

# **Incentivizing Condominium Development in Washington State: A Market and Legal Analysis**

by

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## **Abstract**

The City of Seattle has been experiencing unprecedented population and economic growth over the last five years. As the city's population has increased and the number of high-paying jobs has grown, prices for housing have increased significantly. Condominium development could provide an affordable in-city option for new housing. At present, condominiums are not being built in sufficient numbers to meet demand, and those that are being built are being sold at prices that are beyond the means of the average-income individual. Reasons for this dynamic include financing and capital markets, insurance coverage, and to some degree, legal liability for condominium developers. This paper examines the current state of the housing market in Seattle, focusing on construction of new condominiums, with comparisons to six other Western cities. The paper then examines elements of the Washington Condominium Act that may bear on the heightened liability for condominium builders, and suggests some options for reducing the liability, after comparison to four other states and the Canadian province of British Columbia. Changes to the Washington Condominium Act may be necessary but not sufficient conditions for the building of more affordable condominium units in Seattle. Financial incentives may be required to create the conditions for more affordable condominiums. For the market to be incentivized to build more affordable condominiums without public subsidy, economic opportunity for builders must offset the greater perceived risks and inefficiencies of smaller scale building through lower costs. Insurance costs and the risk of litigation are factors that, if mitigated, can contribute to tipping the scale toward the delivery of more affordable for-sale condominium product.

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## I. INTRODUCTION

The City of Seattle has been experiencing unprecedented population and economic growth over the last five years. As the city's population has increased and the number of high-paying jobs has grown, the prices for housing have increased significantly. Condominium development provides an affordable in-city option for new housing in Seattle. First time buyers, middle-income buyers, and families benefit. If built in sufficient numbers and at an affordable price, condominiums provide opportunities for many types of buyers and could help to address some of Seattle's problems around affordability, as well as transit and urban density.

Condominiums could provide housing opportunities not only for first time buyers and middle-income buyers, but also for "empty nesters", many of whom occupy larger single-family homes. If these homes were then listed because an empty nester moved to a condominium, there would be more single-family housing opportunities for younger families.

Condominiums could provide purchase opportunities for families who want to stay in the urban core. Multi-family housing developers are not currently building rental housing for families since construction of studio and one bedroom units provides a greater financial return. Condominiums can be an alternative for family housing in a higher density format if certain market incentives are in place.

Condominiums could also help contribute to more sustainable development, especially around transit hubs, easing the burden on traffic and parking, and providing opportunities for walkable neighborhoods. Condominiums are also more energy efficient than single-family homes.

Condominiums can be built in a number of forms: large and small unit sizes; large and small total unit count; high-rise, mid-rise and low-rise; and in downtown as well as outlying neighborhoods. In short, they can be flexible to fit almost any neighborhood density or design regimen, adding architectural diversity to the economic and environmental benefits derived from more condominium supply.

At present, however, there is a lack of affordable condominium development in Seattle. In 2015, the Mayor of Seattle commissioned a report on ways to improve housing affordability in the city. One of the findings specifically referenced the state law that imposes a heightened warranty on condominium builders as a hindrance to development:

Condominium developers are subject to an implied warranty for construction under the State's Condominium Act. Courts in Washington have interpreted the statutory language broadly, resulting in a plethora of law suits against condominium developers, a chilling of condominium development in the state, and – often adverse consequences for the condominium owners, despite significant improvements in condominium construction practices.<sup>2</sup>

The main purpose of this report is to provide an overview of the market context and consider possible legislative changes that could be made to facilitate condominium development. Section II will outline the state of the current condominium market in Seattle. Section III will analyze the market and legal forces influencing condominium development, and cite opportunities for legislative consideration that may encourage the development of more and more affordable condominiums. Section IV will conclude, summarizing the paper.

As shown in the analysis below, there are currently a large number of condominiums being built in Seattle relative to other western cities, although overall supply does not appear to be meeting demand. The trend has also been toward building condominiums for the upper end of the income scale. As Seattle has grown in population and

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<sup>2</sup> Seattle Housing Affordability and Livability Agenda, Final Advisory Committee Recommendations to Mayor Edward B. Murray and the Seattle City Council (July 13, 2015), p. 35, recommendation H.3.

wealth over the last five years, the price of new condominiums has outpaced the middle-income individual's ability to afford them.

This issue, however, is multifaceted, with capital market forces, developer goals, the conservative nature of financing, insurance concerns, and litigation avoidance strategy all playing a role. This report focuses on the state of the market and the potential legislative solutions that might better encourage a greater supply of affordable condominiums. Legislative changes, however, may at best be necessary but not sufficient to incentivize development of more condominiums – especially affordable condominiums – in light of the changing income demographics of the city.

## II. STATE OF THE CONDOMINIUM MARKET IN SEATTLE

Condominiums are desirable assets in the real estate marketplace, both for buyers and for sellers and builders. They promote dense, urban development, often near transit, and in the past they have generally been affordable for first-time buyers and buyers of average income. Condominiums promote the goals of Washington State's Growth Management Act,<sup>3</sup> and can help accommodate Seattle's continuing population growth.

### Population & Income Increase

The City of Seattle has been growing at a rapid pace, both compared to other U.S. cities, and Seattle's own past growth. According to the city's Office of Planning and Community Development, the city's estimated population as of 2015 was approximately 662,400.<sup>4</sup> This is an almost 9% increase in the five years since 2010, when the U.S. Census estimated the city's population at 608,660. By comparison, in the ten years between 2000 and 2010, the city's population increased by only 8%. In other words, the city's population grew at more than twice as fast a rate between 2010 and 2015 as it did between 2000 and 2010. In the 12-month period from July 2012 to July 2013, Seattle was the fastest-growing large city in the United States.<sup>5</sup> From July 2013 to July 2014, Seattle was among the top four fastest-growing cities with populations above 500,000.<sup>6</sup> In addition to an increasing population, Seattle is now one of the top-10 densest cities in the United States.<sup>7</sup> Among the top-10 densest cities, Seattle had the highest increase in density since 2010.

Reasons for the sharp increase in population and density include in-migration of residents in pursuit of in-city information-technology jobs, likely due in large part to growth at Amazon, which has recently located its corporate headquarters in downtown Seattle, where it leases, owns and is building a total of about 10 million square feet of office space. Amazon currently employs over 24,000 people in Washington, and based on estimates of its office space being constructed, is likely to continue hiring.<sup>8</sup> In addition to Amazon's growth, the trend of San-Francisco area technology firms expanding their offices to locate in Seattle has brought an influx of highly paid residents to the city.<sup>9</sup>

It is not only information technology jobs pushing the demand curve for new housing. Seattle's highly diversified economy includes other major employers in aerospace, retail, telecommunications, healthcare and education, including Boeing, Costco, Starbucks, the University of Washington, and T-Mobile. Unlike in past years, when the local economy was largely dependent on the success of one large company – i.e., Boeing – Seattle's diverse economy today is driving steady growth in housing demand beyond the levels of past markets. In addition, Amazon's decision to locate its headquarters downtown is a shift from years past, when the region's largest employers elected to locate in the suburbs.

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<sup>3</sup> The GMA's stated goals include, among other items, encouraging development in urban areas, reducing sprawl, and encouraging efficient multi-modal transportation. RCW 36.70A et seq.

<sup>4</sup> <http://www.seattle.gov/dpd/cityplanning/populationdemographics/aboutseattle/population/>

<sup>5</sup> Gene Balk, *Census: Seattle is the Fastest Growing Big City in the U.S.*, Seattle Times (May 22, 2014), accessed via <http://blogs.seattletimes.com/fyi-guy/2014/05/22/census-seattle-is-the-fastest-growing-big-city-in-the-u-s/>, visited April 8, 2016.

<sup>6</sup> Data available from <http://www.census.gov/newsroom/press-releases/2015/cb15-89.html>, last visited April 8, 2016. During this time period Seattle experienced population growth of 2.29%. The other cities with equivalent or higher growth were Fort Worth, Texas (2.29%), Denver, Colorado (2.38%), and Austin, Texas (2.89%).

<sup>7</sup> Gene Balk, *Seattle Among Top 10 Most Densely Populated Big Cities in the U.S. for First Time Ever*, Seattle Times (Feb. 7, 2016), accessed via <http://www.seattletimes.com/seattle-news/data/seattle-density-doesnt-have-to-be-a-dirty-word/>, visited April 21, 2016.

<sup>8</sup> Stephanie Forshee, *Amazon Reveals Washington State Headcount for First Time*, Puget Sound Business Journal (Jul. 23, 2015), accessed via <http://www.bizjournals.com/seattle/blog/techflash/2015/07/exclusive-amazon-reveals-washington-state.html?ana=tw>, visited April 6, 2016.

<sup>9</sup> Alison Vekshin, *Tech Firms in Pricey San Francisco See Exodus to Seattle*, Seattle Times (Apr. 5, 2016), accessed via <http://www.seattletimes.com/nation-world/tech-firms-in-pricey-san-francisco-see-exodus-to-seattle/>, visited April 6, 2016; Todd Bishop, *Google to Move to New 4-Building Complex in Amazon's Backyard in Seattle, Developed by Paul Allen's Vulcan, Inc.*, Geekwire (Mar. 24, 2016), accessed via <http://www.geekwire.com/2016/paul-allens-vulcan-develop-huge-complex-google-amazons-backyard/>, visited April 6, 2016.

The net effect is that in the last five years, Seattle has become a wealthier city, although the increases in income are not evenly distributed. Since 2010, the city has experienced increases in very affluent and very poor residents, and decreases in the number of middle-income residents. See figure 1.<sup>10</sup>

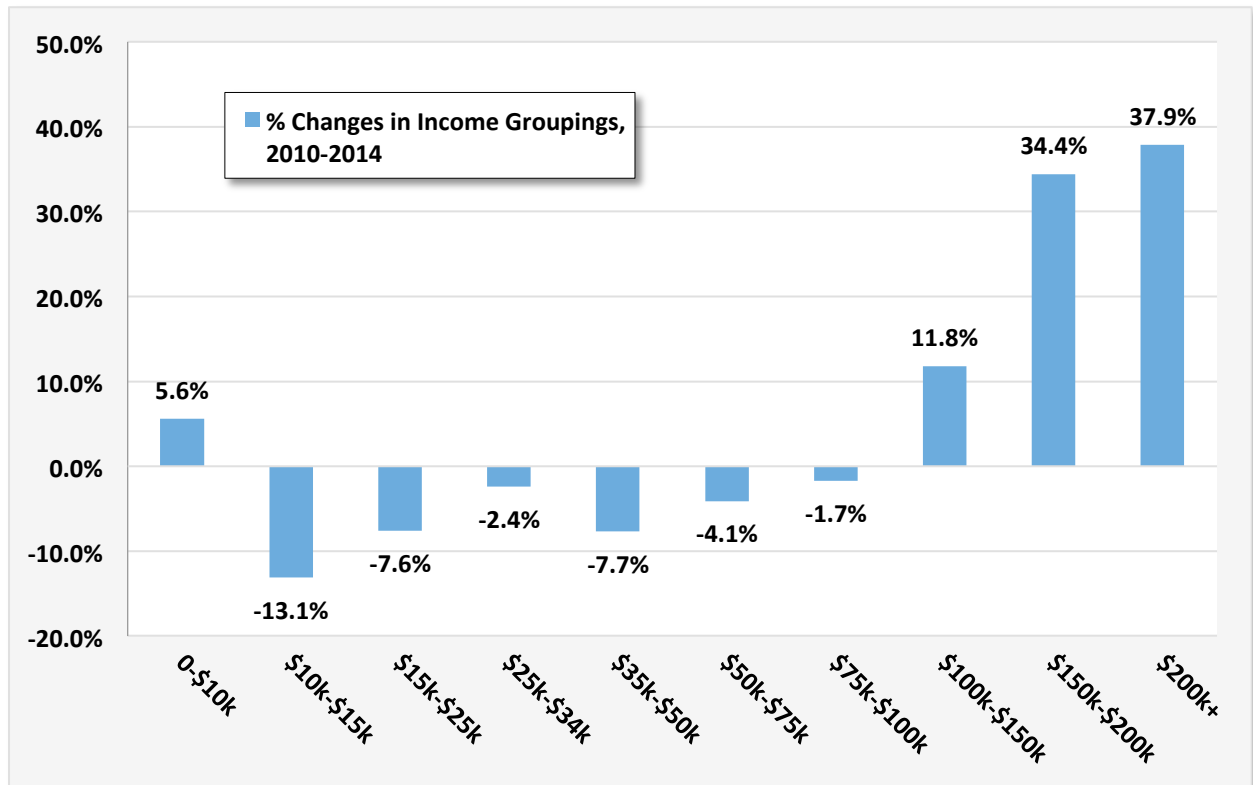


Fig. 1: Changes in Seattle income groupings, 2010-2014. Source: American Community Survey.

### Supply

The housing stock in Seattle is mainly older single-family homes, with a secondary layer of homes built in the 1950s and 2000s. In addition, most multi-family buildings are larger than 20 units. There were 311,286 total housing units in Seattle as of 2014.<sup>11</sup> Of these, 44% were single-family detached units. 29% were in buildings of 20 or more units. All other unit types were under 10%. Twenty-nine percent of the housing units in the city were constructed prior to 1939. 14% were built between 2000-2009 and 11% were built between 1950-1959; all other decades were under 10%.

In terms of ownership and financing, the American Community Survey estimates that of all occupied units, 46% are owner-occupied and 54% are renter-occupied. Seventy-five percent of the owner-occupied units have a mortgage.

Between 2010 and 2015, there were approximately 5,524 sales of newly constructed homes in Seattle.<sup>12</sup> Of these sales, 1,395, or 25%, were condominiums. 40% were single-family homes and 35% were townhomes. As of the time of this writing, inventory of homes for sale in the 23-county Northwest Multiple Listing Service region averaged 1.8 months, down from 2.5 in April 2015.<sup>13</sup> A six-month supply is considered by many to be a desirable

<sup>10</sup> This follows a national trend of a declining middle class. See, e.g., Pew Research Center, *America's Shrinking Middle Class: A Close Look at Changes Within Metropolitan Areas*, available at <http://www.pewsocialtrends.org/files/2016/05/Middle-Class-Metro-Areas-FINAL.pdf>.

<sup>11</sup> [www.census.gov](http://www.census.gov).

<sup>12</sup> Data provided by Redfin; unless otherwise specified, all home pricing information is based on MLS data supplied by Redfin.

<sup>13</sup> Id. The NWMLS region includes the following counties: King, Snohomish, Pierce, Kitsap, Mason, Skagit, Grays Harbor, Lewis, Cowlitz, Grant, Thurston, San Juan, Island, Kittitas, Jefferson, Okanogan, Whatcom, Clark, Pacific, Ferry, Clallam, Chelan, and Douglas.

balance between supply and demand. Both supply and price are up overall since 2010, indicating a response to the strong demand for housing in the city, which is consistent with the figures showing population and income growth. See figure 2. However, the number of condominiums sold in 2015 is actually below the number sold in 2010.

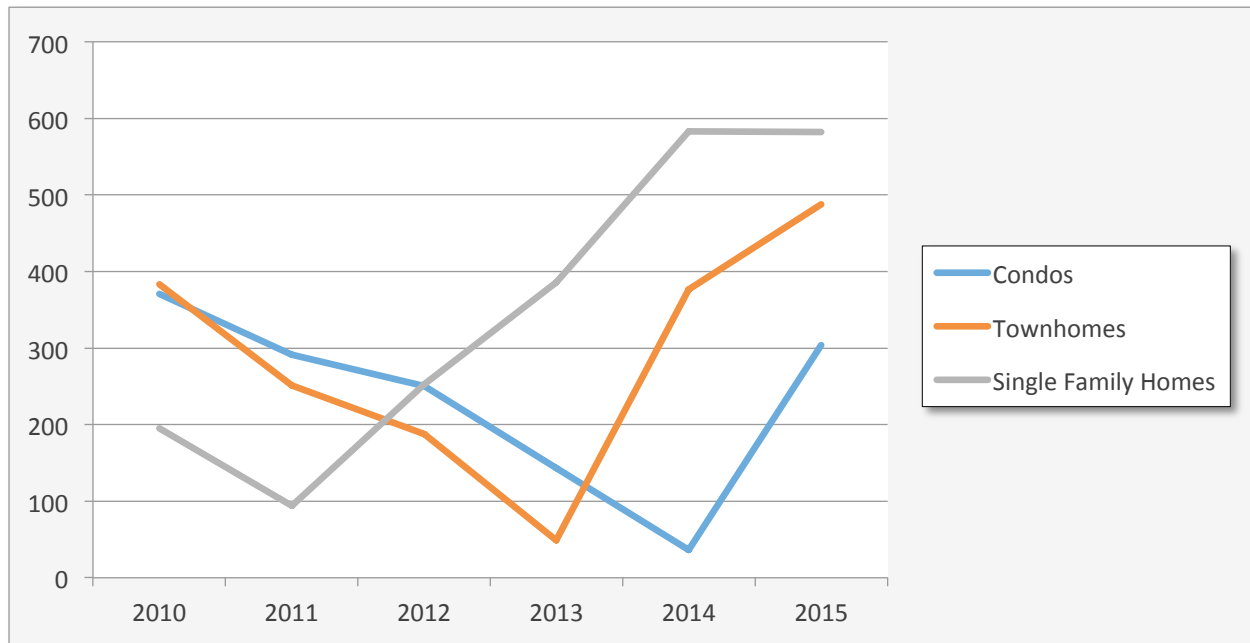


Fig. 2: New home sales in Seattle, 2010-2015 (MLS data courtesy of Redfin).

### Affordability

According to data from the Northwest Multiple Listing Service, the median price of a single-family home in March 2016 in Seattle rose by 20% year-over-year, to \$640,000.<sup>14</sup> The median price of a new condominium in Seattle in 2015 was \$683,590. In 2015, the median household income in Seattle was \$67,365.<sup>15</sup> Assuming a buyer with this median income could afford a 20% down payment of \$136,718, and could take a 30-year fixed-rate mortgage at 4%, the monthly payments would be \$2,611, or about 46% of monthly income.

At this rate, it is unlikely a bank would issue a loan, using the typical threshold where a mortgage payment should equal no more than 30% of income. It would be necessary to increase the down payment to about \$340,000 to get to the 30% of income threshold. This suggests that the median priced new condominiums are not affordable to the median income household.

By contrast, the median “family” income in Seattle is \$94,559.<sup>16</sup> With the same mortgage assumptions, a family with this median income purchasing a median-priced condominium at \$683,590 could put 20%, or \$136,718 down, and take a mortgage of \$546,872, with monthly payments of \$2,611, about 33% of monthly income. This suggests that median-priced condominiums are more affordable for the median-income earning family. The definition of “families”, as opposed to “households”, means more than one income-earning member.

<sup>14</sup> Blanca Torres, *Squeeze on Homes for Sale Extends to Several Counties*, Seattle Times (Apr. 4, 2016), accessed via

<http://www.seattletimes.com/business/economy/squeeze-on-homes-for-sale-extends-to-several-counties/>, visited April 6, 2016.

<sup>15</sup> 2010-2014 American Community Survey 5-year estimates, available at [www.census.gov](http://www.census.gov). The City of Seattle estimates median household income for 2014 at \$67,100. <http://www.seattle.gov/dPd/cityplanning/populationdemographics/aboutseattle/prosperity/default.htm>, last visited May 10, 2016.

<sup>16</sup> *Id.*

This is a big change from only 5 years ago, when the median-income earning household could afford a condominium. The median price of a condominium in Seattle was \$372,000 in 2010. Median household income in 2010 was \$60,665. With the same mortgage terms as above in 2010, a household with a median income would spend 28% of their monthly income on mortgage payments to purchase a median-priced home at \$372,000, with a \$74,400 down payment.<sup>17</sup> The 84% increase in the median price of a condominium has far outstripped the 11% increase in median household income.

Another way to look at the decline of the affordable condominium in Seattle is to consider price tranches. Between 2010 and 2015, the number of condominiums selling for under \$500,000 fell from 269 to 40. The number of condominiums selling for between \$500,000 and \$1,000,000 increased from 61 to 102, and the number of condominiums selling for over \$1,000,000 increased from 41 to 62. See figures 3 & 4.

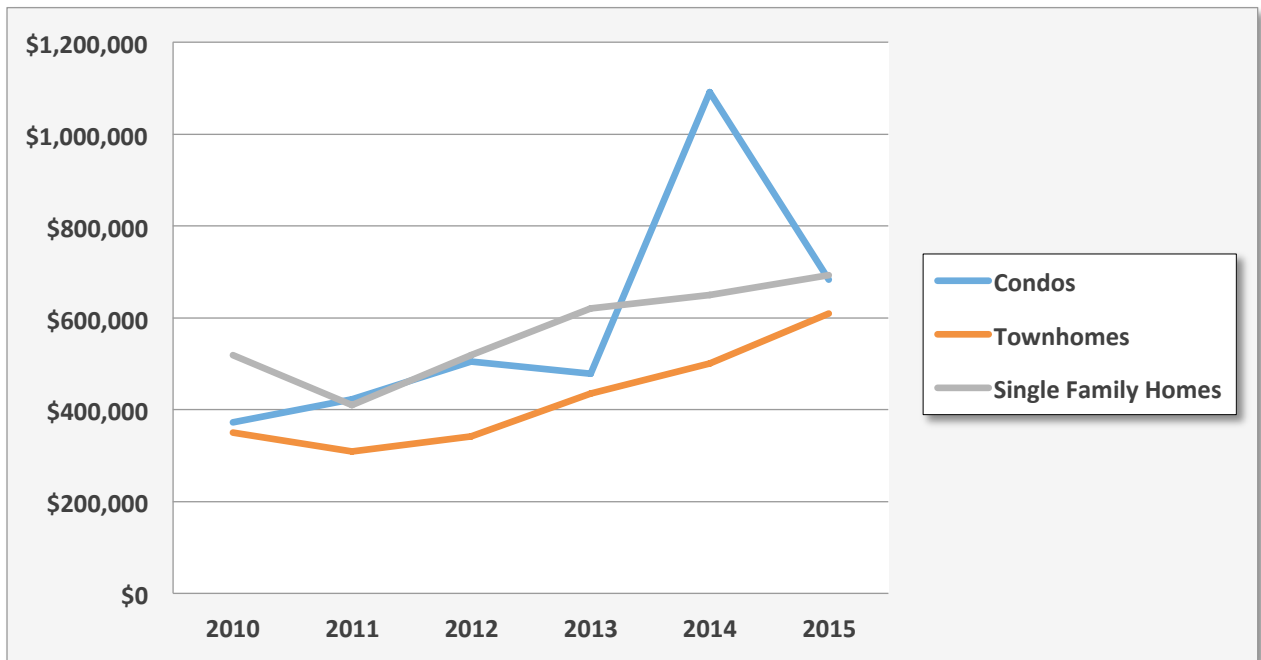


Fig. 3: New home sales median prices in Seattle, 2010-2015 (MLS data courtesy of Redfin).

<sup>17</sup> These estimates do not account for other recent trends that bear on mortgage underwriting, including banks moving toward more stringent lending criteria, or younger borrowers' lower debt payment capacity due to student loan payments.

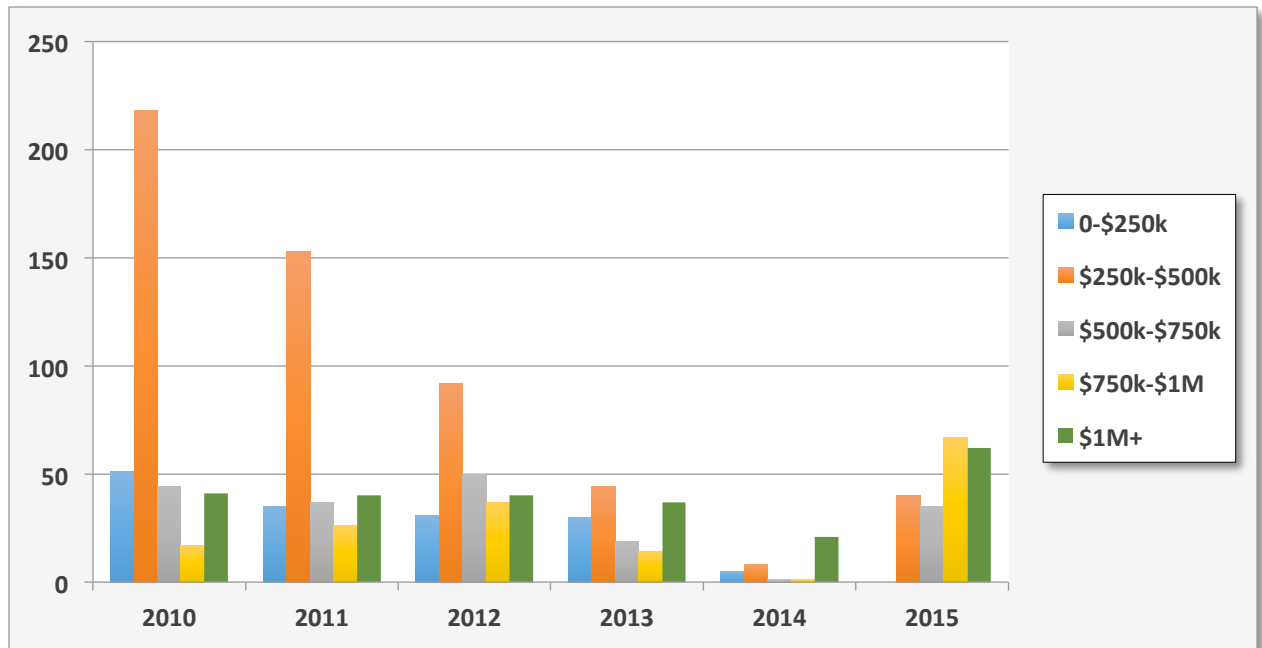


Fig. 4: Sales price tranches for Seattle new condominium sales, 2010-2015.

### Comparison to Other Cities

In order to provide more perspective on the state of the condominium market in Seattle, it helps to review the state of the supply and affordability of condominiums and housing generally in other Western cities. For purposes of comparison, we reviewed data for Portland, Oregon; San Francisco; Los Angeles; San Diego; Phoenix; and Las Vegas.

It should be noted that we anticipated a normal variation from city to city in all of these metrics. The unique qualities of each city – factors including their geography, industry mix, resident income, transportation network, and land-use regulation vary, and naturally, so will their demand and price for condominiums.

In general, we found Seattle is on the high end of condominium supply per resident, and despite the large supply of condominiums, Seattle is still high compared to other cities with respect to condominium price compared to single-family home prices. Seattle is middle-of-the-road with respect to price-to-income ratio, and relative supply of condominiums compared to other housing types. Notable as well was that Seattle had the highest median condominium price in 2015, as well as the most new condominiums sold, and the most total new homes sold.<sup>18</sup> See figures 5-9. These figures are further evidence that supply cannot keep up with demand for new condominiums in Seattle.

<sup>18</sup> Condominium sales numbers also included co-ops sales. Figures do not include sales not listed on Multiple Listing Service.



City	New Condominium Sales	Population	Sales per 1000
Seattle	304	662,400	0.46
Las Vegas	95	597,353	0.16
San Francisco	111	829,072	0.13
Portland	56	602,568	0.09
San Diego	61	1,341,510	0.05
Phoenix	38	1,490,758	0.03
LA	25	3,862,210	0.01

Fig. 5: New condominium sales relative to population, 2015

City	Existing Condominium Sales	Population	Sales per 1000
Las Vegas	3,680	597,353	6.16
Seattle	2,677	662,400	4.04
San Diego	5,136	1,341,510	3.83
San Francisco	2,514	829,072	3.03
Portland	1,713	602,568	2.84
Phoenix	2,047	1,490,758	1.37
LA	2,539	3,862,210	0.66

Fig. 6: Existing condominium sales relative to population, 2015

City	Median Price New Condominium	Median Income	Price / Income
San Francisco	\$1,130,000	\$78,378	14.4
LA	\$649,306	\$49,682	13.1
Seattle	\$683,590	\$67,365	10.1
San Diego	\$643,591	\$65,753	9.8
Las Vegas	\$391,500	\$50,903	7.7
Phoenix	\$328,855	\$46,881	7.0
Portland	\$311,200	\$53,230	5.8

Fig. 7: Median price-to-income ratios, 2015.<sup>19</sup>

City	New Condominium Sales	Total New Sales	Condominiums / Total Sales
San Francisco	111	34*	3.26
San Diego	61	123	0.50
Seattle	304	1,070	0.28
LA	25	193	0.13
Las Vegas	95	847	0.11
Phoenix	38	397	0.10
Portland	56	910	0.06

Fig. 8: New condominium sales as a share of total new sales, 2015.

\* San Francisco new homes sold includes only townhouses, not single-family homes.

<sup>19</sup> Median Income does not account for differences in state tax codes, e.g., the lack of state income tax in Washington, or the lack of state sales tax in Oregon.

City	New Condominium Median Price	New Single-Family price	Condo / Single-Family Price
Las Vegas	\$391,500	\$295,000	1.33
Phoenix	\$328,855	\$287,300	1.14
Seattle	\$683,590	\$693,600	0.99
Portland	\$311,200	\$535,000	0.58
San Diego	\$643,591	\$1,167,500	0.55
LA	\$649,306	\$1,822,500	0.36

Fig. 9: New condominium prices compared to new single-family prices, 2015.

\* San Francisco included no new single-family sales in 2015.

Although Seattle had a large number of new condominium sales per resident in 2015, many of those sales were likely from one large, high-priced building. The Insignia condominiums, a project with 698 total units in two towers, began closing sales in July 2015. As of March 2016, 302 sales had closed, 290 were in contract, and 106 were available. The average price of a sample of closed sales between October 2015 and February 2016 was \$894,300, or \$857 per square foot.<sup>20</sup>

Seattle outpaced the other cities studied in total new condominium sales between 2010 and 2015. When the sales volume for each city from 2010-2015 is represented by a linear trend line, Seattle's condo production has actually been decreasing slightly over the last five years. This trend is also generally the case for the other cities, except for Las Vegas, and to a lesser extent, San Diego.<sup>21</sup> See figures 10-11.

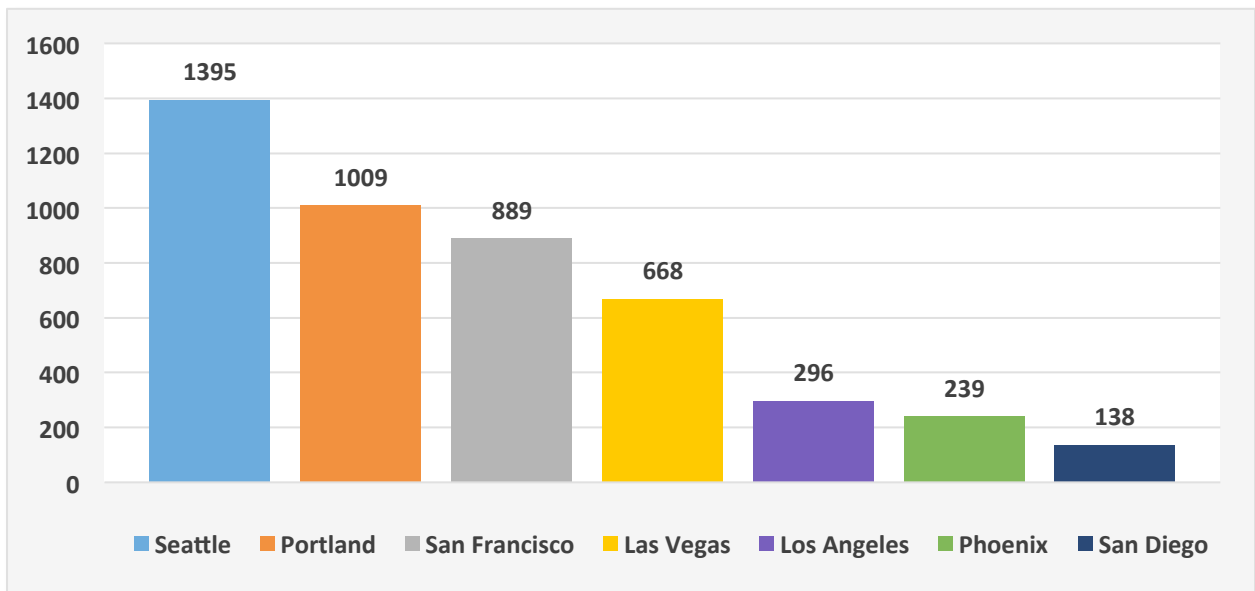


Fig. 10: Total new condominium sales by city, 2010-2015.

<sup>20</sup> The Mark Company Monthly Report, Downtown Seattle (March 2016).

<sup>21</sup> MLS data for San Diego showed no sales of new condominiums in 2011 or 2013, and only one new condominium sale in 2012.

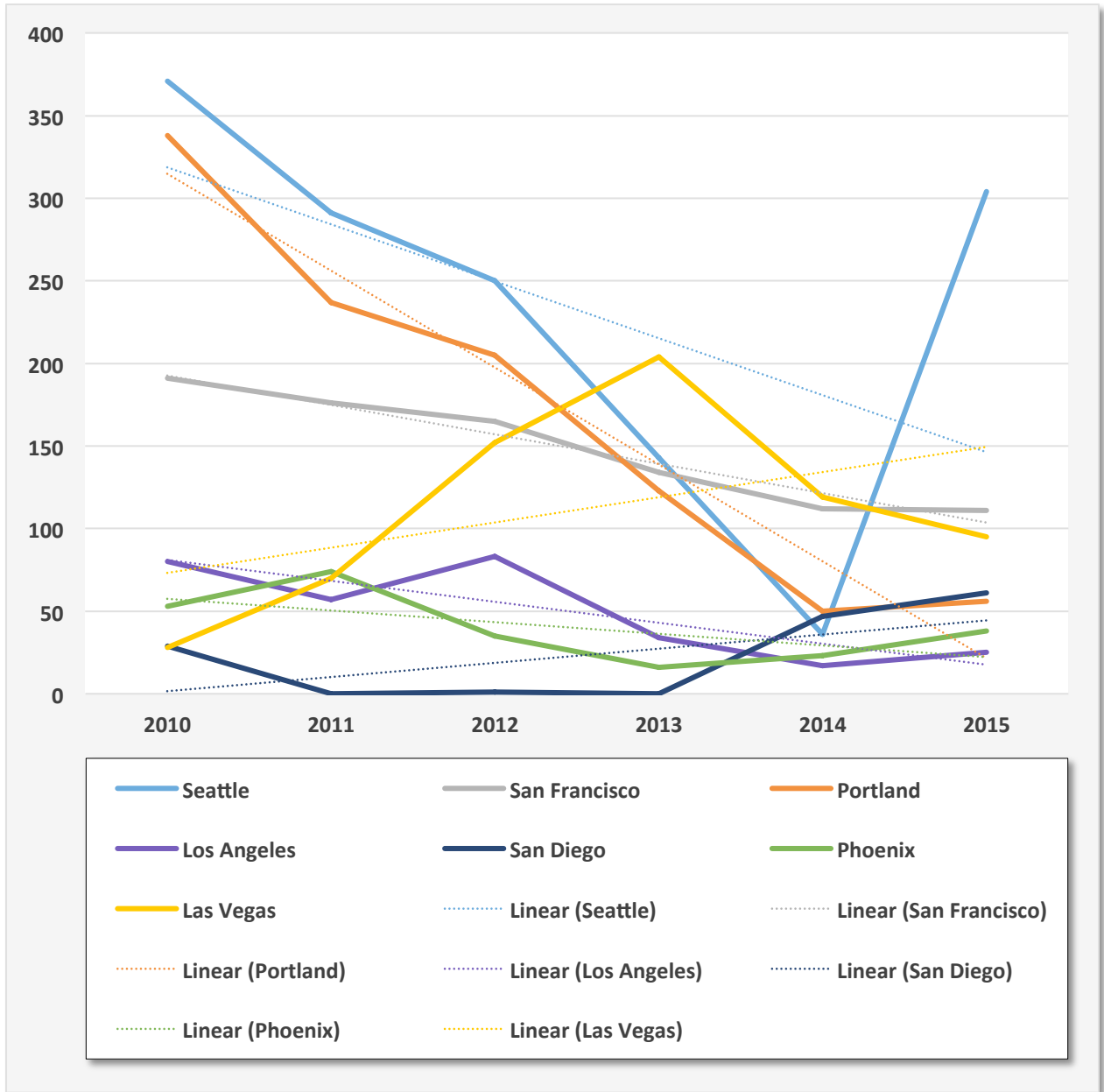


Fig. 11: New condominium sales by city, 2010-2015, with linear trend lines.

### III. ANALYSIS

The data indicates that while Seattle is producing a steady stream of new condominiums, the new deliveries are not affordable to the middle market, and overall supply is not meeting demand. As detailed above, the middle market is not growing as fast as the higher end of the income spectrum. People in the middle of the income spectrum are also more likely to face challenges in being approved for mortgages. In addition to these factors, the market currently incentivizes the construction of high-end product to deliver more revenue to cover the risk of building.

There are some additional factors in play that make building condominiums, especially affordable condominiums, more difficult. These include insurance considerations, capital market dynamics, the high bar to entry in the development field, and, finally, legal considerations.

#### **Insurance Considerations**

Developers building condominiums currently take an owner-controlled insurance policy – also known as an “OCIP” or “wrap” policy – to cover any potential liability from construction defects. An OCIP policy for condominium construction can cost about 2% of the project’s hard costs, and in the Seattle-area market, there may be between two and four carriers that issue such policies.<sup>22</sup>

This is different from other building types, where contractors and subcontractors can take their own insurance policies and build it into their pricing. When contractors include the cost of their policies in their bids, it may add 1%-1.5% to the cost of the job.<sup>23</sup>

In this way, developers are required not only to take the extra step of taking their own insurance policy, but they also are paying a higher premium on the policy – 0.5% to 1% of construction costs – to build condominiums. On a \$100 million-dollar project, for example, this would amount to between \$500,000 and \$1,000,000. The policy would cover costs in the event of litigation, although even with better actuarial experience – i.e., less litigation costs, it is likely that carriers would improve the terms of the policies rather than reduce the costs.<sup>24</sup>

Ultimately, the requirement for developers to take out their own policy is an added step and an added cost. The added cost would seem to move developers toward building higher-priced, higher-volume, lower risk product. However, insurance cost alone is not likely to be the only factor that may limit condominium development.

#### ***British Columbia Warranty Insurance Program***

The Mayor’s HALA committee report suggested that revisions to the current insurance regime may remove barriers to developing affordable condominiums, citing the British Columbia warranty insurance program.<sup>25</sup> The British Columbia Homeowner Protection Act makes third-party home warranty insurance mandatory on new home construction throughout the province.<sup>26</sup> The warranty insurance program is administered by the Homeowner Protection Office, a branch of B.C. Housing. Revenue collected from residential builder license fees provides the funding for the Homeowner Protection Office’s programs, including a compliance program.

As of 1999, all residential builders in British Columbia are required to be licensed by the Homeowner Protection Office and arrange for third party home warranty insurance on proposed new homes prior to obtaining a building permit. Home warranty insurance can only be provided by insurance companies that are approved by the provincial Financial Institutions Commission. Minimum coverage and allowable exclusions for third-party home

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<sup>22</sup> Interview with Guy Armfield, Brian Hearst & James Waskom, Parker Smith & Feek (May 23, 2016).

<sup>23</sup> Id.

<sup>24</sup> Id.

<sup>25</sup> Seattle Housing Affordability and Livability Agenda, Final Advisory Committee Recommendations to Mayor Edward B. Murray and the Seattle City Council (July 13, 2015), p. 35, recommendation H.3.

<sup>26</sup> SBC 1998, Chapter 31, available at [http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_98031\\_01#section22](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_98031_01#section22).

warranty insurance are set by legislation.<sup>27</sup> The program applies to all single-family homes, as well as to the Canadian equivalent of condominiums, or “strata” buildings.

At a minimum, home warranty insurance in British Columbia includes a two-year warranty on labor and materials, a five-year warranty on the building envelope and a 10-year warranty on the structure of the home. Repairs and replacements to the building also carry a warranty that extends until the later of one year from their completion or the end of the original warranty period. Repairs to the building envelope on multi-unit buildings built before 1999 are covered by the two-year warranty for materials and labor, and the five-year warranty for the building envelope.

The two-year warranty on materials and labor covers any defect in labor, materials, or violations of the building code for 12 months for all new homes and 15 months for the common property of strata buildings. It also covers defects in materials and labor for the electrical, plumbing, heating, ventilation and air conditioning systems, as well as the exterior cladding, and caulking around windows and doors, for 24 months, including for the common property of strata buildings. Violations of the building code (i.e., “defects”) must constitute an unreasonable health or safety risk, or cause (or be likely to cause) material damage to the new home.

The five-year building envelope warranty covers defects in the exterior walls, foundation, roof, windows and doors, that cause or are likely to cause material damage to the home. The 10-year warranty covers the load-bearing parts of the home, and any defects that cause structural damage that materially and adversely affects the use of the new home for residential occupancy. In general, defects are defined as damages resulting from the design, materials and labor that are contrary to the building code, if the non-compliance with the building code constitutes an unreasonable health or safety risk, or if it has resulted in, or is likely to result in, material damage to the home. Defects are also defined to include damages that require repair or replacement due to the negligence of the builder or a person or company working for the builder.

Under the warranty program, the cost of coverage is included in the purchase price of the home. A homeowner has a duty to maintain their home in a reasonable manner and consistent with any guidance a builder provides. In fact, the builder provides a maintenance manual, and the warranty insurance coverage is contingent on the homeowner maintaining the home consistent with the manual.

When a homeowner finds a defect, they have the responsibility to mitigate the damage, and report it to their insurance carrier, as well as the builder. The carrier will then inspect and either repair the defect or explain in writing why it will not repair the alleged defect. The carrier can contract with the original builder for this repair work. The amount of warranty coverage is capped; for strata units, the cap is the lesser of the first owner’s purchase price or \$100,000. In addition, a separate warranty applies to common property in strata buildings, with a coverage cap of the lesser \$100,000 times the number of dwelling units in the building or \$2.5 million per building.

If a dispute should arise over a potential defect, any party in a residential construction dispute can compel the other parties to participate in a structured mediated session. All participants pay for mediation costs equally, unless all parties agree to other arrangements. If mediation does not result in a settlement, the dispute can proceed to other alternative dispute resolution, including arbitration, or go to litigation.

The production of new units in strata buildings in British Columbia has been above 10,000 per year every year since 2010, which exceeds the numbers of single-family homes built in those years in B.C., and which far exceeds the combined production of several hundred condominium units per year in the U.S. cities we have studied. In fact, the production in British Columbia in an average month over the last five years exceeds the combined average annual production in all the U.S. cities studied. See figure 12. Although the numbers reported by B.C. Housing are for the entire province, with a population of 4.6 million, when combined, the population of the U.S. cities noted above exceeds the population of British Columbia.

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<sup>27</sup> <https://hpo.bc.ca/homeowners>.

REGISTERED NEW HOMES, 2002 TO 2016 YEAR-TO-DATE				
Calendar Year	Registered New Single Detached Homes		Registered New Homes in Multi-unit Buildings	Rentals Exempted
	Single Detached Homes Enrolled with Home Warranty Insurance	Owner Builder Authorizations		
2002	9,179	3,268	12,075	2,178
2003	11,498	3,508	16,338	2,539
2004	11,747	3,666	19,732	2,654
2005	11,619	3,854	23,211	1,945
2006	10,838	4,124	23,263	1,484
2007	9,993	3,959	25,334	1,688
2008	7,856	3,373	15,017	799
2009	7,167	2,749	6,827	1,783
2010	8,439	3,199	13,980	1,679
2011	7,417	2,596	14,512	1,371
2012	6,926	2,446	16,293	1,948
2013	6,552	2,067	16,431	2,951
2014	8,989	2,335	16,013	2,921
2015	9,155	2,549	18,497	4,319
2015 Jan – May	3,442	1,116	7,889	1,911
2016 Jan – May	4,627	985	7,977	1,826

REGISTERED NEW HOMES, 2015 TO 2016 YEAR-TO-DATE AND 5-YEAR AVERAGE, MONTHLY						
Month	Registered New Single Detached Homes			Registered New Homes in Multi-unit Buildings		
	2016	2015	5-year Average	2016	2015	5-year Average
Jan	888	676	655	1,789	1,239	1,197
Feb	1,022	841	709	957	1,538	1,301
Mar	1,280	1,024	897	1,702	2,548	1,718
Apr	1,159	1,025	916	2,279	1,004	1,476
May	1,263	992	1,027	1,250	1,570	1,139
Jun		1,199	969		2,023	1,254
Jul		1,089	988		915	1,253
Aug		995	908		2,306	1,579
Sep		1,110	855		2,384	1,682
Oct		913	823		1,217	1,619
Nov		999	751		712	1,192
Dec		841	709		1,041	939

Fig. 12: British Columbia's new home registrations for single-family and multi-family homes, 2002-2016. Source: <https://hpo.bc.ca/statistics>.

The higher production of strata units in British Columbia may have many reasons, including cultural, financial, and legal differences. There is an argument, however, that the predictability provided by the warranty insurance program allows builders to produce strata buildings without the risk presented by a less regulated insurance market, as in the U.S.

In addition, the B.C. warranty insurance program's dispute resolution provisions provide for not only predictability, but also for a weeding-out of non-meritorious claims outside of court. See figure 13. For example, in 2015, of the 3,920 claims received, 3,044 were resolved by the builder, and only 27 legal actions were filed. In other words, less than 1% of claims turned into law suits.

WARRANTY INSURANCE CLAIMS 2011-2015					
Type of Claim	2011	2012	2013	2014	2015
Claims Received	3,298	3,640	3,408	3,638	3,920
Claims Covered	1,132	1,893	1,472	1,496	1,984
Claims Not Covered	809	1,209	1,109	1,011	1,167
Claims Resolved by Builder	1,385	1,322	1,099	1,871	3,044
Claims Paid	272	363	442	296	527
Mediations Initiated by Owners	58	27	35	29	51
Legal Actions Commenced by Owners	6	21	9	20	27
Legal Actions Concluded	17	8	68	39	11

Figure 13: B.C. Warranty insurance claims, 2011-2015. Source: <https://hpo.bc.ca/statistics> [footnotes omitted].

The Washington Condominium Act, discussed in more detail below, does provide for a warranty insurance program, patterned on the legislation adopted in British Columbia. This program is designed to free developers from the warranty provisions of the Act if they provide warranty insurance policies to condominium purchasers that include legislatively prescribed coverage.<sup>28</sup> It is currently unclear why the Washington market has not adopted this option.

### Developers' Capabilities

Developers that are currently building condominiums in Seattle's downtown core are building for the higher-end market, with pricing around \$800+ per square foot.<sup>29</sup> Two of the developers currently building condominiums – Daniels Real Estate and Bosa Development – manage construction internally, to keep better track of quality, and have self-financed a significant portion of their construction costs.<sup>30</sup> This approach manages the risk of defects for a lender and improves the availability of financing and insuring new condominium construction. However, these ways of managing the risk of building condominiums in the current market are not feasible for all developers.

### Capital Markets

Another critical factor is that the capital markets in Seattle currently favor construction of for-rent apartment buildings. Seattle real estate has attracted large amounts of institutional and international capital seeking stable returns, driving cap rates to low levels, which in turn, increases the price for income-producing properties. Apartments, as opposed to condominiums, present lower construction costs, lower legal risks, and lower marketing expense for developers, and a steady income stream for an investor.

A condominium requires multiple sales over time, with attendant marketing costs, and risk from changes in the housing market, like falling prices or increasing interest rates. The condo developer's profit may only come with the last 5%-10% or so of units sold, requiring a greater up-front capital outlay and later returns.

By contrast, a developer who builds a for-rent apartment building can make one sale of the entire building after – or even sometimes before – full lease up occurs. While there is risk in a lease up it is more manageable and over a shorter period; a moderately sized building might expect to lease at 20 units per month. Thus, market incentives for lenders and developers are tilted toward building apartments, not condominiums.<sup>31</sup>

<sup>28</sup> Mark O'Donnell & David Chawes, *Improving the Construction and Litigation Resolution Process: the 2005 Amendments to the Washington Condominium Act are a Win-Win for Homeowners and Developers*, 29 Seattle U. L. Rev. 515 (Spring 2006); RCW 64.35.

<sup>29</sup> The Mark Company Trend Sheet, Downtown Seattle (April 2016), available at <http://www.themarkcompany.com/blog/the-mark-company-trend-sheets-april-2016/>, last visited May 13, 2016.

<sup>30</sup> Interview with Weitao Zheng & Allan Cornell, Daniels Real Estate (March 16, 2016).

<sup>31</sup> Interviews with Neil Maris & Roger Long, Wells Fargo (Jan. 11, 2016); Matthew Gardner, Windermere (Jan. 7, 2016).

## Legal Considerations

In addition to the above considerations, the development of new condominiums is influenced by legal considerations. This section will review Washington's law to see what provisions might influence the under-development of condominiums, especially affordable condominiums.

### ***Growth Management Act***

Washington State's Growth Management Act ("GMA") requires local jurisdictions to designate urban growth areas and prepare comprehensive plans to limit growth to within an urban boundary,<sup>32</sup> in order to conserve open space, and protect "the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by the residents of this state."<sup>33</sup> The GMA's stated goals include, among other items, encouraging development in urban areas, reducing sprawl, and encouraging efficient multi-modal transportation.<sup>34</sup>

The City of Seattle, as Washington's most populous and dense urban area, presents the best opportunity for meeting the goals of the GMA. With a concentration of large employers located in an expanding central business district, and a large inventory of aging in-city and suburban single-family housing, there is an opportunity for building in-city multi-family development, many of which could be condominiums.

However, restricting growth to specific zones has the effect of constraining supply and increasing price. There is a policy balance to strike between constraining growth and ensuring affordability. Seattle is located on two narrow peninsulas, with water and mountains on the east and west. This creates a natural geographical constraint that limits housing to a north-south strip of urban density along the Puget Sound. In addition, Seattle's local land use restrictions and building code requirements add cost which in turn leads to increased prices.<sup>35</sup>

### ***Condominium Act and Revisions***

Washington State initially passed a statute to govern condominiums called the Horizontal Property Regimes Act, which still applies to condominiums built prior to 1990.<sup>36</sup> The current Washington Condominium Act ("WCA") was passed in 1989, and is based on the Uniform Condominium Act ("UCA"),<sup>37</sup> which was issued in 1980 and was designed to standardize condominium construction and governance standards across the states.<sup>38</sup> The WCA adopted most of the provisions in the UCA, and applies to the financing, construction, sale, and management of all condominiums built after July 1, 1990.<sup>39</sup>

According to the Washington State Supreme Court, "[a] principal purpose of the WCA was to provide protection to condominium purchasers, in part through creation of implied warranties of quality construction."<sup>40</sup> The warranties imposed by the WCA are as follows:

- (1) ... a unit will be in at least as good condition at the earlier of the time of the conveyance or delivery of possession as it was at the time of contracting, reasonable wear and tear and damage by casualty or condemnation excepted.

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<sup>32</sup> RCW 36.70A et seq.

<sup>33</sup> RCW 36.70A.010.

<sup>34</sup> RCW 36.70A.020.

<sup>35</sup> Seattle places high on the Wharton Land Use Regulatory Index. See <http://www.zillow.com/research/land-use-regulation-12159/>.

<sup>36</sup> RCW 64.32.

<sup>37</sup> National Conference of Commissioners on Uniform State Laws, Uniform Condominium Act (1980), <http://www.uniformlaws.org/Act.aspx?title=Condominium%20Act>, visited April 6, 2016.

<sup>38</sup> O'Donnell & Chawes, *Improving the Construction and Litigation Resolution Process*.

<sup>39</sup> RCW 64.34 et. seq.

<sup>40</sup> *Park Avenue Condominium. Owners Ass'n v. Buchan Devs., L.L.C.*, 117 Wash. App. 369, 374, 71 P.3d 692, 693-94 (2003).



(2) ... a unit and the common elements in the condominium are suitable for the ordinary uses of real estate of its type and ... will be:

- (a) Free from defective materials;
- (b) Constructed in accordance with sound engineering and construction standards;
- (c) Constructed in a workmanlike manner; and
- (d) Constructed in compliance with all laws then applicable to such improvements.

(3) ... an existing use ... does not violate applicable law....<sup>41</sup>

This warranty has been held to require compliance with building code standards, and does not require defects to render a unit uninhabitable. The warranty extends to subcontractors of the builder, and extends to re-conveyances during the statutory warranty period.<sup>42</sup> The WCA also allows for monetary damages and attorney fees for the prevailing party.<sup>43</sup>

The statutory warranty provisions, however, along with the provision of attorneys' fees in the WCA, gave rise to what has been described as a "groundswell of litigation."<sup>44</sup> According to one observer:

By the late 1990s, Washington's condominium industry had run into serious problems, with condominium owners alleging loss of value and damage from water penetration. Resulting litigation led to damage awards or settlements that exceeded the insurers' anticipated exposures. In response, insurers narrowed coverage, substantially increased premiums, or simply fled Washington's condominium market. The resulting inability to obtain insurance threatened the legislature's express desire to expand home ownership opportunities for low-income families and to meet the goals of growth management.<sup>45</sup>

In response, the Washington state legislature created legislation that provided some protection for builders. In 2002, the legislature passed laws requiring residential homeowners to give developers notice of and an opportunity to cure construction defects before the homeowner could file a lawsuit.<sup>46</sup> In 2003, the legislature created affirmative defenses that developers could argue to mitigate or avoid liability.<sup>47</sup>

In 2004, the legislature amended the WCA to add a heightened standard of proof for defect claims, as well as the statutory insurance program patterned on the program adopted in British Columbia discussed in the prior section of this paper.<sup>48</sup> Finally, in 2005, the legislature approved a number of additional revisions including requirements for inspection of building enclosures, filing of design documents with local building departments, an alternative dispute resolution ("ADR") procedure including mediation and arbitration, and a further refinement of fee shifting provisions.<sup>49</sup>

Thus, the Washington Condominium Act has provided a statutory remedy and a legal process for resolving construction defect claims by homeowners associations against builders. According to one construction defect attorney, the WCA led to improvements in the quality of construction, especially with regard to building

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<sup>41</sup> RCW 64.34.445.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> O'Donnell & Chawes, *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> RCW 64.50

<sup>47</sup> RCW 4.16.326

<sup>48</sup> *Id.*; O'Donnell & Chawes.

<sup>49</sup> O'Donnell & Chawes, *Id.*, RCW 64.55 et. seq. Additional revisions to the WCA have been proposed, including Senate Bill 5961 (2015)(regarding notices and inspections), and two bills regarding reserve studies: House Bill 2240 (2013) and Senate Bill 6616 (2016).

envelopes.<sup>50</sup> The WCA, however, continues to cast a shadow over condominium development, at least in the minds of the builder community. There are several provisions in the WCA that may be revised to create more certainty for developers and insurers.

For example, with regard to the ADR provisions, parties are permitted a right of appeal *de novo* to a trial court after an arbitration award.<sup>51</sup> The *de novo* standard allows complete reconsideration of the arbitrator's award and arguably makes arbitration less reliable as a means of reducing the cost and risk of litigation.<sup>52</sup> If the Washington State legislature were to consider revisions to the condominium law to facilitate development of more affordable units, it may wish to address the appeal standard for review of arbitration decisions and revise the standard to be more narrow, such as, for example, the abuse of discretion standard.<sup>53</sup> In addition, the arbitration provisions in the WCA are optional for parties, which diminishes their usefulness. Mandatory, binding arbitration would allow a better chance for parties to resolve disputes prior to litigation.

With regard to attorneys' fees, there continues to be no cap on the amount a developer may have to pay in attorneys' fees for plaintiffs' counsel, although fees are decided by judges within parameters that are well established, although ultimately not very predictable to a builder or insurer in advance of litigation.<sup>54</sup> The WCA, does impose a cap on any fees a homeowners' association may have to pay in an offer of settlement, in the amount of 5% of the assessed value of the building.<sup>55</sup>

Other states are considering or have recently removed the award of attorneys' fees in construction defect claims, in an attempt to avoid litigation and stimulate the building of more condominiums.<sup>56</sup> Nevada's legislation repealing attorneys' fees was passed in 2015, so there has not been much time to see whether the new legislation has had an effect on condominium construction defect lawsuits. Completely eliminating attorneys' fees is an extreme measure, and would likely result in legitimate defect claims not being filed, but it may be worthwhile to discuss capping fees for both parties at, e.g., 5% of the subject property's cost, or alternatively, setting a knowable fee schedule so that developers and their insurers can have more certainty given the potential for defect litigation.

Regarding remedies for defects, it seems there is a strong incentive for homeowners' associations to seek monetary damages rather than specific performance of repairs. There may be, however, an opportunity for homeowners' associations to put any monetary judgments to other uses and not to actually repair the alleged defects. The legislature may wish to consider revising the remedies available under the WCA to be limited to specific performance of repairs. This kind of revision would limit the volume of defect litigation to those parties that are seeking repairs for actual defects, rather than simply money that can be applied to other uses. However, those builders that are required to do such repairs may not be the best qualified to perform the repairs.

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<sup>50</sup> Interview with Jo Flannery, Ryan, Swanson & Cleveland, July 5, 2016.

<sup>51</sup> RCW 64.55.100(4).

<sup>52</sup> The *De Novo* standard allows the court to review all evidence the arbitrator considered and come to different conclusions.

<sup>53</sup> The Washington State Supreme Court has held, "Courts will only review an arbitration decision in certain limited circumstances, such as when an arbitrator has exceeded his or her legal authority. To do otherwise would call into question the finality of arbitration decisions and undermine alternative dispute resolution." *Int'l Union of Operating Engineers Local 286 v. Port of Seattle, Wa. Sup. Ct. No. 86739-9* (2013), citation omitted, citing *Clark County Pub. Util. Dist. No. 1 v. Int'l Bhd. of Elec. Workers, Local 125*, 150 Wn. 2d 237, 245, 76 P.3d 248 (2003). Arbitration is currently used only rarely, as it duplicates or exceeds the cost of litigation, and provides little certainty with regard to rules. Interview with Jo Flannery, *id.*

<sup>54</sup> "Awards of attorneys' fees are generally calculated using the 'lodestar' method. Under the lodestar approach, a court first determines that counsel expended a reasonable number of hours obtaining the successful result. This involves excluding wasteful or duplicative hours, and time spent on unsuccessful theories or claims. The court then determines the reasonableness of counsel's hourly rate. The billed rate or fee usually charged by the attorney is not necessarily 'reasonable.' The actual hourly rate may be adjusted based on the level of skill required by the litigation, time limitations imposed on the litigation, the amount of the potential recovery, the attorney's reputation, and the undesirability of the case. The 'lodestar award' results from multiplying the reasonable hourly rate by the number of hours reasonably expended. After the lodestar has been calculated, the court may adjust it based on the 'contingent nature of success and the quality of the work performed.'" Allison Peryea, "The Right to Attorneys' Fees: A Lawyer's Best Frenemy?", 25 *Litigation News* 2 (Spring 2013), citations omitted.

<sup>55</sup> RCW 64.55.160.

<sup>56</sup> Kris Hudson, *Nevada, Other States target Construction Defect Lawsuits*, Wall Street Journal (Feb. 25, 2015), available at:

<http://www.wsj.com/articles/nevada-other-states-target-construction-defect-lawsuits-1424912880>, visited July 11, 2016; Nev. Rev. Stat.

40.600. Condominium construction defect cases were so prevalent in Nevada that three judges were appointed in 2006 to hear nothing but these type of cases. In the ensuing nine years, over 828 cases were handled by these judges.

There may also be a need for more clear standards regarding what constitutes a construction defect. The WCA imposes a duty for builders to comply with all provisions of applicable building codes, including defects that “may not be so serious as to render the condominium unsuitable for ordinary purposes.”<sup>57</sup> This is a very strict standard, and it requires builders to apply different construction practices in different jurisdictions. The legislature may wish to revise this standard to either reflect definitions of specific kinds of defects, as in California, or narrowing the definition of a defect to be one that causes or is likely to cause actual damage, as in Nevada.

One final option to improve the attractiveness of condominiums as a development choice may be in the way condominium associations are governed. Currently, the homeowners’ association board members are delegated the responsibility to make decisions on behalf of the members. They owe a duty of care to the members to manage the building in a responsible way.<sup>58</sup> This may create an incentive to litigate minor defect cases rather than settle on an agreement to repair.

If a board member declines to pursue litigation of construction defects, however minor, he may open himself up to claims of liability because he did not discharge his duty and was not as careful or responsible as he should have been. The solution to this problem may be to allow for a vote of the entire association on major decisions, like whether to initiate litigation. This solution, however, assumes the members, as lay persons, are capable of analyzing complicated construction and financial choices, and would be counter to the basic structure of delegated decision-making responsibility in a homeowners association.

### Comparison to Other States

A review of the state condominium laws from the five states in which the cities in Section II are drawn indicates a wide range of approaches to regulating condominium construction defect cases. See figure 14.

California’s “Right to Repair” Act, for example, is similar in some ways to the WCA, and was also passed in response to a wave of construction defect litigation in the late 1990’s.<sup>59</sup> “At the time, many observers believed the mounting volume and intensity of such litigation caused rampant increases in insurance premiums for contractors and builders, was a deterrent to new home construction, and generally served as a drag on the California economy.”<sup>60</sup>

The California law, much like the WCA, addressed many of the concerns among builders, developers, and homeowners – including a process for mandatory ADR, definitions of building defects, and the right to repair, but even with these measures, there has still been a large volume of construction defect litigation, and the California law arguably imposed more expensive and time-consuming processes on parties to construction defect disputes.<sup>61</sup> According to one set of authors,

[T]hose truly interested in maintaining their homes and correcting legitimate construction deficiencies have the chance to do so without incurring the expense of litigation....

In the end, it does not appear that resolving truly contentious disputes between homeowners and homebuilders has become simpler or faster, but the Act presents an easier alternative for homeowners with legitimate grievances to achieve a resolution from those homebuilders who are genuinely motivated to settle claims.<sup>62</sup>

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<sup>57</sup> O’Donnell & Chawes, *Id.*, quoting *Park Ave. HOA v. Buchan*.

<sup>58</sup> RCW 64.34.308(1)

<sup>59</sup> Cal. Civ. Code, Title 7, Part 2, Div. 2., Miller, Gruen, Smith, Meyers & Schoech, “*The Ten Year Anniversary of SB 800: ‘Mission Accomplished or Missed Opportunity,’*” 30 Cal. Real Prop. J. 4 (2012); *Pinnacle Museum Tower Ass’n. v. Pinnacle Market Development*, 55 Cal.4th 223, 282 P.3d 1217 (2012), (holding mandatory arbitration provisions enforceable).

<sup>60</sup> *Id.*, Miller, et. al., “*The Ten Year Anniversary of SB 800*”.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

State / Law	Right to Repair prior to litigation	Statute of Repose	Attorney's Fees	ADR	Definition of Defect
Washington, RCW 64.34, RCW 64.55	Yes	4 Years	Yes	Optional, appealable arbitration, mandatory mediation	More than technical, significant to a reasonable person <sup>63</sup>
California, SB 800	Yes	Different for different building elements; up to 10 years	Yes	Yes, and allows declarants to use own process	46 classes of specific defect definitions
Nevada, AB 125, NRC 40.600	Yes	6 years	No	No	Unreasonable risk of damage to person or property, or not completed in workmanlike manner and causes damage to property
Oregon, Or. Rev. Stat. 100	No	2 years	No	No	N/A
Arizona, Az. Rev. Stat. 12-1361 et seq.	Yes	8 years	No	No	Material deficiency caused by code violation, defective materials, or failure to adhere to workmanlike standards

Fig. 14: Comparison of state laws regulating condominium construction defects.

<sup>63</sup> RCW 64.34.445(7) provides: "In a judicial proceeding for breach of any of the obligations arising under this section, the plaintiff must show that the alleged breach has adversely affected or will adversely affect the performance of that portion of the unit or common elements alleged to be in breach. As used in this subsection, an "adverse effect" must be more than technical and must be significant to a reasonable person. To establish an adverse effect, the person alleging the breach is not required to prove that the breach renders the unit or common element uninhabitable or unfit for its intended purpose."

#### IV. CONCLUSION

Condominium development can provide an affordable in-city option for new housing in Seattle. First time buyers, middle-income buyers, and families benefit. If built in sufficient numbers and at an affordable price, condominiums provide opportunities for many types of buyers and could help to address some of Seattle's problems around affordability, as well as transit and urban density.

Condominium production in Seattle is among the highest in major West Coast cities, although the current price of the condominiums being produced in Seattle makes them unaffordable to most households, and supply does not appear to be meeting demand. Seattle is a city experiencing a tremendous amount of population growth and an increase in wealth. However, the increase in wealth is concentrated at the top of the income spectrum, and the cost of a condominium has far outpaced the increase in household income.

The lack of affordability of condominiums in Seattle is likely due to a combination of real estate and insurance market forces, as well as geography, local land use regulation, and state legislation. It is not possible to say that any one of these factors, taken in isolation, has directly caused the sharp increase in price. The Washington Condominium Act likely has some effect on the high price of condominiums, because it represents potential risk and liability. Comparison to other state laws indicates that although different state laws contain different provisions governing condominium construction defects, there is not a direct correlation of specific types of legal provisions to condominium supply or affordability.

The WCA contains a number of provisions that are intended to protect homebuyers, improve the quality of construction, and reduce the cost of resolving disputes over construction defects. To respond to the growing concerns over housing affordability, it may make sense to remove some of the perception of risk and uncertainty imposed by the WCA by, for example, clarifying the nature of a construction defect, incentivizing repairs rather than money damages as a remedy; making arbitration mandatory and binding; narrowing the standard of appeal from arbitration decisions; and limiting attorneys' fees or adjusting attorneys' fees to a knowable schedule. This would reduce the legal risk, or at least the perception of the legal risk in building condominiums. It might also make sense to revisit the warranty provisions in the WCA and develop an insurance program similar to British Columbia's, through state action, rather than the private market.

Ultimately, the WCA is only one factor influencing the development of condominiums in Washington State. It may be that the WCA – like California's Right to Repair Act – can reduce developers' and insurers' risk only in situations where parties are motivated to resolve disputes through ADR, with the goal of doing repairs, rather than to litigate. Any revisions to the Washington Condominium Act would likely be a necessary, but perhaps not sufficient condition required to improve condominium supply and affordability. It may be that government financial intervention is necessary to meaningfully incentivize the construction of more condominiums in Washington State.

It is clear that there is sufficient economic incentive for developers to build condominiums in Seattle's downtown core. The central location allows larger scale buildings and there is significant demand for the higher price points. Because the potential economic returns of this type of large-scale development offsets the higher costs and any actual or perceived risks, the market has seen a preponderance of this higher end product.

For the market to be equally incentivized to build smaller scale and more affordable condominiums without public subsidy, the opportunity must offset the greater perceived risks and inefficiencies of smaller scale building through lower costs. Lowering the regulatory costs and construction costs are subjects for another study. However, it is clear that insurance costs and the risk of litigation are factors that, if mitigated, can contribute to tipping the scale toward the delivery of more affordable for-sale condominium product, as there is clearly a very strong demand.

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