

# TEXAS SITE CONDOMINIUMS

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**CHAPTER \_\_\_\_**

## TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION .....</b>	<b>2</b>
<b>II.</b>	<b>WHAT, EXACTLY, IS A SITE CONDOMINIUM? .....</b>	<b>3</b>
A.	Description of Units Generally: The Statutory Framework .....	3
B.	Horizontal (Upper and Lower) Boundaries .....	4
C.	Topology with Structural Observations.....	9
1.	Simple Site Segregation. ....	10
2.	Residential and Commercial Detached Units. ....	11
3.	Attached Site Condominium Units.....	12
D.	Allocations.....	16
<b>III.</b>	<b>SITE CONDOMINIUMS AND THE SUBDIVISION ISSUE .....</b>	<b>18</b>
<b>IV.</b>	<b>CONCLUSION .....</b>	<b>20</b>

# TEXAS SITE CONDOMINIUMS

## I. INTRODUCTION

This article is about a specific type of condominium, referred to as a “site” condominium or sometimes a “horizontal” condominium. The term “site” is preferable to horizontal, since in the taxonomy of condominium unit boundaries, horizontal means the upper and lower boundary separating one unit from another.<sup>1</sup> A site condominium is a unit which comprises an area of land, i.e., a “site”, or the land and improvements located thereon. Site condominiums are also commonly referred to as “detached” condominiums in that there are no constructed improvements shared by adjacent condominium units, i.e., the improvements within the condominium unit, or that constitute all or a part of the condominium unit, are separate and not connected or shared with another unit. A site condominium does not include an upper and lower boundary separating one unit from another. In effect, a site condominium acts and operates in almost all respects as land subdivided through the traditional subdivision platting process, though the condominium declaration and the plat and plans required by Section 82.059 of the Texas Property Code are used to legally separate the land into condominium units as opposed (or in addition<sup>2</sup>) to the subdivision plat regulatory process. Site condominiums can be residential, commercial, or a mix of both uses.

Site condominiums are legally possible as a result of the flexibility allowed by Chapter 82 of the Texas Property Code, i.e., the Texas Uniform Condominium Act (“TUCA”), when defining condominium unit boundaries.<sup>3</sup> Prior to January 1, 1994, the effective date of TUCA, the creation of condominiums and condominium units were governed by Chapter 81 of the Texas Property Code. Chapter 81 defined a condominium unit (“apartment” is the term used by Chapter 81) with reference to the “interior surfaces of walls, floors, and ceilings.” Though legally possible on and after January 1, 1994, site condominiums as a residential and commercial development alternative, did not gain general acceptance until the early 2000’s, with the greatest concentration in Central Texas, and in particular Austin, Texas, as a result of local regulatory difficulties and delays associated with subdivision platting.<sup>4</sup> As with any “new” development style, especially one where a private owner creates conveyable property (the owner records a condominium declaration and the declaration creates separate conveyable property) and where the privately

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<sup>1</sup> See Uniform Condominium Act, Section 2-109 (Plats and Plans), Comment 7 (1980).

<sup>2</sup> There is often confusion related to whether Chapter 82 the Texas Property Code, specifically Section 82.051(d) overrides local subdivision ordinances. The confusion partly is attributable to Section 82.051(d), but also the comprehensive mapping process, referred to as plat and plans, required by Section 82.059, which must accompany each recorded condominium declaration. The interrelation of Chapter 82 and local subdivision ordinances is discussed in Section III of this article. As discussed further in Section III, the author believes that even though local subdivision regulations may apply to site condominiums, local regulatory authorities that insist on applying their subdivision regulations, in toto, to site condominiums should reconsider their approach.

<sup>3</sup> See Section II.A of this article for a discussion of the statutory basis for the creation of site condominiums.

<sup>4</sup> The author prepared his first site condominium documents in 1999 for a residential project located in Austin, Texas. The project was structured as a condominium due to a preexisting development agreement with the local regulatory authority that limited the number of platted lots but did not limit the number of condominium units.

created components are then used as loan collateral, there was a learning curve for consumers, lenders, local authorities and title companies. However, with time and the successful development, sale, and financing of these early projects, additional developers and builders began exploring site condominiums and practitioners and developers came to realize additional benefits. Some of those benefits included increasing density by allowing the developer to set the site condominium land area<sup>5</sup>, freeing the project from rectilinear lot lines<sup>6</sup>, greater flexibility to assign impervious cover to meet the market for building improvements (where impervious cover would otherwise be equally apportioned among platted lots), and a more time and cost efficient local regulatory approval process.<sup>7</sup>

## II. WHAT, EXACTLY, IS A SITE CONDOMINIUM?

### A. Description of Units Generally: The Statutory Framework

Prior to January 1, 1994, condominiums were created pursuant to Chapter 81 of the Texas Property Code, known as the “Texas Condominium Act.” On and after January 1, 1994, Chapter 82 of the Texas Property Code replaced Chapter 81 and is the Texas enabling statute governing the creation and administration of condominiums.<sup>8</sup> Chapter 82 is based on the 1980 Model Uniform Condominium Act<sup>9</sup> adopted by the National Conference of Commissioners on Uniform State Laws and is referred to as the Texas Uniform Condominium Act. A condominium unit exists only by enabling statute and is an enclosed area of real property. Accordingly, both Chapter 81 and Chapter 82 include definitions of a condominium unit. The definition of a condominium unit under Chapter 81 presumes that the condominium unit will be defined with reference to constructed improvements. Chapter 81 uses the term “apartment” to generally describe the condominium unit and defines the unit as an “enclosed space [...] that consists of one or more rooms in a building that has a direct exit to a thoroughfare or to a common space that leads to a thoroughfare.”<sup>10</sup> As to the specific unit boundaries, Chapter 81 further defines the

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<sup>5</sup> The boundaries of each site condominium are established by the condominium plat and plans which are prepared as part of the condominium declaration. If the developer properly reserves certain development rights in the condominium declaration the developer can later modify the boundaries should the initial boundaries need to be changed to address market conditions or to adjust unit lines for constructed building improvements.

<sup>6</sup> The developer can set the site condominium unit lines which, for example, can be used to enhance marketability. In one case, the unit lines were established to preserve views from each residence and include certain trees within common areas, ensuring that those trees would be preserved and maintained by the condominium association.

<sup>7</sup> For example, some regulatory authorities provide that site condominiums be processed by approval of a site plan as opposed to a platting process. In certain circumstances, the site plan review and approval process is shorter than the subdivision platting process. Certain local regulatory authorities have also adopted form template development agreements which can take less time than platting or site plan approval.

<sup>8</sup> For a brief history of condominium enabling laws and the Texas enabling laws, see Robert D. Burton, *TUCA Turns 25: Condominium Drafting Tips*, 30<sup>th</sup> Annual Advanced Real Estate Drafting Course 2019 (March 2019).

<sup>9</sup> The 1980 Model Uniform Condominium Act is available at <https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=3304f481-3a47-4f52-9b05-73db978e33bc&tab=librarydocuments>.

<sup>10</sup> See Section 81.002(1) of the Texas Property Code.

“enclosed space” as “the interior surfaces of the apartment's perimeter walls, floors, and ceilings, and the exterior surfaces of the apartment's balconies and terraces.”<sup>11</sup> There is no convenient, or legal, means under Chapter 81 to create a site condominium which constitutes an unimproved land area or an area defined by the exterior boundaries of existing improvements.

Chapter 82 provides much greater flexibility to the owner or developer related to the configuration of a condominium unit. Under Chapter 82, the separately owned real property is defined as a “unit” and as the “physical portion of the condominium designated by separate ownership.”<sup>12</sup> Unit boundaries are defined as the “walls, floors, or ceilings”, but importantly, walls, floors or ceilings is the default definition and only applies if there is no other definition of the unit boundaries in the condominium declaration.<sup>13</sup> As a result, the developer and the developer’s counsel, can design and describe the boundaries of the condominium unit to align with the project and the real property intended to be conveyed to purchasers.

## **B. Horizontal (Upper and Lower) Boundaries**

Custom and practice is to describe a condominium unit in three dimensions consisting of an upper, lower and lateral boundaries connecting thereto. We are accustomed to lateral, or side to side, boundaries on land surveys, subdivision plats, and the depiction of leased premises. Lateral boundaries for site condominiums are usually the main and principal point for the description of a site condominium since most site condominiums are created to describe a land area. There are, however, exceptions where the site condominium is defined by constructed or to be constructed improvements (remember that our definition of a site condominium for the purpose of this article excludes any structure with units above or below one another). In such case, the lateral boundaries will conform to the boundaries of the improvements.

Horizontal boundaries seem to serve no meaningful purpose for a site condominium that is intended to describe a land area. If the object is to create a condominium unit that conforms to a land area it seems superficial to confine this separate land area within an upper or lower limit. A recent change to Chapter 82 has removed the requirement for an upper and lower boundary for a site condominium, but the genesis and effect of this change needs some exposition.

Since the effective date of Chapter 82, there have been no changes to the statute affecting the formation or creation of units<sup>14</sup>, but there has been one change affecting how units may be described (the “2019 Change”). The 2019 Change relates specifically to site condominiums. The

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<sup>11</sup> See Section 81.105(a) of the Texas Property Code.

<sup>12</sup> See Section 82.003(23) of the Texas Property Code.

<sup>13</sup> See Section 82.052 of the Texas Property Code. Section 82.052 provides that “[e]xcept as otherwise provided by the [condominium] declaration or plat”, the walls, floors, or ceilings form the boundaries of the condominium unit. This is one of the “5 keys” I have identified as core components of Chapter 82 and the flexibility afforded developers under the Act. The 5 keys are: 1) unit boundaries, 2) developer rights, 3) project phasing, 4) nesting of regimes, and 5) commercial carve-outs. See Robert D. Burton & Kristi E. Stotts, *Condominium Alternatives: Mixed and Non-Traditional Uses*, 7<sup>th</sup> Annual Advanced Real Estate Strategies Course (December 2013).

<sup>14</sup> For a list of changes to Chapter 82 of the Texas Property Code up and until the 86<sup>th</sup> Regular Session (2019), See Robert D. Burton, *TUCA Turns 25: Condominium Drafting Tips*, Exhibit D.

impetus for the 2019 Change was to allow site, or detached, residential condominiums to qualify for Federal Housing Administration (“FHA”) mortgage insurance.<sup>15</sup> As a precondition to issuing mortgage insurance, FHA requires that the condominium project be approved and otherwise comply with the FHA’s Condominium Project Approval and Processing Guide (the “Guide”)<sup>16</sup> unless the condominium project is a “site condominium”.<sup>17</sup> The site condominium exemption is particularly important to developers and builders since without the site condominium exemption, the project is required to meet certain unit presale requirements prior to issuance of FHA mortgage insurance on a specific unit. If the site condominium were not exempt, the developer or builder would likely be required to phase units in order to manage the presale requirement, would be required to submit the project for FHA approval initially and as each phase is added, and would also be required to meet certain requirements designed for attached product. Managing the presale requirement and obtaining FHA approval for the project initially, and then for each separate phase, increases the administrative and legal costs associated with the development. If the units qualify as site condominiums, there is no FHA approval required for the project and loan underwriting related to mortgage insurance is handled in the same manner as a non-condominium residence. The Guide includes a list of characteristics that a site condominium must include in order to be considered exempt from project approval. One of the characteristics is that the “condominium unit consists of the entire structure as well as the site and air space and are not considered to be common areas or limited common areas.”<sup>18</sup> On the face of it, this characteristic appears manageable with the presumption that the upper, lower and lateral boundaries used to describe a three-dimensional condominium unit do include “the entire structure as well as the site and air space” within the upper, lower and lateral boundaries of the condominium unit. However, FHA issued verbal guidance<sup>19</sup> that this characteristic requires that the condominium unit may not include an upper boundary.<sup>20</sup> Though there is no express requirement in Chapter 82 that a condominium unit include an upper or lower boundary, there has been general uncertainty in Texas as to whether a condominium unit can comply with the requirements of Chapter 82 if the condominium unit does not include an upper or lower boundary.<sup>21</sup> The uncertainty stems from Section 82.059 of Chapter 82 and the requirements

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<sup>15</sup> The FHA loan amount for the Austin-Round Rock-Georgetown MSA in 2020 (FHA will only insure a mortgage up to such amount) is \$404,800.00. Current FHA mortgage limits searchable by state and county can be found at <https://entp.hud.gov/idapp/html/hicostlook.cfm>.

<sup>16</sup> The Condominium Project Approval and Processing Guide can be found at <https://www.hud.gov/sites/documents/11-22MLGUIDE.PDF>. Note that FHA periodically issues updates to the project guide by separate rule which rules may not be included in the guide.

<sup>17</sup> Condominium Project Approval and Processing Guide, Section 1.8.1, page 19 (June 2011).

<sup>18</sup> Condominium Project Approval and Processing Guide, Section 1.8.1, Item 3, page 19 (June 2011).

<sup>19</sup> The verbal guidance was issued by FHA during a quarterly call with mortgage issuers. FHA took the position that no written guidance was necessary since the position was an FHA legal interpretation of an existing rule.

<sup>20</sup> FHA refers to a condominium unit with an upper boundary as a “cloud condominium” and a “cloud condominium” does not comply with the definition of a site condominium under the Guide.

<sup>21</sup> It is suggested, but by no means clear, under the comments to the 1980 Model Uniform Condominium Act that creation of a unit without an upper and lower boundary may be possible, but Texas did not adopt the comments to the 1980 Model Uniform Condominium Act. See 1980 Model Uniform Condominium Act, Section 2-101, Comment 11 and Section 2-109, Comment 3 (1980).

applicable to the preparation of plat and plans describing the regime and units. Specifically, Section 82.059(b)(6), prior to the 2019 Change, provided that each plat must show the location of “horizontal”, i.e., upper and lower, boundaries if those boundaries were not reflected on the condominium plans. Section 82.059(d), prior to the 2019 Change, provided that each plan must show the location of horizontal boundaries if those boundaries were not reflected on the condominium plats. If the plat and plans were required to (must) show horizontal boundaries, then how can a Texas condominium be described without upper and lower boundaries and still comply with Chapter 82?

House Bill 2569, passed by the 86th Regular Session and effective September 1, 2019, resolved the issue by making two minor changes to Sections 82.059(b) and (d) of Chapter 82.<sup>22</sup> Specifically, the changes to Sections 82.059(b) and (d) now require that horizontal boundaries only be shown on the plat and plans if those boundaries exist.<sup>23</sup> In addition, the practitioner may now describe upper and lower boundaries, if they exist, in the condominium declaration and these boundaries need not be shown on the plat and plans. Whether to describe upper and lower boundaries in a site condominium, either on the plat, plans, or in the condominium declaration, depends on the project. The 2019 Change was directed at allowing residential projects within FHA loan limits to qualify for the site condominium exemption. However, the 2019 Change applies to all condominiums. For any commercial or residential site condominium, it may be sensible to exclude an upper or lower boundary if the configuration of the project is similar in all meaningful respects to a platted lot subdivision.

If you do actually have horizontal boundaries, i.e., a project with units above or below one another, the 2019 Change allows the practitioner to describe those boundaries in the condominium declaration rather than the plat and/or plans. Should the practitioner describe upper and lower boundaries in the condominium declaration as opposed to showing those boundaries on the plans? That depends. It is probably important to show upper and lower boundaries on the plat and/or plans for a project with units above other units if those units conform to physically constructed improvements. For example, if there is a casualty that requires reconstruction, projecting the upper and lower boundaries on a depiction of the improvements shown on the plans is necessary, and it is easier to show the upper and lower boundaries on the plans rather than trying to describe the physical components that conform to those boundaries in the condominium declaration. On the other hand, if the units comprise a vertical segregation

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<sup>22</sup> The changes to these sections were proposed and written by the author and passed without any modification. House Bill 2569 was filed by Representative Darby and would not have passed without the assistance of the Texas Association of Builders.

<sup>23</sup> The changes to Section 82.059(b) and (d) of the Texas Property Code, which are redlined against the prior versions, are as follows:

82.059(b)(7) the location of horizontal unit boundaries, if any, with reference to established data, unless described in the declaration or [~~of any horizontal unit boundaries not~~] shown or projected on recorded plans, and the unit's identifying number;

82.059(d)(2) the horizontal unit boundaries, if any, with reference to established data, unless described in the declaration, and the unit's identifying number; and

without reference to any actual or proposed physical improvements, a standard measurement such as mean sea elevation, can be set out in the declaration and not shown on the plat or plans.

Though Chapter 82 does provide flexibility relative to describing (or not describing) upper and lower boundaries, there are considerations external to Chapter 82 that a developer and practitioner should consider. A local zoning ordinance or other local regulatory requirement<sup>24</sup> may limit the height of physical improvements constructed within the site condominium.<sup>25</sup> The upper boundary of the site condominium need not be set to conform to the regulatory requirements, but setting an upper limit will achieve architectural control of the height of improvements if this is important to the developer and the project. In the same vein, there may be private covenants impressed on the land that predate the condominium declaration. For example, the project may be subject to design criteria administered by an architectural authority that has jurisdiction over the project which limits the height of improvements. If it is important to limit height to conform to a regulatory requirement or provide a height restriction for architectural control, probably the most sensible solution is to incorporate the requirement in the condominium declaration rather than conform the unit boundary to the limitation. Requirements and conventions change over time. If conventions change, or the source restriction is modified or terminated, it will most likely be easier (at least under the amendment requirements under Chapter 82) to conform a restriction in the condominium declaration to the convention rather than modify the unit boundary.<sup>26</sup>

If the practitioner determines that an upper boundary is needed for the project, the specifics of the project, planned improvements, and a bit of common sense is your guide. Obviously, the location of the upper boundary will need to be set at a height to ensure that the proposed improvements, and any logical extension thereof, will be contained within the upper boundary and that upper boundary should be set with room to spare.<sup>27</sup> If an upper boundary is

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<sup>24</sup> Section 82.051(d) of the Texas Property Code requires that a county clerk accept a condominium declaration for recordation without the approval of any regulatory authority. However, Section 82.006 of the Texas Property Code provides that Chapter 82 does not invalidate or modify any provision of any zoning, subdivision, building code, or other real property use law, ordinance, or regulation. The interrelation of Chapter 82 and local ordinances is discussed in Section III of this article.

<sup>25</sup> It is typical for the height of a residential structure to be limited to thirty-five (35) feet which is the standard height of a two (2) story residence. See City of Bee Cave Code of Ordinances, Section 32.03.013(c)(1), Ordinance 07-09-25-C, ex. A (14.153), adopted September 25, 2007.

<sup>26</sup> A general amendment to the declaration, for example changing a use or construction restriction in the original condominium declaration, is governed by Section 82.067(a) which would require the consent of at least 67% of the votes in the condominium association. On the other hand, Section 82.067(e) requires the consent of 100% of the votes in the association if changing the boundaries of a unit. Note that the declarant can reserve the right to change the boundaries of a unit in conjunction with development of the project. For a discussion of declarant development rights and the reservation thereof see Burton & Stotts, *Condominium Alternatives: Mixed and Non-Traditional Uses*, Sections II.B, III.B, and IV.B; and Burton, *TUCA Turns 25: Condominium Drafting Tips*, Section III.

<sup>27</sup> Section 82.003(a)(12)(B) of the Texas Property Code permits the declarant to reserve the right to create units and common elements. It seems logical that the right to create units and common elements would include modification of an upper boundary since the change would, at minimum, either create a new unit (if the unit were expanded) or common elements (if the unit were contracted). The condominium declaration can reserve,

needed and there are no project or local regulatory constraints, the Federal Aviation Administration (“FAA”) height regulations may provide a meaningful proxy. The old common law maxim “Cujus est solum ejus est usque ad coelum” (“The person who owns the soil owns up to the sky”), was rejected by the United States Supreme Court in 1946<sup>28</sup> in a case ultimately allowing the FAA to establish navigable air space.<sup>29</sup> The FAA has established navigable air space “over congested areas” at an altitude of 1000 feet and “over other than congested areas” at an altitude of 500 feet.<sup>30</sup>

As with upper boundaries, for lower boundaries there are no specific requirements related to the location in Chapter 82 or otherwise.<sup>31</sup> If a lower boundary is necessary, the boundary will need to be determined based on the specific project. Lower boundaries can be particularly troublesome due to subsurface utility improvements, easements, and previously reserved mineral interests. There is a natural tendency to try and capture below grade improvements that exclusively, or may exclusively, serve the site condominium unit within the lower boundary. However, where to set that boundary is a “riddle wrapped in a mystery inside an enigma.”<sup>32</sup> The

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on behalf of the unit owner, the right to subdivide units, but there is no corresponding right in Chapter 82 of the Texas Property Code for an owner to change the boundaries of a unit unilaterally. See Section 82.063 of the Texas Property Code related to an owner’s right to subdivide a unit. Even assuming the change to the upper boundary was done in conjunction with a resubdivision of an owner’s unit, it is not certain, at least to the author, whether the right to subdivide would permit modifying the upper boundary of the resubdivided units. One way around this uncertainty, if it is important to reserve the right to change the upper boundary, would be to ensure that the time period by which declarant may exercise its development rights, and specifically the right to create units and common elements, is long enough to accommodate any potential change. Section 82.104 of the Texas Property Code allows the original declarant to assign its reserved rights to a third-party which could be used to address upper boundary revisions. In addition, it may be advisable to specifically state in the condominium declaration that in conjunction with any resubdivision of a unit the resubdivision may modify the upper boundary of a unit. Section 82.055 of the Texas Property Code, which lists what must be included in the condominium declaration, also provides that the declarant may include in the condominium declaration “any other matters the declarant considers appropriate.” See Section 82.055(17) of the Texas Property Code. Whether including this right in the condominium declaration overrides Section 82.067(e) of the Texas Property Code and its prohibition related to changing unit boundaries is uncertain.

<sup>28</sup> United States v. Causby, 328 U.S. 256, 260 (1946). “It is the ancient doctrine that at common law ownership of the land extended to be periphery of the universe... But that doctrine has no place in the modern world.” (260-61).

<sup>29</sup> Causby at 261.

<sup>30</sup> See 14 C.F.R § 91.119. The “FAA Guide to Low-Flying Aircraft” which provides a summary of the current rules can be found at [https://www.faa.gov/about/office\\_of\\_field\\_offices/fsdo/lgb/local\\_more/media/FAA\\_Guide\\_to\\_Low-Flying\\_Aircraft.pdf](https://www.faa.gov/about/office_of_field_offices/fsdo/lgb/local_more/media/FAA_Guide_to_Low-Flying_Aircraft.pdf). The FAA determines “congested areas” on a case by case basis. See <https://pilot-protection-services.aopa.org/news/2016/january/15/congested-area>.

<sup>31</sup> In a Texas case which appears to contradict Causby, the Twelfth District Court of Appeals, adjudicating the extent of a surface owners interest in the subsurface, stated that “[Lightning Oil Co. v. Anadarko E & P Onshore, LLC] placed no limitation on the surface owner’s interest in the subsurface or implied that the surface owner’s rights to the underlying earth ends at some depth below the surface.” XTO Energy, Inc. v. Goodwin, 584 S.W.3d 481, 488 (2017) interpreting Lightning Oil Co. v. Anadarko E & P Onshore, LLC, 520 S.W.3d 39 (2017).

<sup>32</sup> Winston Churchill, BBC Broadcast (October 1, 1939). Sir Churchill was commenting on the intentions of Russia at the beginning of World War II.

better approach, in the author's view, is to establish the lower boundary co-terminus with the surface of the land with a provision that includes within the boundary of the site condominium unit any improvements which exclusively serve such unit. As previously noted in this article, Section 82.052 allows the unit boundaries to be established by describing such boundaries in the condominium declaration. In effect, the addition of a provision that captures anything that exclusively serves the unit within the boundaries of the unit extends the boundaries to include such improvements. Below is sample unit boundary language that creates upper and lower boundaries and extends the lower boundary to capture subsurface improvements that exclusively serve the unit:

*Section A.1 Unit Boundaries. The boundaries and identifying number of each Unit are shown on the Plat attached hereto as Attachment X. The boundaries of each Unit are further described as follows:*

*(i) Lower Boundary of Unit: The horizontal plane corresponding to the existing surface of the land within the Unit, as described and defined on Attachment X, except as expressly provided in Section A.2 below.*

*(ii) Upper Boundary of Unit: The horizontal plane parallel to and five hundred feet (500') above the lower boundary the Unit.*

*(iii) Lateral Boundaries of Unit: A plane located on each side of a Unit perpendicular to the lower and upper horizontal planes, from the lower boundary of the Unit to the upper boundary of the Unit, as described and defined on Attachment X.*

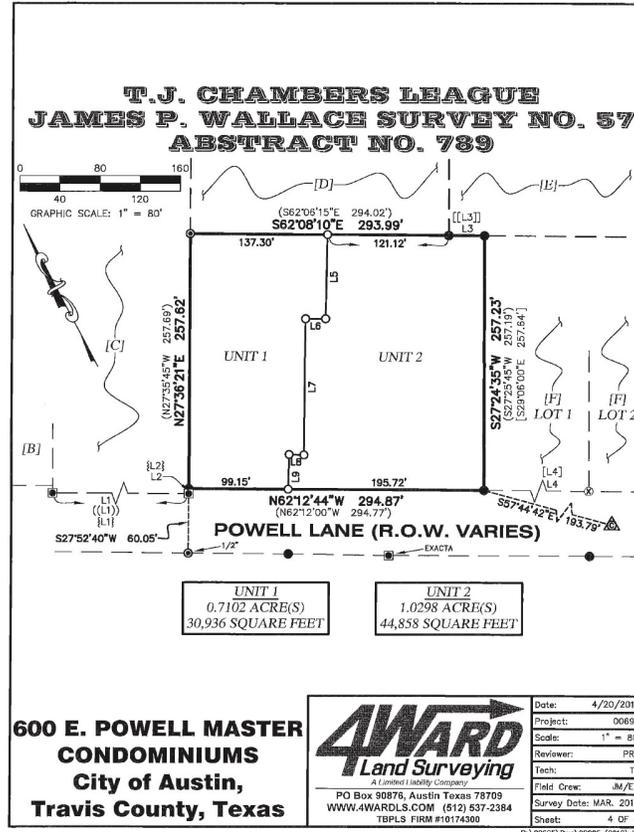
*Section A.2 What a Unit Includes. Each Unit includes the spaces and improvements now or hereafter constructed within the lower, upper, and lateral boundaries defined in Section A.1 above, including without limitation the roofs and foundations of any such improvements, landscaping, driveways, parking areas, sidewalks, fences, yards, utility lines and meters (to the extent such lines and meters exclusively serve such Unit) and all other improvements located within the Unit. In addition to the improvements within the Unit, each Unit also includes the following improvements, fixtures, and equipment serving each such Unit exclusively: (i) those which are located below the finished grade of the land comprising the lower boundary of the Unit, whether or not attached to or contiguous with an improvement, including but not limited to below grade foundation, piers, retaining walls, structural supports, utility and drainage facilities, and subterranean components of plant material, and (ii) any utility facilities and meters located outside the lower, upper, and lateral boundaries of a Unit as defined in Section A.1 above.*

## **C. Topology with Structural Observations**

Site condominiums are more properly understood if seen in relation to their configuration. Accordingly, below are a few examples of site condominium configurations.

# 1. Simple Site Segregation.

In its simplest form, a site condominium merely separates one land area into separate land areas each of which may be owned by separate parties. Each separate site condominium unit has ingress and egress to and from the unit to an adjacent right-of way and there are no shared surface common elements.



## Site Segregation

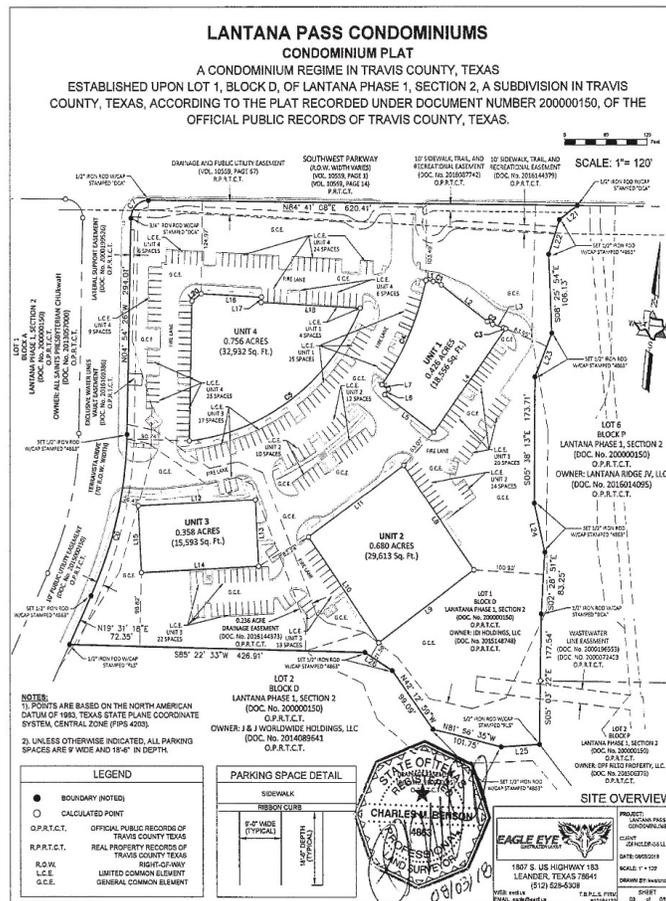
Since there are no shared surface common areas, the condominium association exists primarily to comply with the statutory requirement that the association be formed prior to conveyance of a unit by the declarant to a third-party.<sup>33</sup> The condominium declaration is used to segregate the land, but can also be used to impress use and construction restrictions on each unit, establish an architectural review authority for the approval of those improvements, and disclose specific features applicable to the project, e.g., impervious cover limitations. For commercial segregations, especially where there are more than 2 created units, it may be important to adjust

<sup>33</sup> See Section 82.101 of the Texas Property Code. Note also that Section 82.111(b) of the Texas Property Code only requires that the association obtain insurance covering the units if the units have horizontal boundaries, in the case of 82.111 meaning that there is a building that includes condominium units above or below other condominium units. Section 82.111 does require that the association obtain insurance on the common elements and commercial general liability insurance "to the extent reasonably available." See Sections 82.111(a)(1) and (a)(2) of the Texas Property Code.

the amendment (67%)<sup>34</sup> and condominium termination (80%)<sup>35</sup> thresholds from their statutory defaults to preserve marketability of the units to third parties. It is unlikely that a purchaser of a commercial unit would agree to acquire the unit if the declaration can be amended in material respects or the regime terminated without their consent.<sup>36</sup> The simple site segregation would utilize boundaries similar to the example boundaries in Section II.B of this article.

## 2. Residential and Commercial Detached Units.

Similar to the site segregation, residential and commercial detached units are defined by a land area that include existing or proposed residential or commercial building improvements as well as areas external to such building improvements such as a yard areas, an exclusive parking lot, or improvements that support the principal structure.

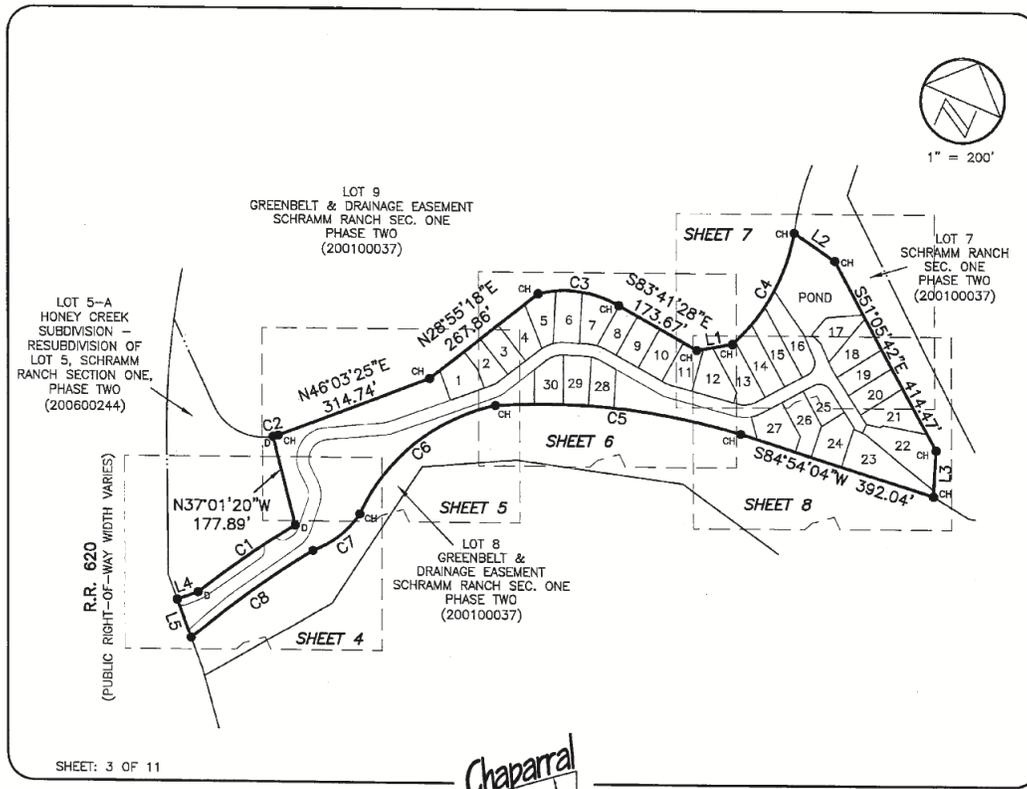


## Commercial Detached Units

<sup>34</sup> See Section 82.067(a) of the Texas Property Code.

<sup>35</sup> See Section 82.068(a) of the Texas Property Code.

<sup>36</sup> An alternative to adjusting the amendment and termination thresholds is to add a major decision provision to the condominium declaration. A major decision provision can provide that any act or action to modify or terminate the condominium declaration or adopt rules under the declaration, by an owner, the association, or sometimes the declarant, to the extent the act or action has a material and adverse effect on an owner must be consented to by that owner.



**Residential Detached Units (Overall Plan Sheet)**

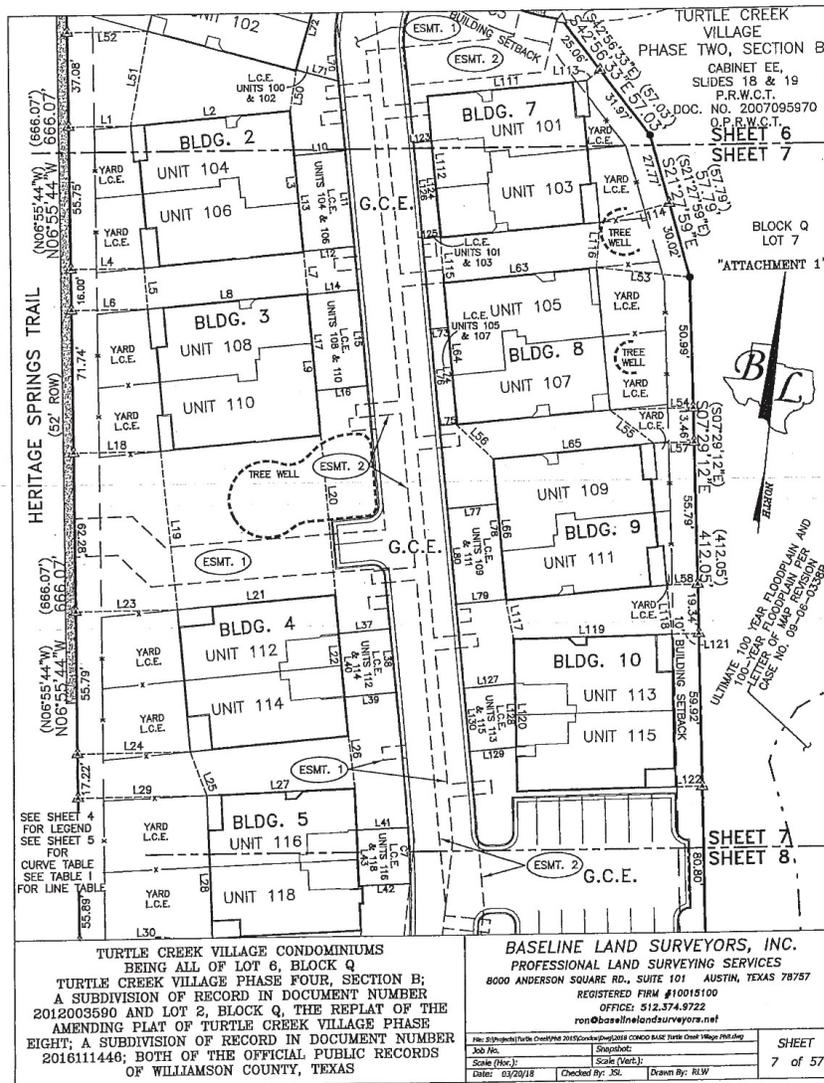
The detached unit approach includes shared surface common elements area which may include private access ways, private open space, recreational amenities, or detention facilities. Unless there are specific project requirements<sup>37</sup>, the detached units, and any improvements located therein to the extent such improvements exclusively serve the unit, are maintained and insured by the unit owner. Since there is often surface common areas external to the detached units, the responsibilities of a detached unit condominium association are more robust than the condominium association in a site segregation. Detached units, commercial or residential, would utilize boundaries similar to the example boundaries in Section II.B of this article.

**3. Attached Site Condominium Units.**

The most counterintuitive of all site condominiums is the attached improvement site condominium. The attached improvement site condominium consists of at least one building where the building is segregated into separate sites. There are no units above or below other units. The easiest way to visualize this is by considering a traditional residential townhome project. The conventional approach is to designate the internal living areas of each townhome residence as comprising the condominium unit (the customary walls, floor and ceiling boundaries) with the exterior components (roof, foundation, and exterior) forming part of the

<sup>37</sup> See Section II.C.3 of this article for a description of the “Area of Common Responsibility” concept, which is one method used to assign maintenance responsibility otherwise discharged by the unit owner to the condominium association.





**Attached Site Condominiums**

**(Unit Conforms to Improved Dwelling With Yard LCE)**

One further note on the two examples above. Both are attached site units, but the second example incorporates exclusive yard area and assigns that yard area to its adjacent unit. It is possible to incorporate the yard area with the actual unit as opposed to creating separate limited common area yard space.<sup>38</sup> If there will be private yard areas associated with each unit, whether to incorporate these areas within the unit depends on several factors such as the planned physical improvements, uniformity of the yard areas, configuration of units within the development, and whether it is important for maintenance or marketing purposes to show the yard areas as separate areas. Below is an example of the written attached site condominium boundaries included in the condominium declaration.

<sup>38</sup> Limited common elements are common elements assigned or allocated to at least one but less than all the condominium units. See Section 82.003(a)(17) of the Texas Property Code.

Section A.1 Unit Boundaries. The boundaries and identifying number of each Unit are shown on the Plat and Plans attached hereto as Attachment X. The boundaries of each Unit are further described as follows:

(i) Lower Boundary of each Unit: The horizontal plane corresponding to the finished grade of the land within the Unit, as described and defined on the Plat and Plans.

(ii) Upper Boundary of each Unit: The horizontal plane parallel to and two hundred and fifty feet (250') above the lower boundary of the Unit, as described and defined on the Plat and Plans.

(iii) Lateral Boundaries of each Unit: A plane located on each side of a Unit perpendicular to the lower and upper horizontal planes, from the lower boundary of the Unit to the upper boundary of the Unit, as described and defined on the Plat and Plans. On interior walls, i.e., walls between two Units, the Unit's lateral boundaries are the planes defined by the midpoints of the interior wall. The Unit on each side of an interior wall extends to the middle of the interior wall.

Attached site condominiums, since the unit includes exterior components (roof, foundation, etc.) and those components are shared, will likely require that the condominium declaration include provisions for the condominium association to provide maintenance to some or all of those components. The condominium declaration can provide that the condominium association will maintain improvements or other areas within the boundaries of the detached unit, e.g., landscape services, roof areas, foundations, etc. Usually this is accomplished by adding an "Area of Common Responsibility" to the condominium declaration which identifies the area(s) or improvements within the unit that will be maintained by the condominium association. The Area of Common Responsibility provision includes an easement in favor of the condominium association for the purpose of discharging the maintenance responsibilities and usually describes the extent of the maintenance to be provided by the condominium association. If an Area of Common Responsibility, or similar concept, is used to assign maintenance to the condominium association, the drafter would be wise to allow for changes to the area (usually by the board of the association) since later circumstances may require additions to, or deletions from, the items to be maintained by the condominium association.

The primary reason the attached site condominium approach is used for attached townhome residential projects, as opposed to using inside walls to define the condominium unit, is to mitigate construction defect exposure and to qualify attached townhome product for the detached condominium exemption for FHA mortgage insurance purposes.<sup>39</sup> Construction defect

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<sup>39</sup> FHA issued new rules, FR-5715-F-02 Project Approval for Single-Family Condominiums, Federal Register 2019-17213, effective as of October 15, 2019, extending the site condominium exemption (See Section II.B of this article for a description of the FHA site condominium exemption) to "townhouse-style horizontally attached dwellings where the unit consist of both dwelling and land." (FR-5715-F-02 Project Approval for Single-Family Condominiums, Federal Register 2019-17213, Section III.I). See 84 Fed. Reg. 41846 (2019).

claims brought by a condominium association, despite efforts by Texas to require sensible procedures associated with those claims<sup>40</sup> and favorable case law<sup>41</sup>, still is a concern raised by some Texas residential developers and builders. The attached site condominium structure, by including exterior components of the dwelling within the unit, eliminates the need to designate these areas as common elements. Section 82.101, which describes the powers of the condominium association, permits the drafter of the condominium declaration to exclude the right for a condominium association to bring a claim affecting the units. Accordingly, with no common elements and removing the right for the condominium association to bring a claim affecting the units, the risk of a claim by the condominium association related to the residential dwelling improvements is eliminated.<sup>42</sup>

#### **D. Allocations**

When property is submitted to a condominium declaration, the declaration creates units and common elements. Units are owned separately while common elements are owned in undivided interests by all condominium unit owners.<sup>43</sup> The condominium declaration must include an allocation of the undivided ownership in the common elements to each condominium unit.<sup>44</sup> For a condominium project with horizontal boundaries (units above or below other units), the common interest ownership allocation is usually based on the relative size of each condominium unit, i.e., larger condominium units are allotted a higher percentage of common elements relative to smaller condominium units.<sup>45</sup>

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<sup>40</sup> Known as “Texas Condo Tort Reform”, Sections 82.119 and 82.120 were added to Chapter 82 of the Texas Property Code and effective as of September 1, 2015. Section 82.119 applies to construction defect claims brought by a condominium association and establishes certain prerequisites, including owner approval, that must be satisfied before filing suit or arbitrating the claim. Section 82.120 provides that a condominium declaration may include a provision for binding arbitration and that the declaration may not be amended to remove binding arbitration for a claim that arose prior to the date of the amendment.

<sup>41</sup> See Mosaic Residential N. Condo. Ass’n v. 5925 Alameda N. Tower, L.P., 2018 Tex. App. LEXIS 8514, which can be generally viewed to support enforcement of the terms associated with the claims resolution process set forth in a condominium declaration. In the Mosaic case, the condominium declaration disenfranchised the condominium association from bringing defect claims pertaining to the common elements and the units. The court upheld the restrictions in the condominium declaration and dismissed the case.

<sup>42</sup> Despite the Mosaic case and the fact that, based on the case, the condominium declaration could provide that the condominium association does not have the power to bring a claim affecting the common elements, describing the exterior dwelling areas as part of the unit is more consistent with limited warranties provided by builders in conjunction with a residential home sale.

<sup>43</sup> A condominium, in fact, exists if any portion of the common elements is owned in undivided interests. See Section 82.003(a)(8) of the Texas Property Code. The author has reviewed a covenant recorded for a marina project where the covenant provided that certain service buildings were owned in undivided interests by the boat slip owners. Though unintended by the drafter, the covenant inadvertently created a condominium.

<sup>44</sup> See Section 82.057(a) of the Texas Property Code.

<sup>45</sup> If units may be added or removed after the condominium declaration is recorded, the condominium declaration must include a formula for the purposes of allocating the common element ownership interest. See Section 82.057(b) of the Texas Property Code.

For residential site or detached condominiums, it is common to allocate the common interest allocation equally among all condominium units using the so-called “one-over” approach, i.e., 1 divided by the total number of condominium units created by the condominium declaration equals the undivided ownership interest in the common elements assigned to each condominium unit. The one-over approach is used since these condominiums lack the type of common elements usually present in a residential condominium with horizontal boundaries (units above or below other units) such as structural and mechanical shared building areas, corridors, elevators, and internal building recreational amenities. In a residential condominium with horizontal boundaries, the common elements are more closely aligned with the value of condominium unit, so the common interest allocation formula often uses the relative size of each residential condominium unit as a proxy for value. The value of the site or detached residential condominium unit is more a function of the area within the unit and the improvements located within the boundaries of the unit.<sup>46</sup> The legal and practical effect of aligning the common interest allocation with the value of a residential condominium unit is to ensure that the higher value residential condominium units receive a greater proportion of condemnation, termination upon sale, or insurance proceeds to the extent such proceeds are distributed to residential condominium unit owners.<sup>47</sup> For the residential site and detached condominium, the common elements are often minimal and resemble common area owned by a non-condominium property owners association in a traditional platted subdivision, e.g., internal roadways, open space, or detention/drainage facilities. To the extent residential site or detached condominium common elements are taken by condemnation, the project is terminated and sold, or there are excess insurance proceeds attributable to the common elements, it is usually less important that the residential condominium unit owner receive a share of the common element proceeds based on the relative value of the owner’s unit. In addition to the common interest allocation, the condominium declaration must also allocate to each unit votes in the condominium association and a proportion of condominium association common expenses.<sup>48</sup> If the one-over approach is used for the common interest allocation, it will likely be appropriate for the allocation of votes and common expenses.<sup>49</sup>

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<sup>46</sup> Assigning a value to common elements and then assigning that value to detached residential units based on the size of the unit seems overly complicated especially where the project is structured to operate, for all intents and purposes, as a traditional non-condominium residential subdivision. There is also the concern that a relative value approach would create issues related to an appraisal of the residential condominium unit for property tax or mortgage lending purposes.

<sup>47</sup> See Sections 82.007(b) [Condemnation], 82.068(f) [Termination], 82.111(i) [Insurance] of the Texas Property Code.

<sup>48</sup> See Section 82.057(a) of the Texas Property Code.

<sup>49</sup> Chapter 82 of the Texas Property Code permits the allocation of common interest, votes, and common expenses to be determined by different formulas. See Sections 82.057(a) and (c) of the Texas Property Code. It has been this author’s practice to always use the one-over formula for the purpose of allocating votes even where the common interest and expense allocations are determined based on relative size. The reason for allocating votes in a residential condominium equally is to expressly not equate voting power with the value of a unit. The author believes, except in unusual circumstances or when dealing with a commercial or mixed-use project, that voting power in a residential condominium should be similar to our democratic voting convention where wealth does not equate to more votes.

The one-over approach can also be used for commercial site or detached condominiums, but commercial owners may be more sensitive to allocating common interests in a manner other than based on relative size. To the extent common elements are minimal and similar to the residential project described above (roads, open space, etc.), the same arguments for using the one-over approach in a residential site or detached condominium project apply to the commercial project, but whether those arguments are accepted by the commercial buyer or their counsel is a different matter. There is generally a lack of understanding among practitioners and their clients on the practical effects of the common interest allocation and it may be easier to default to the traditional relative size model. If the relative size model is used, it may also be used for votes and common expense allocations. There is a good deal of variation on how each allocation (common interest, votes, and common expenses) are deployed in the commercial project. For example, if there is a specific common element component that one or less than all the units will use disproportionately, e.g., a detention pond, it may be appropriate to assign a different cost allocation. However, there are other tools for handling the non-uniform use of common elements, specifically by a separate allocation document describing each component and the percentage of costs allocated to each unit based on projected use.<sup>50</sup> Votes may also be handled differently based on the project or the relationship between units. It may make sense to apportion votes equally, or for marketing “optics” assign votes in some other manner. The practitioner should be careful when determining how votes are allocated and the effect the allocations will have on the ability to amend or terminate the declaration. It may be detrimental to the project where the condominium declaration can be amended or terminated by less than all the owners.<sup>51</sup>

### III. SITE CONDOMINIUMS AND THE SUBDIVISION ISSUE

The site condominium approach raises the issue of whether filing the condominium declaration and creating separate site condominium units constitutes a subdivision for local regulatory platting purposes.<sup>52</sup> The issue arises since TUCA is the exclusive means in Texas to create condominium units<sup>53</sup>, requires that condominium plat and plans be recorded as part of the condominium declaration<sup>54</sup>, and expressly provides that a condominium declaration shall be accepted for recordation by a county clerk without the consent of any authority.<sup>55</sup> However, Section 82.051(e) provides that TUCA “does not affect or diminish the rights of municipalities and counties to approve plats of subdivisions and enforce building codes as may be authorized

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<sup>50</sup> See Mathew J. Leeds, Edward A. Peterson, and David Van Atta, *Cost Allocations in Mixed Use, Mixed Ownership Developments*, American College of Real Estate Lawyers (October 2014).

<sup>51</sup> With certain exceptions, a condominium declaration can be amended with 67% of the votes in the condominium association. See Section 82.067(a) of the Texas Property Code. A condominium declaration can be terminated with no less than 80% of the votes in the condominium association. See Section 82.068(a) of the Texas Property Code.

<sup>52</sup> See Texas Att’y Gen. Op. No. GA-0223 (2004).

<sup>53</sup> TUCA applies to all condominiums created on or after January 1, 1994 and units may be created only by recording a condominium declaration that conforms to the requirements of TUCA. See Sections 82.002(a), 82.051(a), and 82.055 of the Texas Property Code.

<sup>54</sup> See Section 82.059(a) of the Texas Property Code.

<sup>55</sup> See Section 82.051(d) of the Texas Property Code.

or required by law.”<sup>56</sup> Though no Texas court has addressed the issue directly, the Texas Attorney General has issued an opinion finding that a county can determine whether the project will be required to comply with the county’s subdivision ordinances.<sup>57</sup> At least as it pertains to a detached site condominium, where the developer creates separate units that correspond to land areas, the author agrees that a county, or city, may require compliance with its subdivision requirements.

Since a county or city can require that a site condominium comply with subdivision requirements, it is important for the developer and practitioner to determine if the county or city will apply those requirements, and if so, how those requirements will be applied. It is the author’s view that although permissible, the county or city should not require that the site condominium be platted as a traditional subdivision. TUCA requires that condominium plat and plans be recorded with the condominium declaration and further provides specific and comprehensive requirements for the condominium plat and plans.<sup>58</sup> As the plat and plan examples shown above demonstrate, the condominium plat and plans show the separate units and other improvements also shown on a subdivision plat, e.g., roads, easements, etc. The condominium plat and plans are recorded, and the units are legally created, when the condominium declaration and condominium plat and plans are recorded. When the condominium declaration and condominium plat and plans are recorded, each unit is a separate parcel of real property<sup>59</sup> and each unit is separately assessed for ad valorem tax purposes.<sup>60</sup> TUCA provides an alternative to traditional subdivision platting as it pertains to describing the units that will be separately owned. Requiring that separate site condominium units be platted through the customary subdivision platting process, arguably, eliminates the developer’s right to create a condominium regime<sup>61</sup>, or, at a minimum, is duplicative of the condominium plat and plans required by TUCA. The site condominium process of development is an accepted means to develop residential and commercial projects in Texas and provides consumer benefits not usually present in similar non-condominium developments.<sup>62</sup>

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<sup>56</sup> See Section 82.051(e) of the Texas Property Code.

<sup>57</sup> See Texas Att’y Gen. Op. No. GA-0223 (2004).

<sup>58</sup> See Section 82.059 of the Texas Property Code. A condominium plat must be prepared and certified by a licensed surveyor or engineer. Condominium plans must be prepared and certified by a licensed architect, surveyor, or engineer. See Section 82.059(g) of the Texas Property Code.

<sup>59</sup> See Section 82.005(a) of the Texas Property Code.

<sup>60</sup> See Section 82.005(b) of the Texas Property Code.

<sup>61</sup> At least if the purpose of using the condominium form of development was to create units. Why would the developer use the condominium form of development if the city or county required that the units be platted into separate “lots” that correspond to the real property that would be conveyed to a residential homeowner or commercial user?

<sup>62</sup> TUCA, among other things, requires a mandatory transition of the condominium association from developer to owner control (See Sections 82.103(c) and (d) of the Texas Property Code), requires the developer to subsidize the operational expenses of the condominium association (See Sections 82.112(a) and (b) of the Texas Property Code), includes constraints on amendment of the declaration (See Section 82.067(e) of the Texas Property Code) and requires that the condominium association procure insurance (See Section 82.111 of the Texas Property

#### IV. CONCLUSION

Site condominiums, whether used for a simple site segregation, to create detached commercial or residential units, or separate attached improvements, is a tool in the developer and practitioner's toolbox. Whether the site condominium approach makes sense will depend on the specific project and the local regulatory requirements. However, if the site condominium approach will work for the project, TUCA is mighty flexible. Units can be created in a manner that fits the project and market, common area shared improvements can be identified, maintenance duties can be assigned to meet the traditional home or lock and leave market, and the actual functions of the condominium association can be customized.

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Code). Non-condominium projects with a mandatory property owners association have no such consumer protections or benefits.