# Condominiums: Managing Risk While Unlocking Flexibility

by **JENNIFER MARTIN,** Member, Winstead's Real Estate Development & Investments Practice Group

Many Texas builders and developers hear "condo" and immediately picture a downtown high-rise, attached townhomes or a lawsuit waiting to happen; but that's not the whole story. In Texas, condominiums can be a very practical ownership structure for "horizontal" or "site" projects where they can function as an alternative to separately platting lots and afford vastly more flexibility for mixed-uses and multiple owners.

## LEGAL STANDARDS FOR CREATING CONDOS

Condominiums in Texas are created and primarily governed under the Texas Uniform Condominium Act ("TUCA"). Condominiums are, essentially, separate pieces of real property, but they can take many forms including airspaces 50 stories aboveground, parcels of dirt, entire buildings or what resemble individually platted lots with single-family homes on them.



In the simplest of terms, in order to create these interests in real property, all that TUCA requires is recording a condominium declaration (the central governing document) and the condominium plat and plans (certified by a surveyor and/or architect). Once the declaration and condominium plat and plans are recorded, each unit is separately taxed and can be separately owned.

## LIMITS ON FLEXIBILITY: CONDOS VERSUS LOCAL GOVERNMENT CODE SUBDIVISIONS

TUCA provides a standalone framework for creating condominiums. However, local subdivision regulations may still apply, and the enforcement of those regulations varies significantly across Texas.

The problem is tension within TUCA itself. It prohibits local governments from treating condominiums less favorably than traditional subdivisions or imposing stricter requirements on them yet also preserves local authority to enforce subdivision and land-use rules. The authority to enact such rules, found in Chapter 232 of the Texas Local Government Code for counties and Chapter 212 for cities, each of which requires a subdivision plat whenever land is divided, allows local governments to impose detailed requirements related to layout and infrastructure. Because local governments often justify these requirements under their general authority to protect public health and safety, they sometimes apply subdivision rules to condominium projects in ways that meaningfully impact — or effectively dictate — the project's design.

This legal tension was addressed in a 2004 opinion by the Attorney General concerning property in Hays County. The opinion concluded that counties and municipalities may require condominium projects to comply with subdivision regulations that apply more broadly to land development, such as mandated sidewalks, bike lanes or lot dimensions. Although the opinion is not binding law, it has been widely relied upon by local governments, and some jurisdictions take the position that condominium developments must be platted in the same manner as traditional subdivisions. If a developer is required to subdivide the property into separate lots, it can undermine the flexibility that makes the condominium structure attractive in the first place.

This incongruity also intersects with current policy efforts, at the federal and state levels, to reduce "red tape" inhibiting housing development. During the

most recent Legislative Session, a bill supported by Texas Association of Builders sought to clarify how subdivision requirements apply to site condominium developments and to preserve condominiums as a flexible planning tool. The bill did not pass, leaving the current legal uncertainty in place.

Looking ahead, this unresolved tension between TUCA's condominium framework and local governments' interpretation of their subdivision authority will likely remain an important issue for future legislative consideration.

## THE COMMON NARRATIVE VERSUS THE REALITY OF RESIDENTIAL CONDO DEFECT LIABILITY

I often discuss condos at industry events. The first response I get from many developers, builders, contractors, architects and engineers is "Oh, we don't do condos anymore" or "We worked on a condo once [15 years ago] and haven't done one since." The reality is that residential condominium defect claims are strictly governed by the Residential Construction Liability Act ("RCLA") in Chapter 27 of the Texas Property Code, and Sections 82.119 and 82.120 of the Texas Property Code, commonly known as the "Texas 2015 Condo Tort Reform Act." Both statutes establish frameworks and processes that must be followed before any construction defect lawsuit can be filed.

Adopted in 1989, RCLA protects residential buyers while limiting frivolous construction claims against developers and contractors. RCLA requires 60 days certified pre-suit notice, supporting evidence, contractor inspection rights and an opportunity to make a settlement offer before a suit proceeds. It also limits claims and damages through heightened causation standards, statutory defenses, mediation and repair rights. RCLA encourages early resolution and, when paired with strong condominium declarations, provides meaningful protection against defect claims.

Alongside RCLA, the Tort Reform Act within TUCA benefits developers, builders, design and engineering professionals, subcontractors and unit owners by imposing timelines and checks on proposed defect litigation.

Before filing a defect claim, a condominium association's board must involve the unit owners. While that may seem intuitive, prior to the Tort Reform Act, defect lawsuits could be — and sometimes were — approved by a majority vote of the board without notice to the owners. Now, all owners must receive detailed notice prepared by someone other than the attorney or firm pursuing the claim. The notice must include, among other items, an independent engineer's report, a description of the alleged defects, an anticipated litigation timeline, an assessment of the likelihood of success, the fee agreement, expected attorneys' fees and expert costs, potential court expenses, funding information and disclosure that litigation may affect unit value, marketability and refinancing.

These requirements give owners a full picture of the costs, risks and potential outcomes, not just the allegations, while better positioning developers and builders to address legitimate issues. After notice is provided, at least 50 percent of unit owners must approve filing suit and there is a 90-day "cooling-off period" allowing further evaluation, information exchange and potential resolution.

## RISK MANAGEMENT THROUGH GOVERNANCE DOCUMENTS

Even with robust statutory protections described above, your documents matter. A lot. Well-drafted dispute resolution provisions in a project's condominium documents can encourage early evaluation and resolution, reduce litigation cost and avoid class-action-style chaos.

1. Align purchase agreements, warranty documents and condominium governance documents so they don't fight each other.
2. Make dispute-resolution provisions broad enough to capture the kinds of claims that are actually filed.
3. Make sure the process works with the RCLA's and TUCA's notice/inspection frameworks rather than accidentally undermining them.

The builder's goal is to deliver a quality product, not to avoid responsibility for legitimate issues. At the same time, the current legal environment can expose builders to claims that are costly and difficult to manage. The most effective approach is a proactive one: understanding the statutory framework that governs defect claims and implementing governance documents that create a clear, predictable process for addressing issues as they arise. With that foundation in place, condominiums can be a practical and flexible development tool — one that, when paired with careful planning and disciplined drafting, offers a manageable risk profile while contributing to broader housing goals. ★

**About Jennifer Martin**



Jennifer Martin is a member of Winstead's Real Estate Development & Investments Practice Group. Prior to joining Winstead, she practiced law in Los Angeles for 13 years. She has broad experience in real estate law representing HOAs, homebuilders, developers, investors and municipalities as well as serving as Corporate Counsel – HOA and Community Management at a large real estate investment, development and operating company focused primarily in the SFR (Single-Family Residence) and BTR (Build-To-Rent) sectors. Routinely, Jennifer participates in speaking engagements to inform and educate real estate industry professionals as to the opportunities and potential pitfalls that HOAs and condominiums pose.

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