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Yun-chien Chang


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## CONDOMINIUM LAW IN TAIWAN: DOCTRINAL OVERVIEW UNDER THE LENS OF INFORMATION-COST THEORY

*Yun-chien Chang*

THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

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# Condominium Law in Taiwan: Doctrinal Overview under the Lens of Information-Cost Theory

Yun-chien Chang\*

## Abstract

*This article describes the law relating to condominiums ('condominium law') in Taiwan, a densely populated country with many people residing in apartments. The Condominium Administration Act and Taiwan Civil Code are the major sources of the law, in addition to various land use regulations and court precedents. Several features and problems stand out among the intricate web of condominium law. First, the law gives condominium bylaws spacious room to supersede the default rules set by statutes, yet condominium bylaws are merely available upon request and need not be registered. Second, since day one it has been unclear whether a condominium association (or a condominium board) has juridical personality and who owns the common fund. Courts and scholars still differ as to what the judicial and legislative solutions are. Third, apartment owners and condominium boards have used courts as a viable dispute-resolution mechanism. Condominium boards have successfully evicted unneighbourly inhabitants and have even forced uncooperative apartment owners to sell their titles. Apartment owners, on the other hand, have persuaded courts to vacate unfair condominium bylaws.*

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\* Associate Research Professor and Director of Center for Empirical Legal Studies, Institutum Iurisprudentiae, Academia Sinica, Taiwan. J.S.D., New York University School of Law. Email: kleiber@sinica.edu.tw. I thank Dr Chen Lei for inviting me to present at the condominium conference held at City University of Hong Kong on 27–28 November 2014. As this article was written for the conference, the structure and scope of this article largely follow the survey prescribed by the conference organiser. I thank two anonymous referees, Chen Lei, Ding Chunyan, Man Hongjie, Arjya Majumdar, Charlies Qu, Tang Hang Wu for helpful comments. Yi-sin Chen, Charline Jao, Alice Kuo, Hilary Tsai, Chieh-han Wang, Christine Yuan, and Yu-june Tseng provide valuable research assistance. I thank Ministry of Science and Technology, Taiwan for financial support (grant number: MOST 104-2628-H-001-001-MY3).

## I. Introduction

*Before I built a wall I'd ask to know,  
What I was walling in or walling out,  
And to whom I was like to give offense.  
—Mending Wall by Robert Frost<sup>1</sup>*

In *Mending Wall*, American poet Robert Frost muses whether ‘good fences make good neighbors’. Fences can be a concrete separator as well as a metaphor for law. Frost is a maestro in depicting rural life, yet his insight also applies to life in big cities, where most people live in common-interest communities. This article summarises the condominium law in Taiwan. While it is beyond the capacity of this article to answer Frost’s fundamental question—whether good fences/laws make good neighbours, hopefully, readers of this article will come away with a good idea of what the fences/laws are like in Taiwan.

This article aims to give a comprehensive overview of condominium law in Taiwan. Introduced below is the historical development, doctrinal basis, key concepts and scope of the law. Also covered are limitations on the sale and lease of apartments (before or after construction of buildings is finished); the formula for calculating co-ownership shares; quorum rules and the procedure for owners’ meetings; and apartment owners’ and inhabitants’ financial and social obligations. The role of bylaws, the dispute-resolution mechanism and the management of daily matters are also discussed. More ink will be spilt on the two major controversies: first, the source and ownership of the common fund; and second, whether the condominium board and the condominium association have or should have juridical personality. This article concludes after a short overview of the recent developments in condominium law in Taiwan.

This article draws on legal sources from all three branches of the government. The Condominium Administration Act of Taiwan (公寓大廈管理條例; ‘the CAA’) and the Taiwan Civil Code (民法; ‘the TCC’), enacted by the legislature, are the major sources of law restated below. Various land use and building regulations,

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<sup>1</sup> This poem is available in the website of the Academy of American Poets, at <https://www.poets.org/poetsorg/poem/mending-wall>.

stipulated by administrative agencies (mainly the Ministry of the Interior 內政部), and dozens of court decisions (ranging from those rendered by the court of the first instance to those by the Supreme Court) are also cited. The official language in Taiwan is Chinese. All statutes and regulations are thus enacted in Chinese. The Ministry of Justice (法務部) put English translations of certain important statutes and regulations on its website.<sup>2</sup> In this article, the author re-writes the ‘official’ English translations of the statutes for the sake of clarity.

## II. Background and the Basic

### A. *Historical development*

The condominium form has been recognised by law as early as 1930, when the TCC went into effect. The TCC of 1930, however, contained only two articles regarding condominium form (TCC, sections 799–800), which were insufficient to delineate the rights and duties of residents in apartment buildings.<sup>3</sup> In 1987, the central competent authority (中央主管機關), the Ministry of the Interior, drafted a bill on condominium form (高樓集合住宅管理維護法), but the bill did not become a statute. In 1992, the Ministry of the Interior announced the administrative rule ‘Rule on Maintaining Safety in Condominium and Common-interest Community’ (公寓大廈及社區安全管理辦法), as criminals were found hiding in apartment buildings.<sup>4</sup> In 1989, the Ministry of the Interior commissioned two famous scholars and a justice of the Constitutional Court to draft a new bill on condominium form.<sup>5</sup> After an amendment by the legal task force at the Ministry of the Interior, the bill was sent to the Legislative Yuan, which passed the CAA after a couple of revisions in 1995. To date,

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<sup>2</sup> In the case of the CAA, see its English translation at <http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?PCODE=D0070118>.

<sup>3</sup> It was contended that the original TCC, s 799 could only apply to real estate developments in which units are vertically separated (such as townhouses), but not those that are horizontally separated (such as apartment buildings). The Supreme Court of Taiwan has ruled in a case (80 年台上字第 804 號判決) that s 799 applies to horizontally separated units. The legal uncertainty, among others, is the driving force behind a fuller-scale condominium law. Gang-Ming Wu, *New Property Law* (Sanmin, Taipei, 2009), p 274.

<sup>4</sup> See Shu-Huey Li, ‘Condo Administrative Act: Goals and Legislative Process’ (2004) 33 *Kaohsiung University of Applied Science and Technology* 245 at 246.

<sup>5</sup> German law may influence the bill. The Honourable Dong-Xung Dai, then dean of the National Taiwan University College of Law and the scholar in charge of drafting the bill, revealed that he used his sabbatical to study German condominium law for a year before starting to draft the law. See Dong-Xung Dai et al, *Condominium Law in a Nutshell* (2<sup>nd</sup> ed, Perennial Group, Taipei, 2014), pp 21–22.

the CAA is still the major source of condominium stipulations and the CAA is often described as ‘the constitution for residential housing’ (住宅憲法).

Another wave of improvement in condominium law came in 2009, when the TCC was amended. Section 799 of the TCC was expanded, but the new stipulations are only a summary of the most important definitions already existent in the CAA. The brand new section 799-2 of the TCC allows the sole owner of a building to convert it to condominium form. Section 799-1 does some heavy-lifting. Section 799-1(3) gives minority apartment owners who disagree with the amendment of their condominium bylaws (規約) a cause of action to petition the court to revoke any ‘obviously unfair’ (顯失公平)<sup>6</sup> amendment within three months after the decision is made (this is discussed more in Part IV(E) below). According to section 799-1(4), condominium bylaws bind grantees (繼受人) of unit ownership, whether they know the contents or not. Also, other covenants (其他約定) among unit owners bind successors (概括繼受人) even without their actual knowledge of the covenants, whereas purchasers or the like (特定繼受人) of unit ownership are bound only if they know or should have known (明知或可得而知) these covenants (discussed more in Part IV(B) below).

## ***B. Dogmatic basis of the condominium regime***

Condominium form of shared ownership in Taiwan implicitly recognises the ‘threefold relationship’ (*Dreigliedrige Einheit* in German<sup>7</sup>). The threefold relationship consists of private ownership of an apartment; co-ownership of the common areas (共有部分);<sup>8</sup> and membership in the condominium association.<sup>9</sup> The lawmaker explicitly defines ‘unit ownership’ as containing only the former two elements of the threefold relationship (CAA, section 3(1)).<sup>10</sup> Nonetheless, membership in the condominium

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<sup>6</sup> The TCC, s 799-1(3) lists several factors that courts should take into account when deciding whether the condominium bylaws are obviously unfair: the location, area, purpose of use and use condition of the individual unit, common area and base land; whether the owner has paid the consideration; and other conditions.

<sup>7</sup> See Tze-Chien Wang, *Property Law of Civil Code* (2<sup>nd</sup> ed, Author, Taipei, 2010), pp 214–15.

<sup>8</sup> To be more exact, the common areas are held in tenancy-in-common, but co-tenants cannot request partition of the common area: TCC, s 823.

<sup>9</sup> See Feng-Wen Wen, ‘Maintaining Order in Apartment Building’ (2005) 22 *Tunghai University Law Review* 1 at 9.

<sup>10</sup> See Feng-Wen Wen, ‘Analyzing Condominium Form’ (2009) 168 *Taiwan Law Review* 42 at 45.

association is a built-in feature of unit ownership (CAA, section 25). The legislature does not conceptualise membership as part of the *property rights* of unit owners, but functionally, Taiwan has the equivalent of the threefold relationship.

Between the so-called ‘dualistic system’ and ‘unitary system’, the Taiwan regime better fits the description of the former, under which the private ownership of an apartment and the co-ownership of the common property are of equal importance, and together form a ‘composite ownership’.<sup>11</sup>

Both the lawmakers of the CAA and the English translation of the CAA make conceptual errors about the key terms in condominium law. Section 3(1) of the CAA defines ‘公寓大廈’ as ‘a building and *its base* that has indicated definite boundaries structurally ... and may be divided into a number of units’ (emphasis added). Two problems arise: one is that ‘公寓大廈’ is translated as ‘condominium’ while its transliterated and more accurate meaning is ‘low-rise’ (公寓) and ‘high-rise’ (大廈). The other is that the definition of low-rise and high-rise includes their base land. As buildings and land are separate type of real estate in Taiwan, the definition of low- and high-rise buildings probably should not include land.

The CAA also fails in consistency. In section 23(1) of the CAA, low-rise, high-rise and base land are listed as separate things, suggesting that lawmakers there consider them separate type of real estate again. Then, section 3(1) of the CAA defines ‘區分所有’ as ‘a number of people [who] divide one building and each owns an individual unit of the building and also holds a share of the common areas’, and ‘區分所有’ is translated as ‘unit ownership’, while the better translation is simply ‘condominium’. In short, the key concepts in their original and translated languages are anything but clear.

Here are the key concepts as defined and used in this article. Condominium is a type of concurrent ownership.<sup>12</sup> Several types of buildings, such as high-rise(s) and low-rise(s), are held in condominium form. In other words, high-rises and low-rises are the things, whereas condominium is a type of property form. A high- or low-rise

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<sup>11</sup> See Rong-Chwan Chen, ‘The Relation Between the Condominium Administrative Act and the Old and the New Civil Code’ (2014) 226 *Taiwan Law Review* 16 at 17–18; Rong-Chwan Chen, ‘Buildings without Underlying Land (I)’ (2003) 51 *Taiwan Law Journal* 31 at 41.

<sup>12</sup> See TW Merrill and HE Smith, *Property: Principles and Policies* (2<sup>nd</sup> ed, Foundation Press, New York, 2012), pp 733–34.

(also referred to as an ‘apartment building’ below) contains multiple apartments (the physical space of a separate unit) solely owned by a unit owner. Within such a building but outside of the apartments are the common areas, held by all unit owners in tenancy-in-common. The base land of an apartment building is also held by all unit owners in tenancy-in-common—when the CAA refers to the common area, sometimes base land is also included. The sole ownership of apartments, the co-ownership of the common area in the building, and the co-ownership of the base land are bundled together and cannot be granted or mortgaged separately.

Given the official status of the CAA English translation, this article makes compromises. ‘Apartment’ and ‘individual unit’ (專有部分; also ‘unit’ for short) are used interchangeably. Condominium and unit ownership should be coterminous, but due to the confusion described above, this article will refrain from using the term ‘condominium’ from this point on to the extent feasible. When readers encounter the term ‘condominium’ in the quoted English translation of the CAA, bear in mind that it means high- and low-rises.

### *C. Various types of condominiums*

Neither the TCC nor the CAA limit the application of condominium forms to residential usage, although section 1 of the CAA does hint that the CAA was enacted with its full attention on residential uses.<sup>13</sup> In Taiwan, mixed uses in one building, particularly mixtures of residential and commercial/office uses, are quite common. Corporate owners of apartments for commercial uses and owners of apartments for residential uses are treated the same under the relevant law. Perhaps as a result of the prevalent mixed uses, there are no official statistics of the numbers of residential and commercial units.

The condominium form, as stipulated in the CAA, is applicable only to buildings, as evidenced by section 3(1) of the CAA, cited above. As no other statutes recognise the condominium form, mooring spaces for boats and yachts (dockominiums), airspace and caravan sites cannot be held in this form.

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<sup>13</sup> CAA, s 1(1): ‘The Act is enacted to enhance the administration of condominiums to improve the *living quality*’ (emphasis added).



#### ***D. Physical division of the buildings and land***

A building held in condominium form and its base land can be further divided into components. The building contains multiple apartments and common facilities such as elevators. Apartments<sup>14</sup> constitute the individual unit,<sup>15</sup> whereas common facilities constitute the common area, which is, along with base land, co-owned by all unit owners *pro rata*. Designated common areas (約定共用部分) are ‘individual units in the condominium that are designated for common use by agreement’, whereas designated private areas (約定專用部分) are common areas of a high- or low-rise that are designated by agreement to be used by specific unit owners (CAA, section 3(1)).<sup>16</sup>

#### ***E. Participation quota, share value, unit entitlements***

The unit owner’s share of the common areas and base land is determined by the area of her apartment divided by the total area of all apartments. For example, a unit owner’s share is eight percent if her unit area is 800 m<sup>2</sup> and the total area is 10,000 m<sup>2</sup> (TCC, section 799(4)),<sup>17</sup> ‘unless otherwise agreed upon’,<sup>18</sup> and the agreement cannot contradict the CAA, the Regional Plan Act (區域計畫法), the Urban Planning Act (都市計畫法) and other building regulations (CAA, section 9(3)). In the simplest case, if all apartments in a low-rise are of equal size, a unit owner’s share is the inverse of the

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<sup>14</sup> Regarding the exact scope of the apartment (for instance, the apartment extending to the exterior or the centre of the common wall), see Feng-Wen Wen, ‘On Initial Registration of Unit Ownership’ (2013) 1(6) *Taiwan Environmental and Land Law Journal* 148 at 149–50.

<sup>15</sup> The scope of the apartment is specified in the CAA, s 56(3).

<sup>16</sup> The CAA, s 7 lists the inherent limitation of designated private areas: ‘Any of the common areas of a condominium may not be used as part of an individual unit. The items specified in the following subparagraphs may not be designated as designated private areas: 1. The lot the condominium is built on; 2. The hallways or stairs leading to a number of individual units, the passages or vestibule leading to the outdoors, and the alleys and fire escape alleys within the community; 3. The foundation, principal beams and pillars, load-bearing walls, and the structures of floors and roof of the condominium; 4. When such designation is in violation of related laws; 5. Any other common areas that have been designed for particular purposes and are indispensable in the daily activities of all the unit owners’.

<sup>17</sup> The share is clearly chronicled in the property right certificate (權狀). For an example, see <http://enews.nfa.gov.tw/issue/990408/images/20100408-rule-002-b.jpg>.

<sup>18</sup> Note that neither the TCC nor the CAA stipulates ‘unless otherwise stipulated in the condominium bylaws’. If shares are prescribed in the condominium bylaws, a super-majority (even a simple majority) of unit owners can increase their shares at the expense of the minority unit owners. Scholars have argued that the agreement stipulated in the proviso can only be changed by unit owners by consensus. This will avoid the tyranny of the majority. See Feng-Wen Wen, *Land Law* (Taipei, 2005), p 64; Jer-Shenq Shieh, *Property Law* (3<sup>rd</sup> ed, San-Min, Taipei, 2010), p 161.

unit number (say, one twelfth). The default quorum rule applies to both the number of unit owners and the percentages of shares (see Part IV(E) below).

The responsibility for maintenance and reparation can be exemplified when an outside window is broken not through the fault of residents, but by natural forces such as strong winds. The unit owner can (but is not obliged to, unless otherwise mandated by the condominium bylaws) fix the window in his or her apartment at his or her own expense (CAA, section 10(1)). If the window is installed in the common areas, the responsibility for reparation falls on the board of the community association (also referred to as condominium board in this article), which either uses the common fund<sup>19</sup> (公共基金) or levies assessments from *all* or *certain* unit owners *pro rata* to defray the expenses,<sup>20</sup> unless otherwise required by the condominium bylaws or condominium association.<sup>21</sup> More specifically, the expenses of repairing and maintaining the common areas are shared in different ways, based on whether it is the ‘common areas owned by all unit owners’ (大公) or ‘common areas owned by some unit owners’ (小公).<sup>22</sup> The expenses for fixing the former (such as an elevator), if not paid from the common fund, are shared by unit owners *pro rata* (CAA, sections 10(2) and 11(2)). Those for fixing the latter (such as the common floor/ceiling between a second-floor inhabitant and a third-floor inhabitant) are shared by only those two unit owners (CAA, section 12).<sup>23</sup>

## ***F. Termination of the condominium regime***

The law does not explicitly allow the condominium form to be terminated as long as the building exists (although theoretically all unit owners may do so by consensus). Reconstruction of the building would temporarily terminate the condominium form,

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<sup>19</sup> The source of the common fund is stipulated in the CAA, s 18(1): ‘Each condominium shall establish a common fund from the following sources: 1. The builder of the condominium is required to provide a certain percentage of the cost of the project or a certain amount to pay for the management and maintenance during the year after the usage license is obtained; 2. Each unit owner pays an amount as decided by the community association; 3. The interest accrued on the fund; 4. Other incomes.’ Enforcement Rules for the CAA, s 5 provides concrete percentage numbers (0.3%, 0.5%, 1.5%, or 2%) that the builder shall use to compute its assessments due to the common fund.

<sup>20</sup> Repairing certain facilities in the common area may be subsidised by the government: CAA, s 10(3).

<sup>21</sup> An inhabitant breaking a window in the common area still has to pay: CAA, s 10(3).

<sup>22</sup> The legal distinction between ‘common areas owned by all unit owners’ and ‘common areas owned by some unit owners’ is based on the Regulations of the Land Registration, s 81(1). See Feng-Wen Wen, ‘Sharing Maintenance Fees in Apartment Buildings’ (2013) 39 *Cross-Strait Law Review* 115 at 119.

<sup>23</sup> See Tsay-Chuan Hsieh, *Property Law*, vol. 1 (5<sup>th</sup> ed, Author, Taipei, 2010), p 345.

as unit owners would be co-tenants of the base land upon destruction of the building. Reconstruction requires consensus of all unit owners, unless the re-development is conducted in line with an urban renewal project (regulated by the Urban Renewal Act 都市更新條例). In addition, if the building is seriously damaged and may endanger public safety, a reconstruction plan can be approved by the community association with ordinary voting procedure (see Part IV(E) below). Dissenting unit owners can be forced to sell their apartments (CAA, sections 13 and 14). Nonetheless, the CAA fails to specify to whom and for how much dissenters have to sell their units, and how to proceed if no one makes an offer to buy the dissenter's apartment.<sup>24</sup>

### ***G. Dispute resolution***

The competent authority can impose a civil fine (罰鍰) on the convener of the community association, an inhabitant, the officer, the chairperson of the board, the real estate developer, the property management firm and the management staff (管理服務人員) (CAA, sections 47–51). The fined party can first appeal to the Administrative Appeal Review Committee (訴願審議委員會) in the local government.<sup>25</sup> Then, the fined party can bring the case to the Administrative Litigation Division in the District Court (地方法院行政訴訟庭). Rules for summary proceedings apply, because the civil fine authorised by the CAA cannot go beyond 400,000 New Taiwan Dollars (Administrative Litigation Act, section 229). Unsatisfied with the verdict of the court of first instance, the fined party can appeal to the High Administrative Court (高等行政法院) only if the original judgment is in contravention of the laws and regulations (違背法令). The case cannot be brought to the Supreme Administrative Court (最高行政法院) (Administrative Litigation Act, section 235).

If the disputes are between private entities, for example, those between a particular inhabitant and the board, the Civil Division of the (ordinary) District Court (地方法院民事庭) has jurisdiction. Nonetheless, pursuant to section 403 of the Civil

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<sup>24</sup> See Feng-Wen Wen, 'Selling Condo' (2011) 190 *Taiwan Law Journal* 239 at 239–41.

<sup>25</sup> For an empirical study on administrative appeal in Taiwan, see generally Yun-chien Chang, 'An Empirical Study of Administrative Appeal in Taiwan: A Cautionary Tale' (2014) 23 *Transnational Law & Contemporary Problems* 261 at 261–304.

Procedure Code,<sup>26</sup> before litigation starts, the disputants are likely to be subject to mandatory mediation by the judge.<sup>27</sup> If the claimed value of the case is greater than 500,000 New Taiwan Dollars, rules for ordinary proceedings apply (Civil Procedure Code, section 427). Appealing to the High Court (高等法院; the court of the second instance for cases handled in ordinary proceedings) is in general as of right (Civil Procedure Code, section 437). Even though section 464 of the Civil Procedure Code stipulates that appealing to the Supreme Court (最高法院; the court of the third and final instance for cases handled in ordinary proceedings) be *otherwise* allowed, the devil is in the details. Appealing is subject to various restrictions. For instance, the claimed value has to be greater than one million New Taiwan Dollars (Civil Procedure Code, section 466); the appellant has to be represented by an attorney (Civil Procedure Code, section 466-1); and the original judgment has to be in contravention of the laws and regulations (that is, the applicable laws are not applied or are erroneously applied) (Civil Procedure Code, sections 467 and 468).

### III. Transfer of Apartments

#### A. *Purchasing an apartment off building plans*

Consumers purchasing an apartment off building plans are protected in multiple ways. Real estate developers are allowed to sell apartments upon acquiring building permits (CAA, section 58);<sup>28</sup> that is, before the building is completed and a condominium plan of subdivision is registered. The extreme informational asymmetry in the sale of ‘pre-sale apartments’ has led to many disputes between consumers and developers. The Fair Trade Commission (公平交易委員會), in charge of the Fair Trade Act (公平交易法), has promulgated a guideline on the sale of pre-sale apartments,<sup>29</sup> advising

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<sup>26</sup> The Civil Procedure Code, s 403(1) stipulates that the following disputes are subject to mandatory mediation: ‘3. Disputes among co-owners of real property arising from the management, disposition, or partition of a real property held in undivided condition; 4. Disputes arising from the management of a building or of a common part thereof among the owners of the dividedly-shared title or persons using the building’.

<sup>27</sup> The CAA, s 59-1 also authorises the Ministry of the Interior to form a condominium dispute mediation committee (公寓大廈爭議事件調處委員會). Mediation before this committee is voluntary.

<sup>28</sup> This stipulation, which allows developers to sell apartments at a very early stage, has been criticised by scholars. See Feng-Wen Wen, ‘Condo Administrative Act in Action’ (2014) 226 *Taiwan Law Review* 5 at 11.

<sup>29</sup> FTC Guideline on Sales of Pre-sale Apartments (公平交易委員會 s 對於預售屋銷售行為案件之處 理 原 則 ) , available at <http://www.ftc.gov.tw/internet/main/doc/docDetail.aspx?uid=167&docid=13818>.

developers to comply or risk violating the Fair Trade Act. Moreover, the Ministry of the Interior, pursuant to section 17 of the Consumer Protection Act (消費者保護法), has promulgated (and constantly revised) ‘mandatory rules to be used in standard-form pre-sale apartment contracts’ (預售屋買賣定型化契約應記載及不得記載事項).

Insolvency protection for purchasers of uncompleted buildings is an important part of the aforementioned Ministry of the Interior rule. The standard-form contract between consumers and developers must adopt one of the five given options: First, real estate development trust (不動產開發信託), under which the developer as settlor transfers the land title and development fund in trust to a financial institution; second, price-return guarantee by a financial institution (價金返還保證), under which the guarantor would pay back the prices consumers have paid; third, transaction price trust (價金信託), under which the prices paid by consumers are transferred to a financial institution in trust; fourth, construction guarantee by another developer (同業連帶保證), who promises to finish construction if the original developer becomes insolvent; and finally, construction guarantee by the developer association (公會連帶保證), under which consumers can demand a pre-specified developer who has joined the guarantee network organised by the association. In short, consumers should be able to get their money back or receive a completed apartment as promised.

Another important issue in ‘pre-sale apartment’ transactions is the exact area sold. Unit area is a major determinant of transaction prices, yet developers are not always able to construct the building exactly according to the blueprint. The current ‘mandatory rules to be used in standard-form pre-sale apartment contract’ stipulate that developers have to return the price *pro rata* if the actual area is smaller than the area specified in the sale contract and consumers have to compensate developers if, say, the completed building is larger than what was pre-specified. Consumers, however, are not obliged to compensate more than two percent of the contractual price, whereas developers’ obligation to refund is unlimited. Before 2009, ‘mandatory rules to be used in standard-form pre-sale apartment contract’ allowed a one percent margin of error for both sides. The rule has since been changed to the one described above, partly because it is widely believed that developers have calculatingly reduced the size of buildings—but not by more than one percent—to save costs.

## ***B. Restrictions on sale and letting of apartments***

Restrictions on the sale and letting of apartments imposed by covenants between private parties would not be enforced for two reasons. First, covenants running with land are not a generally recognised property form, so they only have *in personam* effect. Second, such covenants might be considered by courts as violating public morals or social policies, and are thus invalid.

In terms of public law, there are very few statutory restrictions on discrimination in the sale or lease of apartments. So far, there is neither a general civil right law that bans discrimination between private parties, nor a comprehensive anti-discrimination stipulation regarding real estate sales or leases. One reason might be that there is no large-scale discrimination in action that warrants legislative intervention. Taiwan does not have racial issues and no hostility among ethnic groups has resulted in salient voluntary segregation, exclusionary zoning or ‘exclusionary amenity’.<sup>30</sup> In other words, there is no ethnic discrimination in the apartment sale or lease market. Nonetheless, other forms of discrimination, such as age (against elderly citizens) and gender (against adult men<sup>31</sup>), persist in the lease market. No law addresses this discrimination.

A notable exception to the regulatory vacuum is the HIV Infection Control and Patient Rights Protection Act (人類免疫缺乏病毒傳染防治及感染者權益保障條例), article 4 of which bans discrimination against AIDS patients in housing matters.<sup>32</sup> In one famous case, a community association of a high-rise revised its condominium bylaws to evict a shelter for AIDS patients. A court of first instance ruled against the shelter,<sup>33</sup> but the appellate court, pursuant to the aforementioned Act, revoked the

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<sup>30</sup> See LJ Strahilevitz, *Information and Exclusion* (Yale University Press, New Haven, CT, 2011), pp 55–74.

<sup>31</sup> For news report, see <http://www.chinatimes.com/newspapers/20140712000339-260114>.

<sup>32</sup> HIV Infection Control and Patient Rights Protection Act, s 4: ‘The dignity and the legal rights of the infected shall be protected and respected; there shall be no discrimination, no denial of education, medical care, employment, nursing home, *housing* or any other unfair treatment; regulations governing the protection of their relevant rights shall be formulated by the central competent authority in consultation with various central competent enterprise authorities’ (emphasis added).

<sup>33</sup> Case number: 2006 Taipei District Court Zhong Su Zi No 542 Decision (台北地方法院九十五年度重訴字第五四二號判決).

condominium bylaws and ruled in favour of the shelter.<sup>34</sup>

## IV. Managing Common-interest Communities

### A. *Sanctions to enforce financial and social obligations*

A man's home may be his castle, but when that castle is shared, other issues such as financial and social obligations arise.<sup>35</sup> An inhabitant has to pay assessments to the common fund (CAA, section 18(1)) usually every month and share the reparation and maintenance expenses *pro rata* (see Part II(E) above). If inhabitants have missed paying their monthly assessments twice and refuse to comply after a notice to pay within a specified period is given, the officer or board may sue the inhabitants in court for the assessments plus the overdue interest (CAA, section 21).

Certain conduct is prohibited by the CAA or condominium bylaws. For instance, the following alterations are subject to the condominium bylaws and community association resolutions 'that have been reported to the local competent authority':<sup>36</sup> changing structures or colours and installing advertising signs or metal gratings on the exterior wall of the building, on the rooftop terrace,<sup>37</sup> or in air raid shelters (CAA, section 8(1)).<sup>38</sup> Moreover, inhabitants should not create a nuisance, such as discarding garbage or making unreasonable noise (CAA, section 16(1)), blocking or possessing fire escape alleys, open space, stair landings, common hallways or air raid shelters

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<sup>34</sup> Case number: 2006 High Court Shang Yi Zi No 1012 Decision (高等法院九十五年上易字第一零一二號判決). See also Fu-lung Lee, 'The Freedom of Personal Habitation for an AIDS Patient and the Unfairness of the Provision of the Master Deed' (2008) 20 *Cross-strait Law Review* 150 at 150–58.

<sup>35</sup> See the CAA, ss 5–6 for several obligations of unit owners and inhabitants. Note that s 6, para 2 specifies the 'minimum damage rule', which is also prescribed by the TCC, s 787 (regarding a similar issue: legal servitude of passage). For an economic analysis of the minimum damage rule, see Yun-chien Chang, 'Access to Landlocked Land: A Case for a Hybrid of Property and Liability Rules' (2013) working paper (on file with the author).

<sup>36</sup> The clause 'that have been reported to the local competent authority' was inserted to s 8 in 2003. Whether reporting is a necessary condition for the condominium bylaws and the resolutions to be legally effective is under dispute. See Jiin-Yu Wu, 'Punitive Damages Clauses in Condominium bylaws' (2014) 249 *Taiwan Law Journal* 207 at 207–11 (contending that it is not necessary).

<sup>37</sup> Scholars have contended that s 8's stipulation that the rooftop terrace (or flat roof to be less fancy) be part of the common area is inefficient. First, co-ownership tends to be less efficient than single ownership. See Yun-chien Chang, 'Tenancy in "Anticommons"?: A Theoretical and Empirical Analysis of Co-ownership' (2012) 4 *Journal of Legal Analysis* 515. Second, the transaction cost of re-allocating entitlements is lower if the right to the rooftop terrace is initially assigned to one single owner—the person who owns the top floor. See Tzu-Shiou Chien, *Economic Reasoning and the Law* (3<sup>rd</sup> ed, Angle, Taipei, 2014), p 177.

<sup>38</sup> The board can stop the act of the violator and request the violator to restore: CAA, s 8(3).

(CAA, section 16(2)).<sup>39</sup>

The board can evict uncooperative inhabitants that violate certain rules. The common preconditions for eviction are (1) inhabitants ‘fail to make the improvement within 3 months after the officer or board urges for improvement’; (2) community association makes a resolution of eviction. One of the following conditions also has to be met: first, owed expenses reach one hundredth of the total value of the apartment; second, inhabitants make no improvement or continue to violate rules after civil fines have been imposed according to section 49(1) of the CAA;<sup>40</sup> third, inhabitants have violated the condominium bylaws or laws to a serious extent (CAA, section 22(1)). In practice, boards have successfully evicted inhabitants who failed to pay their monthly assessments,<sup>41</sup> inhabitants who were mentally ill and threw knives from their windows<sup>42</sup> and inhabitants who swore at and hit other inhabitants.<sup>43</sup>

If the uncooperative inhabitant is a unit owner, the officer (or board) may petition the court for an injunction to force the unit owner to sell his or her unit ownership, again on the condition that the community association makes such a resolution. If the inhabitant fails to complete the transaction and finalise the ownership transfer registration within three months after the final court decision, the officer (or board) may petition the court to put the unit ownership up for auction (CAA, section 22(2)). The author’s comprehensive survey of the case law reveals that the officer (or board) in most lawsuits only requested evictions, not forced sales. A few cases were found in which the officer (or board) requested forced sales and the court agreed, because the unit owners owed their monthly assessments<sup>44</sup> or changed the structure of the building—endangering public safety.<sup>45</sup>

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<sup>39</sup> If any inhabitant should create the aforementioned nuisance, ‘the officer or board shall stop the act or take action according to the condominium bylaws’: CAA, s 16(5).

<sup>40</sup> The CAA, s 49(1) penalises a unit owner in violation of s 5; s 8, para 1; s 9, para 2; and s 16, paras 2–3. It also punishes an inhabitant who changes the purposes of use of an individual unit or a designated private area.

<sup>41</sup> Case number: 2002 Taoyuan District Court Su Zi No 2197 Decision (臺灣桃園地方法院 101 年度訴字第 2197 號民事判決).

<sup>42</sup> Case number: 2004 Taoyuan District Court Su Zi No 93 Decision (臺灣桃園地方法院 93 年度訴字第 93 號民事判決).

<sup>43</sup> Case number: 2009 Hsinchu District Court Su Zi No 154 Decision (臺灣新竹地方法院 98 年度訴字第 154 號民事判決).

<sup>44</sup> Case number: 2007 Changhua District Court Zhang Jian Zi No 507 Decision (臺灣彰化地方法院 96 年度彰簡字第 507 號).

<sup>45</sup> Case number for the appellate case: 2008 High Court Shang Yi Zi No 448 Decision (臺灣高等法院臺中分院 97 年度上易字第 448 號民事判決); case number for the district court case: 2006 Changhua



## ***B. Bylaws***

### **1. Overview**

Condominium bylaws are—to put it more colourfully—the constitution of apartment buildings (see CAA, section 23; TCC, section 799-1). There is no such distinction between declaration of covenants, conditions and restrictions and board bylaws as that exists in the United States.<sup>46</sup> Condominium bylaws in Taiwan serve the functions of both these legal documents.

### **2. Bylaws versus statutes**

Condominium bylaws supplement, sometimes supersede, stipulations in the CAA and the TCC. More specifically, condominium bylaws interact with statutes in the following ways. First, stipulations in the CAA and the TCC with the phrase ‘unless otherwise stipulated by condominium bylaws’ are clearly default rules that can be contracted around. Second, some provisions, like section 7 of the CAA,<sup>47</sup> are clearly mandatory rules that condominium bylaws cannot alter. Third, certain joint decisions are effective only when incorporated in the condominium bylaws—that is, ordinary resolutions by a community association on such matters are invalid (CAA, section 23(2)<sup>48</sup>). This stipulation reduces information costs for current and future unit owners, as condominium bylaws are a salient document, easy to retrieve.<sup>49</sup> Fourth,

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District Court Su Zi No 463 Decision (臺灣彰化地方法院 95 年度訴字第 463 號民事判決). Another district court case: 2010 Changhua District Court Su Zi No 101 Decision (臺灣彰化地方法院 99 年度訴字第 101 號民事判決).

<sup>46</sup> See JW Singer, *Property* (3<sup>rd</sup> ed, Aspen Publishers, New York, 2010), p 374; TW Merrill and HE Smith, *Property: Principles and Policies* (2<sup>nd</sup> ed, Foundation Press, New York, 2012), p 744; J Dukeminier, JE Krier, GS Alexander and MH Schill, *Property* (7<sup>th</sup> ed, Aspen Publishers, New York, NY, 2010), pp 896–901.

<sup>47</sup> The CAA, s 7 forbids certain common areas to be used as part of an individual unit.

<sup>48</sup> Pursuant to the CAA, s 23(2), these joint decisions are: ‘1. The range and the users of individual units and designated common areas; 2. The rights of each unit owner to use and to benefit from the common areas and the base, and the special agreements of unit owners on the use of the common areas; 3. Special agreements on prohibition of pet keeping by the inhabitants; 4. Measures for handling of obligation violations; 5. Regulations on supervision of financial management; 6. Special agreements on the required numbers and unit ownership proportions of the attending and approving unit owners to hold the community association and to approve the decisions; 7. The procedure for dispute mediation.’

<sup>49</sup> These joint decisions are important ones that warrant more careful deliberation. Given that condominium bylaws may enact different quorum rules for revising condominium bylaws and for making less important resolutions, the mandatory rule to utilise condominium bylaws to make

certain condominium bylaws are valid upon reporting to (CAA, section 8(1)), or even approval by (CAA, section 16(2)), the local competent authorities.<sup>50</sup> Finally, there are stipulations that can be either a default rule or a mandatory rule, leaving the court more room for interpretation. Note also that a mandatory rule can be interpreted as setting a ceiling, a floor, or both, and it is not always clear from the statutes which type of mandatory rule is prescribed.

### **3. Drafting bylaws**

A condominium bylaw comes into being in several stages. A builder (起造人), who may or may not be the developer/constructor, should file a draft condominium bylaws when applying for the building permit (CAA, section 56(1)). The draft condominium bylaw is presumed to be the bylaw of the high- or low-rise before the official condominium bylaws are adopted (CAA, section 56(2)). It is advised that the draft condominium bylaw take reference from the model condominium bylaw stipulated by the Ministry of the Interior (CAA, section 60).<sup>51</sup> When half of the units and half of the shares are already sold, the builder is obliged to convene the first general assembly of the community association within three months (CAA, section 28). The CAA, however, only mandates the first general assembly to form a board, but does not prescribe that an official condominium bylaws has to be passed. The condominium bylaws shall then be passed according to the quorum rule prescribed by the draft condominium bylaws. Revision of the official condominium bylaws shall be done pursuant to the ' $\frac{2}{3} + \frac{3}{4}$ ' quorum rule specified in section 31 of the CAA (more on this in Part IV(E) below), unless otherwise stipulated in the official condominium bylaws. It is not uncommon for common-interest communities to add substantive contents into the condominium bylaws.

### **4. Legal effects of bylaws and other covenants**

Condominium bylaws are similar to co-ownership covenants (共有物分管契約), but

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important decisions ensures that they are made with sufficiently wide support from unit owners.

<sup>50</sup> The CAA, s 16(2) prescribes that open space (開放空間) and vacant recesses (退縮空地) can be used for approved business purposes.

<sup>51</sup> The model condominium bylaw stipulated by the Ministry of the Interior is available at <http://glrs.moi.gov.tw/LawContentDetails.aspx?id=FL003879&KeyWordHL=&StyleType=1>.

they are also different in several important aspects.<sup>52</sup> First, co-ownership covenants require consensus among co-tenants, while condominium bylaws can generally be passed with a super-majority vote. Second, co-ownership covenants can only stipulate the management of co-owned properties, while condominium bylaws can limit the ways unit owners utilise their own apartments. Third, condominium bylaws need not and cannot be registered in the land registry, whereas co-ownership covenants regarding immovable properties have to be registered to be valid (TCC, section 826-1(1)).<sup>53</sup>

Condominium bylaws are *in rem*<sup>54</sup> and bind all current and future unit owners, even illegal possessors (CAA, section 24(2)), without their knowledge (TCC, section 799-1(4)). The bylaws thus are clearly not just contracts, but a type of new property form—real covenant, to be more exact. Other covenants among unit owners also have a third-party effect, unless the grantees of unit ownership are good-faith (that is, not knowing) purchasers without negligence (TCC, section 799-1(4)).<sup>55</sup> Such covenants include resolutions by the community association and a bilateral agreement between two unit owners who, say, own apartments on the same floor regarding pet and party policies.<sup>56</sup>

The latter stipulation (the conditional *in rem* effect) should be interpreted along with section 24 of the CAA, which mandates the grantees to (1) ask the officer or board for access to the documents specified in section 35 of the CAA before the granting; and (2) abide by all the obligations of the original unit owner defined in the Act or the condominium bylaws. The documents specified in section 35 include the condominium bylaws; the spreadsheet of the common fund; the accounting vouchers; the account books; the financial reports; the outstanding payments to common fund,

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<sup>52</sup> The Ministry of the Interior, in an ‘interpretive direction’ (內政部 99 年 8 月 18 日內授中辦地字第 0990725118 號令), available at <http://www.land.moi.gov.tw/law/chhtml/openframe.asp?lid=6834>, has declared that condominium bylaws cannot be registered as co-ownership covenants.

<sup>53</sup> See Gang-Ming Wu, ‘On Condominium bylaws and Easement on One’s Own Property’ (2005) 1 *Property and Economic Law Journal* 1 at 12–18.

<sup>54</sup> Regarding *in rem* versus *in personam*, see generally TW Merrill and HE Smith, ‘Optimal Standardization in the Law of Property: The Numerus Clausus Principle’ (2000) 110 *Yale Law Journal* 1; TW Merrill and HE Smith, ‘What Happened to Property in Law and Economics’ (2001) 111 *Yale Law Journal* 357 at 357–98; TW Merrill and HE Smith, ‘The Property/Contract Interface’ (2001) 101 *Columbia Law Review* 773.

<sup>55</sup> On the distinction between good faith with and without negligence, see Yun-chien Chang, ‘An Economic and Comparative Analysis of Specificatio (the Accession Doctrine)’ (2015) *European Journal of Law and Economics* 39(2), 225–243. See also Wang (note 7 above), p 205 (pointing out that the exception to the *in rem* effect is to increase the certainty in transacting).

<sup>56</sup> See Hsieh (note 23 above), p 379.

shared expenses and other payable expenses of the inhabitants; the board meeting minutes; and the community association assembly minutes. Taken together, grantees are bound by other covenants among unit owners when the covenants are chronicled in either the board meeting minutes or the assembly minutes and are on file with the officer or the board, whether grantees have asked for them or not, because grantees should have had access to them and would have known. By contrast, grantees are not bound if they ask the board for the documents but the covenants in question cannot be found in the provided documents and it is unreasonable for grantees to find the loopholes themselves. In addition, covenants made by a limited number of unit owners will probably not be included in the meeting minutes. If a grantor failed to inform his or her grantee, in general (but still depending on context) it is difficult for grantees to ascertain the existence of such covenants.

The courts in Taiwan have held in several cases that grantees who know, or should have known, will be bound by the covenants. In one case, a covenant between the developer and all the purchasers of pre-sale apartments stipulated that the balconies of certain apartments should be used for growing plants to ‘green’ the community. The court held that this covenant should bind purchasers who bought the apartments several years later, because the obligation imposed by the covenant was obvious to anyone.<sup>57</sup> In another case involving pre-sale apartments, the covenant between the developer and all the purchasers prescribed that the basement counts as an individual unit and belongs to the developer, who then voluntarily provided the basement as a common area for installing water and electrical facilities. The court ruled that the party who purchased the basement later from the developer should be bound by the covenant, as the facilities were easy to find.<sup>58</sup> In a case with a similar arrangement of the basement, the court ruled that the owners who acquired the basement in court auctions should still be bound.<sup>59</sup> In one case, a newcomer challenged the arrangement of designated private areas (see Part II(D) above), but the court ruled that this arrangement was easy to observe.<sup>60</sup> This court applied section

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<sup>57</sup> Case number: 2011 High Court Shang Zi No 1086 Decision (臺灣高等法院 100 年度上字第 1086 號民事判決).

<sup>58</sup> Case number: 2013 High Court Tainan Branch Shang Yi Zi No 21 Decision (臺灣高等法院臺南分院民事判決 102 年度上易字第 21 號).

<sup>59</sup> Case number: 2012 Shilin District Court Su Zi No 111 Decision (臺灣士林地方法院 101 年度訴字第 111 號民事判決).

<sup>60</sup> Case number: 2011 Taipei District Court Su Zi No 3156 Decision (臺灣臺北地方法院 100 年度訴

799-1 as ‘a rule of reason’ (法理), as the dispute arose before this stipulation was passed by the legislature. In two cases, new residents challenged the arrangement of designated common areas (see Part II(D) above), and the courts again ruled against the plaintiff for similar reasons—because the arrangements were obvious.<sup>61</sup>

## 5. Problems and reform proposal

The informational burden on purchasers might be too heavy.<sup>62</sup> Mandatory disclosure of information has been seriously challenged.<sup>63</sup> Scholars have argued that complicated information does not empower consumers to make better decisions, and may even be misleading.<sup>64</sup> The CAA, however, appears to be even worse—it mandates that information be acquired, but does not request disclosure. A purchaser has to have the legal knowledge to request access to all the separate documents. (The author, for one, has to admit an utter failure to make such a request due to ignorance when hunting for an apartment.) A purchaser has to have the luck, time or personal connection to locate the board. After all these efforts, a purchaser has to be equipped with legal, accounting, financial, if not also other, knowledge to get a sense of the implications of the documents. As none among the seller, real estate agent and chairperson of the condominium board can be relied on to provide a faithful summary of the documents, most purchasers are likely to have a nonchalant attitude. The unlucky ones among them will later find themselves bound by an unfavourable covenant (such as ‘no cats allowed’).

How to better structure the notice to potential purchasers is an important and interesting issue. Due to limited space, only a preliminary proposal can be laid out here. The basic idea is that information costs for third parties who are bound by *in rem* duties should be low. Mandatory registration is one way to lower information costs.

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字第 3156 號民事判決).

<sup>61</sup> Case number: 2012 Kaohsiung District Court Jian Shang Zi No 281 Decision (臺灣高雄地方法院 101 年度簡上字第 281 號民事判決); 2011 Kaohsiung District Court Feng Jian Zi No 721 Decision (臺灣高雄地方法院 100 年度鳳簡字第 721 號民事判決).

<sup>62</sup> See Wu (note 53 above), p 18.

<sup>63</sup> See generally O Ben-Shahar and CE Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press, Princeton, NJ, 2014).

<sup>64</sup> See generally CR Sunstein, *Simpler: The Future of Government* (Simon and Schuster, New York, NY, 2013); O Bar-Gill, *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets* (Oxford University Press, Oxford, 2012).

Theoretically, mandatory registration of condominium bylaws itself is not the only option. If condominium affairs can be stipulated through other property instruments that are already required to be registered, the reform may be more politically feasible. The question, then, is why the CAA creates another legal instrument called the condominium bylaws rather than using the existing property forms to achieve the policy goals. The short answer is that property forms recognised by the TCC are insufficient to coordinate lives in a common-interest community.

To be more concrete, condominium bylaws expand the scope for unit owners to make agreements that have third-party effects. Sections 851–859 of the TCC recognise easements. Apartment owners can use easements to designate an individual unit as a common playground for children.<sup>65</sup> Section 859 of the TCC allows real estate developers to first establish the easements and then sell the apartments.<sup>66</sup> Pursuant to section 826-1 of the TCC, apartment owners, as co-tenants of common areas, can designate a certain part of common areas for the use of specified unit owners by entering into co-ownership covenants. The author argues that section 859-4 of the TCC should apply, *mutandis mutatis*, to the co-ownership context, so that single owners can first establish a covenant for management, then sub-divide their properties, and sell part or all of their shares to others. So far, so good.

Taiwan law, however, does not recognise any *general form* of real covenants,<sup>67</sup> equitable servitude or their functional equivalents that run with the land. If unit owners prefer to impose on one another and all future grantees the obligations of not raising any pets in their own units, they run into trouble. They cannot use co-ownership covenants because they do not co-own the individual units and easements are not helpful because pet policies have nothing to do with an apartment serving the interest of another apartment. Real covenants and equitable servitudes, again, are lacking. Condominium bylaws, as was seen above, can serve as replacements for real covenants—in fact, condominium bylaws are a specific form of

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<sup>65</sup> TCC, ss 859-2 and 836-2 allow them to specify and register the nature and limits of the easement.

<sup>66</sup> See Wu (note 53 above), pp 20–24.

<sup>67</sup> Real covenants are a promise to do (or not to do) certain things related to the use of land. See JE Krier, *Property* (17<sup>th</sup> ed, Gilbert Law Summaries, Chicago, 2006), p 323. The TCC does allow specific forms of real covenants, such as the co-ownership covenants mentioned above. Such real covenants, however, can be used in only limited context. Occasionally, courts in Taiwan allow contracts to be reified (債權物權化), but it is very context-dependent, and the general rule is still that contracts have only *in personam* effects.

real covenants. Nevertheless, what if the TCC incorporates real covenants as a property form—as the author argues it should—would condominium bylaws become useless? Probably not.

Some condominium affairs, such as the quorum rule for the community association (discussed in Part IV(E) below), can hardly be considered as easements, real covenants, or co-ownership covenants, and are better described as *in rem* agreements necessary and unique to common-interest communities. Hence, a special instrument like condominium bylaws is needed to facilitate effective management.

That being said, if what is stipulated in condominium bylaws can be broken down into several components, and some of them under current Taiwan law can be registered, why should condominium bylaws be banned (by the Ministry of the Interior) from being registered? Granted, condominium bylaws might change relatively frequently, so it could be costly to mandate their registration. In the digital age, online registration and maintenance of condominium bylaws would most likely be low-cost. Unlike registering limited property interests, where the registrar has to substantively review the contents of the property contracts, condominium bylaws can give notice just by requiring the board of each common-interest community to upload the latest condominium bylaws to a centralised website, indexed by address. Any person can then simply go to the website and check the latest condominium bylaws. The *in rem* effect of them could be designed to depend on their uploading—this is more like recording than registration.

One might contend that it is less costly to require the condominium seller to disclose the bylaws to the buyers. The author respectfully disagrees. Like in other property transaction issues, sellers do not always have incentive to disclose the bylaws to the buyers, particularly when the bylaws reduce the value of the condominium to the buyers (such as a no-dog policy to a dog lover). Even when the sellers are perfectly honest, they may not be aware of the contents of the latest bylaws. Hence, a centralised deposit for condominium bylaws should be overall less costly.

Alternatively, the ‘official copies of real estate registration information’ (土地、建物謄本) for all apartments can contain a sentence such as ‘purchasers are advised to consult the condominium bylaws to understand the full duties that run with this real estate’, so that purchasers without much legal knowledge will be prompted to check

the condominium bylaws. Another institutional design is to require real estate developers to register what is now generally included in the condominium bylaws as easements and co-ownership covenants to the extent possible, and leave other unregistrable contents in (draft) condominium bylaws.<sup>68</sup> To conduct a more sophisticated cost-benefit analysis of the several proposals here, more data is needed. The lack of data prevents the author from conducting further exploration.

Also ill-advised is the stipulation by section 799-1(4) of the TCC that other covenants among unit owners bind purchasers who know or should have known the resolutions. In terms of legal policy, bilateral or multilateral covenants between some but not all unit owners should bind third parties only if they are registered as easements, co-ownership covenants or real covenants.<sup>69</sup> At the very least, the ‘should have known’ requirement in section 799-1(4) of the TCC should be narrowly construed so as not to impose too much informational burden on purchasers. Moreover, ordinary resolutions by community association should not receive such a favourable treatment. The community association should be induced to either incorporate the resolution into condominium bylaws or register the agreement as a property interest. Otherwise, the ordinary resolution should bind only the current inhabitants—at most also the knowing purchasers.

### ***C. Juridical personality of management associations***

#### **1. The doctrinal uncertainty**

Under current law and the court jurisprudence, a community association<sup>70</sup>, consisting of all the owners, does not have juridical personality. A condominium board (管理委

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<sup>68</sup> One important implication for this legal design is that only consensus among apartment owners can change the existing easements and co-ownership covenants in the common-interest communities. As compared to the (super-) majority rule used for condominium bylaws, the former’s rigidity could be a pro or a con, depending on the context. Real estate developers can consider registering certain agreements that are better to remain unchanged as easements and co-ownership covenants, whereas leaving matters that need flexibility in condominium bylaws. The design adopted in the US that distinguish master deed from condominium bylaws makes sense.

<sup>69</sup> The legislature has the power to make real covenants one of the recognised property forms.

<sup>70</sup> The CAA unfortunately uses a wrong term again here, using ‘general assembly’ (區分所有權人大會) to refer to ‘community association’, which confused many jurists. The association is the organ of all apartment owners and they make resolutions in the general assembly to govern the common-interest community. In using ‘general assembly’ without ever mentioning the condominium association, the CAA sends a misleading message that a mere assembly cannot be a juridical person.



員會), ‘board’ for short, ‘an organization composed of a number of inhabitants elected by unit owners to execute the decisions made in the community association and to manage and maintain the condominium’ (CAA, section 3), does *not necessarily* have juridical personality. To be more specific, in theory, although a board could be incorporated as a legal person according to the TCC or the Civil Associations Act (人民團體法), the statutory requirement for incorporation presents huge hurdles.<sup>71</sup> Thus, in practice, the boards are not incorporated as juridical persons and are considered by courts and scholars as ‘a group without juridical personality’ (非法人團體).<sup>72</sup> Nonetheless, pursuant to section 38 of the CAA, the board can be plaintiffs and defendants in litigation in its own name.

Given that the board is not a legal person and thus cannot own properties on its own, who owns the common fund becomes a thorny problem. Sections 18(3) and 19 of the CAA<sup>73</sup> hint that all inhabitants co-own the common fund, and the common fund is a separate patrimony,<sup>74</sup> managed by the board.<sup>75</sup> Not all agree with this interpretation; some claim that the common fund is a quasi-partnership, separate patrimony, held by all unit owners in ‘tenancy in partnership’.<sup>76</sup> Both are pragmatic solutions, but neither approach fits easily into the legal system in Taiwan. This issue is dealt with in full in the next sub-section below.

Theoretically preposterous but pragmatic, courts have long held that the management body can be a contracting party,<sup>77</sup> even a tortfeasor,<sup>78</sup> despite the lack of legal personality. Under current law, no doctrinal interpretation can make sense of it. In the next sub-section, some reform proposals are advanced.

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<sup>71</sup> See Jiin-Yu Wu, ‘A Study of Legal Disputes Related to Repairs Made to Common Areas of Condominiums and a Simultaneous Review of the Legal Status of Boards of Directors’ (2013) 133 *Chengchi Law Review* 1 at 9–10.

<sup>72</sup> *Ibid.*, p 11; Kuan-Ling Shen, ‘Party’s Capacity of an Unincorporated Association and Effects of Judgment’ (2011) 120 *Chengchi Law Review* 95 at 105–113.

<sup>73</sup> Section 18, para 3: ‘The common fund shall be deposited in a designated account and placed under the management of the officer or board. Utilization of the fund shall be conducted according to the decisions of the community association’. Section 19: ‘The right of each unit owner to the common fund shall be transferred when the unit ownership is transferred; it may not be surrendered, distrained, offset, or used to create encumbrances for personal reasons’.

<sup>74</sup> See Wu (note 71 above), pp 13–14.

<sup>75</sup> Article 20 of the CAA regulates duties of the board in managing the common fund.

<sup>76</sup> See Wun-Yu Chang, ‘Board as Objects of Penalties Stipulated in Construction Act’ (2013) 232 *Taiwan Law Journal* 59 at 70–71. For tenancy in partnership, see Singer (note 46 above), p 379.

<sup>77</sup> See Wu (note 71 above), pp 14–16.

<sup>78</sup> *Ibid.*, pp 17–19.

## 2. Reform proposals

A scholar has contended that Taiwan should take reference from the German law *Whonungseigentumsgesetz* and give the community association the capability of enjoying rights and assuming duties (享受權利並負擔義務，即有實體法上權利能力). Under this proposal, the community association, albeit not a legal person, can own the common fund, serve as a party in contracts and lawsuits and be a tortfeasor.

The policymakers can consider three alternatives to reform the CAA: the agency approach, the juridical person approach and the trust approach. Under the agency approach, the CAA should clarify that the common fund is indeed a separate patrimony co-owned by all unit owners. The patrimony is separate and should at least enjoy ‘priority with liquidation protection’;<sup>79</sup> that is, unit owners’ creditors cannot force liquidation of the common fund to satisfy their claims. The board, as an agent, can utilise the fund according to the stipulations in the condominium bylaws and the community association resolutions. Under this proposal, agency law regulates the relations.<sup>80</sup> Unit owners, as owners of their own apartments and co-owners of the common areas, delegate certain decision-making powers and common fund appropriation rights (delineated in section 36 of the CAA and condominium bylaws) to either a single officer or a board (CAA, section 29(12)).

Under the juridical person approach, the community association is recognised as a juridical person, even a non-profit corporation (which is currently not recognised in Taiwan). This is one-step further than the scholarly proposal outlined above. Other arrangements follow logically from the legal-person construction. The community association owns the common fund and manages the associational affairs, including contracting and litigating. A community association should be a ‘super-strong-form legal entity’;<sup>81</sup> that is, associational creditors have an exclusive claim to the common fund and unit owners’ personal creditors cannot use the common fund at all to satisfy their claims. The board is, again, the agent for this association. The second approach, thus, is built on the agency approach.

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<sup>79</sup> See H Hansmann and R Kraakman, ‘The Essential Role of Organizational Law’ (2000) 110 *Yale Law Journal* 387 at 394.

<sup>80</sup> Regarding the agency relationship between the unit owners and the board, see Ming-Tsann Chen, ‘The Legal Status of Board’ (2009) 140 *Taiwan Law Journal* 188 at 192.

<sup>81</sup> See Hansmann and Kraakman (note 79 above), p 395.

Under the more controversial trust approach, the common fund is considered trust property, again a separate patrimony, owned by the trustee, the board. All the unit owners are both the settlor and beneficiary of the trust. The condominium bylaw is the trust instrument that stipulates the duty and power of the trustee. The downside of this approach is that this condominium trust is idiosyncratic, as the settlors/beneficiary are obliged to ‘donate’ to the trust regularly, and the trust instrument—the condominium bylaws—can be revised by a (super-) majority of the settlors multiple times. Also, for the condominium board to serve as a trustee, it should have juridical personality. The third approach, thus, is built on the juridical person approach, rather than on the agency approach, and the fiduciary relation in trust law replaces that in agency relation. The fiduciary duty that accompanies trustees may become a hurdle too, as board members usually are volunteers and impositions of fiduciary duties may drive away volunteers.

Scholars immersed in English trust law might suggest the ‘purpose trust’, which lacks specific beneficiaries, as a solution to the problem of constant changing of beneficiary/residents. Although Taiwanese trust law allows charity trust (including community trust), it would be a doctrinal stretch to interpret that charity trust includes a trust for the benefits of specific common-interest communities. In addition, the strict regulations of ordinary charity trust may become a straightjacket for most common-interest communities.

#### ***D. Daily management of condominium***

Daily management is entrusted by the community association to a board or an officer (the latter being an exception in practice). If a board is formed, the board members shall elect a chairperson. The power delegated to the chairperson and members of the board as well as other procedural (including election) rules shall be specified by the condominium bylaws or resolutions of the community association (CAA, section 19(1) and (2)).<sup>82</sup>

Recognising that the officer or the board is unlikely to run the daily errands by itself, the CAA devotes a whole chapter to management service providers (管理服務

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<sup>82</sup> More detailed stipulations can be found in the CAA, s 29(3), (4) and (6)

人)。A common-interest community can either outsource the daily management duty to a property management firm (公寓大廈管理維護公司), which has to acquire a special licence from the central competent authority or employ management staff (CAA, sections 41–46).

### ***E. Procedures at general assembly***

The community association shall convene its general assembly according to the following procedures. The assembly must be held at least once a year (CAA, section 25(1)), initiated by the chairperson of the board (CAA, section 3), who issues a written ten-day notice (that carries the agenda) to each unit owner (CAA, section 30(1)). An *ad hoc* assembly may convene if an announcement is posted at least two days in advance (CAA, section 30(1)) and one of the following conditions applies: (1) ‘When critical incidents that require timely handling have taken place and the officer or board has made the request to convene the assembly’; (2) ‘over one fifth of the unit owners who own more than one fifth of the shares request to convene the community association’ (CAA, section 25(2)).

The CAA designs a default quorum rule for both the ordinary and exceptional procedures for convening the community association and voting. All resolutions (including those revising condominium bylaws) made by the community association require (a) the attendance of at least two thirds of the unit owners who also represent at least two thirds of the shares;<sup>83</sup> and (b) the consent of at least three quarters of the attendees who represent at least three quarters of the shares (CAA, section 31). When a decision cannot be made according to the aforementioned ‘ $\frac{2}{3} + \frac{3}{4}$  rule’, the convener of an assembly may convene another one to decide on the same issue. Under such circumstances, unless otherwise stipulated in the condominium bylaws, the ‘ $\frac{1}{5} + \frac{1}{2}$  rule’ is adopted instead (CAA, section 32).<sup>84</sup> Unit owners who are unable to attend

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<sup>83</sup> One individual unit, one vote. Co-owned individual unit has one vote, cast by the representative selected by the co-owners: CAA, s 27(1).

<sup>84</sup> Scholars have critiqued the ‘ $\frac{1}{5} + \frac{1}{2}$  rule’ as too loose. See Wen (note 28 above), p 6. Apartment owners, unlike corporate shareholders, live nearby, so it shall not be difficult for a substantial portion of the apartment owners to meet together. See Feng-Wen Wen, ‘On Certain Problems of Condo Administrative Act’ (2009) 140 *Taiwan Law Journal* 1 at p 6. Perhaps this is a ‘penalty default rule’ (see I Ayres and R Gertner, ‘Filling Gaps In Incomplete Contracts: An Economic Theory of Default Rules’ (1989) 99 *Yale Law Journal* 87 at 87–130), and the default rule itself can be changed by the condominium bylaws to another default rule.

an assembly may delegate in writing to his or her spouse, ‘a direct-blood relative with capacity for civil conduct’ (有行為能力之直系血親), another unit owner or a tenant of an unit to attend (CAA, section 27(2)). No unit owner may control more than one fifth of the total possible votes, either through representing his or her own multiple units or as a proxy voter for others (CAA, section 27(2) and (3)). The aforementioned default rule can be changed by condominium bylaws. Two concrete alternatives are provided by the model condominium bylaws.

As for minority protection, the opposing unit owners may file a claim with the court to revoke the condominium bylaws within three months of its revision or establishment (TCC, section 799-1(3)). A few district courts have applied section 799-1(3) of the TCC to revoke revisions to condominium bylaws because the community association had singled out one or a minority of unit owners and increased their parking fee or monthly assessments, which was found to be unfair, unreasonable or discriminatory.<sup>85</sup> A gap in the law is whether the court may revoke resolutions (其他決議) by community associations that do not amend the condominium bylaws. The author found a case in which both the district court and the appellate court applied section 799-1(3) of the TCC *mutatis mutandis* to revoke such a resolution.<sup>86</sup>

Lease tenants have limited capacity to get involved in the management of apartment building affairs. General assemblies of community associations are, by definition, a meeting of all unit owners. Tenants do not have a right to vote, other than by serving as a proxy voter (CAA, sections 25 and 27). The CAA is silent as to whether tenants have the right to participate and speak in a general assembly. A tenant can serve as a member or chairperson of the board, unless the condominium bylaws or community association stipulates otherwise (CAA, section 29(5)).

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<sup>85</sup> Case number: 2013 Kaohsiung District Court Su Zi No 1891 Decision (臺灣高雄地方法院 102 年度訴字第 1891 號民事判決); 2013 Hsinpei District Court Su Zi No 1416 Decision (臺灣新北地方法院 102 年度訴字第 1416 號民事判決); 2010 Kaohsiung District Court Xiong Jian Zi No 2056 Decision (臺灣高雄地方法院 99 年度雄簡字第 2056 號民事判決).

<sup>86</sup> Case number for the appellate case: 2011 High Court Tainan Branch Shang Zi No 250 Decision (臺灣高等法院臺南分院 100 年度上字第 250 號民事判決); case number for the district court case: 2010 Tainan District Court Su Zi No 1672 Decision (臺灣臺南地方法院 99 年度訴字第 1672 號民事判決). In this case, the community association singles out the plaintiff and unreasonably increases its monthly assessments.

## ***F. Management in a multi-building scheme***

A multiple-building scheme was almost entirely absent in the CAA. In defining ‘unit ownership’ in section 3, paragraph 1, subparagraph 2 as ‘[a] number of people [who] divide *one building* and each owns an individual unit of the building and also holds a share of the common areas’ (emphasis added),<sup>87</sup> the legislature showed that its main interest is in solving the problem in stand-alone high- or low-rises, not in say, a gated community that contains more than one building. The sole exception is section 26(1) of the CAA, which stipulates that if several apartment buildings form a complex that mixes residential and commercial uses, the commercial unit in one building or all commercial units in all apartment buildings in the complex may form its own board.<sup>88</sup>

As for a multi-building residential complex, the CAA can be applied *mutatis mutandis* if multiple buildings used independently (獨立使用) have common facilities that are inseparable (整體不可分性) in use and management (CAA, section 53). This enabling stipulation, however, implies that the complex should form a unified community association and a unified board. The central competent authority (the Ministry of the Interior), in its Rule for Condominium Management Organization Application (公寓大廈管理組織申請報備處理原則<sup>89</sup>), allows a multi-building residential complex to form separate boards, on the condition that the common funds are separate and the rule for sharing maintenance expenses is clear. Therefore, a multi-building complex in Taiwan could adopt a two-tier management system, under which one single community association makes the important decisions, while multiple boards run the daily routine matters and manage the separate ‘common’ fund.

## ***G. Keeping of pets, conduct of a profession, making music***

Neither the CAA nor the TCC regulate the level of commercial activities (for example, operating hours of a medical practice) and other conduct like the making of music in an

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<sup>87</sup> The official translation uses ‘a building’ instead of ‘one building’, but the author believes that the former fails to express the nuance. Articles such as ‘a’, ‘an’, and ‘the’ are unnecessary, if not utterly non-existent, in Chinese, so is the plural form. The one building in the statute should mean one single building.

<sup>88</sup> Please note that the regulation in section 26 is more complicated than what the author summarises in the text.

<sup>89</sup> Rule for Condominium Management Organization Application, available at <http://glrs.moi.gov.tw/LawContentDetails.aspx?id=FL003853&KeyWordHL=&StyleType=1>.

apartment building. That being said, inhabitants who do not use their units for purely residential purposes cannot behave in an ‘unneighbourly’ way and create a nuisance (see Part IV(A) above). For instance, in an appellate court case,<sup>90</sup> the board sued a unit owner (a corporation) who used its apartment as the headquarters of an Indian Buddhism sect (中華巴濕伐那陀佛教協會). The worshippers often gathered there from early morning until midnight, making loud music and refusing to follow the security code (that is, signing in). The court, reversing the lower court, forbade the unit owner to continue the religious activities within the unit. In another district court case,<sup>91</sup> the board filed an eviction lawsuit against an inhabitant, a famous restaurant. The court agreed that the defendants had illegally changed the structure of the unit, occupied open space and emitted excessive heat and smoke, and thus ordered the restaurant to move.

Moreover, inhabitants running restaurants or hazardous businesses in their apartments are required to purchase liability insurance (公共意外責任保險) in accordance with the insured amount specified by the central competent authority and also compensate other inhabitants for the increased fire insurance premium (CAA, section 17).

Inhabitants can keep pets as long as they do not ‘hinder public sanitation, peace or safety’ and the condominium bylaws<sup>92</sup> and other laws do not prohibit keeping (certain) pets (CAA, section 16(4)).

## V. Recent Developments

Other than adding or revising a few articles in the TCC that relate to condominium laws in 2009, condominium law itself has not been extensively amended since 2003. One recent development in condominium law will have profound impacts on unit owners, whereas a high-profile yet failed attempt to revamp the condominium law

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<sup>90</sup> Case number: 2010 High Court Shang Zi No 994 Decision (臺灣高等法院 99 年度上字第 994 號民事判決).

<sup>91</sup> Case number: 2005 Taipei District Court Su Zi No 1005 Decision (臺灣臺北地方法院 94 年度訴字第 1005 號民事判決).

<sup>92</sup> The CAA, s 23(2) emphasises that prohibition of pets has to be specified in condominium regulations to be effective. That is, the community association cannot ban animal raising by an *ad hoc* decision.

could have made a sudden impact. Both can be attributed to the high and increasing prices of home ownership, particularly in the urban areas, where most people live in high- or low-rises.<sup>93</sup>

The first regards the definition of unit or the scope of the apartment that owners buy. In real estate transaction in Taiwan, a seller quotes a total price and a buyer compares the quoted prices by calculating the price per *ping* (坪; =3.3057 m<sup>2</sup>).

Price per ping \* total area = total price

The total area in practice refers to (1) the apartment area + (2) the area of the peripheral building<sup>94</sup> (附屬建物) + (3) the area of the individual share of the common areas.<sup>95</sup>

(3) / (1) + (2) + (3) = infrastructure ratio (公設比).<sup>96</sup>

While buyers may be aware of the implication of high infrastructure ratio (meaning a smaller individual unit for personal exclusive enjoyment), the focal point in real estate transactions is price per ping. Thus, real estate developers have incentives to construct low-cost facilities if they are defined as either (1) or (2), so that it would appear to buyers that they own a larger real estate while paying a lower price per ping—and with a lower infrastructure ratio. So what do developers do? They build over-size awnings and overhangs, which under section 56, paragraph 3 of the CAA and section 273 of the Land Record Survey Rule (地籍測量實施規則) are part of (2). In 2009, the Control Yuan (監察院) has corrected (糾正) the Ministry of the Interior for facilitating this phenomenon (called ‘灌虛坪’). In April 2010, the then Premier criticised this practice of constructing over-sized awnings and overhangs and including them in the total area, even calling the developers ‘robbers’. In July 2010, the Ministry of the Interior amended the Land Record Survey Rule section 273, hereby allowing only balconies, but not awnings and overhangs, to be counted as part of (2). The Premier, however, later overruled this amendment after protests from the association of real estate developers.<sup>97</sup> Therefore, an important and

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<sup>93</sup> See Wang (note 7 above), p 202.

<sup>94</sup> For example, a porch, a veranda, a balcony, an overhang and an awning.

<sup>95</sup> For example, if the common area is in total 100m<sup>2</sup>, and John’s share is 3%, the area of the individual share of the common areas is 3m<sup>2</sup>.

<sup>96</sup> See Kuan-Yeu Cheng, *Property Law* (3<sup>rd</sup> ed, Author, Taipei, 2013), p 334.

<sup>97</sup> See Wen (note 28 above), pp 8–9.



efficiency-enhancing policy proposal eventually was not implemented.

The second development regards the cost of acquiring price information of real estates. Before August 2012, no agency, real estate agent, or consumer had systematic knowledge of the actual transaction prices of real estates. The local governments announce Publicly Announced Land Value (公告地價) for each land parcel every three years for property tax (土地稅) purposes,<sup>98</sup> and they announce Assessed Current Land Value (公告土地現值) for each land parcel every year to assess land value increment tax (土地增值稅).<sup>99</sup> To save the latter tax, transacting parties almost always report to the government that the transacting price of land is exactly the Assessed Current Land Value, which everyone in Taiwan knows is below fair market value. As a result, real estate (land or land plus fixtures) value is opaque, leaving a lot of room for developers to command unreasonably high prices.<sup>100</sup>

In 2012, as part of his presidential re-election campaign, President Ma Ying-jeou advocated ‘residential justice’ (居住正義). The legislature passed or revised five statutes, three of which mandate that the *actual* sale prices of immovable properties be reported to the government. The ‘actual price report’ (實價登錄) regime came into effect on 1 August 2012. The raw data are available for download and the competent agency, the Ministry of the Interior, opened a website that enables users to check sale prices in any region in Taiwan through a graphic interface.<sup>101</sup> Users can also acquire information on that website regarding the transacting month, total area, zoning, layout of the apartment etc. From August 2012 to February 2013 alone, there were 60,530 reported sales of land (that is, sales of buildings with or without land are not counted

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<sup>98</sup> To be more exact, landowners are then allowed to report a self-assessed Declared Land Value to replace the Publicly Announced Land Value, as long as the Declared Land Value is between 80% and 120% of the Publicly Announced Land Value. The self-assessed value (Declared Land Value) is the tax base for property taxes. See Yun-chien Chang, ‘Self-Assessment of Takings Compensation: An Empirical Study’ (2012) 28 *Journal of Law, Economics & Organization* 265 at 268–70. The default tax rule is that if private landowners do not declare a Declared Land Value, it will be presumed to be 80% of the Publicly Announced Land Value (without any adverse effect). As a result, almost no landowners bother to take any action. In short, for privately owned land, Declared Land Value=0.8×Publicly Announced Land Value.

<sup>99</sup> See Yun-chien Chang, *Private Property and Takings Compensation: Theoretical Framework and Empirical Analysis* (Edward Elgar, Northampton, Mass., 2013), pp 61–66.

<sup>100</sup> Part of the reason might be that the high offered price serves as the anchor, which increases the ultimate transacting prices. See generally AD Galinsky and T Mussweiler, ‘First Offers as Anchors: The Role of Perspective-Taking and Negotiator Focus’ (2001) 81 *Journal of Personality and Social Psychology* 657 at 657–69. Regarding the anchoring effect in general, see eg D Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* (Harper, New York, NY, 2008), pp 25–48, D Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux, New York, NY, 2011), pp 119–28.

<sup>101</sup> See <http://lvr.land.moi.gov.tw/N11/homePage.action#>.

here).<sup>102</sup> Many believe that the user-friendly disclosure of sale prices stabilises the real estate markets (stopping the growth of bubbles that is). Thus, while the CAA itself has not changed in recent years, the actual price report system has a profound impact on the wealth of current and future apartment owners.

## VI. Conclusion

This article reviews the statutory and court-made doctrines of condominium law in Taiwan. Basic features, major issues and recent trends are identified. Using information-cost theory, this article also examines in detail two problematic stipulations and provides reform proposals. This article argues that given the *in rem* effect of condominium bylaws, the current regime, under which condominium bylaws are merely available upon request and cannot be registered, imposes high information costs on potential transacting parties. It advocates two alternatives: first, condominium bylaws should be uploaded to a centralised deposit, available for any interested party; second, the official copies of real estate registration information should add a warning that certain restrictions on real estate are only available in condominium bylaws. In addition, this article contends that a condominium association's lack of juridical personality has created legal uncertainty—such as who owns the common fund. This article compares the pros and cons of three reform proposals: the agency approach, the juridical person approach and the trust approach. All things considered, the juridical person approach shall be the best one to end the long-time doctrinal mess.

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<sup>102</sup> See Yun-chien Chang, Kong-Pin Chen and Chang-ching Lin, 'Anchoring Effect in Real Litigations' (2015), working paper (on file with the author).