. Whereas urban governments were seen as a guard of social well-being in the 1970s, this changed in the 1980s and 1990s towards being a manager of urban economic development (Wentz 1996b). As a consequence, it were no longer urban governments which provided housing via their housing companies but the role changed towards coordinating and mediating building projects. Since then, private investors and developers are the ones who predominantly realize housing projects. The first big building project started in the 1990s and took place along the Main river on public premises which had been used until then for a slaughterhouse (Hausmann 1996). Another example is the Western harbor which was shut down in order to generate land for an up-scale project in the 2000s. On both—and more—sites, developers have created mostly condominium buildings that are much in demand. Particularly these days, they find buyers way ahead of finalizing the construction process. Especially, multi-family houses along the river are divided into high-quality condominiums; in the case of the Western harbor project some condominiums are even equipped with boat landings. These projects have been the signal for further projects on public, semi-public and private land throughout Frankfurt (e.g. Europaviertel, Maintor, Henninger Areal or Riedberg). The last four projects are still under way. For the location of some projects see Fig. 1.

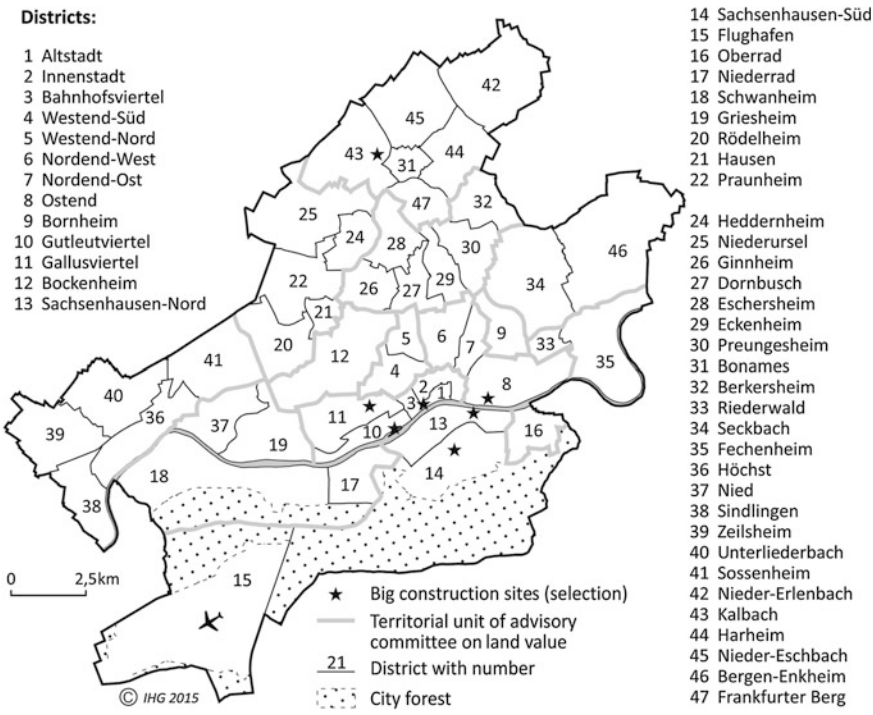

Fig. 1 Districts in Frankfurt and important big construction projects

What nowadays unifies cities in Germany is the attempt to make urban regeneration narratives come true. Growth coalitions of planners, politicians, economic and social elite literally sing the song of cities as being resurrected from ruins. The narrative refers to cities as growing entities.

The current growth in population (for Frankfurt see Fig. 2), housing and jobs in big German cities is seen as evidence for a steady improvement of urban conditions and proof of the consistency of property-led strategies in urban development. According to Ivan Turok, property-led development refers to an approach to foster urban regeneration "[…] through the direct employment effects of construction-related activity; by accommodating the expansion of indigenous firms; by attracting inward investment; by revitalising run-down neighborhoods; and by initiating areawide economic restructuring." (Turok 1992, p. 361). Therefore the assembly of finance, land, building materials, planning, and labor to produce or improve buildings for occupation and investment purposes as well as revitalizing neighborhoods is arranged. Property development is perceived as an independent source of dynamism and as catalyst in the process of economic growth.

According to this narrative, urban planners, through the strategic use of planning and property development, have managed a turnaround owing to decisive actions and decision-making in times of exception (Wentz 1996b). Contemporary urban

success stories are again and again told as an outcome of clever strategies appreciating and enabling market developments in general and development processes in the built environment in particular. Meanwhile, cities are perceived and marketed as places of opportunities and options because they provide jobs, up-scale housing, culture, events and a broad spectrum of services—taken together, a stimulating environment.

However, the benefits rarely flow to the vulnerable, poor and disadvantaged urban population. Rather, it implies to privilege the well-off over poor or welfare-dependent inhabitants. The built environment and public spaces of the inner city are reshaped for urban consumers (Sassen 2015). Urban policy and politics imply a marketization and economizing of the inner cities for well-to-do inhabitants. Intensified in the context of 'war on terror,' it goes along with explicit and implicit social control, surveillance and militarization of public spaces in order to guarantee an atmosphere for consumers (Glasze et al. 2005; Graham 2012; Marquardt and Henning 2012; Wacquant 1999). In that respect, it makes sense to argue that urban regeneration is not so much an urban fact but a form of governing the city. It refers to strategies of the local state to influence the social and economic composition of the city and to revalorize public space with exclusive effects. In this sense, the narrative of urban renaissance is a form of reinventing and restructuring the city (Porter and Shaw 2009).

For this end, planning was deregulated in Frankfurt as well as in other cities. One aspect of this is a growth in the number of subdivisions and conversions of apartment buildings into condominium buildings. A precondition for this is an administrative act in which permissions in the form of certificates (so-called "*Abgeschlossenheitserklärung*") are issued. These certificates state that the units are sufficiently separate and self-contained. It is a tricky instrument because it usually includes transforming reasonably priced apartments into expensive condominiums. Particularly central districts are affected by conversions. Investors can safely assume that subdivision and subsequent sale of flats will work there. Due to the fact that vacant flats achieve higher prices than rented ones, the inner city of Frankfurt is generally most affected by illegal and semi-legal termination of rental contracts and subsequent eviction ("*Entmietung*"). Districts where these developments take place the most are Westend, Bornheim and Sachsenhausen. Since buildings that can still be converted become more and more rare in the inner city, districts next to it such as Ostend or Gallus become attractive (Amt für Wohnungswesen Frankfurt am Main 2015).

In the time period between 2000 and 2013, the number of certificates increased considerably. Interestingly, the number gets particularly high in times of market exuberances. In 2013 the number of certificates reached an all-time high with 3900. Other peaks took place in 2002 and 2006. According to data provided by the advisory committee on land value for the city of Frankfurt the potential profits are quite impressive. An example for this is the price increase for a building which was converted in 2006. Before this, the adjusted purchase price of the building within the central city was €2,200,000. After the conversion and the sale of flats the price of the different flats in the building added up to €6,853,000 in 2008. More examples

within the central city are (a) an adjusted purchase price of €5,640,000 of a residential building and sale price of €8,336,800, and (b) a purchase price of €1,260,362 and a sale price of €3,014,000. Obviously the buildings did not become more valuable through the investment of money in refurbishment but because of the issuance of conversion certificates. The inherent speculative price increase is realized in the subsequent sale.

A direct effect is the decline in the number of cheap flats and apartment houses (Manus 2015). To this end, conversions as an example for deregulated planning change the social composition of neighborhoods. Another aspect of deregulated planning is the transformation of traditional working-class neighborhoods by introducing high-income and luxurious developments. This is done either directly by replacing working class housing by new projects or indirectly by realizing new developments on underutilized sites. This has beneficial effects in the form of new housing but the benefits flow rarely to those who have worked and lived there. Instead, for the inhabitants, it creates direct and indirect pressures to move. This takes place mostly in inner city areas on formerly manufacturing sites. The majority has been and is developed on public land (Deutschherrenvierel—former slaughter house, Campus Bockenheim—former university location, Europaviertel—former goods rail depot, Westhafen and Osthafen—former harbor areas, Riedberg—land bought by the city in order to offer green environments for families with kids). The projects Maintor along the river and the project on the site of the Henninger brewery are realized on private land. Starting from the first project—Deutschherrenviertel—the projects have become more and more expensive and exclusive.

Thus, on the one hand, it was possible to satisfy an increasing demand for housing. On the other hand it matched the goal of the urban government to attract new well-off inhabitants to socially deprived neighborhoods. This is important from a sociopolitical and a fiscal standpoint: socio-politically, it seemed possible to contribute to social stability in these neighborhoods. The assumption is that homeowners have an invested interest in stabilizing their neighborhoods because they want to maintain and/or increase the value of their own residential property. Also, from a fiscal standpoint the attempt to attract wealthy and economically-active population makes sense because this social group potentially enhances the tax revenue. Cities in Germany receive a certain percentage of the tax revenue collected in the urban area. Thus, the increase in inhabitants with stable income and labor contracts goes along with increasing tax revenues which is of prime importance in the context of austerity and chronic deficits in city budgets.

An example for this urban policy is a program implemented to improve the "main station district" (Bahnhofsviertel) which is located in the inner city and has suffered from a bad reputation as a red light district and drug sales point as well as being home to poor and migrant population. In 2005 a program to facilitate housing projects ("Stadtumbau Bahnhofsviertel") was launched in order to change the social composition of the inhabitants. Klaus Peter Kemper who is in charge of implementing the program emphasizes: "The program has no explicit social objective. In light of the contemporary discussion around displacement, I have to stress that there

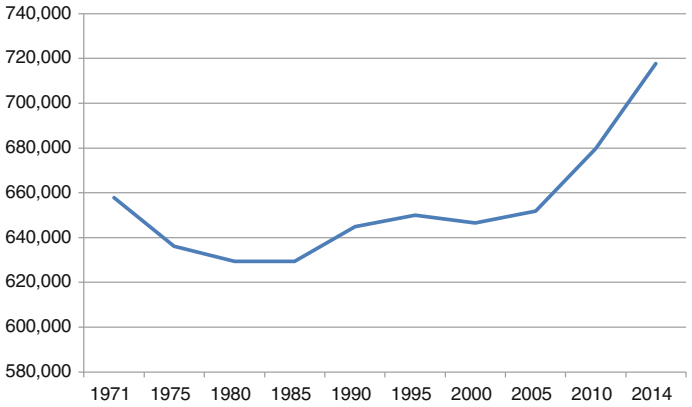

Fig. 2 Development of Population in Frankfurt, 1971–2014. *Source* Hessian State Bureau of Statistics (2014)

has never been the goal to support reasonably priced dwellings."[1] Rather, allowing condominiums was seen as a way to attract young and higher income inhabitants in order to change the social structure. In the territorial unit consisting of the districts "Alt-/Innenstadt, Bahnhofs-, Gutleut- und Gallusviertel" only 494 housing units were sold between 1984 and 1993 and 868 units from 1994 to 2003. But from 2004 to 2013 the sale has leaped to 3407 units (see Fig. 3). The reason for aggregating four districts into one territorial unit is that in the first period of time from 1984 to 1993 only few transactions took place. Due to requirements of privacy and data protection most other territorial units—apart from the districts of Westend, Bornheim and Oberrad—also consist of several districts.

4 Transactions in Residential Property

As Fig. 3 shows, transactions are concentrated in inner city territorial units that enjoy a growing interest as residential areas particularly by young urban professionals. This is particularly true for the Westend, the territorial units of Nordend/Ostend as well as Sachsenhausen (including Western harbor). In other districts as well, transactions in residential property have increased since 1984. The housing prices reflect this development (see Fig. 4). Between 1984 and 2013 the

[1]"Eine besondere soziale Zielstellung hatte das Förderprogramm nicht. Angesichts der aktuellen Debatte um Verdrängung im Bahnhofsviertel muss man sagen, dass es nie das Ziel gab, mit diesem Förderprogramm billigen Wohnraum zu schaffen." (Frankfurter Rundschau, 29 January 2014, No. 24, Vo.l 20, "Billige Wohnungen waren nicht das Ziel").

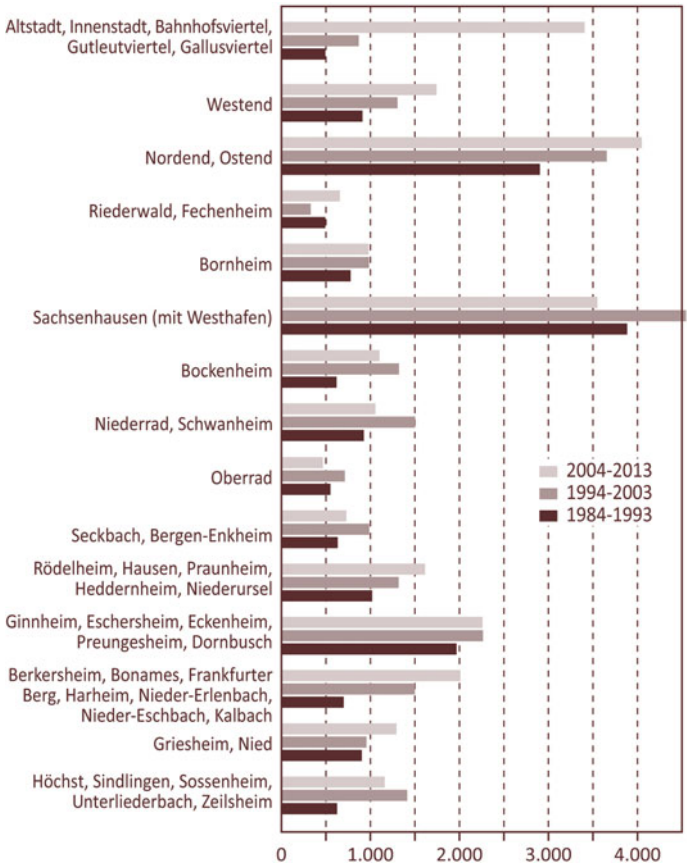

Fig. 3 Number of sold residential property in territorial units of Frankfurt from 1984 to 2013. *Source* Data provided by the advisory committee on land value for the city of Frankfurt

overall index of price increases rose in the majority of districts by 50 % to 150 points (in €/m^2).

Considering the price increase, most attention is paid to the inner city that was built out until the Weimar Republic period. In particular the Wilhelminian style apartment buildings and mansions (built between 1870 and 1914 in the so called "Gründerzeit" era) of the inner city have attracted considerable interest. In respect to these buildings (category "built before 1950"), prices have increased more than 200 %. Reason for this is that these buildings are very advantageous in respect to interior features as high ceilings, wood flooring and spacious room layout. The exterior features also explain the attractiveness of these buildings and thus the price increase: they are located in centrally-located areas with excellent public transportation links, high employment density, good provision of social infrastructure such as kindergartens, and many dining, entertainment, and cultural facilities.

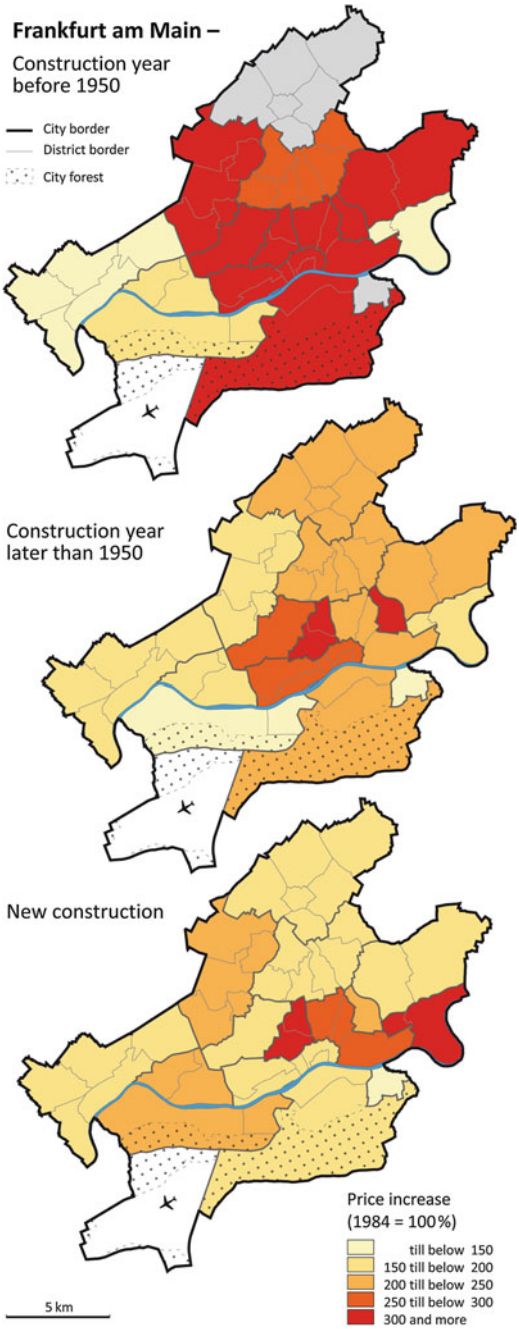

Fig. 4 Price increase for sold residential property in territorial units of Frankfurt according to year of construction from 1984 until 2013. *Source* Data provided by the advisory committee on land value for the city of Frankfurt

Similar developments are perceptible for buildings constructed after 1950. Again, this is particularly true in respect to inner city territorial units like the Westend, Bornheim (>200 %), Bockenheim and Alt/Innenstadt, Bahnhofs-, Gutleut- und Gallusviertel (150 to >200 %) where the price increase was very strong. This kind of buildings—and price increases—can also be found in territorial units of the North, South and West of Frankfurt.

The illustration on new-built construction reflects above all districts where recently much construction has taken place. Several large-scale building projects have been and have yet to be realized. However, due to the fact that this statistical category covers a considerable period of time, namely from 1984 to 2013, the new projects have no such big bearing on the category as it would be appropriate. Particularly in 2014 many condominiums and homes have been sold in Riedberg (Heddernheim) and Europaviertel (Gallus) and there are many more to come (Gutachterausschuss 2015). But these sales are yet not included into the category.

In Europaviertel the average price for new condominiums rose in the years 2008 until 2014 from 2,940 to 4,410 €/m^2 (Gutachterausschuss 2015). Within this period, the price increase for residential property in Riedberg was—2,730 to 3,680€/m^2—less dramatic (Gutachterausschuss 2015). Presumably, this has to do with the peripheral location of Riedberg and its defined target group of upper middle class families. According to the advisory committee on land value for the city of Frankfurt (Gutachterausschuss), the price of terraced houses as well as so-called last or corner houses rose steadily from 2006 to 2013 but in the following year the average purchase price fell (Gutachterausschuss 2015). However, this does not indicate a general drop in prices but those homes which were sold in 2014 in Riedberg where situated in less attractive locations. This explains the price decline for Riedberg. In contrast to Riedberg, Europaviertel is typified by multi-floor apartment buildings which are addressing young professionals who would like to benefit from the location close to the inner city.

Taken together, a trend is visible in Frankfurt—as in other big German cities—to live in homeownership which at the time being goes along with a considerable price increase for the property. In the meantime, there is a supply of housing for different residential needs (for families, for entertainment-oriented lifestyles, living amidst greenery etc.). The range of offers has—together with other above discussed reasons—contributed to an increasing importance of condominium-living and homeownership in the formerly tenant-dominated city of Frankfurt.

5 Private Communities?

Particularly, newly built projects show more signs of enclosure and forms of shielding. Usually, there has been a continuum between private and public spaces in the transition from house/apartment to the street. It is common, that houses themselves are only accessible to inhabitants but that the premises on which house are built are semi-private. In contrast to this, many of the new projects have fences not

only around one house but around several houses so that they shut off entire street blocks. In order to be able to enter these premises someone must allow access to the semi-private space between houses. In addition to the horizontal fencing off, there is also a vertical fencing off. More and more high-rise residential towers built in Frankfurt have doormen services. They ensure an exclusive living protected against outsiders.

These exclusive and excluding spaces within cities generally exhibit increasing prices for buying and renting flats. Those groups of the urban society who problematize the exclusive effects of these developments get the answer by urban planners, politicians and real estate consultants that there is no way to avoid higher living costs, higher rents and higher prices for homeownership. According to these actors, market principles determine the price of inputs and resources and this is the reason why urban living is becoming more expensive. But there is a blind spot: public land and public housing is sold for market prices and, thus, contributing to a price spiral in a situation of high demand. Taken together, this has paved the way for luxury residential projects and exclusive urban environments within the city. As such, these strategies cater to the needs of neoliberal urban subjects.

In respect to income, social status and culture, homeownership in these new projects is an appeal to control one's environment and its exclusivity. This is also true for the owners of converted apartments, which are usually in neighborhoods and districts that are much in demand. However, the exclusivity and selectivity is not a direct strategy by specific actors but an indirect one, which works through prices for homeownership. The inhabitants of condominium and residential property usually cannot actively decide over new occupants. At the beginning, the developer and later on, the owner of a flat is free to sell or rent to whom he or she wants. What is mandatory is that owners/tenants comply with house rules.

House rules are framed by national law but also by individual homeowner associations. Homeowner associations are a mandatory legal form for the management of a building with different owners. It means that all owners of a flat within a multi-family house decide jointly on matters concerning the building/community and must establish for this purpose a homeowner association. Members of the homeowner association are addressed as economic subjects who can participate in decision-making process and decide on the quality of services. The bigger a homeowner association is—that is the more members it has—the less it forms a community but anonymity is common. In most cases these associations engage a professional property management. The rule is that a property manager takes care of the maintenance and administration of the houses. It remains an open question what the impact of more homeowners and organized homeowner associations will have on cities. However, it is plausible and there is already anecdotal evidence that they claim to have a say in their surroundings.

Thus, not only individual owners are economized as strategic and calculating subjects capable of balancing benefits and losses, but urban space becomes economized. Different actors cooperate in transforming poor, neglected and crisis ridden spaces into pleasant as well as adventurous spaces. Up to now, it was always the city and locally active inhabitants who engaged in rehabilitating, improving and/or

protecting neighborhoods. However these days, additional actors emerge. In neighborhoods with a high percentage of homeowners, homeowner associations and homeowners make themselves heard. They become active in attempts to prevent the decline of residential property values. Particularly these days, there are voices which claim that the settlement of refugees or additional housing projects in the neighborhood is a threat to housing values. In this sense, economizing urban space and subjects will trigger social exclusivity as well as struggle about the question: "who governs neighborhoods?"

Acknowledgments I would like to take the opportunity here to thank the German Federal Statistical Office in Wiesbaden for providing me with the data on the historical devlopment of homeownership in Germany.

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New Trends in Condominium Law and Access to Housing in Post-crisis Spain

Sergio Nasarre Aznar

Abstract The worldwide economic crisis in 2007, whose negative effects are still present in Spain in 2016, has led to high unemployment, low salaries, and over-indebted families in a country of 80 % homeowners. This has had in turn a negative impact on condominiums by way of increased delinquency, squatting, and an even more deteriorated housing stock. Catalonia's last reform of Condominium Law in 2015 tries to address these issues by increasing the liability of the units and the role of the reserve fund, simplifying the governing body's decision-making processes, and facilitating environmental and information technology (IT) improvements in condominiums. In addition, a new framework for condo-hotels, as well as two new types of intermediate tenures (shared ownership and temporary ownership) have been established. These institutional innovations are intended to facilitate access to housing for middle-class families through such new stable, flexible, and affordable types of tenure, thus helping them to avoid becoming over-indebted.

Abbreviations

AC/JUR/RJ	References to a court case in Aranzadi database (http://www.aranzadidigital.es)
ADR	Alternative dispute resolution
BOE	Spanish Official Bulletin (*Boletín Oficial del Estado*)
CC	Spanish Civil Code (*Código civil*)
CCC	Catalan Civil Code (*Codi civil*)
DOGC	Catalan Official Bulletin (*Diari Oficial de la Generalitat de Catalunya*)
ECHR	European Court of Human Rights
EU	European Union
IT	Information Technology
LEC	Spanish Civil Procedure Law (*Ley de Enjuiciamiento civil*)

S.N. Aznar (✉)
University Rovira i Virgili, Tarragona, Spain
e-mail: sergio.nasarre@urv.cat

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LPH	Spanish Condominium Act (*Ley de Propiedad Horizontal*)
NIMBY	Not-in-my-backyard effect
RLD	Royal Law Decree
SAP	Regional Appeals Court ruling
STS	Spanish Supreme Court ruling

1 Housing Bubble and Burst in Spain: The Role of Condominiums

The long-lasting housing policies (since the 1960s) favoring widespread home-ownership through easy access to credit and a clear-cut tax and legal framework, taken together with the liquidity shortage of Spanish banks due to the international crisis, caused the collapse of the Spanish economy in 2007, virtually stopping loans to the building industry, retailers, and consumers. This is a situation that has largely continued in 2016,[1] and it has also affected the day-to-day reality of condominiums.

The crisis triggered the weakening of the (traditionally already weak) welfare state. Retirement age was delayed to 67, public retirement pensions are in constant jeopardy, and there has been a reduction in public expenditure on health and education. Spain ranked amongst Western European countries as having the highest rate of risk of poverty or social exclusion in 2011 and 2012; a dramatic rise in the unemployment rate, from 8.26 % in 2006 to about 23 % and 50 % youth unemployment in 2015; and an increase in social and political tensions.[2]

Ultimately, the crisis led to significant numbers of evictions for many over-indebted mortgagors and tenants, and even to an increase in squatting. There have been an average of 45,000 families per year evicted from their primary residences due to a mortgage foreclosure in the period 2010–2013, while there were an average of 35,000 evicted tenants per year in the same period.

The legislation and public policies have not treated housing tenure choices systematically for decades. Homeownership is traditionally encouraged through incentives (taxation and national housing plans were homeowner-driven), affordability (there has been a developed, structured and professional mortgage market and a mature mortgage securitization system since 1872), safety and transparency (clear-cut rules for buying and selling, fast mortgage foreclosure and well-trained market gatekeepers such as solicitors, public notaries and property registrars). However, these mechanisms were lacking in the private rental market. Meanwhile, no intermediate tenures market (e.g. shared ownership) has been developed in

[1]For a more in depth explanation, see Nasarre Aznar (2014).

[2]For a description and the consequences of unemployment in the context of housing, see Nasarre Aznar (2016).

centuries, while new legislation on intermediate tenures has only just been passed in Catalonia in August 2015.[3] Reckless lending and bad banking practices have contributed to this situation by favoring the granting of mortgage loans to customers that could not repay them (e.g. high loan-to-value ratios, swaps and floor clauses arranged directly with consumers, desperate fund-raising by banks who massively sold preference shares to consumers from 2009 onwards, etc.).[4] This has led to an increase in the number of mortgages in arrears up to 2015, being 6 % of the total number of outstanding mortgages by the end of 2014 (when in 2006 only about 0.5 % of mortgages were in arrears).[5]

The areas in Spain most affected by the crisis and the evictions are the regions on the Mediterranean Sea coast (Catalonia, Valencia and Andalusia) and Madrid (right in the center of the country), which are precisely the regions with the highest population density (92 inhabitants per square km) of a country of 46.5 million inhabitants.[6] The phenomenon of "ghost neighborhoods" (i.e. hundreds of newly built housing units either unfinished or not rented/bought by anybody, usually in the outskirts of cities and even villages; many of them are, in fact, are condominiums[7]) is also more common in these regions. In fact, 17.8 % of the Spanish population is concentrated in Andalusia, 16 % in Catalonia, 13.7 % in the region of Madrid and 10.8 % in the Valencia regions. In contrast, most of the territory surrounding Madrid until reaching the coast is very sparsely populated, with only a few exceptions, thus creating a sort of a "doughnut" effect.

The condominium has been a crucial type of co-ownership organization, especially—but not only—for residential buildings. This has contributed dramatically to the widespread growth of homeownership in Spain. In densely populated areas, the residential condominium is the most preferred legal structure. Thus, while in 2014, according to Eurostat,[8] four out of every 10 persons in the EU-28 lived in flats, just over one quarter (25.6 %) in semi-detached houses and just over one third (33.7 %) in detached houses, Spain (including Catalonia) ranks first among EU member states in people living in flats (66.5 % in 2014) as shown in Fig. 1. Flats, in turn, are almost always organized as condominiums.

The condominium (including complex multifaceted condominiums and condominiums subdivided into parcels of land) is by far the most widespread type of model used in Spain to organize schemes consisting of multi-unit buildings or multi-unit

[3]A new generation of intermediate tenures has only recently been introduced into Catalan law by Act 19/2015, 29 July (DOGC 4-8-2015, no. 6927). See Sect. 3.4.

[4]See Nasarre Aznar (2011).

[5]See: http://www.ahe.es/bocms/images/bfilecontent/2006/04/26/90.pdf?version=17. Accessed 3 Nov 2014.

[6]See: https://es.wikipedia.org/wiki/Demograf%C3%ADa_de_España. Accessed 22 Dec 2015.

[7]See: http://www.businessinsider.com/spain-ghost-towns-satellite-2011-4# and http://www.dailymail.co.uk/news/article-2102074/Spain-haunted-ghost-towns-built-boom-years-unemployment-tops-5million.html. Accessed 22 Dec 2015.

[8]See: http://ec.europa.eu/eurostat/statistics-explained/index.php/Housing_statistics. Accessed 22 Dec 2015.

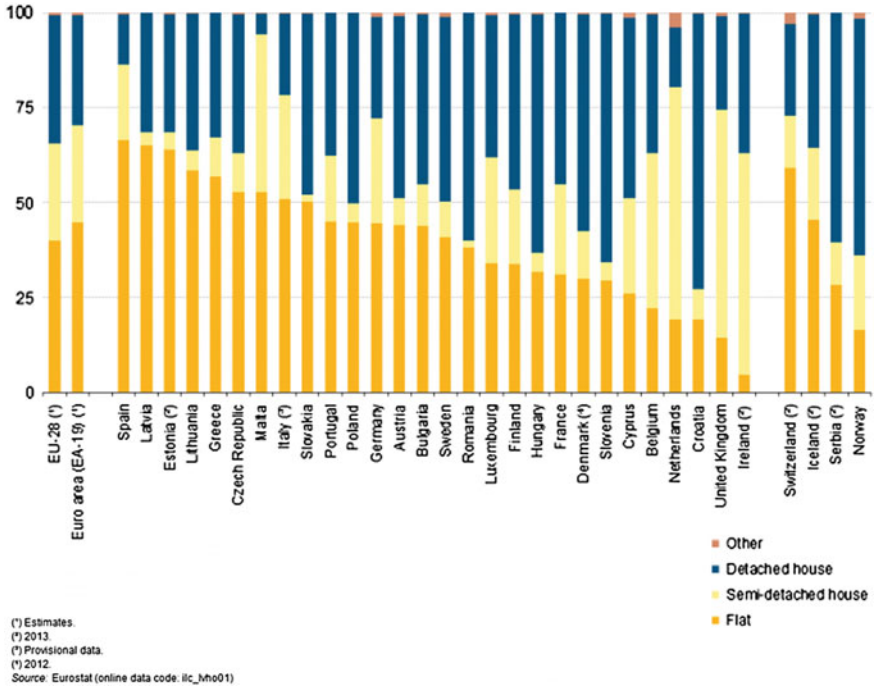

Fig. 1 Distribution of population by dwelling type in 2014. *Source* Eurostat

parcels of land.[9] Thus, Catalan Law 5/2006, dated 10 May 2006,[10] expressly recognizes that the condominium-type organization has made an extraordinary contribution in the last 50 years to the universality of private ownership of real estate in Spain. The condominium is hailed as one of the fundamental legal institutions guaranteeing the access of citizens to the ownership of residential dwellings.

This is particularly due to the fact that a large number of residential buildings have been built in successive construction booms in Spain since the end of the Civil War in 1939. This caused, as has been already pointed out, a high population density in many Spanish cities, mainly along the coast. Some of these construction booms were caused by internal migration from poorer and agricultural regions in Spain to more industrialized ones, such as the migration during the 1950s, 1960s and even the 1970s from Andalusia and other parts of Spain to Catalonia. This created high-density population belts around big cities and new neighborhoods

[9]See Van der Merwe (2015) for other ways of residential organization in Catalonia and in whole of Spain, such as homeowners' associations, time-sharing schemes or housing cooperatives, which all have their own legal configuration problems that make them less appealing.

[10]DOGC 24-5-2006, n. 4640, p. 23167.

surrounding Barcelona and other big and industrialized Catalan cities, such as Tarragona.[11]

The typical architecture of those new cities and neighborhoods was gray multi-unit buildings organized as condominiums.[12] Other condominium construction booms were caused by the rise of international tourism since the 1960s, which led to the mass construction of high-rise apartment buildings for use as summer residences along almost the whole of the Spanish coast.[13]

The last housing boom, which began in 1995, suddenly came to an end in mid-2007 on account of the current global economic and financial crisis. Once the long Spanish recession beginning in the 1990s came to an end, the extensive building construction projects were not confined to inner cities but also led to the creation of very large, new, densely populated neighborhoods on the outskirts of large and middle sized cities such as Madrid and most of the larger coastal cities in Spain.[14]

The last reform of Condominium Law in Catalonia, through Act 5/2015, dated 13 May 2015,[15] clearly reflects new trends and needs in relation to condominiums, taking into account the new reality after the beginning of the crisis, as explained in Sect. 3. Moreover, two new additional Acts (Act 3/2015 and Act 19/2015) opened up new possibilities for new types of condominiums (condo-hotels) and facilitate access to housing for middle-income families.

Therefore, this chapter focuses on Catalonia, as it has introduced the most recent reform of Condominium Law and has adopted the most innovative mechanisms for access to housing within Spain, in addition to being one of the Spanish regions most affected by the crisis. Therefore, Catalonia today has the most updated legal framework for condominiums and access to housing in Spain,[16] given the current social and economic situation that began in 2007.

[11]See images of Tarragona (the second most important capital city of Catalonia; 133,000 inhabitants) from above at https://www.youtube.com/watch?v=q_2ANTycnPM. Accessed 31 Dec 2015. As can be observed, condominiums are present in nearly all parts of the city: old town, new town, ramblas, fishermen's quarter, Eastern—sea—and Western—inland—neighborhoods, and the outskirts.

[12]See images from above of greater Barcelona (belt surrounding Barcelona) at https://www.youtube.com/watch?v=XcBh0h-2nkY. Accessed 31 Dec 2015.

[13]See images of a traditional tourist village, Salou, at https://www.youtube.com/watch?v=fKOWq_KPBPU. Accessed 31 Dec 2015.

[14]Nearly every little village in many regions across Spain has a new neighborhood in its outskirts built during in that period (1995–2007) and organized through condominiums, thus altering the harmony of the traditional type of construction in those places, namely classical single-family houses.

[15]DOGC No. 6875, 20-5-2015.

[16]The right of Catalonia (and other historical regions in Spain) to have its own private law is recognized in the Spanish Constitution 1978, in particular art. 149.1.8.

2 The Essential Features of Catalan Condominiums

2.1 Introduction

Since 1 July 2006, and through Act 5/2006,[17] Catalonia now has its own rules in its own Civil Code (CCC; *Codi Civil de Catalunya*) with regard to property rights and rights in rem, including condominiums (*propietat horitzontal*[18]) and other forms of co-ownership.

Moreover, by virtue of the 6th Transitional Provision of that Act, the condominium provisions of the law apply also to condominiums already in existence on 1 July 2006, although they were established and governed by the Spanish Law on Condominiums (LPH; *Ley sobre Propiedad Horizontal*) 49/1960, 21 July 1960,[19] and article 396 of the Spanish Civil Code 1889 (CC).[20] Therefore, since that date, these Spain-wide provisions are no longer applicable to Catalan condominiums. Here are some essentials to understand the organization of condominiums in Catalonia.[21]

2.2 Elements Within a Condominium

2.2.1 Private and Common Elements

Catalan law recognizes a threefold legal relationship to which a fractional owner enters when he or she acquires the ownership of a unit within a condominium. The unit owner also becomes co-owner of the common property holding a quota in it (art. 553-1 CCC) and a member of the management body of the co-owned construction (art. 553-19.1 CCC).

Catalonia follows a dualistic approach in awarding the same legal status to the private ownership of a unit and to the co-ownership of the common property. Thus, each unit has its own individual record in the Land Register (*folio*, literally, "page"), where the new owner's right is registered, and which is separate from the record of the building as a whole (art. 553-9.4 CCC).

Catalan Condominium Law does not confer any right of first refusal or of repurchase on any other owners if any given proprietor intends to sell his or her unit. Unlike in the case of ordinary co-ownership (arts. 552-4 and 552-10 CCC), the

[17]This Act contains the Fifth Book of the Catalan Civil Code.

[18]All translation of key words will be into the Catalan language, except for Spanish laws, where the Spanish language is used.

[19]BOE 23-7-1960, n. 176, p. 10299.

[20]Royal Decree 24 July 1889.

[21]More details about both Catalan and Spanish Condominium Law can be found in Van der Merwe (2015).

owners are not allowed by themselves to apply to the court for the termination of the condominium and the division of the land and buildings in a condominium community among the property holders. A condominium can only be dissolved with the unanimous consent of all co-owners of the units (art. 553-14 CCC).

Generally speaking, the common elements are those parts of the condominium that are necessary for the optimal use of the private units. The common elements are co-owned by the owners and can be used by all of them (arts. 553-41 and 42 CCC). If one of the owners uses the common elements in a way by which he impedes the others from using them, it will be considered a breach of the law according to art. 7 CC. Moreover, the CCC provides a non-exhaustive list of what are considered common elements. These include the site, gardens, swimming pools, structural parts of the building, façade, roof, halls, stairs, elevators, antennas and, in general, the facilities and services located outside private units that serve the community of owners or facilitate the use and enjoyment of private units. The housing units, in turn, should necessarily have direct or indirect access to a public pathway and should be able to be owned separately (art. 553-33 CCC).

The CCC also caters to exclusive use rights with regard to the common property (art. 553-43 CCC). These can be created in the constitutive title of the scheme or subsequently, by a unanimous resolution of all the members of the governing body of the condominium. This is a novel way of linking any common area to which only one co-owner has physical access (e.g. a terrace or a balcony) to its natural or normal user. Moreover, as he or she is the only one that benefits from that common element, that unit owner bears all the normal expenses of its maintenance, while the community of owners assumes extraordinary expenses.

Parking spaces in the basement of the condominium building are normally allocated and legally registered in one of the following ways (arts. 553-52 and 553-35 CCC): (a) as inseparable parts of an apartment or unit (art. 553-35 and 553-52.2(a)); (b) the whole basement is designated as a common element of the condominium, with each parking space being available on a first come first served basis (art 553-52.2(b)); (c) the whole basement is structured as the object of co-ownership with the share of each co-owner entitling him or her to the exclusive use of a specific parking space as an exclusive use area (art. 553-52.1(a)); (d) the parking bays are considered independent and clearly identified private elements or units, each with their own quota, while the common spaces of the garage are considered as common spaces of the condominium (art 553-52.1(b)).

These four options are also available for the structuring of storage rooms located in the same building, but physically separated from the units (dwellings) themselves.

If any parking spaces are situated outside the building, in another built construction, or if they are only delineated with lines on bare land, they would normally be structured as units in a separate condominium scheme (independent from the condominium building with the residential units), but nothing prevents the application of any of the other forms. The only limit is that these parking spaces must be structured solely by means of a subsidiary condominium scheme if two or more condominiums share the use of the parking spaces (art. 553-52.3 CCC).

2.2.2 The Quota

The formula used for the calculation of quotas or share values in a condominium is a combination of several factors, namely the floor area of the unit measured in square meters, the intended use and location of the unit in the scheme, and the physical features or permitted use conditions attached to the unit in the constitutive title of the scheme such as exclusive use areas (art. 553-3.2 read with art 553-9.1(b) CCC). Thus, the quota for a business premises can be larger because of its commercial use than the quota for the residential units, as long as this is provided for in the constitutive title. The quotas for units with allocated parking spaces can be larger than those without parking spaces. The quota of a unit is calculated in hundredths.

The quota determines the co-ownership share that any owner of a private unit has in the common elements of the scheme. It is also used to allocate the percentage of charges, expenses, and benefits owed by or assumed by the owner of a particular private unit as well as an owner's share in the management and administration of the condominium (art 553-3.1). There can be specific quotas for specific expenses. For example, the by-laws may provide that the owners of ground floor apartments are not obliged to contribute towards the cost of maintaining the elevator in the building (art. 553-3.4 read with art. 553-11.2 (b) CCC).

2.2.3 Rules to Govern the Condominiums

A Catalan condominium is governed, in the first place, by the constitutive title or the notary deed establishing the condominium regime.[22] This deed sets out the way in which the scheme is divided into private units and common property as well as the use of the private units and other parts of the scheme attached to the unit (art. 553-9.1 CCC). Secondly, the condominium is governed by the by-laws (art. 553-11 CCC) or rules adopted to regulate the use of the units and common elements in the condominium. If no by-laws have been stipulated for a particular scheme, the provisions of the CCC will apply by default. Any scheme foreseen in the by-laws will therefore normally be included in the notary deed that establishes the condominium, and this document may be registered in the land register (art. 553-9.4 CCC) and it will thereafter be enforceable against any third parties (art. 553-111.3).

The by-laws (statutes) bind future owners and all building occupants as well as their visitors. However, for everyday activities (or neighbor relations) an internal set of house rules (*reglament de règim interior*) may be adopted by the condominium association, which binds both owners and users of the multi-unit condominium building (art. 553-12 CCC). This set of rules regulates the coexistence and neighbor relations between the owners and the use of the common property, facilities, and

[22]Spain, including Catalonia, follows the Latin type Notary system (http://www.uinl.org/146/fundamental-principles-of-the-latin-type-notarial-system). Accessed 31 Dec 2015.

equipment used by all residents. The house rules may not contain any rules that are contrary to the provisions of the constitutive title or by-laws of the scheme.

The CCC does not provide model by-laws but gives examples of the possible content of by-laws in art. 553-11. These potential provisions include the location, use, and exploitation of individual units and common areas; limitations on the use of and other charges on private units; the manner in which rights can be exercised and how scheme obligations must be honored; and how income, expenses, charges and benefits will be distributed amongst the unit owners. These provisions also touch on the management body of the condominium and the election of other administrative officials in addition to the president, secretary, and manager who have to be elected under the terms of the CCC. Finally, these provisions contain rules concerning the management of the condominium (art. 553-11.1(a)–(f)).

Other clauses in the by-laws may provide for the contraction, expansion, segregation or consolidation of private elements or the detachment of components allocated to private units to create new units without the consent of the management board but with an adjustment of the quotas allocated to each new unit. Such clauses can also address the exemption of certain units from contributing to the maintenance and repair of the land, stairs, lifts, gardens, and recreational and other similar areas. They can also deal with the establishment of an exclusive use area on the common property and, where applicable, the closure of part of the land or roof or any other common area for the exclusive use of a particular unit owner. Other issues may include the placement of a sign or a notice on the façade of the building to announce the location of a unit situated in the basement of the building; a rule limiting the activities that can be carried out in private units; and a rule agreeing to solve disputes within the condominium through arbitration or mediation (arts. 553-11.2(a)–(f) CCC).

2.3 Management of the Condominium and Lack of Legal Personality

The management body of a Catalan condominium (*junta de propietaris*), representing all the owners, does not have a legal status that is separate from that of its members (art. 553-19.1 CCC). It is technically conceived as the main organ of governance of the condominium in addition to the president, the secretary (arts. 553-16 and 17 CCC) and the condominium manager, who is often a professional, designated real estate manager (*administrador de finques*) (art. 553-18 CCC).

The condominium itself lacks legal personality. However, in one sense, it has a sort of "legal personality-like" behavior, given that its president represents the community of owners in all judicial and non-judicial affairs and thus the condominium acts as a claimant or defendant in any litigation (art. 553-16.2 (b) CCC and art. 6 LEC).

The community of owners through its president is further empowered to enter into contracts with third parties (for example, with an electrician for repairs to the corridor lights), and the condominium can be held contractually liable to pay for the service rendered (art. 1124 CC). It can even be held liable under tort law, for example, where a visitor is injured by slipping on a puddle of oil that was not removed by the cleaning service hired by the condominium (art. 1902 CC). The condominium also controls a special fund to cover essential expenses (*fons de reserva*), whose role has been reinforced in the reform of 2015, as explained below. Condominiums may have an 'official' name if such is mentioned in its by-laws. If they do not have an official name, a common way to refer to Catalan condominiums, in judicial or administrative documents, is under the general designation of *Comunitat de Propietaris de l'edifici X* (literally meaning the "owners' community of the building X").

The management body (consisting of a general meeting held by the community of owners) holds all the residual powers that are not expressly granted to other organs of the condominium. It has the following specific powers: (1) appoint and remove the president (*president*), the secretary (*secretari*) and the manager (*administrador*) as well as the other organs that govern the scheme as provided for in the by-laws, such as a vice-president (*vice-president*) or a board member (*vocal*); (2) amend the constitutive title; (3) adopt and amend the by-laws and internal house rules of the scheme; (4) approve the annual budget and the financial report; (5) decide to undertake extraordinary repairs and improvements and to provide for special levies to pay for these; (6) establish and modify the criteria for determining quotas; (7) terminate the condominium regime and thus return the land and buildings in the scheme to the ordinary co-ownership regime (art. 553-19.2 (a)–(g) read with art. 553-14 CCC).

Owners are normally reluctant to assume the post of president (only a co-owner can become president) especially given that it is unpaid job, and also because it involves a range of potentially difficult functions (arts. 553-15 and 16 CCC) and requires constant attention to the complaints and demands of his or her fellow owners. Therefore, the Catalan law has introduced a special procedure to ensure that the posts of president, secretary and manager (if the last two are not professionals) are always filled: owners are obliged to take turns filling these posts, otherwise the next office holders have to be decided by a draw amongst any owners who have never occupied such posts. The appointed persons must act as the president, secretary or manager respectively for one full year.

Meetings of the government body take place at least once a year (art. 553-20 CCC) and only co-owners are allowed to attend (art. 553-22 CCC). Decisions require a majority of co-owners that also represent a majority of quotas (shares) (arts. 553-25 and 26 CCC); sometimes, a supermajority of 80 % of co-owners and quotas is required for certain decisions, or even unanimity, which is discussed below.

2.4 Types of Condominiums

Under art. 553-2.1 CCC, the provisions concerning condominiums in the CCC (arts. 553-1 to 553-59) may be applied to any development in which there are both private and common elements with the following specific requirements. On the one hand, the private units (apartments) must be functionally independent, which means that they must be capable of being used for residential or commercial purposes. On the other hand, the common elements must be linked to the units, and so be capable of rendering adequate services to such units and must be *physically* linked to the private units.

The Catalan CCC caters to all types of condominiums, whether residential, commercial, industrial, office or tourist under art. 553-1 ff. CCC. However, the law requires that the application of these provisions must be duly adapted to the nature of each particular scheme. "Complex condominiums" (a condominium containing several condominiums) are also permitted and have their own specific regime (arts. 553-48 to 553-52 CCC).

Art. 553-2.2 CCC mentions examples of distinctive types of developments that may be structured as condominiums. These are "dockominiums" (the units being the mooring spaces for boats and yachts), street markets (the units being each individual stand), and graveyards (the units being the individual graves). Under art. 553-52 CCC, condominiums can also be created to organize an independent non-residential scheme consisting of storage rooms or a building consisting only of parking bays. This may be easier to manage, for example, if the number of apartments in a nearby residential scheme does not have sufficient storage rooms or parking spaces for all its residents.

Airspace condominiums, as well as the so-called bare-land or caravan site condominiums, are not expressly governed by the CCC, but it would be better to view this from the perspective that these are schemes that it should be possible to create, so long as they fulfill the requirements of being physically subdivided into independent units and common property (art. 553-2.1 CCC). The so-called bare-land condominiums follow the rules of arts. 553-53 to 553-59 CCC. Condominiums consisting of caravan and bare-land sites would be similar to parking bay condominiums, in that identifiable independent physical spaces are required to create the relevant units surrounded by sufficient common spaces to allow access to the units.

Airspace condominiums or at least rights to establish condominiums on airspace reserved for that purpose are encountered in two cases. In the first instance, the developer is allowed to establish a condominium with regard to a building based on construction plans or where the construction of the building is not completed yet (art. 553-7.1 CCC). In the second instance, the developer (or any third party) is allowed to reserve for itself the right to build on the top of or below the existing condominium building (arts. 553-8, 553-10.2, 553-13, 567-1 and 567-2 CCC). Hotel condominiums (*condo-hotels*) can also be created in Catalonia since 2015.[23]

[23]See Sect. 3.3.

3 The Catalan Reforms on Condominiums and Access to Housing in 2015

3.1 Reasons Behind the Changes

Due to the increase of the aforementioned evictions, the constant decrease in the sales of dwellings and the unaffordability of leases, the number of empty dwellings in Spain rose in 2011 up to 3.5 million, making the day-to-day reality of condominiums more and more complex. These are some of the effects:

(a) Increase of arrears in the payment of the condominium expenses by flat owners. This is either due to the economic difficulties of the unit owners or simply to the freewill of a special type of "new owners."

As for the former type of owners, the aforementioned unemployment rate, the number of mortgages in arrears, the voluntary or forced restructuring of debts,[24] and even the circumstances giving rise to energy poverty,[25] are delaying the payment of condominiums expenses, as they are perceived as less urgent or necessary than paying one's mortgage or one's electricity or gas bills. In 2014, delinquency by co-owners in the payment of common condominium expenses amounted to €1.8 billion (an increase of 3.15 % in comparison to 2013).[26] 51 % of these debts are owed by people with financial problems, while 25 % are owed by "professional defaulters"[27]—i.e. those co-owners that systematically default on their payments to the condominium. It must be also borne in mind that most vulnerable families cannot be evicted (even after a court order stating so) since 2012 and until 2017,[28] so they are still living in their units. Ultimately, the failure to contribute to the payment of the condominium expenses may lead to the seizure of the unit and its forced sale to a third party (art. 9.1 LPH and arts. 553-4 and 5 CCC).

[24]According to the Spanish Mortgage Association, 8.4 % of housing mortgages were refinanced and/or restructured (delays, suspension of installment payments, prolonging of duration of the mortgage, modification of interest rates, alternative forms of repayment and voluntary *datios in solutum*) until the end of 2013, see: http://www.elconfidencial.com/empresas/2014-05-09/la-banca-ha-refinanciado-el-15-del-credito-200-000-millones-y-la-mitad-esta-en-mora_127604/ . Accessed 9 May 2014.

[25]See the first Spain-wide study on this question at Association of Environmental Sciences (ACA), available at: http://www.cienciasambientales.org.es/index.php/cambio-climatico-y-sector-energetico/pobreza-energetica.html. Accessed 31 Dec 2015. The report revealed that since 2012, 16.6 % of Spanish families (seven million people) have had to use an excessive amount of their economic resources to pay the utilities. The main cause has been the increase in the price of energy (60 % since 2007) and the drop in family income (8.5 % according to INE).

[26]Observatorio de Comunidades de Propietarios (2015).

[27]The last portion of the debts is owned by banks; see more below.

[28]RLD 1/2015, 27 February 2015 (BOE no. 51, 28-2-2015).

As for the latter type of owners, many mortgaged dwellings, and a number of properties and sites in development or in unsold finished buildings,[29] ended up in the hands of lenders.[30] This has been quite usual since 2007 that very few, if any, bidders attended the auctions of forced sales (art. 671 LEC). This has brought dozens of thousands of properties to the hands of the banks (in January 2015 the six major Spanish banks still owned 65,000 properties[31]) or into the hands of the so-called "Bad bank" (*Sareb*),[32] real estate management companies or (vulture) funds, which have little incentive to pay condominium expenses for such a large number of properties. In fact, 23.9 % (€445 million) of the total delinquency in paying the condominium common expenses is due by banks, real estate managers or funds.[33] In this context, some judges have even justified squatting, in view of the disinterest of the banks and of the *Sareb* when it comes to taking care of their properties.[34] Thus, the Order of Criminal Court no. 4 Sabadell of 8 May 2013,[35] stopped the removal of squatters from a building owned by the *Sareb* because the latter was not fulfilling the social function of its property, that is, it was not occupying the building but the squatters actually were.

(b) Decrease in the funds that the condominium has available for maintenance and for quick, legally binding or urgent repairs of common elements (basically, the reserve fund; art. 9.1 (f) LPH and 553-6 CCC).

Consequently, many non-essential common elements in many condominiums have been closed down, such as swimming pools or elevators and many common parts have fallen into a state of disrepair, such as façades and roofs, which is especially dangerous in the context of a stock of housing properties that is very old. In fact, in 2011, about 12 million primary residences out of a total of 18 million were more than 30 years old and more than five million were over 50 years old;

[29]Risky loans to land developers are still very high by the end of 2015, around 30 % (Asociación Hipotecaria Española 2015).

[30]These lenders may, in turn, retain the properties or sell them to real estate management companies or funds or to the Sareb.

[31]See a summary at: http://www.eldiario.es/andalucia/activos-inmobiliarios-todavia-lastran-banca_0_324068716.html. Accessed 28 Dec 2015.

[32]A Sareb is an *ad hoc* corporation created by the government to take unsold/foreclosed properties and loans to developers from banks (especially from those intervened by the State) and sell them at a profit. See: https://www.sareb.es/es-es/Paginas/web-Sareb.aspx. Accessed 28 Dec 2015.

[33]See Observatorio de Comunidades de Propietarios (2015).

[34]The situation of the Sareb is particularly complicated because, according to Articles 16.3 and 17 of Royal Law Decree (RDL) 1559/2012, it is not entitled to exploit or to occupy its properties, its single purpose being to sell them at a profit as quickly as possible. The Sareb is not legally authorized to occupy the dwellings, which automatically goes against Article 33.2 CE (social function of ownership), thereby authorizing squatters to establish a legal priority, as they would be using the property more properly (i.e. for living in it) than the Sareb that will never be able to do.

[35]JUR 2013\242758.

600,000 of these were built before the year 1900.[36] This will lead to increased costs in the near future. It potentially leads to more liability for damages caused by the lack of maintenance of the condominium (art. 1907 CC) and gives rise to more penalties for the same reason (arts. 30 and 123 ff Catalan Act 18/2007, on the right to housing[37]). This could be even considered a criminal offence if it harms or kills people. The owners themselves now undertake other common services that traditionally have been outsourced to professionals in condominiums, such as the cleaning of common areas or even the administration. Lack of care of common elements in a condominium is, in fact, a structural/traditional problem in Spain. While residential housing renovations are the main source of work for the construction industry in Europe, making up 41 % of its activity in 2011, in the same year this represented only 28.7 % of construction work in Spain.[38] As a result, 1.8 million dwellings are ruined or are in a very bad state. This problem extends to necessary improvements that were not undertaken (for example, in the field of accessibility, 2.5 million main residences in condominiums with more than four floors lack an elevator) or to energy inefficiency (around 60 % of current dwellings were built without any energy efficiency standards and only 56.7 % of the total number of main residences have heating installed).[39] Although new legislation was passed in 2013 (RLD 8/2013, 28 June 2013)[40] to push forward rehabilitation, regeneration and renewal of urban spaces, it has been assessed that 41 % of owners are not in an economic condition to assume any extraordinary costs for this purpose.[41]

Finally, the high level of indebtedness of families due, for example, to contracting a burdensome mortgage to buy a unit, also hinders the regular maintenance of common elements of a condominium, which fall into disrepair earlier than they are supposed to (Bozalongo 2011). In this case, there is a need for a special levy, which is usually more onerous than the ordinary maintenance and many co-owners fail to pay. If, finally, the defaulting co-owner is sued by the condominium, he or she usually continues not to pay the share in the common expenses during the process, which might last several months (169 days on average in 2014).[42] This situation might lead the condominium to default in its payment of the next electric bill, which, in turn, increases the economic pressure on the other co-owners and affects their coexistence (more difficulties in further decision-making, additional conflicts to be resolved through the courts or by ADR methods, and so forth).

[36]See: Insituto Nacional Estadística, http://www.ine.es/censos2011_datos/cen11_datos_resultados.htm#. Accessed 28 Dec 2015.

[37]DOGC 9-1-2008, no. 5044.

[38]Euroconstuct Report, 2014, quoted by De Santiago (2014).

[39]Ibid.

[40]BOE no. 155, 29 June 2013.

[41]Observatorio de Comunidades de Propietarios (2015).

[42]Ibid.

(c) Increase of squatting in condominiums.

This is mainly due to economic reasons,[43] and to the number of empty dwellings (3.5 million). The number of criminal offences (art. 245 Criminal Code) related to squatting have increased by 168 % since 2008,[44] and the number of criminal procedures initiated for squatting reasons have doubled in 2014 (24,164) in comparison to those in 2013 (12,569). The ECHR decision in *Ceesay Ceesay and Others v. Spain*,[45] suspending the eviction of several squatters until the Spanish authorities make alternative housing available to them, and the promotion (through the internet and even with the publication of a handbook on "how to squat"[46]) of squatting as an emergency housing "solution" by certain popular social movements,[47] might have had acted as pull factors. Finally, it is worth mentioning "Robinprudence."[48] This term refers here to recent post-crisis decisions delivered by some Spanish judges and courts that do not really apply the law. Rather, these decisions try to come up with solutions to protect the parties that courts consider to be the "weak party"—those that are economically more vulnerable—thus encouraging dwellers to default on the payment of the rent (AJPI núm. 39 Madrid, 6 March 2013),[49] the mortgage (AJPI 4 Arrecife, 8 April 2013)[50] or, as seen above, to squat. Squatting has compelled many condominiums and owners of empty units to build brick walls in the entrance doors of the units to avoid it, though this causes additional externalities. The unit cannot be accessed either by the owner or by prospective buyers who will only be able to purchase it without seeing it. Prospective buyers would not be able to observe serious and hidden defects inside, as the unit had probably been abandoned by defaulting tenants and had been then likely squatted into.[51]

[43]This is the main reason, according to the Spanish Attorney General (Fiscalía General del Estado 2015).

[44]According to INE (2014), there were 1669 convictions for squatting (*usurpación*) in 2013, while only 622 people were convicted for it in 2008. This means that squatting is the criminal offence that increased the most during that period (168.3 %).

[45]See: http://afectadosporlahipoteca.com/wp-content/uploads/2013/11/TEDH.pdf (accessed 2 Feb 2015).

[46]See PAH (2013).

[47]For example, the "platform of people affected by the mortgage" claimed in December 2015 to have "rehoused" 2500 people through this method. See: http://afectadosporlahipoteca.com/obra-social-pah/. Accessed 28 Dec 2015.

[48]See Nasarre Aznar (2015).

[49]AC 2013/726.

[50]AC 2013\498.

[51]See some pictures and an explanation here: https://cuantovalemipiso.wordpress.com/2014/08/12/por-que-no-comprar-un-piso-tapiado/. Accessed 29 Dec 2015. Even the Catalan Government has invested €125,000 in the last three years to build brick walls at the entrances to public dwellings due to squatting. See: http://www.lavanguardia.com/economia/20150205/54426858529/generalitat-gasta-tapiar-pisos-publicos.html. Accessed 29 Dec 2015.

(d) Meetings of the condominium board (to which, by law, all co-owners belong; tenants do not play any role) can become tense, and decisions are difficult to reach, especially if they entail extra costs for the members.

While sometimes decisions can be blocked due to the requirement of a supermajority, there is a high degree of litigation against agreed decisions. Condominiums-related problems accounted for the initiation of 80,000 judicial processes in the year 2015 alone; cohabitation problems are so common that open online consulting services even exist in major national newspapers.[52] While the majority of cases relate to delinquency, those related to neighbor relations problems (especially noise) are also common, as well as those related to defective construction problems.[53] The use of ADR mechanisms (arbitration, mediation) in the context of condominiums' conflicts is scarce.[54]

(e) Strong "not-in-my-backyard" (NIMBY) effect, combined with strict city planning rules.

Condominiums are usually reluctant to accept the establishment of certain businesses in their building/complex of buildings (e.g. a bar). Low levels of entrepreneurship are a traditional problem in Spain (although a dedicated legal framework was recently passed by Act 14/2013, 27 September 2013,[55] mainly due to the liquidation of 1.9 million businesses between 2008 and 2013). Authors have linked high rates of homeownership to the scarcity of starting up new businesses (Blanchflower and Oswald 2012). In fact, members of a condominium, i.e. co-owners, have proprietary rights to restrict the activities of other owners, such as impeding the construction of new structures (art. 250.1.5 LEC; STS 4-12-1996),[56] abating noises or foul odors (such as in STS 12-12-1980[57] and SAP Segovia 28-5-1993),[58] and protecting easements (e.g. light and view, arts. 580 to 585 CC), among others. Catalan legislation on condominiums (art. 553-45.4 CCC) seems keen on preserving this NIMBY phenomenon, allowing condominiums to double the contribution to the condominium's common expenses of any business that is established within its premises/units.[59]

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[52]See one such service at: http://blogs.elconfidencial.com/vivienda/consultorio-inmobiliario/2015-12-29/quieren-cobrarme-una-derrama-extra-que-no-fue-aprobada-en-junta-puedo-no-pagar_1127274/ . Accessed 29 Dec 2015.

[53]See: http://www.elmundo.es/economia/2015/04/28/553f47d6268e3e24258b4576.html. Accessed 28 Dec 2015.

[54]See: http://blog.sepin.es/2014/04/arbitraje-en-comunidades-de-propietarios/. Accessed 28 Dec 2015.

[55]BOE no. 233, 28-09-2013.

[56]RJ 1996\8810.

[57]RJ 1980\4747.

[58]AC 1993\957.

[59]The legal reasoning behind this is that some of these businesses, such as language schools, might contribute more to the deterioration of the condominium (noises, use of elevator, cleaning) than regular dwellings. Therefore, they should contribute more. However, this measure does not exclude the fact that this increases the establishment and running costs for any entrepreneur working in the condominium.

(f) Legislation such as the Telecommunications Act 9/2014[60] (arts. 29 ff) forces condominiums to authorize the establishment of communication facilities (such as antennas) in their common spaces (e.g. roofs), without the need for the consent of the co-owners, nor a permit to undertake works, nor the requirement of a prior health/environment evaluation.

Until that Act, the condominium's consent (three-fifths of the co-owners) was necessary and, if accepted, it could have arranged for a lease with the telecommunications company to establish the antenna in exchange for a consideration. Following the new Act, the telecommunications company can force the "occupation" of the roof (either through expropriation or a forced easement or right of way). The company can freely choose the building to establish the antenna, obtain a reduced price for the use of the roof and, because it is only a user, does not have the obligations of co-owners toward the common expenses of the condominium (Magro Servet 2014).

(g) Finally, a specific problem for the City of Barcelona: the massive private renting of flats/rooms for holiday purposes within condominiums.

By mid-2014 alone around 30,000 beds have been offered by particular unit owners, which is equivalent to half of the beds offered by hotels in the city (Arias 2015). These offerings are scattered in condominiums located mainly (89 %) in central districts, where hotels are situated.[61] Several negative consequences have been identified with this phenomenon: (1) although this commercial activity is regulated, the regulation is mostly ignored (in two-thirds of the properties in some districts), so it is normally part of the "black economy;" in addition, condominium regulations may prohibit this activity but that is not common as it is a very profitable business; (2) decrease in the number of year-round neighbors, leading to the depopulation of some districts; for example, in *Barri Gòtic* there were 28,000 neighbors in 2007 and there are only 16,300 in 2015; (3) exacerbation of nuisances and deterioration of condominiums; (4) inflation of the value of properties.

In this context, the Catalan legislature realized there was a need for a change in condominium rules. Figure 2 summarizes the four lines of action taken in the new reform of Catalan condominium legislature by Act 5/2015. They highlight the need for dynamic condominium legislation that, to make the co-ownership scheme work, should be constantly adapted to the social and economic reality. In addition to this, Catalonia has recently accepted the condo-hotels and two new types of home-ownership. All three legal reforms are explained in the following sections.

[60]BOE no. 114, 10-5-2014, pp. 35824–35938.

[61]This development has been facilitated (especially putting in touch non-professionals with end-users) through apps such as AirBnB (see: https://www.airbnb.es. Accessed 29 Dec 2015). This is a phenomenon which is similar, *mutatis mutandis*, to the Uber business model (https://www.uber.com) affecting the taxi industry to the point that the app was forbidden in Spain. See: http://www.elconfidencial.com/tecnologia/2015-06-26/seis-meses-de-prohibicion-en-espana-la-lenta-travesia-de-uber-hacia-la-legalidad_901531/. Accessed 29 Dec 2015.

Fig. 2 The four areas of new reform in Catalan condominium's law in 2015. *Source* Author

3.2 Actual Changes in the Catalan Condominium's Law by Act 5/2015

3.2.1 Reinforcement Mechanisms Against Delinquency

Spanish Condominium Law (art. 9.1 LPH) foresees a special guarantee for the ordinary amounts owed by the unit holders to the condominiums. It is an "in rem charge" over the unit, regardless of who its owner is or who is the debtor (the current or prior owners of the unit). Through the reform of Catalan Act 5/2015 (arts. 553-4.3 and 553-5 CCC), this guarantee has been extended to any ordinary and extraordinary expenses and to the amounts due to the reserve fund generated during the current year and the prior four years. It is treated as a privileged debt (art. 1923.3 CC) and charges the unit like a mortgage, but it does not require any deed or registration to exist, as it is created by law and is tacit.

To avoid unforeseen expenses for the buyer of a unit under a condominium, the seller must provide a certificate issued by the secretary of the condominium that shows the current state of payment of his or her part of the condominium's expenses. Without this certificate, the notary public will not provide the deed of sale of the unit (art. 553-5 CCC). In addition, the secretary must state future foreseeable debts that the new unit holder will have to pay due to decisions already taken by the governing body of the condominium (but not claimed so far). Through this measure, as it happened in SAP Tarragona 9 December 2009,[62] the buyer avoids unexpected payments due to a decision. This could be the case, for example, with a decision to install an elevator taken by the condominium before the sale of the unit, but which has not been enforced yet (e.g. the president of the condominium is still

[62]JUR 2010\85668. The court ruled in this case that it would reduce the compensation claimed by the buyer of the unit by 50 %.

looking for offers from elevator installment companies, though the decision to install the elevator is firm).

The functionality of the reserve fund (an amount available for urgent or legally compulsory repairs or payments, at the disposal of the condominium; a sort of "estate" belonging to the condominium, although it does not have legal personality) has been expanded. The reserve fund must be equal to at least five percent of the condominium budget, it must be deposited in an independent current account (it cannot be seized by the creditors of the individual unit-holders), and it is the property of the condominium and is not refundable for exiting co-owners. In addition, if there is any surplus amount remaining at the end of the year, it is accumulated in favor of the following year (it is not redistributed among co-owners in any case) (art. 553-6 CCC).

3.2.2 Facilitation of Decision-Making in Condominium Meetings

For a number of reasons,[63] attendance in condominium meetings is usually not high. Therefore, in order to facilitate the viability of the decision-making process, the meetings of the governing body of the condominium can start (and are validly constituted) regardless of the number of co-owners that are actually attending. It is the first time that it is possible to hold a meeting of the governing body with only one vote,[64] as non-attendants are presumed to agree with the decisions made if they do not oppose them within a limited period of time after the meeting. This is supposed to work as a "negative incentive" for those that ignore condominium matters.[65] Moreover, if the president, the vice-president and/or the secretary are not attending, the governing body chooses any of the attending co-owners to take those posts (art. 553-23 CCC).

[63]This is due particularly to the traditional lack of interest that homeowners have in the condominium's common amenities. However, there can be other reasons. For example, on the Catalan coast many apartments organized as condominiums serve as second homes for owners usually living in other non-coastal regions of Spain or in another country. According to the Board of Land Registrars, in the year 2014, 13 % of all housing acquisitions in Spain were undertaken by foreigners, mostly British (Board of Land Registrars 2015). Naturally, it is complicated for such foreign owners to join the meetings of the governing body if these are not convened during the summer time.

[64]Under Spanish law, it is usual to admit "two calls" for associations: the first one requiring a certain number of attendants ("quorum") and a second one, sometime afterwards, without this requirement. This is still true for current Spanish condominiums law (LPH) in art. 16.2, which established that the "second call" could be made a half an hour after the first one.

[65]In addition, after the decision is taken in the meeting (arts. 553-30 and 31 CCC), some co-owners can try to challenge the decision before a court, alleging clerical or procedural errors (e.g. in the call of the meeting) or by claiming that the decision contravenes the statutes or the law or is against the interest of the condominium (art. 553-31 CCC). These claims are subject to a statute of limitation of one year or three months, depending on the case, since the time co-owners were given notice of the agreement.

Another facilitating measure is to limit the types of decisions that require a supermajority. Therefore, the general rule for adopting decisions is simply that more owners (representing a majority of quotas/shares) agree on the decision than those that are against it (art. 553-25 CCC). Situations where this applies include the improvement of infrastructures, the installation of elevators or energy/water efficiency mechanisms, changes to the rules of the condominium, etc. In addition, this rule is applied to any decision that is not expressly included as one of those that need a supermajority or unanimity (art. 553-26 CCC). Finally, the votes are counted at the precise moment when each decision is discussed among the co-owners actually present in that moment of the meeting (thus giving those that are not interested in a particular point the opportunity to leave and those that are, the chance to join in).

The requirement of 80 % of owners and shares to vote in favor of a measure is exceptional (art. 553-26.2 CCC). This is required only for situations that can be particularly burdensome to the condominium, such as building amenities like a swimming pool,[66] renting out common elements for more than 15 years, altering the title and statutes of the condominium, transforming a private element to one with common use (e.g. porter's lodge), etc. Unanimity is even more exceptional in Catalan law (art. 553-26.1 CCC). It applies to the alteration of quotas, unlinking of annexes, providing for the private use of a common element or the free concession of the use of a common element, termination of the condominium, etc.

Finally, the handicapped or those over 70 years old (either co-owners, or simply those holding a right of possession—e.g. widows—or co-habitants), can force the elimination of physical barriers within the condominium premises, if their claim is proportionate and reasonable (art. 553-25.5 CCC).

3.2.3 Environment and New Technologies

The new law also includes a number of measures aimed at promoting energy efficiency and information technology (IT) for more effective governance.

First, the law allow convening a meeting of the governing body through safe IT mechanisms (e.g. certain guarantees are required for an e-mail call) (art. 553-21 CCC). Second, the law enables members of the governing body to attend meetings through proxies as well as through a video conference or other audiovisual mechanisms (art 553-22 CCC).

The new law also facilitates agreements on improving the energy efficiency of the building or the mobility of users, to install modern IT systems or charging points for electric vehicles. Such decisions require a simple majority, even if those measures require the modification of the statutes of the condominium (art. 553-25 CCC).

[66]Developers usually provide such amenities for new buildings. If not, due to their construction and/or maintenance costs, these amenities could be unexpectedly burdensome for some co-owners; therefore, a supermajority is required to establish such amenities.

Finally, if a co-owner wants to install a charging point for an electric vehicle in his or her private unit (e.g. in a parking space in the garage), even if it affects common elements of the structure, all that is required to undertake this work is to give notice to the condominium. The other co-owners may suggest a better solution; if they do not do so within two months, the co-owner can proceed with the installation (art. 556-36.3 CCC).

3.3 The Promotion of Condo-Hotels

Real estate development activity in Spain stopped abruptly by mid-2007 and only a slight recovery is perceived in 2015. Thus, while in 2006, 737,186 housing building permits were granted (of which, 506,372 were for multi-family dwellings, most of these it can be assumed are organized as condominiums), there were just 268,435 permits in 2008, but only 31,236 in 2013. However, in 2014, there were 33,643 permits and partial data reveals an increase of 27.6 % in permits granted until July 2015 in comparison to the same period in 2014.[67] As previously stated, renovation of housing is still underdeveloped in Spain, and new markets should be opened up to builders and developers to promote this aspect of economic recovery.

In this vein, art. 93.19 Catalan Act 3/2015, dated 11 March 2015,[68] authorizes, for the first time, the possibility of organizing hotels and tourist apartments as condominiums. Although it has not been fully elaborated so far, there is a Draft Decree of 30 July 2015 that further develops both arts. 213-6 and 213-8. Some provisions applying to Catalan condo-hotels require that the manager of the facility should be a single person (it can be a legal entity) and that unit owners must agree to vest the management and use with the manager for at least 10 years. The unit owners can remove or reappoint the manager, by majority vote, when the initial period expires.

Further provisions stipulate that unit owners can use any of the units assigned to them, regardless of who their owner is, and that unit owners should be protected as consumers. Owners are not allowed to use the units as their primary residence, but only to use the assigned units for seasonal stays.

In addition to Catalonia, there has been a general promotion of condo-hotels in many Spanish autonomous regions, especially since 2014, such as in the Canary and the Balearic Islands, Murcia, Valencia and Andalusia, both in new construction of hotels and conversion of existing hotel rooms. Although condo-hotels have had a limited success so far, the concept of condo-hotels represents a win-win situation for developers and unit owners. For developers, the sale of rooms within a hotel

[67]For the gradual recovery of the construction sector, see: http://www.fotocasa.es/blog/tag/recuperacion-construccion/. Accessed 30 Dec 2015. See also data from the Spanish Ministry of Development at http://www.fomento.gob.es/BE/?nivel=2&orden=10000000. Accessed 30 Dec 2015.

[68]BOE no. 81, 4-4-2015.

helps them to finance the building of the hotel itself; units can be sold at 15–40 % above the price for conventional second homes. For unit owners, there are numerous advantages: they are not required to manage the unit; they can get the unit fully furnished and profit from the hotel's services; the unit is rented out when they are not there by tour operators and travel agencies and they participate in the profits. Therefore, units at condo-hotels can be considered as good alternative to second homes.

However, it is difficult to achieve a full development of condo-hotels unless the following challenges are successfully resolved. First, it is still an unstructured market and there is usually a preemption right in favor of the manager. Second, the high season is usually excluded to unit holders as hotels are usually fully booked during that time. Third, there is also a limitation by law of the months during which the units are available to owners (e.g. in Andalusia, two months). Fourth, the manager cannot be easily replaced. Fifth, unit owners cannot alter the furniture, decoration, etc. of the unit or use it as a permanent residence,[69] nor can they undertake professional activities there. Finally, there can also be planning problems, as service-based land is tacitly transformed into residential land.

3.4 *More Affordable Types of Homeownership: Shared Ownership and Temporary Ownership*

As previously stated, the widespread nature of homeownership in Spain has led many families to become over-indebted, thus defaulting on their mortgages and their payments in the condominiums. In addition, in the context of a weak welfare state like Spain, it is difficult to assert a solution such as renting.[70]

Catalonia has taken an interesting approach to solve this conundrum through a new Act 19/2015, an Act which brings forward new and more affordable types of homeownership, the so-called "intermediate tenures," thus delivering to people what they need and want: more affordable and flexible but still stable types of housing tenures. There are two such new types of tenure: shared ownership and temporary ownership. These forms represent the first important exception in Spain in more than 200 years to the absolute ownership principle established in the Code of Napoleon (*Code civil de France*).[71] Both forms are intended for any type of properties (including housing) and also for certain types of chattels (e.g. ships, cars).

[69]Because of the prohibition on yearlong stays, a condo-hotel is not really useful for an owner if he or she divorces and/or is subsequently dispossessed or evicted (due to mortgage or rent default) from his or her primary residence.

[70]See Nasarre Aznar (2016).

[71]This principle persists in the rest of Spain, according to art. 348 CC.

The **shared ownership** (*propietat compartida*) model provides the buyer (the shared owner) with a share of the property, while the seller (the original owner) retains the other share, both coexisting, but the buyer uses the whole property as if he or she was the full owner. Thus:

(i) The buyer is the (shared) owner of (a part of) the property from the outset. In this sense, this approach differs from others, such as the rental with purchase option (which usually only entails a delay in the purchase for about three years) or building rights.
(ii) The shared owner pays the (shared) seller of the property an economic compensation (like a rent) for the portion of the legal element of the property that the former does not currently own. This, in combination with his or her owned share, entitles him or her to use the whole property in an exclusive way.
(iii) Shared owners have all the rights related to homeownership: the exclusive use and enjoyment of the whole property, and the ability to dispose of the share he or she owns, both *inter vivos* and *mortis causa.* Because of this, the shared owner pays all expenses and taxes relating to the use and ownership of the house (e.g. utility bills, taxes on home-ownership), but extraordinary expenses are divided according to the respective shares. The shared owner is the only one allowed to attend the condominium governing body and can take part in its decisions.
(iv) The shared owner can mortgage his or her share of the property, even for funding his or her acquisition. Naturally, a mortgage on 20 % of the property is less onerous for the buyer and for the financer than a mortgage loan to fund the acquisition of the whole property.
(v) The shared owner has the right to acquire gradually more shares of the ownership of the property ('staircase up'). In social housing, the scheme would also offer the possibility of a 'staircase down,' i.e., the shared owner can reduce his or her share of the property in accordance to his or her housing and economic needs.

Thus, the shared ownership approach has been designed to give a number of benefits to those in need of housing but who cannot buy a property in the private homeownership market. Such persons enjoy the possibility to own (step by step) a house without becoming over-indebted (thus allowing shared-co-owners in a condominium to have enough resources to contribute to the payment of the condominium's expenses). The shared owners (buyers) are granted all powers necessary to act as full owners of the property, although with certain limitations to protect the interests of the seller (who is retaining, in our example, 75 % of the property), and the eventual financer of the acquisition. Of course, the buyer in a shared-ownership scheme cannot destroy the property and he or she must use it for the agreed purpose (e.g. residence in the case of social housing); nor can he or she alter its structural elements. Figure 3 shows the standard structure of a Catalan shared ownership according to the new Act 19/2015.

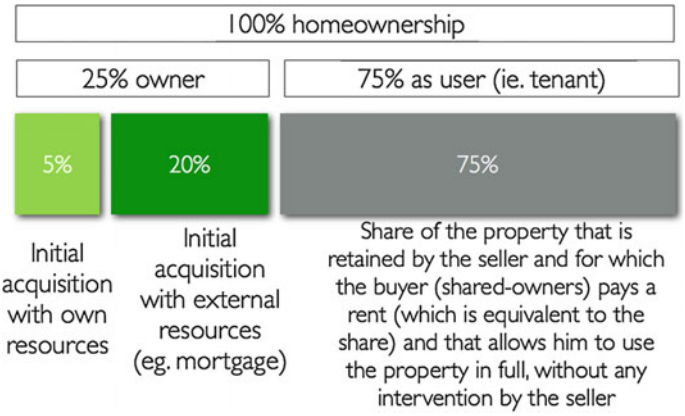

Fig. 3 Standard initial structure of a Catalan shared ownership. *Source* Author

Next to the shared ownership model, there is also the **temporary ownership** (*propietat temporal*) model, where a new owner acquires the ownership from an original owner of a property, but only for a certain and determined period of time (from 10 to 99 years). During this time, he or she has all the powers over the property (use, enjoyment, disposal *inter vivos* and *mortis causa* and charge—e.g. with a mortgage to acquire the temporary ownership), as he or she is considered a 'temporary owner.' For this same reason, the temporary owner will be responsible for all expenses related to the property.

Once the agreed number of years expires, the property will revert automatically and without cost to the original owner (the seller, his or her heir, or anyone that has acquired the right to recover the property/chattel), unless extensions are agreed on. The original seller is entitled to be compensated for the depreciation of the property caused by the negligent or willful misconduct of the temporary owner. Moreover, it is foreseen that it can be used in combination with shared ownership, thus increasing the fragmentation and the affordability of the available housing stock in the same way as the leasehold is used in combination with shared ownership in the United Kingdom.

4 Conclusion

The economic, financial and housing crisis of 2007, whose negative effects are still present in Spain in 2016, has led to high unemployment, low salaries, and over-indebted families in a country of 80 % homeowners. This has had an important impact on condominiums. These condominiums now suffer from reduced resources for ordinary maintenance and repairs in the context of a very old stock of properties (which leave them in disrepair and with increasing costs at a medium

stage), high delinquency in the payment of condominium common expenses, significant level of squatting, and a higher number of judicial conflicts. In turn, condominiums have tightened up the NIMBY effect and the government has even had to force them to "concede" the use of their common elements to establish telecommunication facilities.

In this context, the Catalan government has reacted in 2015 with a range of measures that increase the mechanisms of condominiums against delinquency, giving them more flexibility in the decision-making processes and facilitating environmental and new technologies improvements. The reinforcement of the reserve fund or the charge over the unit to guarantee the payment of the condominium's expenses are measures that are supposed to bring more stable resources to condominiums for the purpose of keeping up their regular maintenance. The more lenient rules on quorum requirements or on the majority needed to pass decisions (making the supermajority rule a narrow exception) are measures that facilitate the decision-making of those co-owners that are involved in the day-to-day running of the condominium. These new measures are particularly important in relation to simplifying the introduction of environmental improvements and promoting the installment of IT in a context of conservative over-indebted condominiums and neighbors. All of these measures exemplify that condominiums law should not be static but should constantly be adapted to the social and economic reality and needs.

Other legislative improvements in Catalonia include a new legal framework for condo-hotels, perceived as a new possibility for builders, developers, and the tourist industry to boost the economy. These new mechanisms also enable the implementation of two new affordable, stable, and flexible ways to gain access to homeownership: shared ownership and temporary ownership. This reform represents a crucial innovation in the concept of ownership that has reigned over the last 200 years.

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Public, Private, People Partnerships (PPPPs): Reflections from Latin American Cases

Clara Irazábal

Abstract Public–private partnerships (PPPs) have been exalted as effective and adopted in many areas that used to be exclusive public domains, from urban service provision to construction works and program management. I argue that despite their undeniable potential, in many cases the participation of the public sector in PPPs is insufficient to bring about desired and expected public outcomes, given that public sector actors often focus overwhelmingly on serving and supporting the private interests to the detriment of public interests. The private sector's participation in PPPs is insufficient to bring about public and lasting good, given their focus on profit making. People and communities have been the most vulnerable actors in PPPs scenarios, often excluded from partnerships. I examine developmental partnerships in Latin America to assess how public, private, and community ("people") agents interact and affect each other, and whether the trade-offs among them have shaped equitable and productive partnerships. It would be appropriate to institutionalize the 4th "P" for "people" in these endeavors (PPPPs) and critically and explicitly examine the distribution of costs and benefits of urban partnerships among stakeholders if we aspire for more just and sustainable cities.

1 Introduction

A public private partnership (PPP) is a tool where private and public actors agree to share responsibilities, risks, and rewards in the funding, construction, and/or management of projects, programs or services for the benefit of themselves and the larger society. PPPs have probably existed for centuries worldwide, (although the term PPP is relatively new, from the 1970s) but in our neoliberal times they have been exalted as virtuous and effective, and extensively adopted in all areas that used to be primarily or exclusively public domains, from urban service provision to

C. Irazábal (✉)
Graduate School of Architecture, Planning and Preservation,
Columbia University, New York, USA
e-mail: irazabal.zurita@columbia.edu

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construction works and program management. PPPs are supposed to create equitable partnerships between the public and private sectors. Governments have been necessary actors in such PPP frameworks, but in many cases their participation is insufficient to bring about desired and expected public outcomes. They often focus overwhelmingly on serving and supporting the private interests to the detriment of public interests, particularly those of the most vulnerable low-income people. On the other hand, the private sector is not always a necessary actor in developmental work, and its participation in PPPs is almost always insufficient to bring about public and lasting good, given how centered actors usually are on profit making to the point of forgoing their social responsibility.

I argue that, despite their undeniable potential, PPPs have constituted an imperfect aspiration and benchmark by segregating or excluding larger sectors of society from the partnerships, such as collectives of individuals, third sector actors, and informal institutions (residents, NGOs, neighborhood associations, and interest groups). People and communities have been the most vulnerable actors in PPP scenarios and, in many cases, they have been excluded from developmental partnerships, both from processes and outcomes that directly affect them, particularly vulnerable groups.

This chapter analyzes partnerships schemes and how these have been developed in Latin America. I examine developmental partnerships in different subfields of planning (urban redevelopment, housing, and tourism) in cities and countries of Latin America to assess how public, private, and community ("people") agents have interacted with each other and to what effects, and whether the trade-offs among them and their outcomes have shaped equitable and productive partnerships.

PPPs may have existed since early urbanization, but they started to get a different shape with the questioning on the public sector as the only provider of public services towards the late 1980s. A new order was purportedly needed to make urban services more efficient. In the initial stages of these PPPs, the private sector was a passive actor that did not have a decisive role in the construction and operation of the new projects. However, by the mid-1980s that model began to change, the public partner was no longer the managing partner and the private one no longer a passive investor (Sclar 2015). This change meant to secure the return of the capital investment to private actors and the effectiveness of the public sector in the provision of services, a situation that satisfied the needs of both players.

PPPs can have different approaches depending on the type of project, as long as they aim to improve the efficiency and quality of projects, programs or services to be provided. They can place most of the responsibilities in the hands of the governments involved, or trust a great part of them in the hands of the private sector. A partnership with the private sector can consist in a consultancy, where an experienced company advises the government in topics where the public sector does not have expertise. In another type of partnership, the private participation can have a funding role and/or control over the development and management of the project. Also, there are cases where private and public partners get together to more equitably contribute their strengths to achieve a common goal (United Nations Human Settlements Programme 2011). In recent years, the goal has frequently been

to involve multiple private companies in a partnership, so that with more private actors, a more competitive environment is created, benefiting the governments in many ways and reducing the costs of the project. In these cases, different phases of project development may be in charge of different private developers, a positive situation when it comes to unproductive handling of a specific phase, because it is easier to localize and fix mistakes.

In Latin America, many projects in subfields of planning (infrastructure, housing, urban revitalization, etc.) have been undertaken by PPPs. For example, in Brazil and Colombia, large urban operations are cases where the public actors have implemented regulatory and financial instruments to encourage the private actors to invest in large areas where the city needs to develop or redevelop. While regulations often mandate the provision of social housing and other public goods in these developments, not always they are realized. In another case, despite the drawbacks of large social housing projects developed in Mexico, Brazil, and Chile through PPPs, there are some good examples of inclusionary social housing developed with and for groups of vulnerable people that demonstrate that PPPPs are possible when there is willingness on the part of the actors to collaborate in aims larger than their own self-interest. This chapter discusses these and other cases analyzing how their diverse public, private, and in cases people partnerships have operated, to what effects, and how costs and benefits of the PPPPs are distributed.

2 Large Urban Operations

Countries such as Brazil and Colombia have implemented regulatory and financial instruments to encourage private actors to invest in areas the city needs to develop or redevelop. "Urban operations" are one example of this in Brazil. In this collaboration scheme, the government role is to update regulations to allow more density, different types of uses, improve the area's accessibility through public transportation, provide infrastructure, and in some cases to redistribute land. The private sector is incentivized to invest in these areas by the provision of benefits such as tax abatements or more flexible zoning regulations, which are translated into more development rights and increases in property value and profits. In return, they are often required to invest on and construct infrastructure, provide a specific amount of social housing, and grant part of the land for public purposes. These partnerships have had different results in the Latin American context.

2.1 Nova Luz, São Paulo, Brazil

The Nova Luz project contemplates the renovation of 45 blocks located in the neighborhoods of Luz and Santa Ifigênia in the center of São Paulo. This area is also known as "Cracolandia" (Crackland) due to its notorious drug problems. Over

the years, the city has tried to make improvements in the area by creating cultural and public transportation facilities, like the São Paulo Concert Hall, or connecting the multimodal Luz train station with a new subway line. As a result, it has become a transportation hub that connects these neighborhoods to other important districts of São Paulo. Also, the area has turned into a specialized cluster of electronics and car services that attracts people from diverse parts of the city.

The renovation project for these neighborhoods challenged the structure of PPPs in the case of São Paulo. The government intended to upgrade the area and encourage compact development by increasing the density in underused land through a strategic plan that introduced private capital as a way to share risks and responsibilities. However, the lack of dialogue with the existing community prevented the project from solving deep social challenges that these neighborhoods were confronting. The plan ignored them, a situation that would only displace the problems somewhere else. The involved (Public, Private, People) actors have participated as follows:

Public: The role of the government included policies that permitted the intervention on these consolidated neighborhoods in the center of São Paulo. The City Statute (Brazilian Federal Law 2001) provided the city with legal devices to assure the regularization of informal settlements in private and public urban areas (Rodrigues 2012). Because one of the main focuses was to address social housing in deteriorated areas, these neighborhoods were cataloged as Special Zones of Social Interest (ZEIS) in the city's master plan in order to prevent gentrification. Additionally, the legal instrument "Urban Concession" was implemented to give the private sector the right to expropriate and financially exploit the existing properties in the project area as a compensation for accomplishing desired results defined by the project (Gatti, n.d.). This instrument would allow the city to develop the project with little funding from the public sector.

However, the economic feasibility study showed that a considerable amount of investment would have to come from public resources (Rodrigues 2012). Even though the plan intended to provide affordable housing, it evolved focusing mainly on a massive development that benefited more the real estate sector than the original residents and their needs. Finally, the ZEIS zone contemplated only 25 % of the total area, thus affecting a significant part of the population that would not be able to afford housing units outside the ZEIS.

Private: The private sector would contribute with the physical revitalization of the neighborhoods providing housing office, commercial and public spaces. These interventions would increase the profitability of the area. The benefits to real estate developers included around 60 % of tax exemption in order to encourage investment and low prices for the acquisition of land due to the deterioration of the area (Rodrigues 2012).

People: In 2011, the Residents Association "Amoaluz" began a participatory process and created the Managing Board of the ZEIS located in central areas. As a result, the municipality started to negotiate with the neighborhood representatives to develop guidelines for the proposal. These guidelines included: an increase in the percentage of social housing according to local demand, inclusion of commercial areas on the ground

floors of the new buildings in order to maintain existing trade activities, prevention of demolition of establishments that represented the district's cultural heritage, and registration of the local residents for housing assistance (Gatti, n.d.).

Notwithstanding the government's stated commitment to a participatory process, the Management Board of the ZEIS was informed about the plan when there was already a preliminary proposal for the area. Moreover, the Board was only allowed a voice in the area defined as ZEIS, which, as stated, comprised only 25 % of the project. In addition, the project did not take into account programs for homeless groups or drug addicts, as they do not have access to housing credits. No social rental policies were included, when people who live in rented units comprised 47 % of the residents. The great cultural wealth gained through the community's music stores was not considered within the plan, and there is the risk that with the new project they would disappear (Rodrigues 2012).

Given the weaknesses of this particular PPPP, it was appropriate that the revitalization plans were abandoned. The Nova Luz project was considered not profitable and at the same time was stopped by the courts because it did not comply with the citizen participation required (Kassab 2014). In the new master plan (plano diretor 2014) of São Paulo, ZEIS are given more proper consideration, which should provide a good framework for a revision of the Nova Luz urban operation.

2.2 Partial Plans, Medellín, Colombia

Colombian Partial Plans (PP) are part of the national Territorial Development Law of 1997. They enable collaborative management for parcel assembly and self-funding mechanisms for large-scale urban projects. Moreover, they allow the participation of investors, landowners, real estate agents, and developers in urban interventions where public resources are going to be involved (Maldonado et al. 2006).

Partial Plans have two territorial goals: the first is to regulate and promote the development of potential growth areas or undeveloped areas within the city boundaries, and the second is focused on urban renewal or redevelopment. This model considers distributing the cost of infrastructure investment among those that are going to be benefited by it, using tools as land readjustment, private-public partnerships, and value capture. There are different combinations of project leadership:

1. The state manages the project and tenders its construction. For example, it buys the land and hires a private developer for the construction.
2. Semi-state agencies work with private partners for different projects. The participation of each actor is defined on a case-by-case basis.
3. Private actors manage and construct under government supervision. There are several options of organization depending on the project.

Partial Plans are usually accompanied by the provision of basic urban infrastructure, such as roads, parks, aqueducts, electricity, and communication systems.

In exchange for the new infrastructure, the private owners have to grant their land to the scheme of land readjustment. The expectation is that with new uses and services provided, the land value would rise and their now smaller properties would be more valuable than the original ones.

The SIMESA Partial Plan: While many partial plans have not been yet successful, a case in Medellín offers an example of a public private partnership that integrated the people of an industrial community. While the main private actor was the Simesa Steel Company, the plan also integrated smaller landowners in the process, making it more inclusive. As a result, all actors were benefited by the project, becoming a positive reference of partnership negotiations.

The Medellin *Plan de Ordenamiento Territorial* (POT) or Master Plan established that at the time of the transfer or processing of a large factory located in a corridor designated for redevelopment, the process of urban renewal should be formulated and managed through a Partial Plan. It also established that the area of planning for the renewal should not be just the factory, but the whole area covered by each industrial block. This was the case of the Simesa Partial Plan, an area comprising a surface of approximately 30 ha, where 40 % of the land belonged to SIMESA Steel Company and the rest of the area was owned by three other big industrial companies not interested in a relocation and 18 small active industries (García 2008). The strategy consisted of developing a plan that considered the site as a whole with a gradual development according to the appropriate time of relocation for the rest of the industries.

Public: The project was planned as an integral area formed by various landowners. Following the concepts of "compact city" and "mixed-use development," the plan connected with the metropolitan networks and infrastructure. The plan defined five major areas and 37 management units to be developed in several stages. It also included the preservation and rehabilitation of an existing industrial landmark.

The government wanted to avoid the early departure of valuable industries from the economy of the city by protecting current and new activities. This was possible with principles like: autonomy, which gave the landowners the right to keep the industrial activities until they decided to stop operations; coexistence of current industrial uses with the new ones like housing, recreation and culture; and flexibility for a wide range of activities. The underlying purpose was to ensure that the final results constituted one integral design (García 2008).

Private: The private sector was diverse, and the project intended to benefit each actor in order to make it appealing for real estate companies as well as landowners. The landowners agreed to have one plan for the whole area with the land readjusted even if they were not professionals in the real estate business. They agreed for a gradual development and were open to negotiate since each owner was going to get benefits with the project.

People: The plan considered the preservation of historic places that evoked the industrial past of the place by rehabilitating the oldest construction as a cultural facility for the city. Other components of the industrial architecture were integrated into the public spaces of the project. These strategies preserved the intergenerational

transmission of culture and tradition through tangible elements that tell a story about the city, creating an environment that promotes identity not only for the new inhabitants, but also for all the citizens of Medellín. The "mixed use" concept contemplated the creation of high quality public spaces and community facilities for health, education, museums, offices and commerce, together with better environmental conditions for people.

The Simesa Partial Plan started to be implemented in 2006 with the demolition of the Simesa's industrial facility and the design phase of roads, infrastructure, and parks. In 2009, the building Talleres Robledo was given to the city for the Museum of Modern Art. A second phase started in 2012 to continue the development of green areas and cultural facilities, which today are very popular in Medellín (Ciudad del Río, n.d.).

Despite this particular success story, partial plans still face important practical and equitable challenges in Colombia. The greater the number and diversity of landowners involved in a partial plan scheme, the more complicated the land redistribution becomes. In addition, partial plan operations have yet to fully incorporate residents who rent in the area to be redeveloped, both in the decision making processes and the ultimate redevelopment outcomes achieved.

3 Housing

Housing policy in several countries in Latin America went from having the state largely in charge of financing, developing, and distributing houses, to a situation in which private business largely control most social housing production. This is a model that, in a period of great housing deficit, gives more importance to quantity than to the quality of housing produced. The model has reduced the number of houses needed, but at the same time it has created procued spatial segregation and concentration of low-income groups in the urban has peripheries where land value is lower and access to services and infrastructure is poor.

3.1 Housing Policy, Chile

Public: Chile is one of the first countries to change its housing policy, when the MINVU (Ministry of Housing and Urbanism, created in 1965) converted housing supply from direct action by the state to a market-based model where the private sector finances and constructs, with the state having only a subsidiary role, giving allowances to benefit low income groups. The new housing policy was supposed to put together family savings, state subsidies, and private bank loans. However, some families did not qualify for housing loans and at some point the state intervened with credits for low-income groups. Up to 40 % of the financing of social housing is carried out by the state (Farías 2014).

Private: In the 1980s, large housing programs took place in Chile, and housing developers offered low price options located in the outskirts of cities. The large demand of housing for benefitted from big areas at convenient costs that kept the price of the units low and where a larger number of units could fit in one program. The sites that met these requirements were located in the peripheries. This new policy reduced the housing demand from 30 % in 1990 to 9 % in 2009 (Cociña and Boano 2013). Nevertheless it compromised the quality of housing solutions in terms of functional and social integration with the city, because of their location, material quality, and size of the units. These issues have been addressed to some extent through regulatory processes, but the problem of access to social infrastructure largely remains intact.

People: In 2006, the government launched a program that gives subsidies to private developers to improve the location of new housing, and subsidies to middle-income families that agreed to live close to low-income groups in order to promote social integration in housing projects. An additional program was the promotion of second-hand housing, which is a convenient option because these houses are integrated into the urban fabric. In the period 2010–2013, more than 80 % of houses acquired by vulnerable groups were second-hand (Mora et al. 2014). These strategies would allow vulnerable groups to have access to facilities and infrastructure that keep them connected to the city and prevent the creation of homogeneous areas of poverty.

Yet, the additional subsidiary resources that the government has injected into the system to improve the location of housing programs are internalized as gains by developers without necessarily improving the quality of housing solutions. In the case of the social integration subsidy, the initiative has not been replicated as planned, between 2007 and 2011 only 1 % of the middle-income sector applied for this plan (Mora et al. 2014). An additional program that the state has implemented was the demolition of overpopulated neighborhoods with the goal to improve urban, social, and constructive conditions, but there has been no clear plan about the relocation of families and the future of the vacant lots product of the demolition.

In the last 25 years of democracy, about the same housing policies have been maintained, giving more responsibility to the private sector in terms of housing. But governments have also worked on adjusting these policies to look for inclusionary models and better location for housing projects. This has had some positive results, but these models have served in only few cases—and depended on a strong collaboration between public, private, and citizen actors.

The centralized administration of subsidies has left municipalities the task to mediate between the central government institutions and people eligible for subsidies. The bureaucracy and lack of resources in small and poor municipalities impact the quality and quantity of housing for the most vulnerable people. The system puts families of different income levels to compete for the same housing subsidies, resulting in detriment of the lower-income social class that has been forgotten by developers because this business niche is less profitable.

3.2 *Housing Policy, Mexico*

Social housing policies in Mexico have also gone from being produced, administered, and funded by the public sector, to expanded reliance on the private sector. In this process, the housing produced decreased in quality, as the public actors were in charge of finance and urban sprawl became the fastest strategy to produce more units at a lower price. However, the current national government is aiming for a more compact urban development leaving aside the previous sprawling model of development, which has put the traditional private developers at economic risk.

Public-Private: The Mexican Constitution guarantees the right for each family to enjoy a dignified and respectable house and the establishment of tools and support to achieve that goal since 1983. Affordable housing programs changed in Mexico since the 1970s, when the Institute for the National Housing Fund for Workers (INFONAVIT) was created, and later supported the construction sector using mortgages from workers to fund new developments. This institution quickly emerged as an important housing foundation, having the highest number of union members and substantial monetary resources (García 2010). The housing market went from being provided by the state to the introduction of real estate companies as developers.

There are three important periods for housing policies in Mexico. The first was during Vicente Fox's administration, where INFONAVIT went from being a housing producer to a mortgage manager. Private companies got involved as producers of housing, and the target groups expanded to all income levels. As a result 9 million units were constructed (Valenzuela 2016). However the support to low-income families was diminished, forcing this group to develop alternative ways, like self-construction, to solve their housing needs. The profits earned by private companies were really high, but this new strategy had negative impacts on the quality of housing developments and their effects on the city.

In 2009, President Calderón signed the National Housing Pact "To Live Better," where private developers worked with the government to strengthen the housing market and the government would finance around 80–90 % of it. Private companies acquired big lots of land in the peripheries of cities, producing urban sprawl and low density social housing. This model collapsed when Peña Nieto's administration changed the housing policy goals in 2013, favoring high and dense development in urbanized areas. With this change, the demand for low-income housing in the peripheries continued to decrease, a tendency that was already in place because the rejection of many people to live far away from job centers with bad services and poor quality housing. However, large real estate developers such as GEO, URBI, and HOMEX kept producing housing in the peripheries. The result was an overstock of housing located in areas without access to services, and the companies' risks of bankruptcy.

According to INFONAVIT's financial plan, 25 % of housing financed by them between 2006 and 2009 was unoccupied, and the reason for this in most cases was the location. According to Alfonso Valenzuela (2016), the problem of the social

housing model in Mexico is that "it has been subordinated to the destiny of financial capital, thus suffering the volatility related to markets and as a result disjointing the territory."

People: As a consequence of the initial policies, people had housing units that were too small, rigid in design, and of bad quality, located in the peripheries, far from job centers, schools, and other amenities and opportunities. Alternatively, the new housing policies aim to promote a sustainable housing development within cities and easy access to workplaces and facilities for their inhabitants. This is part of the National Housing Program 2014–2018, which aims to contribute to achieve three of the objectives set out in the Agricultural, Territorial and Urban Development Sector Program (Diario Oficial de la Federación 2014):

- Encourage the orderly growth of human settlements, population centers, and metropolitan areas.
- Consolidate compact, productive, competitive, inclusive, and sustainable cities to facilitate mobility and raise the quality of life of their inhabitants.
- Promote access to housing through solutions that are well located, decent, and in accordance with international quality standards.

3.3 Housing Policy, Brazil

My Home, My Life *Minha Casa, Minha Vida* (MCMV) is the most ambitious national program of the Brazilian government, created in 2009. It aims to provide three million affordable housing units through a strategy of funding consisting of the inclusion of grants, subsidies, and cheap credits to households and constructors. The program defined Target Groups (TG) divided in three social segments according to their income. There are two funding sources: refundable and non-refundable. The latter comes from the federal budget's surplus as subsidies. In the first phase of the program, subsidies represented 75 % of the total investment (UN-Habitat 2013).

Public: The government's role contemplates both registering and organizing beneficiaries and provisioning of land and additional infrastructure in order to generate financially viable projects within given price and subsidy ceilings (Klink and Denaldi 2014). The government is supposed to distribute MCMV resources to municipalities according to their specific needs and housing demand. Additionally it prioritizes local governments that contribute with infrastructure, land, or tax breaks (Somers and Baud 2013).

The program was defined in phases that can be adapted based on monitoring and evaluation. This allows the government to react faster to negative impacts that were not considered from the beginning.

A questionable fact in the program is that resources were not allocated according to the National Housing Plan in terms of fitting the demands of each site. As a result, cities with a relatively high deficit ended up receiving few units or none,

while some smaller municipalities exceeded coverage of their housing deficit (Klink and Denaldi 2014). In addition, usually the projects are disconnected from local master plans, creating new areas of expansion without taking into account the existing and future urban development of the specific sites.

Private: The government established a housing guarantee fund in order to attract private sector interest by reducing risk of loan default during construction. After construction, units are sold to the National Housing Bank that assumes subsequent risks. Because subsidies are given directly to developers and not buyers, they are who decide what and where to build (Valença and Bonates 2009).

Projects focused on solving housing demand for Target I group (the lowest income group) generate small profit margins for developers. For that reason, private companies prefer to invest in projects directed to Target Groups II and III. There is increasing evidence that grants, subsidies, and tax incentives have been capitalized by oligopolistic players in the real estate finance market—effectively reinforcing combinations of land price escalation, higher profit margins, and lower quality of increasingly standardized units (Klink and Denaldi 2014).

People: Citizen participation has been promoted in some municipalities. However, representatives of social movements usually do not get recognition for their work, and sometimes their effort do not have immediate results or are just unsuccessful. Additionally, not all citizens are interested in a participatory process because it is time-consuming and meeting places and times are sometimes inconvenient to attend. Only about 2 % of the budget of MCMV has been allocated to a program called "Entidades" by which organized social groups directly participate in the design and/or construction aspects of their social housing projects.

Target Group I has been deficiently served with regard to the housing demand of this group. Initially only 40 % of the housing production was granted to this group, when they concentrate 91 % of the national housing demand (Klink and Denaldi 2014). As the housing projects tend to be isolated from the city, in some cases households prefer to sell their new unit and go back to their original communities because they allow access to more services and infrastructure, resources that give them possibilities to have more job opportunities and to get out of extreme poverty. In addition, in that way they do not have to make payments for a new house. Thus, many beneficiaries of MCMV have achieved moderately decent housing, but without decent living conditions so far (Somers and Baud 2013).

From 2009 to 2015, more than, million housing units were constructed nationwide (The Rio Times 2015). However, the government has had to slow down the production of houses, adjusting to the current political crisis and budget constraints.

4 Inclusionary Housing

4.1 Chile: Projects La Chimba, Los Maitenes, and La Poza

Analyzing the intertwining of housing and citizenship issues in Chilean cases is quite important since the historic way in which Chile has conceptualized and gone about the provision of affordable housing in the country—gradually minimizing the public role and maximizing the private one—has largely influence the provision of social housing in other countries in the region, e.g., Mexico, Brazil, and Colombia. It thus constitutes one of the so-called "best practices" or models that have travelled quite extensively in the continent and contributed to the dissemination of a neoliberal conception and practice of housing and city planning (Angotti and Irazábal 2017). As this model has gradually shown its drawbacks, sometimes dramatically contributing to suburbanization, car dependency, mono-functional districts, and "new poverties" beyond shelter, inclusionary housing alternatives have also been present in the country. Using them creatively in appropriate PPPP partnerships, the zoning/housing regulations in place allow for the integration of several market priced properties with state subsidized properties in the same projects.

La Chimba, Antofagasta: La Chimba is a large inclusionary housing project developed in Antofagasta, Chile, which has been built since 2003 for mixed-income households. The plan gives affordable, adequate, and well located housing based on an inclusionary zoning regulation model of subsidized housing supported by a public and private partnership (Vásquez 2012).

Public: One of the main challenges of the Chilean government in La Chimba was to provide low-income people social housing options with a reduced budget. A model of subsidies regulated by the government was developed. In this model the state allocates resources or subsidies through governmental entities such as the Regional Secretaries of Housing and Urbanism (SERVIU; Vásquez 2012). In 1997, the Urban Projects Unit, the Antofagasta Municipality, and the Ministry of National Goods collaborated in order to create the urban master plan of La Chimba. In 2002, the Ministry of Treasury with the help of SERVIU executed a plan to obtain the financing for the construction of the first stage of the project. This inclusionary housing model was based on subsidies as the government conventionally does in Chile. The government also provided infrastructure and land for the inhabitants in La Chimba. The state invested in infrastructure in the area in order to increase its land value and to provide better living conditions to the inhabitants (Lancelotti 2015).

Private: Government entities worked as executors of housing projects calling for private construction companies to run the construction. The state provided a subsidy to the registered candidates who were benefited. Private developers designed projects as they pleased with the condition of providing at least a 28 % of housing for the lowest income people (Vásquez 2012). Another successful tool created was

the law of shared urban financing, and La Chimba constituted its first experience of use in Chile.

People: La Chimba was successful not only in terms of developing partnerships between the public and private sectors. The model also incorporated the most vulnerable people as part of it. Instead of generating segregation, La Chimba contributes to inclusion, as the inhabitants of the project are a mix between low-income homebuyers and others (Vásquez 2012).

Los Maitenes, Talca: On February 27, 2010, an earthquake of 8.8 on the Richter magnitude-scale affected the center of Chile. The area of Maule and its capital Talca were damaged by this event. In the historic center of Talca a substantial amount of buildings was affected and as a consequence many families were left homeless. The earthquake affected around 6000 housing properties in this neighborhood. Consequently, 2000 families were left homeless (Letelier and Boyco 2011). Most of the families were not the original owners of these properties but renters. These people were vulnerable in terms of their socioeconomic background and their inaccessibility to subsidies.

Public: The government of Chile organized a process for the recovery of these affected areas and the provision of housing options for the people affected. To rebuild the historic center, the government allocated 4500 housing reconstruction subsidies focused on the recovery of damaged properties. The reconstruction of this area was aiming to recover not only the damaged buildings but also the identity of this neighborhood (Letelier and Boyco 2011).

Private: Many actors took part into this process. The private sector was involved in terms of technical and financial collaboration. While the majority of private real estate companies offered single-family housing solutions in the periphery of the city, a few other housing projects offered more compact typologies in central areas. One of the first areas under the reconstruction was the San Pelayo neighborhood located in a central area characterized by a medium density and inclusionary housing. In the project Los Maitenes 36 housing units were built in two four-story buildings. 20 units were to be sold and the 16 remaining units were going to be inhabited by affected families who had subsidies. This way the project was aiming to regenerate the inclusionary and diverse community that existed before the earthquake (Letelier 2015).

People: People organized to recover the destroyed areas and consolidate the original communities living there. Examples of effective community leadership are the collaboration of La Provincia, a local construction company, and the support of the NGO Reconstruye, which provided the design for the 20 families of San Pelayo. Consequently, these were able to rebuild their houses in the city's inner area where they were living before the disaster (Letelier 2015). Unfortunately, Los Maitenes represents an exception rather than the rule on disaster reconstructions in Chile (Letelier and Irazábal 2017).

La Poza, Constitución: The city of Constitución in the region of Maule was one of the most populated areas affected by the earthquake and tsunami in 2010. Floods caused by the River Maule destroyed the historic, administrative, and commercial

center of this zone. Around 20 % of the housing units in this area were damaged (Imilán 2015).

Public: A Sustainable Reconstruction Plan (PRES) was created in order to orient the subsidies for housing and prioritize the reconstruction of the infrastructures in the affected areas. This master plan was meant to facilitate public-private partnerships. Also, it was important to try to incorporate the participation of the community from these areas in the recovery process (Imilán 2015). The SERVIU acted as the developer and the Ministry of Housing and Urbanism remained in charge of the design and construction of a mitigation park.

Private: ELEMENTAL S.A., COPEC, and the Pontífica Universidad Católica de Chile collaborated as private and academic actors in order to develop the design of the social housing for the PRES. The private company Tironi y Asociados was in charge of coordinating the designs based on a "civic integration and participation" program aimed at generating a project focused on the original areas and localities in need. Also, many private companies oriented their financial resources as donations for the Fondo Nacional de Reconstrucción (Imilán 2015). Celulosa Arauco, the company financing the reconstruction plan, defined the risk area and the architecture firm ELEMENTAL designed the houses.

People: During the process of reconstruction of the area La Poza, many local residents organized themselves in order to remain in place, instead of having to relocate to other areas. Their demand was to remain in a location next to the river, since they were fishermen. After some community protests supported by the local government, different actors worked together with the community to define the location and housing project for La Poza reconstruction (Imilán 2015).

5 Gated Communities

Gated communities have become one of the most profitable real estate businesses of the last decades. However, the way they have been developed has often created segregation and increased inequality in cities. Many local governments with limited resources have lacked negotiation capacity in the process of their planning. The municipalities' permissiveness in the decision-making usually benefits the private sector, which commonly creates the new developments disconnected from the city. Yet, there are private contributions to infrastructure upgrades, even if this is primarily done for the benefit of the gated developments.

5.1 AlphaVille, Curitiba, Brazil

AlphaVille is a large-scale model of development in Brazil with two projects in the metropolitan area in the city of Curitiba: AlphaVille Graciosa (2002) and AlphaVille Pinheiros (2003). AlphaVille Graciosa is located in the municipality of

Pinhais, in the northeastern region of Curitiba. The plan covered 2.48 km^2 of rural land, constituting an environmental hazard for the river basin and the preservation of the forest in the area. This type of development is considered as a semi-gated edge city, a hybrid development with closed, private residential enclaves and open, public commercial and service areas (Irazábal 2006).

Public: The original zoning of the site was changed from Environmental Conservation Area to Territorial Planning Unit in order to legally permit the development. The premise that addressed this change was that the area could become a slum in the future if there were not a plan for its development (Aparecida and Seixas 2009). The local government through the advice of *Instituto de Pesquisa e Planejamento Urbano de Curitiba* (IPPUC) is starting to acknowledge and react to the social costs of gated communities, in view of the negative effects that the rapid proliferation of these developments is causing to the continuity of the street network in the metropolitan area. The city passed an ordinance that constrains the size of new gated communities (Irazábal 2006).

Private: Changes in the zoning of the site have benefited the developers, allowing them to acquire land at very low cost. Thus, the land's environmental amenities and privileged landscape were thus privatized (Aparecida and Seixas 2009). Additionally the company benefited tremendously from the public capital investments done by the public sector for the Contorno Leste freeway, which made access to the AlphaVille condominiums easier and faster. Real estate businesses market these developments as a way to preserve the environment by purporting that prohibiting developments in the river basins produce the abandonment and deterioration of the natural environment. Nevertheless, this "preservation" only considers what is inside the boundaries of these communities.

People: In order to create a sense of "place" and "community," these fortified enclaves turn their backs to the city, surrounded by walls, gates, or green belts. The life inside gated communities encourages individuality. Additionally, spaces for democracy and citizenship that for years have been found in public streets and plazas are used only for recreation, and are accessible only to the residents of the gated community. This control over the use of "public spaces" created a class-homogeneous development for the middle and upper classes of Curitiba, meanwhile social indicators speak loudly of the need for heavy investment in affordable housing, basic infrastructure, health, and living wages. In 2000, AlphaVille Foundation in partnership with the local government created a Community and Learning Center to offer job training in different areas related to services. The aim was to prepare low-income people from neighbor communities for available jobs at AphaVille Graciosa. However, the training program focused on underpaid service jobs that perpetuate existing inequalities (Irazábal 2006). The search for security is a main driver of this type of walled developments. They offer —or appear to offer—the security that residents often do not find in their previous neighborhoods. And because they are walled, they can paradoxically create "public space" inside their compounds for residents' use. Some developments also foster the sense of community thorough intranet services.

5.2 *Buenos Aires, Argentina*

The province of Buenos Aires, which accounts for less than 10 % of Argentina's total territory (307,571 km^2) yet houses roughly 40 % of the country's residents (about 14 million people), has the largest concentration of gated communities in the country (Libertum 2006). Located in the peripheries of the central area (the Autonomous City of Buenos Aires), gated communities for wealthier groups have developed side-by-side with low-income settlements, creating stark segregation between these two groups. This makes more evident the lack of access to facilities and infrastructure for the disadvantaged population and their unequal economic relationship, as they become cheap labor force for domestic services in the gated communities.

Public: In 1977, the law of Territorial Reorganization changed the management of land resources from the province of Buenos Aires to each municipality. The responsibility of the municipalities consisted in the designation of land uses and the approval of new developments. These changes in the law allowed local governments to make decisions on land management according to their specifics requirements. Municipalities that lacked infrastructure and had limited resources found an opportunity in gated communities to bring investment from the private sector and make land more productive (Libertum 2006). Local governments' income increased with the addition of taxpayers without having to invest in infrastructure for these developments.

Private: Private developments contribute with infrastructure works that cannot be afforded by small municipalities, as well as with the provision of housing stock. They have benefited from the decentralization of planning regulations, as well as from the acquisitions of low-price land, located in municipalities close to the Federal District of Buenos Aires, strategically placed near fast access roads (Pírez 2002). In some municipalities, local governments have become, in some way, only a facilitator in the process of development, meanwhile real state companies are the ones making decisions on how the territory is going to be distributed and organized, disconnected from a large scale growth management strategy.

People: Gated communities in Buenos Aires have deepened social segregation. The fact that private companies invest in infrastructure does not mean that the residents of these municipalities are going to be directly benefited. The benefits that are supposed to improve the citizens' quality of life accrue mainly to the new population in gated communities and not to the existing residents. In addition, the housing stock in these developments does not ameliorate the demand of affordable housing. On the contrary, this type of communities is targeted mainly to high-income groups. In some cases, poorer residents tend to perceive gated communities as a positive asset because they require low-skilled laborers (Libertum 2006), but these apparent benefits are only a way to reduce unemployment but not an opportunity for prosperity. Furthermore, access to amenities, recreation facilities, and green areas is restricted to the residents of these developments, privatizing the use of the public realm and the right to the territory for many of the residents of the municipalities.

6 Tourism Development and Historic Preservation

Tourism is one of the fastest growing industries in the world. Thus, it is no surprise that many countries and cities turn to tourism as an instrument of economic and community development, and as incentive for historic preservation. Yet, many experiences around the world demonstrate that too often the benefits of tourism development only accrue to a few privileged stakeholders while costs are mainly borne by the local residents and the environment (Chakravarty and Irazábal 2011; Irazábal forthcoming). A more effective and equitable distribution of the benefits of tourism development requires purposeful and constant attention to the crafting and management of appropriate PPPPs. The cases of Havana, Cuba and Jacó, Costa Rica depict the complexities, contradictions, and diversity of such tourism partnerships for development.

6.1 Old Havana, Cuba

Cuba constitutes a very unique case in Latin America and the Caribbean because it is the only country in the region that since 1959 has declared itself anti-capitalist. How are then PPPPs conceived in this distinct political and ideological context? In theory, the state has primacy leading the partnerships, the participation of the private sector is restricted and monitored, and the people should be deriving maximum benefits from the partnerships. How does this really play out in tourist development and historic preservation in Old Havana?

Havana is characterized by an urban-historical process of four periods: the colonial city (1514–1898), the pseudo-republican city (1898–1959), the revolutionary Havana (1959–1989) and the special period (1990 to the present). This last period is characterized by the rediscovery of tourism as a key point of economic activity. It has a crucial role in the transformation of Havana's environmental, social, and economic functions. 80 % of new architecture developments in Cuba is related to the tourism industry. This is contributing to the city's spatial and socio-economic polarization that allows new urban growth patterns to develop (Colantonio and Potter 2005).

Public: The Cuban government has been promoting national tourism at an international scale. This is based on three main strategies. The first one is based on economic and environment reforms. The Laws 77/1995 and 81/1997 were implemented in order to encourage Foreign Direct Investment (FDI) and to provide a framework of environmental regulations for the new tourism developments and activities to come. These environmental regulations focus on improving seven main categories: air pollution, deforestation, noise pollution, inadequate treatment and disposal of liquid waste, water provision, inadequate management of solid waste, and hospital waste management. As a second strategy, the Ministry of Environment, Science and technology (CITMA) was strengthened. The third one is

the establishment of state holding companies and tour operators within the Cuban territory. In addition, the government created the National Plan for Development of International Tourism. This plan is based on eight tourist priority areas to impulse the new developments to come. For example, the Havana Tourist Board has taken on the mission of identifying problems linked to tourism development, such as inadequate environmental planning, lack of environmental impact assessment, deficiencies associated with infrastructural service provision, environmental health issues, and depletion of natural resources.

The Office of the City Historian (OCH) is a public instrument in charge of preserving the urban and architectural heritage in Cuba. The OCH implemented a plan for the Old Havana revitalization. As part of it, the agency Habaguanex is in charge of managing the restaurants, gift shops, hotels, and museums in the Old Havana. This agency has autonomy to reinvest the profits in dollars without remitting them to the central government. There is a tax of 35 % from the profits of private actors, which is invested in maintaining the buildings and public spaces in the city.

The state owns most of the land in Cuba. Consequently, the government has three main strategies to partner with privates. These strategies are to use land as a capital contribution, land rental, and direct land rental in free zones. The land rental alternative focuses mainly on commerce and offices and is popular due to the fact that it was not possible to purchase land in Cuba years ago. However this has been changing since 1995. On the other hand, the government rents land directly to specific firms in free trade zones. These strategies allow private agents to rent land for 25 years and also to renegotiate the contracts afterwards.

Private: Cuba has been working in association with foreign private companies in real estate development even before the new status of relations in 2015 between the United States and Cuba was established. The government participates with 50 % of the project costs of land. When the land is worth less than the 50 % of the project development's cost, the government has partnered with the private actor in order to achieve the 50 % in credit. The foreign partner plays an important role asking for credit from international banks or institutions outside of Cuba. There are eight foreign firms that operate currently in Havana. These manage around ten hotels in the city. These firms use their credit or financial resources to partner with the state in joint venture firms. Also, some big projects or agencies such as the international airport and the telecommunication company in Cuba are examples of public-private partnerships, which allow new infrastructure to be built and operated (Colantonio and Potter 2005).

People: The informal economy in Havana grew during the special period (1990 to the present). In 1993, the government legalized self-employment through the Law 141. This allowed people to work in activities that were not common in Cuba. Many working people and families started to find new ways of work such as renting their own room space or preparing food for tourists. Some examples are family restaurants and bed-and-breakfast facilities. Tourism became attractive among the population of Havana not only because this industry allowed better working conditions and salaries for Cubans, but also due to the tips of foreigners. Thus, many

Cubans who worked in other fields drained toward the tourism industry. Another negative side of the tourism industry is the increase in prostitution and crime (Colantonio and Potter 2005). In addition, some of the tourist development projects have been oblivious to the need to contextualize their architecture. High-rise hotels such as Hotel Panorama LTI in Miramar have been criticized for not respecting the original low-scale urban fabric of the neighborhood.

6.2 Jacó, Costa Rica

The tourism industry in Costa Rica represented 7.8 % of GDP in 2008, more than the banana and coffee industry combined. In 2011, 13 % of the national employment was related to the tourism industry. In the previous years to the global financial crisis of 2008, a notable rise of tourism and real estate had been developed around the coastal areas of Costa Rica. The lack of a systematic planning and efficient infrastructure in the coastal areas plus the unmeasured real estate developments are causing social and environmental damage. Public private partnerships have been developed in cities where tourism development is happening, as in the city of Jacó.

Jacó is a city located on the Costa Rican Pacific Coast area. It has gone through a process of urban development expansion. Between 2000 and 2011 Jacó's population went from 6568 to 15,479, increasing by 236 %. Consequently, challenges have risen such as beach pollution, fresh water contamination, and forest removal, which directly affect the original communities. New developments have been built with a lack of a regulatory plans or frameworks and in most of the cases these have focused on generating economic benefits for the private actors rather than preserving the environment and dealing with social concerns.

Public: Coastal planning regulations in Costa Rica prohibits any construction less than 50 m from the high tide line, with construction on the following 150 m having to conform to the rules of MLZL (Maritime-Land Zone or Restricted Zone). This area is publicly owned, but can be given in concession to a company that is controlled (at least 50 %) by domestic shareholders. The government is in charge of upholding laws that support these developments.

Private: The government allows private companies to develop projects on specific areas of Jacó. Some undesirable conditions in this city come from these private and public partnerships. The lack of infrastructural investment and effective planning for growth is leading to not only environmental degradation but also to socio-economic inequality. When working with the private sector, the public sector has shown regulatory weaknesses, slow action, poor coordination, and incoherent infrastructure planning.

People: A number of social problems emerged in Jacó. This rapid development brought socio-economic inequality to the people inhabiting this area. Although the tourism industry brought new job opportunities, only a small percentage of the local residents of Jacó were suitable to perform these jobs. At the end, people from other

areas took the best jobs related to tourism management whereas the not so skilled and less paid jobs went to the locals. The arrival of new and wealthier people to work and live in Jacó increased the cost of living for the locals. Consequently, segregation and socio-spatial inequality have grown among the population. Supervision and fees of noncompliance for the private developers are insufficient to prevent water contamination. Informal and underserved housing have followed the attraction of construction and hotel workers to the area (Irazábal forthcoming).

7 Beyond Continental Borders

Latin America now exists the world over (Irazábal 2014). Thus, examples of how Latino diasporic groups make life for themselves in locales around the world, and how their integration is facilitated or hindered by the host societies and their institutions are fertile terrain for the exploration of PPPPs. The shopping mall Plaza Mexico in the US constitutes an enigmatic case for such analysis (Irazábal and Gómez-Barris 2014).

7.1 Plaza Mexico, Los Angeles, USA

Plaza Mexico is a shopping mall located in Southern California, USA. It reproduces not only the architectural aspect of a traditional Latin American plaza, but also its type of store merchandise and event programming. This formula successfully attracts Mexican-Americans, Mexican immigrants, and other Latinos in the region. Architecturally, the Plaza is a collage of Mexican regional and national icons that allow the visitors to feel 'as if they were in Mexico.' This space is conceived and intended to capitalize upon consumer identification with the homeland among an immigrant clientele that has little capacity to make return trips to Mexico.

Public: The local government granted development opportunities to the mall entrepreneurs, incentivizing their development, while also creating a competitive disadvantage for the existing small retail owners and renters around that did not receive such privileges. Plaza Mexico serves as a space not only for private commerce but also as a connection between commerce, immigration, and government institutions. For instance, the Mexican consulate has sometimes opened an office in this space, which has allowed Mexican nationals living in this region to perform consular transactions and take part in the Mexican elections although they were away from their country (Irazábal and Gómez-Barris 2007).

Private: A group of Korean investors initiated and currently owns this mall. This private investors saw in the untapped market and nostalgia of Mexican descent people the opportunity for business. This capitalization on consumers' identity with their homeland reinvented tradition within a structural context of a constrained immigrant mobility. The project typology constitutes a corporate co-optation—it

creates a public sense of place within a private shopping center. Many symbols such as the reproduction of the Mexico City's Angel of Independence work in a built environment that attracts clients. The programming of the mall, conceived and developed together with local artists, event entrepreneurs, and community members creates opportunities for community development (Irazábal and Gómez-Barris 2007).

People: Plaza Mexico taps into immigrants' nostalgia for an imagined homeland. The plaza works as an ethnic enclave where Latinos have access to cultural, commercial, and community facilities and programs. These serve the specific needs and desires of an underserved group of people, not only in the region, but transnationally, as some of the goods purchased in the mall (including electro-domestics, cars, or houses) are delivered to people in Mexico and Central America. This space hosts many different cultural events such as folk music festivals, art performances, health fairs, immigrant workshops, religious celebrations, sport gatherings, emergency rallies, etc., which highlight Mexican traditions and Latin American solidarity. All these cultural expressions allow the people who visit this plaza to identify themselves with this space and with each other as a collective, validating their identity. Thus, the plaza becomes not only a profitable commercial marketplace but also a space where people can re-inhabit and re-present their traditions and values to themselves and others. Thus, this multifaceted and ambiguous "privately-owned public space" constitutes a perfectible PPPP with opportunities for community development not abundant in Los Angeles region (Irazábal and Gómez-Barris 2007).

8 Conclusion

Public private partnerships have been widely exalted for their advantages in the delivery of public services globally. These PPPs are supposed to be equitable between the public and the private partners by delivering services that combine the best of the private (resources, technology, and management skills) and the public (regulatory actions, land, and protection of the public interests) sectors. However, in reality, in many PPPs private investors have been disproportionally favored by receiving high returns on their investments while carrying minimal or no risks, while the public sector has been overburdened by risks and costs of the operations. This is a constant threat when the focus is disproportionally put on profit-making, to the detriment of the public good. To counter this, a model of public, private, and people partnership (PPPP) is proposed, in which both the government and private players work together with communities for social welfare ends. Considering this, conceiving only of a PPP constitutes an incomplete benchmark: it does not include, and often explicitly exclude, the larger sector of society from developmental projects and services: people, organized as collectives of individuals (communities) or in formal and informal institutions (e.g., NGOs, neighborhood associations, and interest groups).

In Latin America specifically, many vulnerable people have been excluded from the processes and outcomes that the government and the private actors were supposed to provide through PPPs. Too often the government and the private sectors have focused on serving their own interests excluding the interests of low-income groups of people. The work of both the private and public sectors are necessary in developmental partnerships, but these have been in many cases insufficient, leaving apart their social responsibility and centering in many cases on their own political or financial benefits. One of the main challenges for PPPs is to improve their efficiency in achieving not only economic, but also social and environmental objectives, becoming inclusive and effective in serving vulnerable groups of people (United Nations Economic Commission for Europe 2008). It would be appropriate to institutionalize the 4th "P" for "people" in these endeavors and critically and explicitly examine the distribution of costs and benefits of urban partnerships if we aspire for more just and sustainable cities.

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Religion and the Construction of the Urban Landscape

Adam Shinar

Abstract This chapter examines the ways in which religiously motivated regulation affects the landscape, feel, and function of the city. Whereas religion's effect on cities is much discussed, this chapter sheds light on its often overlooked role in the regulatory planning process. Using Israel as a case study, the chapter investigates the way religion is deployed in diverse regulatory fields such as the closing and opening of stores, employment during the religious days of rest, public transportation, and land allocations, all of which shape the urban landscape, with implications for distributive justice, spatial segregation, the city's vitality, and our lived experience.

1 Introduction

The way cities look, feel, and operate, is determined by a host of factors. Geographical conditions, individual and corporate choices, economic constraints, national and local regulation, are important shapers of cities, among many others. This chapter will focus on one particular and often overlooked consideration—religion. My basic claim is that religion and the deployment of religious considerations by state officials (and consequently residents (Tiebout 1956)), shapes the way cities look, feel, and function. Indeed, just as cities, and sub-national jurisdictions generally, produce, shape, and contribute to political and social identities (Ford 1999), they can also produce, shape, and contribute to religious identities. Many, if not most, religions require a community that sustains the religion. That community almost always operates within a spatial setting (Horwitz 2014). While that setting may shift across time, it is also partially determined by state choices that are enacted into law. This chapter thus focuses on the choices made by state officials (both national and local) that are motivated, at least in part, by religious considerations, and that in turn shape the city, the neighborhood, or even the single street.

A. Shinar (✉)
Radzyner Law School, Interdisciplinary Center (IDC) Herzliya, Herzliya, Israel
e-mail: ashinar@idc.ac.il

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Whereas religion invariably shapes cities almost everywhere,[1] the deployment of religious considerations by state entities is particularly strong in Israel—the focus of this chapter—where there is no legal separation between church and state (Kimmerling 1999). Defined and conceptualized in its basic constitutional documents as both as a "Jewish and democratic" state that is also home to a sizable Palestinian Muslim and Christian population (Shinar 2013), religion pervades political life and state institutions. The state and local authorities may, under certain circumstances, take religious considerations into account. Sometimes, state bodies (national and local), must take religious considerations into account, for example when they legislate specifically for religious groups or areas or when regulation affects religious rights and interests.

Conventional accounts of the intersection of state and religion in Israel usually focus on the law of marriage and divorce, the prominence of Jewish symbols and culture in Israeli institutions and civic life, and the impact of religious considerations on everyday life, especially their impact on secular society (Statman and Sapir 2014). Notable features of that impact are the exemption of ultra-orthodox Jews from the Israeli military, the absence of civil marriages, state support for religious schools, and the lack of public transportation on the Shabbat (from sundown on Friday to sundown on Saturday) and Jewish holidays.

In this chapter, I take a different approach by examining the ways in which religious considerations affect public spaces, specifically the urban landscape. Religious laws, or laws influenced by religious considerations, affect not only individual choices (whom can I marry, where can I be buried, what food can I eat, etc.), but also the shape and feel of the communities in which we live, and consequently, the choice where to live and whom to live next to.

To give a sense of the legal situation in Israel, one might usefully compare it to the United States. Under the First Amendment to the United States Constitution, there should be no established religion. Although the scope and interpretation of the Establishment Clause is controversial (Feldman 2002), all agree that government decisions cannot be motivated by religious concerns.[2] In this respect, consider two prominent American examples. The first is the 1982 United States Supreme Court case of *Larkin v. Grendel's Den*.[3] At issue in *Larkin* was a challenge to a Massachusetts law that allowed a religious institution situated within 500 feet of a liquor license applicant to prevent the issuance. The court held that the law violated the Establishment Clause of the First Amendment by giving power to a religious entity (in this case the Armenian Catholic Church, located just ten feet from the restaurant) to reject an application for a liquor license. Moreover, whatever secular objective the law sought to achieve, such objective could have been achieved

[1]By "shape" I do not mean to suggest that religion is the only or the most important factor influencing a city's or neighborhood's feel, function, or demographic. In certain cases, its contribution is paramount and determinative. In other cases, it is either negligible or one factor among many.

[2]Lemon v. Kurtzman, 403 U.S. 602 (1971).

[3]459 U.S. 116 (1982).

through other means. To delegate licensing authority to a church would thus have the effect of advancing religion, which is prohibited by the Constitution. Finally, giving churches such power would inevitably entangle the secular state with religion, which is likewise offensive to the Constitution. *Larkin* is a clear example, therefore, of the way religion is prevented from having a foothold in planning and zoning decisions, which, of course, have a direct impact on the construction and operation of cities and communities.

The second example is the slew of "Blue Laws" throughout the United States. Blue Laws, which came to the American colonies from England and spread to almost every state in the Union thereafter, sought to regulate (and prohibit) commercial activity on Sundays (Dilloff 1979; Wallenstein 2004). While their origin was decidedly religious, aligning the day of rest with the religious holy day of Sunday, courts have upheld these laws insofar as they served secular social welfare purposes rather than religious purposes.[4] Similar to *Larkin*, then, when legislation is motivated by religious purposes and risks entangling government with religion, courts strike it down to maintain the separation of church and state.[5]

Thus, whereas religion is a major part of American life (Wald and Calhoun-Brown 2014; Wuthnow 2005), it plays a relatively marginal role in the regulatory planning and operation of the city. To wit, many of the Blue Laws once in place have been repealed in recent years, and others go unenforced (Finer 2004). To be sure, individual and group choices motivated by religious concerns do shape cities and communities (Day 2014; Chiodelli 2015). But insofar as governmental regulation is concerned, religious considerations are relatively marginalized, or discussed mostly in the context of places of worship (Livezey 2000). Indeed, if one were to search basic texts on local government law, urban planning, and urbanization, religion receives a fairly light treatment (Frug et al. 2006; Zelinsky 2001).

Although literature on the relationship between religion, planning, and local government law is minimal, this is starting to change (Blank 2011, 2012). This chapter, therefore, seeks to join a nascent literature by highlighting the ways religious considerations, as deployed by state and local officials, shape our physical spaces and in turn, our lived experience (Fincher et al. 2014; Gale 2005; Gale and Naylor 2002). Although Israel is the focus of this chapter, my conclusions can be generalized to other jurisdictions that do not espouse a strict separation of church and state. I will show how religious considerations, as deployed by state and local

[4]McGowan v. Maryland, 366 U.S. 420 (1961).

[5]For another prominent example, see Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994). In *Kiryas Joel* the Supreme Court struck down New York legislation that established a school district that was created explicitly for the Jewish Satmar community in the Village. The court held that the state cannot "create" such a school district, for doing so would constitute an establishment of religion. Ironically, however, the court did not find the Village itself constitutionally problematic, even though its geographical lines were identical with that of the school district. When it came to the Village, New York merely "recognized" an existing community along mechanical criteria that did not incorporate any religious considerations. For a critique of the recognition/creation distinction, see Ford (1997).

officials, partially determine who lives next to whom, which buildings will be accorded land, which businesses can open at which times, when public transportation will be allowed, and what types of food can be purchased. For each discrete regulatory area I examine, I will discuss its distributive implications and the way in which it contributes to the way cities look and function. For my inspiration, I draw partly on Jane Jacobs's and Lewis Mumford's (and others) vision of the city (Jacobs 1961; Mumford 1961). Under that view, cities, in order to be successful, need to consist of primary mixed uses. Cities (or neighborhoods) need to blend residential, commercial, cultural, institutional, or industrial uses, all of which are integrated in the same place, and which afford pedestrian connections between them. Urban sprawl is thus anathema to ideal cities, for it affects the possibility of interaction and governance.

In Israel, religious considerations play a role (great or small, depending on the situation), in the design and function of the city. Some cities are designed expressly for a distinct population (usually Bedouin or ultra-orthodox Jews), and cities that have a mixed population are nevertheless the subject of religiously motivated regulation, with consequences for both commerce and urban life.

For the most part, my aim is descriptive. I wish to draw attention to the complex and often overlooked ways in which religious considerations have a much wider impact than usually acknowledged. That impact might be desirable or undesirable, depending on one's normative priors. For the most part, I believe that the way religious considerations are incorporated in regulatory decisions run counter to my view of the ideal city. Here, however, I will mostly confine myself to a description of how religious considerations that are taken into account by national and local political bodies might shape urban space.

Before proceeding, however, two caveats are in order. First, I do not claim that the construction of the urban landscape is determined solely by state and local regulations. Individuals, families, and corporations make choices about where to live, which business to open, and where. Many factors go into those decisions, only some of which have to do with governmental regulation. To be sure, background rules and regulations affect that choice, but it is often difficult to determine their precise contribution. Moreover, I do not claim that state-deployed religious considerations are the most important factor in shaping the urban landscape. Individual preferences and market-driven choices no doubt play a significant role in choosing where to live or where to operate a business. My argument, however, is that individual, group, and corporate choices and preferences are shaped, at least partly, by the content of state regulation. To give just one example, when planning authorities decide that a certain parcel of land will be allocated to a synagogue, this makes it more desirable for religiously observant Jews to live close to that area, given that religious Jews do not drive on Shabbat. While this is a fairly straightforward example demonstrating how a religiously motivated decision might have larger consequences, it turns out that subtler religiously driven regulation potentially has this effect as well.

The second caveat is that this chapter focuses on Israel's Jewish population and not on its Palestinian Muslim and Christian population. To be sure, national legislation affects these populations as well. At the sub-national level, because of high degrees of spatial separation between Jews and Arabs (Falah 1996; Khamaisi 2004, 2006), it is safe to assume that local regulation motivated by religious considerations will have a similar impact on Palestinian-Israeli urban life. Still, little data is available on the impact of religiously motivated regulation in Arab towns and cities.[6] Indeed, the legal controversies, and hence the case law, involve the majority Jewish population. Still, I believe that my arguments can be generalized to religiously motivated regulation everywhere, even if the details will be different from place to place. Indeed, although Israel is but once case study, we can expect to find similar findings whenever religious considerations interact with city life.

This chapter proceeds thematically, by highlighting four different ways in which religious considerations play out in the shaping of urban space. Each part will focus on a different area of regulation that is at least partly motivated by religious considerations. The first is Employment Law and the prohibition of work during the day of rest (for Jews, Saturday). The second is local regulation of opening and closing hours of businesses and the issuance of business licenses. The third is transportation regulations, regulating who can operate public transportation on the day of rest. Finally, the fourth part examines how religious considerations affect the allocation of land parcels by local governments. Examined together, I hope to show that religious considerations partially determine who lives where, who lives next to whom, and why cities that are close to one another nevertheless look and function differently. The regulation examined below might be national or local, or both. As Yishai Blank has argued, much religiously motivated regulation occurs at the local level, for two main reasons. First, inability to achieve a national consensus on the appropriate arrangements leads to devolution and fragmentation. Second, the state recognizes that people want to live in places that fit their needs, and therefore vests localities with the legal power to shape their territory, a power that has effect only within the jurisdiction of the local authority (Blank 2011, 2012). As we shall see, this leads to a "national state of diversity," but also to much homogeneity within particular communities, which rely on the coercive legal powers given by the central government to advance community uniformity. In this way, national minorities can become local majorities (Gerken 2005). A prime example is ultra-orthodox Jewish cities and neighborhoods. Ultra-orthodox Jews constitute about 10 % of Israel's population, but are concentrated in particular cities and neighborhoods, thus allowing them to maintain their religious lifestyle, on the one hand, without outside disturbance, on the other (Gurovich and Cohen-Kastro 2004).

[6]Much policy and academic writing on planning issues affecting the Palestinian citizens of Israel focuses on house demolitions, building permits, and the lack of planning programs for Arab towns and cities (Nasser 2012).

2 Four Case Studies on Religion and Cities

2.1 Employment Law

The first, and substantial, wave of Israeli Labor Law legislation was enacted during Israel's first decade, when Israel could be characterized as a Jewish-socialist-collectivist society, or at least had the professed aim of becoming such a society (Kimmerling 1999). As such, labor laws dealt with maximum hours, rests, wages, women's labor, workplace safety, and collective bargaining, all traditional areas of labor protections in a highly concentrated labor market dominated by organized labor (Mundlak 2007). Labor legislation, however, also encompassed a religious component reflected in the Work Hours and Rest Act of 1951.

The Act determines the permitted length of the work day and mandates a weekly day of rest. For Jews, the act provided the day be Saturday (§7(b)(1)). For non-Jews, Friday, Saturday, or Sunday, depending on their day of rest (§7(b)(2)). Thus instead of determining a weekly day of rest that could be decided by the employer and/or the employee, the law linked the day of rest with the religious day of rest. This is by no means exceptional, as we saw when it came to Blue Laws in the United States, and is the case in many other countries that restrict (or restricted) business, recreation, and travel during the religious day of rest.

Despite their decidedly religious origins, the United States, which espouses a strict separation between religion and state, has nevertheless found rest laws constitutional.[7] This is so because of the secular purposes that these laws later came to embody: rest is essential to working life, and the day of rest should be universal so as to enable human interaction and coordination.

Drawing on American cases, Israeli case law has gone much in the same direction. Indeed, in a recent case that sought to invalidate the weekly rest provision of the Hours and Rest Act,[8] the Supreme Court upheld the law against the claim that it violates the freedom of occupation, relying on the secular social welfare justification for the provision and determining that it meets the proportionality requirement under Israeli constitutional law.

While the law provides for certain exceptions to the prohibition of working on the religious day of rest and includes a permit regime that exempts places of business from complying with the weekly day of rest, those are limited, for two reasons. First, the regulator (in this case the Ministry of Economics) is wary of trampling on the delicate status quo between religious and secular Jews. The status quo, a concept that has its origins in 1947, before Israel was established, is basically an agreement between the Jewish Agency, then the governing body of the Jewish people in Palestine, and religious organizations, in order to secure the latter's support for the United Nations' Partition Plan. David Ben Gurion, Israel's first

[7]McGowan v. Maryland, 366 U.S. 420 (1961).

[8]H.C.J. 5026/04 Design 22 Shark Deluxe v. Head of Saturday Work Permit Branch (2005) IsrSC 60(1) 38.

prime minister and then the head of the Jewish Agency, wanted to allay the concerns of ultra-orthodox Jews who were wary of a Jewish state that would be overly secular. The status quo agreement was a compromise between two streams that pushed in opposite directions, a secular and a religious one.[9] An important feature of the status quo agreement was the observance of Saturday as the day of rest. Section 7 of the Work Hours and Rest Act should thus be viewed against this understanding, which is the result of the unwritten status quo agreement.

The desire to maintain the status quo generated, on the one hand, a permit regime that allows businesses to open on the day of rest, but, on the other hand, very few permits were actually granted. Indeed, the total number of permits in force today is about 400 (Heruti-Sover 2015). Alongside the permit regime, the act allows for certain exceptions (§30). For example, management positions or workers in positions of special trust are exempt from the prohibition on working during the day of rest. The exceptions, however, have been narrowly construed by the labor courts. The reason is not religious but stems from traditional labor laws rationales protecting workers, especially vulnerable workers, who hold inferior bargaining power vis-à-vis their employer. Thus the combination of these two devices, despite their seeming permissiveness, results in a quite sweeping prohibition on employing Jews on Saturday. Although the prohibition can be circumvented by employing non-Jews, this solution is impractical, especially considering the informal spatial segregation discussed above that often prevents Arabs from living in proximity to Jewish places of business.[10]

Consequently, most places of business and entertainment are closed on Saturdays (or, to be exact, from sundown on Friday to sunset on Saturday). Restaurants that adhere to a kosher menu are also closed on Saturdays. As a result, many cities and towns (indeed most) become ghost towns on the weekend (the exception being Tel Aviv, more on which later). State institutions, businesses and places of entertainment, are closed precisely when people do not go to work.

There are ways to get around the labor prohibitions. First, lax enforcement of labor laws means that businesses will often choose to violate the law and risk the fine if caught or sued by their (usually former) employees. Businesses with a high profit margin might wish to absorb the fine and/or lawsuit if their revenues exceed both. Second, as I will discuss immediately below, the primary legislature has empowered local authorities, through enabling legislation, to determine the opening and closing hours of business. Localities use this power to force closings on Saturdays, but some also rely on such power to keep places open. Crucially, this

[9]The status quo also explains Israel's unique arrangement applying to religion-state relations. Israel rejected the American separation model, but also resisted becoming a religious state. Jewish law and religious institutions have a "place at the table" when it comes to certain issues (such as marriages, divorces, religious schools, military conscription, Jewish immigration into Israel, Jewish dietary laws (kashrut), and work on the Shabbat), but they have less influence beyond these areas (Statman and Sapir 2014).

[10]As I will discuss below, the lack of public transportation on Saturdays would also likely make private transportation cost prohibitive for many workers.

layer of regulation does not obviate the labor laws, but because enforcement resources are limited, often the local government level is the most meaningful one, yet it has no jurisdiction over labor law violations.

2.2 *Regulation of Business Hours and Licenses for Placed of Food, Entertainment and Culture*

Regulating the work hours and the day of rest shapes the way cities look and feel. There is more traffic when businesses are open; more people are in the streets, eating, interacting, and attending events. Labor legislation prohibiting work on the rest day, even if justified for social welfare reasons, nevertheless restricts these activities. Yet labor legislation, at least in Israel, is usually accompanied by a weak enforcement mechanism (Davidov 2006). Israel enforces its labor laws through a governmental unit in the Ministry of Economics.[11] The deployment of inspectors is costly, and there are few inspectors relative to the size of the country. As a result, many businesses are able to violate the law and operate without criminal and civil sanctions. Moreover, according to the Rest and Hours Act, wages during the day of rest must be higher, which creates an incentive for workers who are interested in higher pay, hence the low number of employee-initiated complaints.[12] Furthermore, as stated above, it is, in principle, possible to comply with labor requirements and keep your business open if non-Jews are employed, though for many businesses this is not a viable option.

Religiously driven labor law protections are but one level of regulation. Their ability to shape the urban landscape is limited, for the reasons discussed above. A much more powerful tool is religiously driven local government law regulating the opening and closing of businesses and the granting of licenses for food stores and places of culture and entertainment.

Independently of labor laws, cities regulate economic activity in their jurisdiction, which also serves as a means to control the community's character. On this view, city self-governance is the ability of citizens (via their representatives) to create the kind of city they want to live in (Frug et al. 2006). Part of that regulation, at least in Israel, is motivated by religious reasons, especially in cities that have a considerable religious population. Religious demands span the gamut from the closing of roads (more on which below), issuing licenses to stores that sell pork or non-kosher meat, to the opening of businesses during the Shabbat. Thus, for example, the opening of movie theatres on Friday nights and Saturdays was a source of political contention for many years, especially in cities like Jerusalem.

[11]This is done in addition to private enforcement through litigation and, where available, unions.

[12]Indeed, many of the lawsuits filed in the labor courts are not about having to work extra hours or during the day of rest, but about receiving proper compensation for those hours.

This was not always the case. For the first four decades of Israel's existence, cities (and the executive branch generally, which local governments are considered part of) lacked the legal power to legislate for religious reasons. In a case decided in 1954, *Axel v. City of Netanya*,[13] which dealt with a city's decision denying a business license to a butcher shop that wanted to sell pork, the Supreme Court held that since the issue of pork consumption is national in nature, cities did not possess the legal power to regulate it. Put differently, cities have the power to infringe individual rights only when such authority is expressly granted to them by the legislature. Whereas the motivation for the city's decision was religious, the court held that such consideration cannot be taken into account unless there was clear authorization in its enabling legislation, which in this case was lacking. To be clear, cities had the legal power to grant business licenses and regulate opening and closing hours. The problem was religiously motivated regulation of this type. While cities could regulate business hours and licenses, they could only do so for specified reasons, religion not being among them.

Heeding the court's call, and probably also as a result of local government pressure, the Knesset (the national legislature) enacted the Local Authorities Law (Special Authorization) in 1956. The law allows municipalities to regulate the sale of pork within its jurisdiction, either limiting it to particular areas or prohibiting it altogether. The issue of selling pork seemed settled,[14] but the closing and opening of businesses on the day of rest remained, since the enabling legislation was confined to stores selling pork and did not touch on other religiously motivated local regulation. Things came to a head in Jerusalem, where the city imposed criminal sanctions on a movie theater that opened its doors on a Saturday. In a controversial decision, known as the *Kaplan* case,[15] the magistrate court dismissed the charges, holding that while regulation of hours was generally permitted, the purposes had to relate to public order rather than substantive religious values, which the city was not authorized to consider. The decision, especially since it applied to Jerusalem, sparked a political backlash, which resulted in the Knesset amending the Cities Ordinance, adding an important subsection (§249(21)) that expressly allowed municipalities to consider religious tradition while exercising their regulatory powers relating to opening and closing of businesses.

To be sure, having legal power to order places be closed on Saturday did not mean that cities had to use that power. And yet, most cities in Israel enacted bylaws that ordered businesses and certain places of entertainment to be closed. Even Tel Aviv, which is often branded as the city that never stops (Ministry of Tourism 2011), had such a bylaw on its books, well before the passage of section 249(21) and the *Kaplan* decision.

[13]H.C.J. 122/54 Axel v. City of Netanya (1954) IsrSC 5 1524.

[14]I will show, however, that the settlement was temporary, at best. The battles over the sale of pork persisted and are only now on the wane (Barak-Erez 2007).

[15]C.C (Jer.) 3471/87 State of Israel v. Kaplan (1987) IsrMagC 1988(2) 26.

Two examples illustrate how the power to regulate businesses affects the way cities look, feel, and operate. The first case deals with the municipal regulation of the sale of pork. The second deals with the municipal regulation of the opening and closing hours of businesses on the day of rest.

In *Solodkin v. City of Beit Shemesh*,[16] petitioners challenged the legality of three bylaws enacted by three municipalities that either prohibited or limited the sale of pork in their jurisdiction. As mentioned above, legislation enacted in 1956 vested municipalities with the power to limit the sale of pork within their jurisdiction.[17] Yet how that discretion should be exercised was not specified in the law. The court held that cities must exercise their regulatory power with due regard to the city's demographic composition. In areas where a sizable majority finds the selling of pork offensive, the city may ban the sale of pork given the offences to religious feelings. However, in an area where a sizeable majority wants to buy and consume pork and a negligible minority wants it prohibited, the city must allow the sale of pork. The court balanced the right to operate a business and to consume the food one wishes against the harm to religious feelings. Only when the latter were grave and severe, may the city use its police power.

In *Bremer v. City of Tel Aviv*,[18] petitioners, owners of small shops in Tel Aviv, challenged Tel Aviv's enforcement policy of its bylaw prohibiting the opening of businesses during the day of rest. The city's enforcement policy amounted to weekly fines imposed on open stores. The problem was that the fine resulted in disparate impact. Fines that were levied on chain stores (mostly supermarkets) were relatively small compared with the revenues generated on the weekend. Consequently, these stores still believed it profitable to open on Saturday. By contrast, independent grocery stores that could not pay the weekly fine had to close their stores and thus lose their business to chain stores, exacerbating the economic disparity between the independent stores and the chain stores.

The small business owners thus filed a petition against the city, demanding that it cease levying fines and move to more aggressive enforcement measures, such as issuing decrees that the stores be closed down during the day of rest (an authority it possessed, but that required judicial approval).

When the case reached the Supreme Court, the court sided with the petitioners. It recognized that Tel Aviv was not truly interested in stopping the operation of grocery stores, which is why it settled for the minimal fine, well aware that the stores would keep opening. This policy was in line with Tel Aviv's image as a "city that never stops" (and it was also a source of revenue). Yet the city did not amend its bylaws to reflect this policy. It simply refused to consider alternative enforcement mechanisms.

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[16]H.C.J. 953/01 Solodkin v. City of Beit Shemesh (2004) IsrSC 58(5) 595.

[17]Since the enabling legislation is from 1956, it is immune from constitutional review under the Basic Law: Human Dignity and Liberty, though it could have been reviewed under the Basic Law: Freedom of Occupation. Petitioners, however, did not seek invalidation of the law. Instead, they argued that the cities' discretion should be shaped by constitutional requirements and therefore the bylaws should be struck down.

[18]A.A. 2469/12 Bremer v. City of Tel Aviv (2469) IsrSC (unpublished).

The court ordered the city to consider other enforcement measures (which the city refused to do up until that point), to see whether they would be more effective.

Pursuant to the court's order, the city came up with a new scheme, allowing some 300 stores to open during the day of rest. The Minister of Interior, however, struck down the plan for failing to take into account the value of the Shabbat. In response, Tel Aviv passed a second bylaw that allowed a small number of stores (164) to be open and ordered others closed, based on street demographics and the level of religiosity in each area. The idea was to make sure that each neighborhood or area had at least one store open in its vicinity, but that neighborhoods with many religious Jews would not have such store. This time the Minister of Interior stalled. Under the Cities Ordinance, in such a case the bylaw goes into effect after 60 days. Soon after, national elections were held and a new Minister of Interior was sworn in. Thus the new bylaw, which adopts the logic of *Solodkin* by taking into consideration the level of religiosity, has entered into force. It should be noted that the Supreme Court is due to revisit the matter in the near future (Lior 2015).[19]

What, then, do these cases tell us about the way religious considerations affect the urban landscape? First, and obviously, religious considerations (their presence or absence) affect the way cities look, which businesses can exist, when businesses (whether commercial, cultural or recreational) can open and close, and which goods can be sold. Sometimes the differences between cities do not lie with formal law, but with its differential enforcement. Both Tel Aviv and Beit Shemesh had regulations determining how businesses should operate, but only one sought full enforcement, whereas the other had a more (though not complete, since it still imposed minimal fines) laissez-faire approach that was willing to overlook persistent violations of city bylaws.

Religion affects the way a city is branded. Jerusalem is a "holy" city not only because of sites important to Judaism, Christianity, and Islam, but also because it maintains a "holy" atmosphere by having a large religious population (partly as a result of city regulation, more on which below) and a religious "feel" when the city grinds to a halt on Friday evenings with most places of business and entertainment closing down for the weekly (and religiously motivated) day of rest. By contrast, Tel Aviv has branded itself (with the state's support) as the "city that never stops," a motto that appeals to different set of tourists (young, secular, western), and is also partly responsible for its appeal among the LGBT community. To be sure, there are many reasons why Jerusalem is "holy" while Tel Aviv is "the city that never stops."

[19]To complete the picture, following the Court's decision in Tel Aviv, Jerusalem reexamined its policy of not fully enforcing its business closing bylaws and has decided to increase enforcement against stores that open on the Shabbat in downtown Jerusalem (Hasson 2015). On January 21, 2016, the mayor decided to close down the seven grocery stores that operated in the city center on Saturday (Globes Service 2016). Relatedly, and due to pressure from city hall, operators of a large cinema complex in Jerusalem have decided to close down the theatres during the Shabbat. The alleged incentive for such a move (the theatre was in the process of litigation against the city to open its halls on the Shabbat) was financial. The cinema complex was performing poorly when it opened six days a week, and, it was claimed, the city was diverting city funds to the complex as a means of exerting pressure (Ettinger and Hasson 2015).

Often overlooked, however, is the way seemingly mundane local regulation and its attendant enforcement shapes and contributes to the city's image in the collective imagination. In Jerusalem, persistent attempts by the city to close down businesses, including places of entertainment, have come to define the type of activity that takes place during the weekend (Ettinger and Hasson 2015). In Tel Aviv, by contrast, the city's persistent refusal to fully enforce its own bylaws, has contributed to the 24-hour image the city wants to project both domestically and abroad.

Furthermore, there is a subtler and indirect way municipal, religiously informed regulation affects city life. As a result of the *Solodkin* decision, residents who wish to shape the communal life of their city or neighborhood are now incentivized to organize both politically and spatially and even isolate themselves from other groups (Blank 2012). In areas where a particular group will have a majority, the city has the legal power (and perhaps the duty) to accommodate that group. So, for example, it could prohibit certain offensive businesses from opening (pork stores, sex shops, music clubs, etc.) or, as I will discuss below, limit the access of public and private transportation during Saturdays and religious holidays. On the one hand, this allows inter-city diversity and pluralism. On a larger scale, however, such areas can become exclusionary and isolationist, having little or no connection with other parts of the city or other cities. The result can be a "national state of diversity," though with much homogeneity when we look at particular cities and neighborhoods.

Indeed, the *Solodkin* decision, on first blush, seems liberal and inclusive. It facilitates the co-existence, within a shared space, of people of different beliefs, values and practices. It lets different people (pork eaters vs. non pork eaters, often a proxy for seculars and religious or traditional Jews, and in this case, a proxy for the Russian immigrant population that eats pork) live in the same city. But on second glance it would seem that instead of being inclusive, the court's ruling incentivizes separation and the formation or solidification of dividing lines (Blank 2012). As Richard Ford argued, "[t]oo often the mirage of autonomy hides the bleak reality of social quarantine" (Ford 1999).

2.3 *Public and Private Transportation*

The above discussion demonstrated the impact of religiously motivated local regulation on the urban landscape. Indeed, cities enjoy increasing discretion to shape their communities. However, as was discussed in the context of labor laws, some of the regulation is national in scope. This section examines religiously motivated regulation of transportation.[20] Unlike the regulation of religion at the local sphere,

[20]To be clear, by "religiously motivated" I also mean regulation that is partly motivated by religion. Discerning the impact of a particular motivation is difficult, while often multiple motivations are in play.

much of the transportation regulation happens at the national level. Licensing regimes for public transportation are national in scope, and the decision whether to operate public transportation on the days of rest is national. Thus, even when municipalities wish to operate public transportation in their jurisdiction, they must receive state approval through the Ministry of Transportation.

Section 71(7A) of the Transportation Ordinance states that the Minister may enact regulations prohibiting public transportation during the days of rest. In the exercise of this authority, the Minister must take into consideration the tradition of Israel as it applies to the prohibition of vehicles during the days of rest. Pursuant to section 71(7A), the Transportation Regulations, enacted in 1961, were amended in 1991, adding section 386A, which states that the authority to operate public transportation during the day of rest is given to the Licensing Authority in the Ministry of Transportation. According to section 386A, the Authority will not grant a license to operate public transportation except in the following five cases: transportation to hospitals, transportation to remote towns, transportation to non-Jewish towns, transportation that is essential in terms of public safety, and transportation that is essential in terms of public transportation (an open ended and ambiguous criterion).

While there is authority to operate public transportation under the Regulations, most public transportation shuts down before nightfall on Friday. A few bus lines do operate during the day of rest, but most of them existed prior to the enactment of section 386A, and servicing mixed cities and the Arab and Druze populations. Several municipalities, including Tel Aviv, have requested the Minister's approval to operate bus lines in their jurisdiction, but to no avail, as the Ministry believes that operating public transportation would violate the delicate status quo between secular and religious Jews. Thus Israel is the only country that, except for a few outliers, shuts down its public transportation for the vast majority of its residents (Lerman 2015).

In addition to regulating public transportation, the Ministry of Transportation also has the authority to regulate private transportation, specifically roads. The Central Traffic Sign Authority, an agency in the Ministry of Transportation, has the power to close roads or parts of roads for, among others, religious reasons. Many of the battles between secular and religious Jews dealt with the closing of roads and streets during the Shabbat. While most of the road closings are in neighborhoods dominated by ultra-orthodox populations, sometimes the closed roads border secular neighborhoods, affect seculars inside orthodox neighborhoods, or apply to a major traffic artery. In such cases, people who want to drive their private car on these roads are prevented from doing so, and thus have to find alternative routes, often resulting in detours. Things are more difficult for seculars who live in religious neighborhoods and are thus "locked-in" and cannot travel anywhere on the day of rest, except by foot.

Although reasons of space prevent me from going into detail here, the Supreme Court has been generally receptive to road closings. Courts employ a similar balancing formula to that developed in the *Solodkin* case. They take into account the harm to both sides: on the secular side, constitutional rights to movement and

autonomy are compromised. People who want to drive cannot go into certain neighborhoods or use certain roads, and people who want to visit people living close to religious areas are similarly constrained. On the religious side, the court takes into account considerations of public order and offences to religious feelings that are caused when religious persons must experience traffic during their holy day of rest.[21] Based on this framework, if the state has considered all the conflicting rights and interests, if the harm to religious feelings is severe and serious and the likelihood of its occurrence is high, and if the imposition on the right to movement is proportional, the court will tend to approve the closing.[22]

The regulation of transportation is a site of interaction between the national and the local. Although regulation is performed at the national level, requests to close roads, for example, can and do come from local municipalities. Importantly, the licensing regime affects both intra-city and inter-city transportation. When the state prohibits public transportation on the day of rest, it affects transportation inside and between cities.

Prohibiting public transportation inside and between most cities in Israel has environmental and distributional consequences. For people who do not own cars, traveling between and outside cities is difficult. Taxis exist, but the costs are usually prohibitive. Thus the lack of public transportation incentivizes people to buy cars and requires more investment in roads. Of course, promoting a car culture has dramatic environmental implications as more cars lead to more pollution (Paterson 2000).

The distributional consequences are also severe. The lack of publicly available transportation disadvantages those without cars who are basically locked in, ironically on the one day they do not have to go to work. Indeed, recent research reveals that many citizens, not just the poor, are affected by the lack of public transportation on weekends. For example, a survey done in the Tel Aviv metropolitan area showed that 95 % of secular Jews gave up on an activity during the day of rest. 37 % of respondents who own cars gave up on an activity during the day of rest because of a lack in public transportation, especially activities such as going to the beach and frequenting bars and restaurants where alcohol is served. Workers, especially those in the service industry who work on Fridays up until the Shabbat enters, complain that they cannot attend family events. Respondents complain of feeling under "lockdown" and an inability to make plans, which makes them dependent on those who own cars (Shuhami 2015).

How does this affect the way cities are organized? First, if many people cannot travel outside their city, we would expect cities to offer more services and amenities to accommodate those who cannot leave it on the weekend. Yet generally we do not find this. The reason is that since local establishments are closed on the Shabbat, there is no incentive to offer the services that appeal to people who are not working

[21]H.C.J. 174/62 The League for the Prevention of Religious Coercion v. Jerusalem City Council (1962) IsrSC 16 266.

[22]H.C.J. 5016/96 Horev v. Minister of Transportation (1997) IsrSC 51(4) 1.

on Saturdays. Many cities have thus become suburban satellites of Tel Aviv. Indeed, much of the cultural activity is concentrated in Tel Aviv on the weekend. Other cities have a much more limited array of cultural and recreational options. As was mentioned above, this has distributive implications, since only a slice of those who would be interested in consuming culture and entertainment are able to do so.

The concentration of secular people in Tel Aviv, coupled with lax enforcement of opening hours laws, and a relatively concentrated area in terms of urban density, allows it to thrive. But other areas, which have either a higher concentration of religious people, more urban sprawl, or a more traditionalist-informed view of regulation, have much less activity during the weekend. This has two consequences. First, since cultural and recreational institutions depend on the people who frequent them, and since much of the revenue is generated during the weekend, they are much less likely to open in cities that frown upon activity during the day of rest. Second, the lack of public transportation prevents many people, especially the poor, from traveling to places such as Tel Aviv and consuming culture and entertainment.

In conclusion, transportation regulation affects much more than whether I can travel from point A to point B at a certain time. It determines who can travel to the city and inside the city. Indirectly, it has also likely affected the decision where to build and operate particular institutions. Places of business that depend on a regular flow of people to generate revenue, are less likely to open in places where they cannot do business during the day of rest. Moreover, without public transportation only those who have cars (or know people who have cars) or who can pay for taxis will be able to travel to the city and consume the cultural and commercial goods it provides. While the lack of public transportation could have generated a plethora of institutions in every city, the demographic and regulatory reality has prevented this from happening.

2.4 Housing, Planning and Land Allocation

One of the most important regulatory functions in Israel is the allocation of land. Unlike most western countries, the majority of land in Israel, 93 %, is state owned (Hananel 2013). The power to allocate land, therefore, necessarily shapes the urban landscape. The state determines how much land to allocate, to whom, and for which purpose. As in other regulatory contexts discussed here, religious considerations are often present. Land allocations can be done by local governments, for specific parcels inside towns and cities, or by national authorities, for example when entire towns and cities are designated for one particular group. In this part I focus on two types of land allocations. The first is done by the state, when it decides to build a town or city exclusively for one particular group. In Israel this applies to the Jewish ultra-orthodox community or the Bedouin community (Rosen-Zvi 2004). The second type of land allocation is done by local governments, when they decide to allocate land to non-profit entities that wish to use a building or a parcel of land for

public purposes, religion among them. In these cases, the land is given free of charge or with a nominal fee far below the land's real value. I discuss each in turn.

Despite the heterogeneity of Israel's population, which encompasses Jews, Muslims, Christians, and Druze, there is a high degree of spatial homogeneity. Separation occurs not only between Jews and Arabs (despite a few "mixed cities," themselves internally segregated (Falah 1996)), but also between Ashkenazi and Sephardi/Mizrahi Jews (Klaff Klaff 1973; Law-Yone and Kallus 2001), and religious and secular Jews (Rosen-Zvi 2004). The reasons are complex and manifold: Zionist ideology that sought to control the territory of Mandatory Palestine led to wide scale land expropriations after 1948 and dispersal of Jews throughout Israel (Forman and Kedar 2004), the structure of Arab society that existed prior to 1948, discriminatory land policies by the state of Israel, discriminatory absorption policies that applied mostly to Mizrahi Jews, private discrimination and individual decisions that could also be described as self-segregation, all contributed to the extant state (Yiftachel 2006).

Notwithstanding the widespread spatial segregation in Israel, only part of it is the result of intentional government design. This is the case, for example, with the construction of towns and neighborhoods for the Jewish ultra-orthodox (Haredi) population. The reasons for separation are readily apparent. Haredi Jews are enmeshed in their community. They adhere closely to Jewish law and rabbinical authority, possess a high degree of cohesion, and segregate themselves from the general Israeli population. Self-segregation is essential for achieving dominance within a particular area, which enables the prospering of the community and the consumption of the unique goods and services they require. Segregation is also essential as a means to avoid contact with other groups that do not adhere to the same set of religious and social values, hence the intolerance toward non-Haredi's and the frequent clashes between the two groups, which also have a spatial dimension (Shilhav 1984).

As a result of these social and religious pressures and the housing crisis among ultra-orthodox Jews, who are also one of the poorest groups in Israeli society, the state has built several cities exclusively catered to the Haredi population. The spatial segregation is thus facilitated and incentivized by the deployment of religious considerations by planning authorities. Indeed, the Israeli planner, backed up by Israeli courts, has recognized that minority communities are entitled to a level of constitutional protection that could warrant separate living areas. In the past, the state offered benefits to the Haredi population to encourage it to move to the new cities. And although the Supreme Court has held that such benefits constitute discrimination if the same are not offered to non-Haredi persons who wish to live in the same region, the principle of separation itself has been judicially sanctioned by allowing the construction of separate cities.[23]

[23]H.C.J. 4906/98 Am Chofshi Assn. v. Minister of Construction and Housing (2000) IsrSC 54(2) 503.

To be sure, not every group is entitled to separate cities. Separate cities are only permitted to distinct groups who substantiate a unique lifestyle. Currently, the Supreme Court has allowed separation for ultra-orthodox Jews and Bedouins, but not secular Jews generally (Blank 2011). And while ultra-orthodox Jews are generally interested in separate cities, the motivation behind construction of Bedouin towns is quite different. For Bedouins, who are dispersed throughout the Negev desert in "unrecognized villages," the state, and not the Bedouins, is behind the relocation and urbanization attempts, part of a longstanding conflict about land rights, development, and territorial control (Abu-Saad 2008; Meir 2005). To complete the picture, in small towns under 400 families, Israeli law allows "admission committees" to decide who joins the community. Committees can disqualify a person or family for not being a "good fit," but that decision cannot be based on reasons motivated by considerations of race, gender, origin, sexual orientation, or religion, among others.[24]

Separate cities are obviously a prominent form of spatial separation. A different form of separation occurs inside cities that are themselves not separate, though they are nevertheless divided internally between different groups. Such divisions are a constant source of friction, especially along the borders between the religious and secular parts. Thus cities that on first blush may be heterogeneous are nevertheless quite homogenous in their respective spheres. Again, this is partly the result of private and group choices where to live, but these decisions are also made against a background of state regulation that incentivizes separation. A case in point is land allocations inside cities. Allocations in particular neighborhoods are meant to address the neighborhood's needs. Consequently, in a secular neighborhood the public buildings that will be built will be of a secular nature, and the same applies to religious buildings in religious neighborhoods. While this makes sense, the (unintended?) consequence is the perpetuation and entrenchment of spatial separation along religious lines. If this approach sounds familiar, it is. It is similar to the one embraced in *Solodkin*: each community should get what it needs, which in turn incentivizes organizing and building a majority of like-minded residents.

The picture, however, is far from monolithic. Whereas the deployment of religious considerations can create separation and isolationism, there is also a competing vision of co-existence between religious and secular Jews. Recently, the Supreme Court signaled such a change of approach. In a case called *Solodokh*,[25] the court upheld a decision to allocate a parcel of public land to a religious non-profit for the construction of a religious study house (*Beit-Midrash*) in a neighborhood that was claimed to be secular. The petitioners were secular residents who were concerned that the character of the neighborhood would change, that it would become religious, and that consequently property value will drop. Unlike cases that

[24]It should be noted that a petition to strike down the law, under the argument that it would, in effect, enable prohibited discrimination, has been rejected by the Supreme Court. See H.C.J. 2311/11 Sabach v. The Knesset (2014) IsrSC (unpublished).

[25]H.C.J. 10907/04 Solodokh v. City of Rehovot (1090) IsrSC 64(1) 331.

dealt with ultra-orthodox cities, here the court extolled the virtues of living together and the necessity of compromise. In a pluralist society, the court argued, seculars need to respect religious practices of others, just like religious persons must make concessions when they step out into the public sphere. As the two groups are fated to coexist, each must give up something. There is no right, the court said, to live separately and reject the "other." Indeed, the court warned of residential segregation and the danger of closed communities, which invite discrimination and social alienation, weakening the social fabric and encouraging hostility and rivalry.

The decision in *Solodokh*, with its strong statements about the need for pluralism, tolerance, and coexistence, is difficult to square with the routine acknowledgement that unique communities can segregate themselves. One possible reading, which also solves the puzzle, is to look at who wants to be segregated. Whereas prior decisions dealt with minority groups who wanted separation, here the secular majority is seeking to maintain its character and not let the minority religious group in. This reading also accords with a conventional view of human rights that seeks to protect minorities, on the assumption that the majority can take of itself. On this view, separate cities for minorities that would lose their unique characteristics if integrated with other population are permissible, whereas cities or neighborhoods that bar minority groups from entering common spaces are prohibited.

Yet such justification is questionable. First, it depends on complicated empirical assessments about majority/minority size, and what makes someone a member of the majority or minority. Second, and more importantly, if living together is an ideal, it is not clear why it only applies to concessions that one group should make. If co-existence between seculars and religious groups is desirable, perhaps no self-segregation should be tolerated, or at least not incentivized by the state, whether it comes from the minority or majority group (Blank 2011).

One way of reading *Solodokh* is to see it as signaling a change of approach from spatial segregation to more inclusive communities. Indeed, this is Blank's argument (Blank 2011). However, I believe that a different reading of *Solodokh* is also possible, one that takes into account the (overlooked) fact that the neighborhood in question was already mixed. The court was interested in preserving the mix, or maintaining the status quo. The courts, however, are more wary when the neighborhood is monolithic. Indeed, in a case called *Claudio*,[26] decided after *Solodokh*, by the administrative court (central district), the court implicitly rejected the model of pluralism and co-existence announced in *Solodokh*. In *Claudio*, the City of Rehovot (the same city in *Solodokh*) wanted to build a *mikveh* (a Jewish ritual bathhouse) in a predominantly secular neighborhood. Under a model of pluralism and co-existence, a *mikveh* should not have been especially problematic. Yet the court argued that the city did not demonstrate the need to build the *mikveh*

[26]A.P. (Central) 20029-06-10 Claudio v. Rehovot Local Planning and Building Committee (2011) IsrAC (unpublished).

specifically in a neighborhood where the population did not need it. Instead, the court said, the area should be preserved for a club or kindergarten as the original plan stipulated.

Claudio was appealed to the Supreme Court,[27] but although the court held that new planning proceedings should be initiated due to flaws in the planning procedure, the lower court's substantive holding was left intact. Indeed, the court required the city to collect professional opinions that will examine the area's current needs and to prioritize among them. Among the considerations that the experts should take into account is the area's demographic composition, after which the city can determine whether a *mikveh* is indeed needed. Thus the integrationist tendencies on display in *Solodokh* seem to have dampened. Taking *Solodokh* and *Claudio* together, it seems that the court is more interested in sustaining the status quo and safeguarding private residential choices than creating a shared space for religious and secular Jews.

3 Conclusion

This chapter sought to demonstrate the ways in which religious considerations are deployed by national and local regulatory institutions in Israel and their attendant effect on the urban landscape. Decisions in diverse areas such as work and rest laws, business licenses, public transportation and land allocations, are partly motivated by religious considerations, which, in turn, shape the way cities, towns, and neighborhoods, look, function, and feel.

Many years ago, Louis Wirth argued that heterogeneity breaks down rigid social structures (Wirth 1938). Homogeneity, then, perpetuates them. Years later, Richard Ford argued that "too often, the mirage of autonomy hides the bleak reality of social quarantine" (Ford 1997). In many ways, Wirth's and Ford's arguments hold true for Israel. Vibrant and vital cities require a heterogeneous community with heterogeneous preferences. Yet it is difficult to create and sustain such cities when the groups for which the space is allocated are intentionally homogeneous. Indeed, heterogeneity and diversity in urban populations generate a particular urban experience that is likely to be lacking in cities comprised of a monolithic culture. Even in mixed cities with a diverse and concentrated population, religiously driven regulation can inhibit the flow of people and goods throughout the day and week. Religiously motivated laws and regulations create different types of urban segregation. One type of segregation, and indeed the most extreme form, takes place through the physical separation of secular and religious Jews, especially ultra-orthodox Jews. The latter have secured rules that incentivize residential segregation along religious lines, mostly through the establishment of cities catered to the ultra-orthodox population and the entrenchment of religious neighborhoods in

[27] A.A. 2846/11 Rehovot Religious Council v. Claudio (2013) IsrSC (unpublished).

generally heterogeneous cities. Secular and religious Jews thus occupy different spaces in the urban landscape, without much mixing. Even when both groups live in the same city, mixing and interaction is limited. Crucially, national and local regulation shapes the urban landscape in a way that reinforces this separation.

Whereas residential segregation is one important effect of religiously motivated planning, religious considerations also operate in a more nuanced way in intra and inter-city governance. Labor and employments laws, local legislation governing the opening and closing hours of businesses, and public transportation regulations, are crucial for understanding the impact religion has on commercial and cultural activity, and on the flow of people within and inside cities, often with distributional consequences that disadvantage the poor.

While this chapter has sought to illustrate the effects of religion on the urban landscape, normative conclusions are more difficult to draw. If one espouses diversity, heterogeneity, and pluralism in the city, as I do, then one should be in favor of, for example, mixed use zoning that strives to provide all the community's needs in one space. In diverse neighborhoods of religious and non-religious Jews, mixed use affords easy pedestrian access to sites with different uses. But there is also a risk. In a diverse community of religious and non-religious individuals, mixed use zoning might end up undermining diversity itself. In cities and neighborhoods that have places of business and entertainment operating during the Shabbat (Saturday), or sell objectionable goods such as pork, religious Jews are less likely to want to live there, or would eventually drive out the secular population. Either way, diversity will be compromised. Depending on the demographics, sustaining both mixed use and a diverse community might be difficult.

A different solution, suggested by Blank, is to decentralize religiously motivated regulation (Blank 2011). This, he argues, will reduce spatial segregation and create a richer tapestry of communities, sensitive to local demographics and conditions. Yet he also suggests, rightly I believe, that demographics should not be the sole determinant of religious regulation. Thus pork stores should not open only in secular neighborhoods, and synagogues should not be confined to religious neighborhoods. Part of Blank's suggestions stem from the understanding that communities and groups are not constant; that they are in a constant state of flux, with movement within and without. To hold them as static is to turn a blind eye to the dangers of sectarianism, isolation, and ossification (Waldron 1992). Thus the state has an affirmative duty. Not only must it not incentivize separation and segregation, but it must encourage integration. Of course, this is easier said than done. Courts cannot go at it alone (Rosenberg 1991), and private and groups choices still account for much separation.

My point, however, is more indirect. Religion operates in complex ways. It affects our lives, even if our religiosity is non-existent. The purpose of this chapter, therefore, is to highlight the ways in which religion affects us, our neighborhoods, and our cities. What we choose to do with this is a question for a separate inquiry.

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Unlocking the "Gates" and Climbing Over the "Walls": Opening up Exclusive Communities

Sharon Perlman Krefetz

Abstract Well before gated communities began growing in the United States, many suburban municipalities could, and did, restrict who could live in them by using their zoning and land use powers. For example, requiring large minimum lot sizes and not allowing any multi-family housing made it impossible for lower-income people, who are disproportionately black, to reside in their community. These and other "exclusionary zoning" techniques have continued to be used by many suburbs to create non-visible, but highly effective, gates and walls to "protect" their middle and upper-middle class white residents from having "undesirable" people living near them. They have, thus, contributed greatly to the pattern of racial and economic segregation that has been found in most metropolitan areas in the United States since the mid-1960s. Since the late-1960s, civil rights activists have challenged such zoning regulations as discriminatory in a number of court cases with mixed results. The first effort to "open up the suburbs" via enacting a state law aimed at overcoming the effects of "snob zoning" was made in Massachusetts in 1969. Since then, civil rights and affordable housing activists in several other states have used this legislation as a model and have gotten similar "anti-snob zoning" laws passed by their legislatures. The Massachusetts statute, its impact on the supply and geography of affordable housing in that state, the opposition it has encountered, and how and why its proponents have been able to prevent it from being repealed or seriously weakened are the focus of this chapter.

1 Introduction

The rapid growth of gated communities in the United States since the 1970s is generally believed to be due to concerns many middle and upper income white Americans have about what they perceive to be the negative effects of racial and ethnic diversity on a community. A gated community, with the restricted access that

S.P. Krefetz (✉)
Department of Political Science, Clark University, Worcester, MA, USA
e-mail: skrefetz@clarku.edu

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its guard house, walls, or fences provide, is viewed as a way of protecting its residents' security, property values, and sense of community (McKenzie 1994, 2006; Blakeley and Snyder 1997; Low 2003; Atkinson and Blandy 2006; Vesselinov 2008). Fears of losing these "valuables" were evident in metropolitan areas of the United States in the mid-1960s when black populations and unrest began growing in many cities, particularly in the Northeast and Midwest, and "white flight" to suburbs began increasing exponentially.[1]

But well before and after gated communities began growing in the United States, many suburban municipalities have "protected" their middle and upper-middle class white residents from having people perceived as "undesirable" live anywhere near them by using their state-authorized zoning and land use powers. "Exclusionary zoning" regulations, such as requiring large minimum lot sizes for homes (for example, two or more acres) and not allowing any multi-family housing, effectively function like gates and walls. After briefly explaining when and why state governments ceded such powers to their local governments, and some well-known controversial efforts to regain them, this chapter will explain how and why one state, Massachusetts, has reasserted its authority in zoning and land use matters. It will then consider what impact this reassertion has had on "Opening up the Suburbs" (Davidoff and Davidoff 1971; Downs 1973; Goetz 2015), which has been the goal of groups and individuals concerned about the negative effects of racial and economic segregation in metropolitan areas of the United States since the late 1960s.

2 Background on Zoning and Land Use Authority in the United States

Danielson (1976) has suggested that "to a greater extent than in other modern societies, urbanization in the United States has separated people spatially along economic and social lines" (p. 1). The highly decentralized structure of governmental authority and the willingness of state governments to delegate to their local governments the authority to regulate the use of land within their boundaries have made it possible for segregation by income and race to become the norm in US metropolitan areas. Haar (1996) has pointed out that "of all the powers held by the local sovereign" zoning is "deemed most sacred by its citizens" (p. 30). Many Americans believe that their local government's power to zone is an inviolate constitutional right and a long-standing power. In actuality, local governments are not mentioned in the US Constitution; in the American federalist system they are "creatures" of their states. The right of state governments to use *their* police power

[1]Taking note of these trends, a Presidential Commission reached the "disturbing conclusion" that the United States was moving toward becoming "two societies, one black, one white—separate and unequal" (Report of the National Advisory Commission on Civil Disorders 1968).

to regulate the use of land in order to promote the public welfare was not even established until 1926, when the US Supreme Court issued its landmark ruling in the Village of *Euclid v. Ambler Realty Co*. case[2] (Babcock 1966; Williams 1978; Mandelker and Payne 2001). However, by 1930 most states had passed some version of the Standard State Zoning Enabling Act (Anon. 1978) and delegated to their local governments the right to formulate and implement zoning and land use policies (Kmiec 1987).

For many years after the *Euclid* decision was handed down, the US Supreme Court refused to hear zoning cases, viewing the states as the rightful authorities in such matters. Beginning in the late 1960s, when the negative effects of exclusionary zoning policies became increasingly evident to planners and civil rights activists, lawyers began to challenge them in federal courts. They did so because rulings issued in civil rights cases they had argued in these courts made them hopeful that they would get favorable decisions from them in cases challenging zoning policies that had discriminatory effects (Mallach 1984). In the early 1970s, some federal court decisions did give the advocates of "opening up the suburbs" cause for optimism as some rulings on challenges to local zoning regulations did find them to be racially biased and, therefore, in violation of the US Constitution's fourteenth Amendment, which guarantees Equal Protection (Metcalf 1988). However, in the mid-1970s a Supreme Court ruling upheld lower court decisions that denied the plaintiffs' charge that their local zoning board's decision to deny a request to rezone a parcel of land that they owned, which was zoned for single family homes, on which they wanted to build apartments, was racially discriminatory. In its *Village of Arlington Heights v. Metropolitan* ruling,[3] the Supreme Court agreed with the lower courts, which had ruled that the zoning board's decision did not violate federal civil rights laws because discriminatory *intent* had not been established.[4]

The decision in the *Arlington Heights* case put a damper on exclusionary zoning suits being brought to federal courts, and since the mid-1970s legal battles against exclusionary zoning have mainly played out in state courts. Given the variations in state laws, methods of selecting judges, and other factors that affect judicial decisions, it is not surprising that there is no consistent pattern in the rulings by courts in different states or even in the same state over time.

In some states, judges have issued strong anti-exclusionary rulings, concluding that local zoning regulations that require large minimum lot sizes for single-family homes or prohibit the building of multi-family housing in a community do not serve

[2]272 U.S. 365 (1926).

[3]429 U.S. 252 (1977).

[4]The lawyers for the plaintiffs in the Arlington Height case had charged the zoning board of that Chicago suburb with violating Title VIII of the U.S. Civil Rights Act of 1968 (known as the Fair Housing Act). However, the language in that Act prohibited only intentional discrimination in the sale, rental and financing of dwellings based on race, color, religion, sex or national origin. The Supreme Court's Arlington Heights decision led civil rights activists to push the US Congress to revise the wording of that Act, and in 1988 an amendment to it was passed that added the words "or discriminatory effects" to it.

the general welfare, while judges in other states have upheld such regulations.[5] However, very few of the favorable court rulings for "open housing" have resulted in getting more than a very small number, if any, housing units affordable to lower-income households built in suburban communities. Why? Because the case-by-case approach is a slow process; by the time a case makes its way through the courts, some proposed housing projects are no longer viable because options on land have expired and/or the cost of construction has risen substantially, making the project no longer financially feasible for the developer to undertake. Danielson (1976) has argued that dragging out court proceedings by making lengthy appeals is a strategy that many suburbs have used to ensure that although they may "lose the battle," they "win the war." Furthermore, most communities in a state remain unaffected by court decisions in individual cases that strike down zoning regulations that are found to be exclusionary, and can, therefore, continue using them to restrict access to all but the more "desirable" higher income, disproportionately white households.

There has been one notable exception to the inconsistent pattern of state court rulings in exclusionary zoning cases and the typically small number of affordable housing units that have resulted from decisions that have found local zoning regulations to be discriminatory. The exception is a series of landmark decisions by the New Jersey Supreme Court beginning in 1975 with what is commonly called the *Mount Laurel I* ruling.[6] In what has become known as "the Mount Laurel Doctrine" (Kirp et al. 1995; Payne 2008; Massey et al. 2013) the New Jersey Supreme Court judges have consistently held that the general welfare provisions of that state's constitution require municipalities to enact land use policies that make "the opportunity for an appropriate variety and choice of housing" to address their region's need for affordable housing "realistically possible."

In 1983, eight years after the first *Mount Laurel* decision was issued, when it became clear that neither that community nor a substantial number of other suburban municipalities was complying with the ruling, the Supreme Court handed down another landmark decision aimed at overcoming exclusionary zoning. The *Mount Laurel II* ruling[7] held that Mount Laurel and other growing communities must "provide a realistic opportunity for the construction of [each community's] fair share of low and moderate income housing." This decision also created a way for developers seeking to build low and moderate-income housing projects in communities that were not meeting their "fair share" to secure expedited approvals directly from three specially-designated judges. What became known as "the builder's remedy" quickly led to more than 135 suits involving over 70

[5]It is beyond the scope of this paper to discuss the reasons for decisions in any of these specific cases. Detailed accounts and analyses of them can be found in Mallach (1986) Kmiec (1987), Weiler (1989), and Mandelker and Payne (2001).

[6]South Burlington County NAACP et al. v. Mount Laurel Township et al., 67 N.J. 151 (1975).

[7]South Burlington County NAACP et al. v. Mount Laurel Township et al., 92 N.J. 158 (1983).

communities being brought by developers to the special judges, who almost invariably approved the projects (Babcock and Siemon 1985).

The *Mount Laurel II* ruling and the decisions made by the special judges appointed to implement it led many communities in New Jersey to push the state legislature to pass a bill, the Fair Housing Act of 1985 (S-2046), which transferred the responsibility for administering the Mount Laurel doctrine from the courts to the state's executive and legislative branches. A new state agency, the Council on Affordable Housing (COAH), was created by the Act and charged with overseeing the certification of plans. Municipalities were encouraged to develop "a fair share" of their region's "present and prospective needs for housing for low and moderate income families."[8] Political controversies and negotiations between COAH and suburban governments occurred frequently after it was created, and developers seeking to build affordable housing in many New Jersey suburbs have continued to seek and obtain court decisions that have found the zoning regulations in many cases to be inconsistent with the Mount Laurel Doctrine.[9]

The most recent New Jersey Supreme Court Mount Laurel Doctrine-based ruling[10] was handed down in March 2015 in a case brought by the Fair Share Housing Center (FSHC), a non-profit affordable housing advocacy organization. The FSHC attorneys argued that COAH had failed to meet the deadline set in a previous court decision for it to adopt revised rules for regulations deemed essential for implementing the Fair Housing Act. The Court agreed and ordered that trial courts should take over responsibilities COAH had been given to implement the Act.[11]

To date, 60,000 affordable homes have been built in New Jersey as a direct result of the Mount Laurel Doctrine. While considerably less than the estimated need for affordable housing in what is the most suburbanized state in the United States, with

[8]Low-income households are generally defined as those earning less than 50 % of the area median income; moderate-income households are usually defined as those earning less than 80 % of the area median income. "Affordable housing" generally means housing that costs no more than 30 % of a household's income per month.

[9]The major factors and actors that shaped the Fair Housing Act and contributed to its passage are discussed by Kirp et al. (1995) and by Payne (2001). One especially controversial provision included in the Act, which was demanded by legislators from affluent suburbs as a condition for voting for it, allowed suburban municipalities to buy out up to half of their fair share obligation by providing funds to a nearby urban municipality for it to use to create more housing for lower income households there instead of in their own community. Called a Regional Contribution Agreement, this feature of the Act, which was anathema to civil rights and "opening up the suburbs" activists (Fox 1987), was eventually removed via an amendment that was passed in 2008 (Bush-Baskette et al. 2011).

[10]re N.J.A.C. 5:96 and 5:97, 221 N.J. 1 (2015).

[11]COAH has had a rocky history. Because its 12 members are appointed by the Governor (with the "advice and consent" of the Senate) and it is located within and funded by the Department of Community Affairs, over the years the Council has tended to take a more aggressive, activist approach when the Governor has been a liberal Democrat and has been much more passive when the Governor has been a conservative Republican. The current Governor, Chris Christie, who is a very conservative Republican, actually abolished the Council in June 2011, but in March 2012 the Appellate Court ruled that he did not have the authority to do so and ordered it re-instated.

a population of nearly nine million people living in 565 municipalities, producing this amount of affordable housing is no small accomplishment. However, 40 years after the Mount Laurel I decision was issued and 30 years after the Fair Housing Act was passed, the innovative, constitutionalized Mount Laurel doctrine has not diffused to any other state. *Mount Laurel II* remains, as Payne (2008) has pointed out, "a leading case without a following." The reasons why not even one of the other 49 states in the United States has adopted the principles and implementation tools that New Jersey pioneered have much to do with the absence of consistently "activist" judges in most other states and the complexities and political challenges involved in developing and enforcing fair share housing requirements for every growing municipality in a state.

3 The Massachusetts State Legislative Approach: Chapter 40B

A law aimed at overcoming exclusionary zoning and "opening up the suburbs" that was enacted by the Massachusetts legislature has made *that* state a leader *with* a following, to some extent. The Massachusetts Comprehensive Permit and Zoning Appeals Act, which is most often called Chapter 40B, or just 40B, referencing its location in the Massachusetts General Laws (Title VII, Chapter 40B, Sections 20-23), has had more direct impact on other states than the New Jersey Mount Laurel court rulings and Fair Housing Act have had. 40B has served as a model for legislation that was passed in several other states, specifically Connecticut in 1989 (Conn Gen Stats Sections 8-30g to 30h), Rhode Island in 1991 (RI Gen Laws Sections 45-53-1-8), Illinois in 2002 (Illinois Compiled Stats Sections 67/1-50), and New Hampshire in 2008 (New Hampshire RSA 674 Chapter 299, Sections 58-61).[12] The features of the Massachusetts statute, its impact on the supply and geography of affordable housing in that state, the opposition it has encountered, and how and why its proponents have been able to prevent it from being repealed or seriously weakened are the focus of the remainder of this chapter.

The Comprehensive Permit and Zoning Appeals Act was passed by the Massachusetts legislature in 1969, six years before the New Jersey Supreme Court handed down its ruling in the *Mount Laurel I* case and more than two decades before the US President's Commission on Regulatory Barriers to Affordable Housing arrived at the "disturbing conclusion" in its "Not in My Backyard": Removing Barriers to Affordable Housing Report (1991) that "exclusionary,

[12]For an overview of the Connecticut and Rhode Island affordable housing acts see Meck et al. (2003). The Rhode Island act is also discussed by Barber (2011), and the Illinois act is reviewed in Devitt (2005) and Hennion (2006).

discriminatory, and unnecessary regulations constitute formidable barriers to affordable housing."[13]

The Massachusetts law states in its introduction that it is "an Act providing for the construction of low or moderate income housing in cities and towns in which local restrictions hamper such construction." The introduction also says that it was intended to address "an acute shortage of decent, safe, low and moderate cost housing." That the Massachusetts legislature passed a law that reasserted the state government's authority in the area of land use control without any judicial pressure or prodding from the courts stands in marked contrast to the origins of the Mount Laurel Doctrine and New Jersey's Fair Housing Act.

3.1 Key Provisions of the Massachusetts Law

The first section of the statute authorizes "qualified developers" (non-profit organizations, local housing authorities, or limited-dividend corporations, i.e., private developers who agree to keep their profit margins below a certain level) to apply to the local Zoning Board of Appeals (ZBA) for a Comprehensive Permit (CP) to build low and moderate income housing. This provision was aimed at streamlining and simplifying what can otherwise be a long, drawn-out and costly process of securing separate approvals from a variety of local boards and departments.

The second and most controversial of 40B's main provisions is the granting to qualified developers who apply for a Comprehensive Permit the right to appeal to a state-level administrative, quasi-judicial body, the Housing Appeals Committee (HAC), if the ZBA denies the application or approves it with conditions attached that the developer deems make the project "uneconomic." If the HAC determines that the ZBA decision was not "reasonable and consistent with local needs" it is empowered to override the local decision and order the granting of a Comprehensive Permit to the developer. What makes this reassertion of the state's authority in zoning and land use matters remarkable is that soon after the landmark *Euclid v. Ambler* decision was handed down in 1926 Massachusetts, like most other states, delegated its zoning authority to its local governments. So by 1969, many local officials in Massachusetts considered their zoning power to be a "natural right" and viewed 40B as a serious violation of their local autonomy (Haar 1996).

The third very important provision of 40B is its establishment of an affordable housing goal or "fair share threshold" for all cities and towns in the state. It did this by stipulating that a local denial of a Comprehensive Permit cannot be appealed to

[13]It is beyond the scope of this chapter to discuss the politics of the passage of this statute. For a description and analysis of the factors that led to its initiation and the success of its supporters in securing the necessary number of votes to get it enacted see Krefetz (1980, 2001) and Krefetz et al. (1990).

the Housing Appeals Committee if 10 % or more of a community's total housing stock consists of low and moderate income housing. When 40B was enacted, of the 351 cities and towns in Massachusetts, only three, Boston, Holyoke, and Fall River, had more than 10 % of their housing affordable to low- and moderate-income households, and most growing suburbs around those and other cities had no low- or moderate-income housing units.

3.2 Impact of 40B on Increasing the Supply of Affordable Housing in Massachusetts

51 municipalities are currently at or above the 10 % affordable housing threshold (MA Department of Housing and Community Development Chapter 40B Subsidized Housing Inventory as of 18 December 2015; December 2014 data was up-dated for the author by DHCD Fair Housing Staff). That only 15 % of all Massachusetts cities and towns have achieved or gone beyond the Fair Share goal four decades after 40B was enacted does not seem very impressive. However, it is misleading to focus solely on the number of communities that have reached the 10 % goal. The data in Table 1 show that there has been progress since 40B was enacted, although it has not been rapid or steady. It is no small feat that a goodly number of municipalities have gotten closer to the 10 % goal: 16 communities now have 9–9.9 % affordable units and another 50 are at 7–8.9 %. Added to the 51 over the 10 % goal, these numbers show that 117 communities now have over 7 % of their housing stock affordable to low- and moderate-income households. Furthermore, as can be seen in Fig. 1, nearly half (48 %) of all Massachusetts cities and towns now have over 5 % of their housing stock affordable. Furthermore, most of the municipalities with less than 2 % affordable housing units are small rural towns in which there is no or little population growth and no demand for more affordable housing.

The increased supply of affordable housing that has been created as a direct result of 40B is an important accomplishment. The geography of this housing is also significant: a substantial number of Massachusetts communities that are over the 10 % threshold are highly desirable, affluent suburbs of Boston, for example, Lexington and Concord. The public schools in these communities are rated among the best in the state and their property values are very high; the median price of housing in these suburbs is around one million dollars. Their high public school ratings and housing prices provide powerful evidence that having at least 10 % of a town's housing units inhabited by lower income households does not adversely affect its "community character" or lower its property values.[14]

[14]Direct evidence that the 40B affordable housing built in suburban communities has not lowered their property values has been presented in studies done by Pollakowski et al. (2005) and by Bratt et al. (2012).

Table 1 Massachusetts communities with 10 % or more housing units affordable to low and moderate income households

Year	1972	1983	1997	2001	2015
Number	3	19	23	27	51
% of total municipalities in the state	1	5	7	8	15

Source MA Department of Housing and Community Development Chapter 40B subsidized housing inventory (SHI) for each year

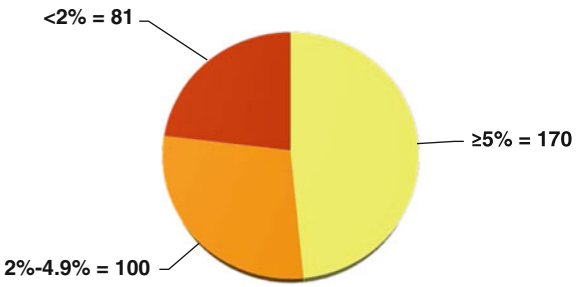

Fig. 1 Number of Massachusetts municipalities with/without at least 5 % affordable housing units (total N = 351). *Source* MA Department of Housing and Community Development Chapter 40B subsidized housing inventory (SHI) 18 Dec 2015 (December 2014 data updated by DHCD Fair Housing Staff)

It is also important to consider 40B's impact on the supply of affordable housing. More than 60,000 units of affordable housing have been built in about 1200 developments in Massachusetts using 40B.[15] While this number of affordable units is nowhere near what the need for affordable housing has been estimated to be, without 40B far less affordable housing would have been built. This can be inferred from the findings of several studies. The Metropolitan (Boston) Area Planning Council reported that in 1972 less than half of all cities and towns in eastern Massachusetts had zoning provisions that allowed any multifamily housing to be built in them, and another report found that since 2000, approximately 80 % of all the new affordable housing built outside the larger cities in Massachusetts was built using 40B (CHAPA 2010). Furthermore, in a scholarly study that used a quasi-experimental design to compare the amount of affordable housing built in several states that have no 40B-like policy to the amount built in Massachusetts, Cowan (2006) concluded that 40B has resulted in significantly more low and moderate income housing being built in the suburbs than would have been created

[15]While this is about the same number of units that have been built in New Jersey as a result of the Mount Laurel Doctrine, Massachusetts' population of less than seven million is much smaller than New Jersey's population of nearly nine million, and Massachusetts has far fewer municipalities than New Jersey: 351 compared to 565. And, according to a recent comparative study by Bratt and Vladeck (2014), a larger number of affordable units have been produced annually in Massachusetts than in New Jersey over the past many years.

if the statute had not been enacted. So, while the 40B "glass" of affordable housing is only half-full, it is likely that the glass would be close to empty if this statute did not exist.

3.3 Attacks on the Law and Modifications Made to It

Since it was enacted in 1969, Chapter 40B has generated intense controversies and fierce resistance from some suburban residents and town officials. However, the statute has continued to secure enough support from the legislature, from the courts, and from the public to remain intact over the past 45 years.[16] Some of the actions officials charged with implementing this law and leaders of non-governmental organizations that advocate for affordable housing have taken that have played a major role in keeping 40B alive and opening up more "gates" in what would otherwise be exclusive communities, are important to consider.

The Housing Appeals Committee, with its power to override local denials of Comprehensive Permit proposals and order that they be granted, has been perceived by many suburban officials as not being at all responsive to local concerns and invariably ruling in favor of developers. In the early decades of 40B's existence, when most local Zoning Boards consistently denied granting every Comprehensive Permit application submitted to them, the developers almost always appealed their decision to the Housing Appeals Committee, and in the majority of these cases the Committee decided to override the local decision, finding that there was no serious health or safety concern that could not be addressed by the developer. However, as time went by, it became apparent that even when the Appeals Committee ordered that a Comprehensive Permit be granted, in many instances the housing did not get built. Why? Because town officials often went to court to contest the HAC ruling, and even though, as noted above, the courts almost invariably upheld the ruling, by dragging out the proceedings, local communities could make a project unfeasible for the developer due to loss of options to buy the land, increased construction costs, or other complications.

Recognizing this pattern of failure to produce the intended outcome of getting the affordable housing built, in the 1990s the HAC began encouraging the parties to engage in negotiations to work out compromises that would make the proposed housing development more palatable to the locals and still economically feasible for the developer. Some of these informal negotiations took place before a formal CP application was submitted and resulted in more applications being approved by local zoning boards. Outright denials went down from 43 % in 1970–79 to 20 % in 1990–99. At the same time, fewer zoning board decisions that were appealed to the

[16]More detailed accounts of numerous attacks on 40B over the years since the law was passed and how its supporters have managed to fend them off are presented by Krefetz et al. (1990), Krefetz (2001), Melcher (2003), and Krefetz and Furman (2011).

HAC were overruled by the Committee; overrides decreased from 45 % in the 1970s to 25 % in the 1990s (Krefetz 2001).

Despite the increase in zoning boards granting Comprehensive Permits for 40B projects and the increased propensity of the HAC to encourage negotiated settlements between towns and developers, the statute continued to generate anger and opposition by a non-trivial number of suburban residents and officials. Numerous bills proposing to terminate or seriously weaken the law were filed in the state legislature, especially during hot housing market periods when many applications for Comprehensive Permits to build affordable housing were submitted to local zoning boards, e.g. in the mid-1980s, late 1990s, and early 2000s, until the housing meltdown began in 2007. None of these attacks resulted in any changes to the statute. Strong, generally progressive leaders in the overwhelmingly Democratic Massachusetts legislature, who received active support from the Executive Branch, including from both Democratic and Republican Governors and their housing agency heads, have managed to prevent bills attacking 40B from even reaching the floor for debate. One of their strategies has been to agree to review the Act, appoint a special commission comprising city and suburban representatives to conduct the review, hold hearings across the state, and then produce a report evaluating 40B and recommending what, if any action, the legislature should take regarding it.

The Commission that was created in 1988 concluded that without 40B "there would be no affordable housing production in the Commonwealth," and that "efforts to weaken it should be discouraged" (Report of the Special Commission Relative to Implementation of Low and Moderate Income Housing Provisions 1989). The report of a 40B Task Force that was appointed 14 years later concluded that "Massachusetts has among the highest housing costs in the nation," and "without this powerful and innovative tool to create affordable housing, the affordability crisis in Massachusetts would be exacerbated" (Chapter 40B Task Force Findings and Recommendations: Report to Governor Mitt Romney 2003).

Modifications to some of 40B's administrative regulations have, in fact, been made by the state's department of housing and community development over the years in an effort to address valid concerns some local officials have expressed about the law and to lessen opposition to it. For example, regulations have been revised to limit the total size of 40B developments to a maximum of 300 units in larger communities and a maximum of 150 units in smaller towns.[17] The revised regulations, along with the economic recession and the bursting of the housing bubble that began in 2007, which led to a significant reduction in the number of Comprehensive Permits applied for by developers, helped quiet some of the opposition to 40B for a while.

[17]These and other changes made to the regulations are described in the CHAPA Fact Sheet (2014).

3.4 Latest Unsuccessful Attempt to Repeal 40B

Efforts to write the last chapter of 40B have not ceased entirely. The most recent attempt to close the book on Chapter 40B came in 2009, when staunch opponents of the law, frustrated by arriving at repeated dead-ends when traveling the legislative route to kill or gut the law, launched a campaign to take their case directly to the voters. The Coalition for the Repeal of 40B began a successful drive to get a repeal referendum on the November 2010 state ballot.

The Repeal Ballot Question and Official Arguments for the Opposing Sides

(Posted on the Massachusetts Secretary of State's Election website and on the November 4, 2010 Ballot)

Ballot Question 2. Comprehensive Permits for Low- or Moderate-Income Housing

Should voters repeal the law allowing developers of projects that include low- or moderate-income housing to apply for a single comprehensive permit from a city or town's zoning board?

Arguments:

Yes—Drop comprehensive permits

Authored by John Belskis, Coalition for the Repeal of 40B, Arlington. www.repeal40B.org.

Voting "Yes" will ensure that quality affordable housing is built and remains for our parents, children, teachers, and public employees. Massachusetts needs more affordable housing. A Yes vote will repeal the current Chapter 40B statute, a law that promotes subsidized, high-density housing on any parcel of land without regard to local regulations, the neighborhood, or the environment. By stripping away local control, it has destroyed communities in rural, suburban, and urban neighborhoods alike, while lining the pockets of out-of-state speculators. The current statute does not build affordable housing. Rather, it maintains a corrupt law that the Massachusetts inspector general has called a "pig fest" and "represents one of the biggest abuses in state history." A "Yes" vote will stop this outrageous misuse of taxpayer money and allow cities and towns to build affordable housing for those who need it most.

No—Keep comprehensive permits for low- or moderate-income housing

Authored by Tripp Jones, chair, Campaign to Protect the Affordable Housing Law, Boston. www.protectaffordablehousing.org.

This referendum would abolish the primary tool to create affordable housing in Massachusetts without providing any alternatives. Housing in

Table 2 Voting outcomes in Massachusetts municipalities on the 2010 ballot question regarding the repeal of Chapter 40B

Majority vote in 350[a] municipalities		
	Number	%
For repeal	73	21
Against repeal	277	79

[a]The voting returns for Becket, a very small town in western Massachusetts were not reported.
Source The Boston Globe, November 10, 2010.

> Massachusetts is very expensive. We need to protect the Affordable Housing Law so that seniors and working families can afford to buy homes here. The Affordable Housing Law has created 58,000 homes across the state and is responsible for approximately 80 % of new housing over the past decade, outside the larger cities. Repealing this law will mean the loss of badly needed construction jobs. Thousands of homes that have already been approved for development will not be built if this law is repealed. Homes and jobs will be lost, and there will be less affordable housing for seniors and working families. A coalition of hundreds of civic, municipal, business, environmental, and religious leaders, including the League of Women Voters and the AARP, urge you to vote NO.

For many months before the November election it looked like the organizers of the repeal effort were on the road to a decisive victory; it seemed very likely that the referendum would pass with a substantial majority of votes and 40B would be terminated by 1 January 2011. However, when all the votes were counted on Election Day the referendum was defeated by a wide margin: 58 % of the electorate voted against repealing 40B, and in only 73 communities did a majority cast their votes for repealing it (see Table 2).

So how did the supporters of 40B manage to overpower the opponents and win a resounding victory that ensures that exclusionary zoning can continue to be overcome in Massachusetts—at least for the foreseeable future?[18] One likely reason is that the organizers of the campaign to repeal 40B over-estimated the amount and intensity of opposition to the Act. The two leaders of the Repeal campaign, who are residents of suburbs of Boston, were able to get over 91,000 Massachusetts residents to sign petitions—about 25,000 more than the number of signatures needed to get the referendum on the ballot. The success of this effort probably led them to believe that the November election would bring an overwhelming vote in favor of repealing 40B. They also framed the language used to give voters the rationale for voting to repeal the law in a way that was intended to appeal to voters in all types of communities. They called 40B "a law that promotes subsidized, high-density

[18]A detailed description and analysis of the tactics used by the leaders of the repeal 40B effort and the supporters of 40B who campaigned against its repeal is presented in Krefetz and Furman (2011).

housing on any parcel of land without regard to local regulations, the neighborhood, or the environment" and said that it "has destroyed communities in rural, suburban, and urban neighborhoods alike" (see Box for the rationales each side gave on the referendum ballot for voting for or against the repeal of 40B).

Over-confidence in the Repeal Campaign's organization was not the only reason why the repeal effort did not succeed. The strengths of the Campaign to Protect 40B contributed greatly to the defeat of the referendum. Chief among these were the political skills of the leader of the organization that created the campaign. The organizer of the Protect 40B campaign was the long-time director of an umbrella organization for affordable housing and community development advocacy groups in Massachusetts, who persuaded the highly-regarded founder of an independent think tank called MassInc, which is supported by business and civic leaders and is well-connected to influential politicians, to serve as the chair of the campaign. With the help of their networks and connections, these two individuals managed to raise over a million dollars from donors, which enabled them to hire a full-time experienced professional campaign manager and several media consultants.

The campaign leaders and staff made a number of strategic decisions about where, how, and when to spend their financial and other resources. These decisions included: securing the support of faith-based groups and clergy; getting all four of the candidates for Governor to publicly express their support for 40B; buying time on television stations for a 30-s ad that aired the last week before the election; and featuring in that ad senior citizens and a two-parent family with a working father and a stay-at-home mom with two young children, who live in communities they made clear they could not afford to live in but for the existence of 40B housing. Bringing the faces and the voices of residents of 40B forward to tell their heart-warming stories and urge a No vote on the Repeal referendum was a clever strategy, which no doubt helped lay to rest negative stereotypes of the occupants of 40B's "subsidized" housing. Using the term "Workforce Housing" and stressing the importance of getting more affordable housing built to address local needs for such housing for "deserving" people, for example, for teachers, police officers, and fire fighters who often have long commutes to their jobs because they cannot afford the cost of housing in the town in which they work, and for young families raised in the town but priced out of its housing market, were also conscious strategies aimed at persuading voters that keeping 40B was the right thing to do.

One additional important strategy the campaign leadership decided to use was to commission a research institute at the University of Massachusetts to gather and present data on the economic impact of 40B over the past decade. When that study's report was released, it highlighted two especially impressive findings, namely, that 40B had generated over nine billion dollars in construction and related spending and that nearly 48,000 jobs were created to complete the more than 20,000 homes that were built using 40B in the previous 10 years. Given the poor condition of the economy and the high unemployment rate in the state in 2010, these findings probably persuaded some people who might otherwise have voted to repeal 40B to support it.

4 Conclusion

The successful campaign to save 40B provides lessons that could be used by affordable housing activists in other states who want to "open up" the suburbs and climb over the "walls" that exclusionary zoning creates. The first is to create a coalition of affordable housing activists, business leaders, and faith-based groups that will mobilize their supporters. The second is to emphasize the economic benefits of the construction in dollars spent and jobs created. And the third is to get senior citizens and families that live—or would like to live—in affordable housing in the suburbs to tell their stories and show their faces to make clear that they deserve the opportunity to live in them and that their being residents of them does NOT have negative effects on their neighbors or on the community's "character." Their stories and faces in Massachusetts have proven to be powerful weapons in the battle to overcome exclusionary zoning. And spreading them could help the United States move closer to achieving the goal of "a decent home and a suitable living environment" for every American household, which was set forth in the landmark 1949 federal housing act some 20 years before 40B was enacted.

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