

Regulating Condominium Projects

Tad Cleaves
Associate Attorney
Bojorquez Law Firm
tad@texasmunicipallawyers.com

Skye Masson
First Assistant City Attorney
City of Georgetown
skye.masson@georgetown.org



The Plan



- Review Condo Basics
- Discuss Municipal Regulatory Authority (and Requirements)
- Illustrate the Challenge new Condo Products can Create
- Review Current Approaches
- Propose Solutions to help you follow the law!

What We Think a Condo Is: Traditional Vertical Condominium Building

- Multistory building with individual units
- Similar to apartment buildings
- This is what most people think of as a condo
- Common elements typically include lobby, hallways, amenities (pool, sport court), parking



Also a Condo...



- “Site Condominium”
- Detached single family houses
- Each house and surrounding space is one unit
- Common elements are roads, trails, amenity centers

Also a Condo...



- Economic Development Condos
- Creation of ownership interest within one structure
- Allows for public ownership within private project
- Useful tool for cities to incentivize development.

What a Condominium *Actually* Is:

Condos are a form of property ownership – Not a type of building or a land use.

Condominium Definition:

A form of real property with portions of the real property designated for separate ownership or occupancy, and the remainder of the real property designated for common ownership or occupancy solely by the owners of those portions. TUCA Sec. 82.003.

The unit owners have to have an ownership interest in the common elements—an HOA or POA or “Condo Association” may not own the common elements without the unit owners.



Condos are development tools



Ownership structure that gives more control over the development to the owners of the property

- Rules
- Boards and committees, etc.

Create a product people want

- Amenities
- Shared cost of maintenance
- Lower personal overhead

Can allow for creative development incentives

- Public-Private partnerships in buildings that would be impossible with fee-simple ownership

Texas Uniform Condominium Act (TUCA)

Section 82.051 – Creation of Condos

- Condominiums are created by recording a Declaration in the Deed Records
- (e) This chapter does not affect or diminish the rights of municipalities and counties to approve plats of subdivisions and enforce building codes as may be authorized or required by law.

Section 82.006 – Applicability of Municipal Regulations:

- Cities may not pass regulations that would prohibit condo regimes.
- Cities may not impose any requirement on a condominium that it would not impose on a physically identical development under a different form of ownership.
- Otherwise, this chapter does not invalidate or modify any provision of any zoning, subdivision, building code, or other real property use law, ordinance, or regulation.

(Additionally -- Cities have no authority to regulate Declarations directly.)

Regulatory Nutshell

- Condos are a form of ownership and not a type of project or construction. (TUCA § 82.003)
- The condo regime does not affect municipal regulatory authority. (TUCA § 82.051(e) & 82.006)
- Cities can regulate condos in the same manner they would regulate a physically identical development.



Physically Identical Property: Apartment vs. Traditional Condo

Apartment Building Process

- Meetings with planners
- Subdivision plat (Legal lot status)
- Site plan (depending on the city)

Vertical Condo

- Can be exactly the same process.

Process meant for a more intense use than a single-family detached.

Condo treated the same as a physically identical apartment building, and the law is followed!



Physically Identical Property: Site Condo vs. Residential Development

Residential Subdivision

- Platting Process
- All subdivision regulations apply
- All zoning regulations apply
- SF Home permitting process

Site Condos

- If a plat, only 1 lot.
- Some subdivision regulations apply
- Zoning is potentially MF instead of SF
- Site plan and site wide CO
- Developer pushback with the subdivision platting

Condo is often treated different than physically identical 'traditional' residential subdivision.



TUCA NOT being followed!

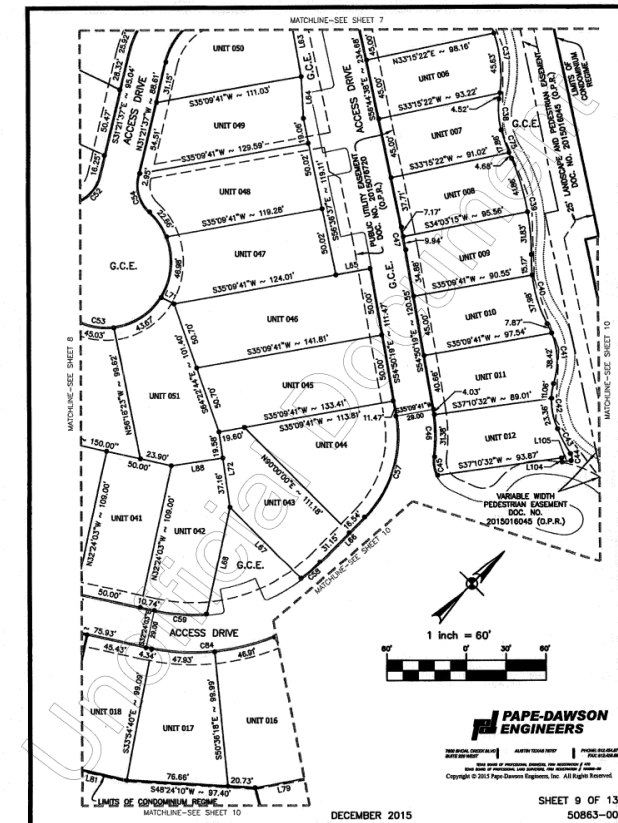
Frequent Disagreement from Developers

- Condominium Declarations often contain highlighted disclaimers that the Declaration does not constitute a subdivision of land.
- This example is from a Site Condo that looks physically identical to a traditional residential subdivision.
- Developers seem to view a condo regime as a force field against municipal regulation based on a condo not being a subdivision of land...

Not a Typical Condominium Unit

Although a Unit resembles a platted lot: (i) a Unit does not include land; (ii) the conveyance of a Unit is not a metes and bounds conveyance of land; and (iii) the creation of a Unit does not constitute a subdivision of land. Instead, each Unit is the surface of a designated piece of land, and everything above the surface for 50 feet, and anything below the surface that serves or supports the above-surface Improvements.

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Are Condos Subdivisions of Land?

(To trigger subdivision platting...)

- Some Condos are Subdivisions of Land.
 - The answer depends on the **physical** layout of the development.
- A Subdivision Plat is required when, “...the owner of a tract of land ... divides the tract into two of more parts to lay out a subdivision of the tract ... to lay out suburban, building, or other lots, or to lay out streets, alleys, squares, parks, or other parts of the tract intended to be dedicated to public use or for the use of purchasers or owners of lots fronting on or adjacent to the streets, alleys, squares, parks, or other parts must have a plat of the subdivision prepared. A division of a tract under this subsection includes a division regardless of whether it is made by using a metes and bounds description in a deed of conveyance or in a contract for a deed, by using a contract of sale or other executory contract to convey, or by using any other method
- AG Opinion in Support – GA-0223 (2004)

The Problem: Restated

- TUCA requires equal treatment of physically identical projects.
- New types of housing (typically) products are receiving different treatment from municipal planners when they are owned as condominiums.
- Potential reasons why:
 - Everyone thinks of condos as vertical condos and applies those rules.
 - Single family detached condo developments are an unfamiliar product for many cities and planners.
 - Every declaration of condominium states it is not a subdivision, which leads some planners to ignore the law and their city's subdivision regs.
 - Developers and their attorneys encourage this. Allegedly.
- Approaches and Potential Solutions...



Sample Approach—Condo as Zoning Use

CONDOMINIUM RESIDENTIAL use is the *use* of a site for attached or detached *condominiums*, as defined in the Texas Property Code.

The minimum site area for a condominium residential use is 14,000 square feet.

At least 3,500 square feet of site area is required for each condominium.

A condominium use with less than 10 dwelling units must provide private personal open space in accordance with the requirements of this subsection.

- (1) The open space must be a minimum of five percent of the gross site area of the property.
- (2) An area of private personal open space at ground level must contain at least 100 square feet and may not be less than ten feet across in each direction.
- (3) An area of private personal open space above ground level must contain at least 50 square feet and may not be less than five feet across in each direction.
- (4) The requirements of this subsection do not apply to a condominium use located within development that meets the requirements in Subsection (F)(1) of this section.

Sample Approach—Condo Specific Regs



Condominium drives.

- (a) In order to provide for orderly development and provision of services, the director of planning or their designee may approve the creation of named *condominium* drives as part of a residential *condominium* project. These drives are not dedicated city streets and maintenance is solely the responsibility of the property owner.
- (b) If the director of planning does not approve the designation of the drives as *condominium* drives, the applicant may appeal the decision to city council as part of the plat approval process.
- (c) Proposed *condominium* drives shall be located within access/fire lane/utility easements as determined necessary by the director of engineering and fire marshal.
- (d) *Condominium* drive names shall be approved by the director of engineering.
- (e) Additionally, the city attorney shall review and approve the *condominium* documents associated with any proposed development that will include *condominium* drives.

Potential Problems

TUCA requires same treatment as physical identical projects

Both of these approach create condo specific rules—unless the rules also apply to residential subdivision, they do not comply with TUCA

Any rule requiring local review of Condo Declaration violates TUCA on its face.



Sample Approach-Condos as Multifamily

Most City codes only mention condominiums in definitions:

Condominium. A form of property ownership providing for individual ownership of space in a structure or complex, and which may be combined with an individual interest in the land, other parts of the structure/complex, and shared facilities in common with other owners.

And then because not treated as subdivision, captured by multifamily:

Multifamily. The use of a single lot or parcel for three or more dwelling units regardless of whether those dwelling units are attached within one structure or detached in multiple structures.

In an effort to follow TUCA, treat all condos as apartment building.

These are not the same!



Treating all Condos as Multifamily

What happens when single family detached condominiums treated like multifamily apartment?

- Process is not the same—Site Plan vs. Subdivision
 - Different rules apply
- Infrastructure is not the same—Private vs Public
 - Streets are narrow, fire lanes often on both sides
 - Private water and wastewater, no city maintenance
- Permitting is different—CO is required for whole project.
- Master meter for entire project
 - Impact fees are different—they potentially pay less.
 - Customer relationship is different

Long term considerations

Condo unit owners think they bought a house.

- Contact the city for a permit for a fence, shed, or other accessory structure.

With master meters, very little relationship with condo unit owners

- Condo unit owners don't always receive the same city communications

Maintenance of private infrastructure will be costly

- Condo unit owners may not understand future assessments



1. Require condo projects to plat
2. Adopt Development Plats
3. Adopt non-subdivision regulations for condo products that achieve same result.



Subdivision Plat

- If creation of certain condominium units is a subdivision of land, just make them plat.
- Would amount to equal treatment and remove some of the issues discussed above.
- Challenges to this approach:
 - Process doesn't match. Platting is first step in development. Condo units created after initial plat, so would have to replat?
 - Subdivision regulations aren't written for condo units
 - Public roads generally cannot bisect a single lot
 - All regs written for lots, instead of units.

Development Plats

- Subchapter B of Chapter 212 of Local Government Code
- Requires a Development Plat for any new construction or the enlargement of any exterior dimension of any building, structure, or improvement.
- Provides avenue to apply subdivision regulations to condo projects
- Challenges to this approach--
 - Has to be adopted by City Council
 - Condos may still not be treated exactly the same.

Adopt Regulations for End Product

- Similar to creating a zoning category
- Instead of making the rules specific to condominiums, adopt regulations for the high density product desired. For example:
 - Minimum lot or unit size
 - All Single family detached must have meter
 - Require private drives to match streets
- Challenges to this approach--
 - Requires extensive revisions to the code
 - Have to be careful not to make condo specific regulations

Conclusions

- ❑ Condos are useful tools
- ❑ TUCA allows FULL municipal regulation of condos
- ❑ Regulating condos requires case-by-case analysis
- ❑ No simple one-size fits all solution

