

# **Condominiums**

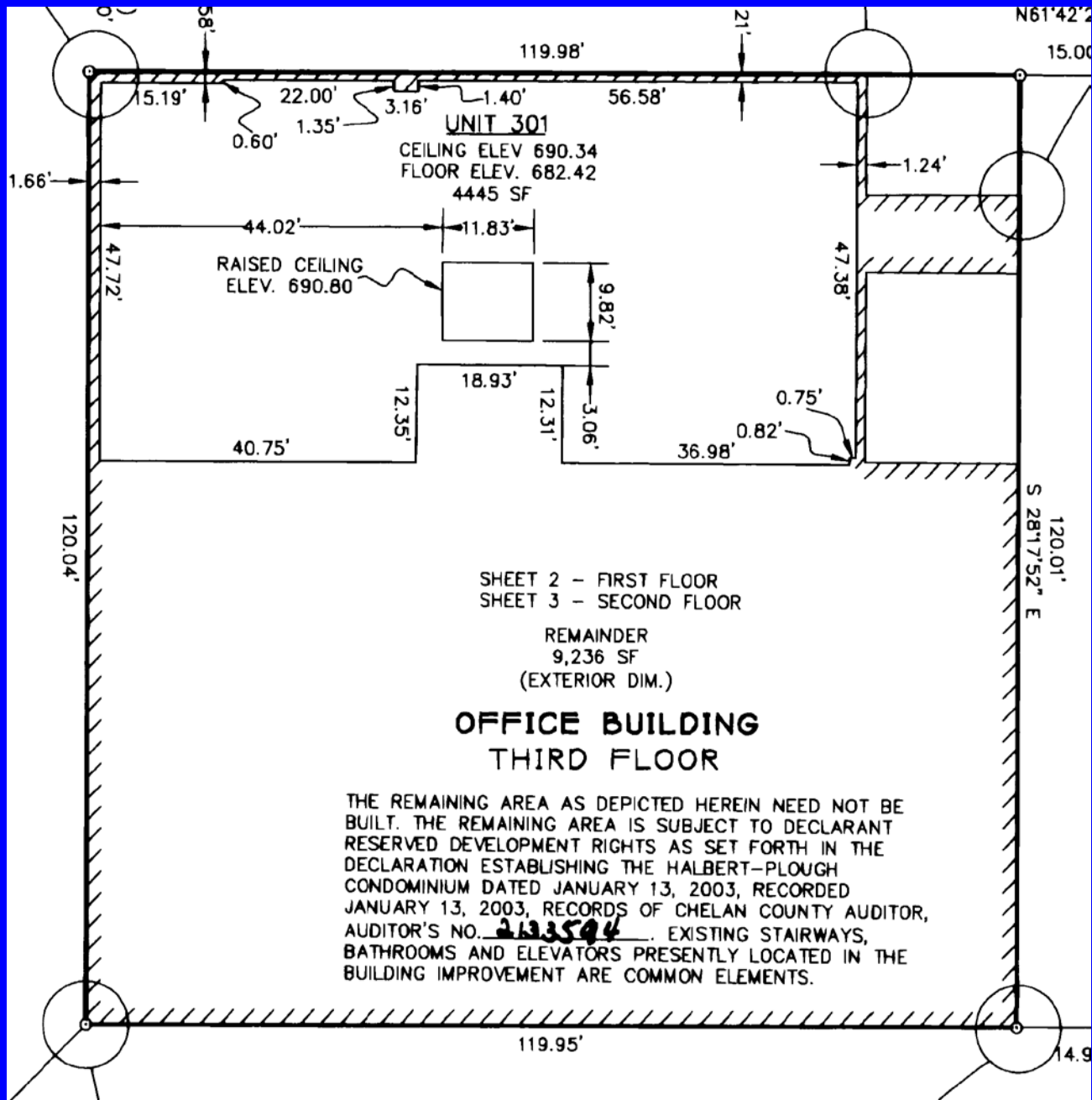
***They're Baaaaaack!***  
***(Well, back to haunt us)***

## **Unusual Issues in the Current Market**

**2016 WLTA Fall Education Seminars  
Spokane (Sept 24) & Lynnwood (Oct 15)  
David E. Lawson  
Fidelity National Title Group  
(Many slides courtesy of George Peters)**

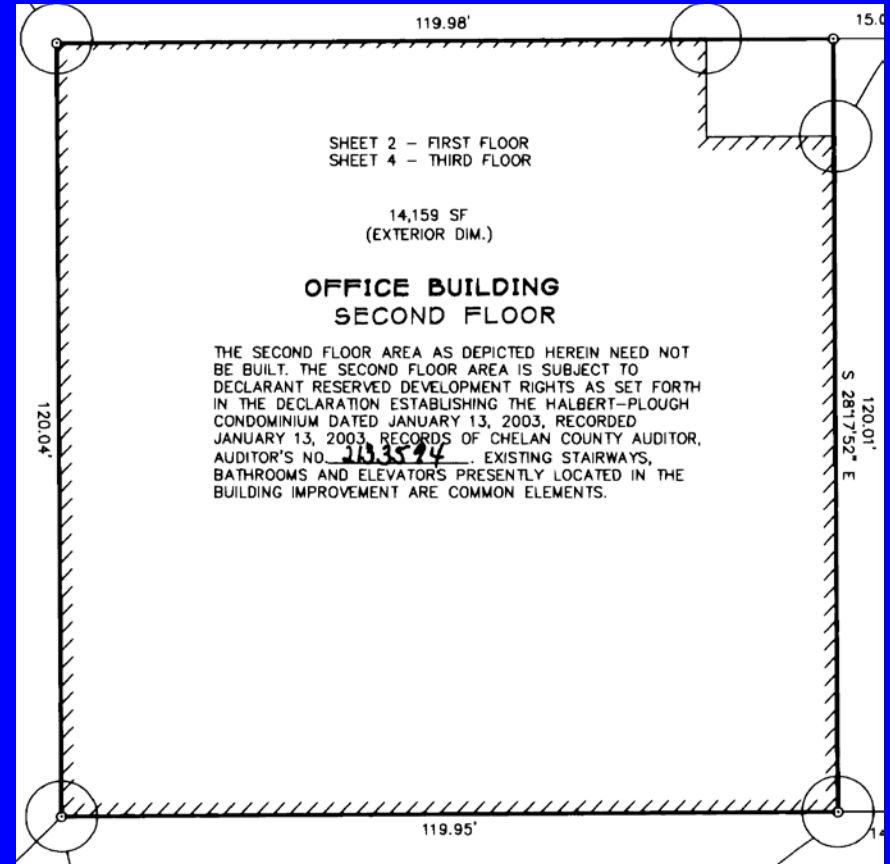
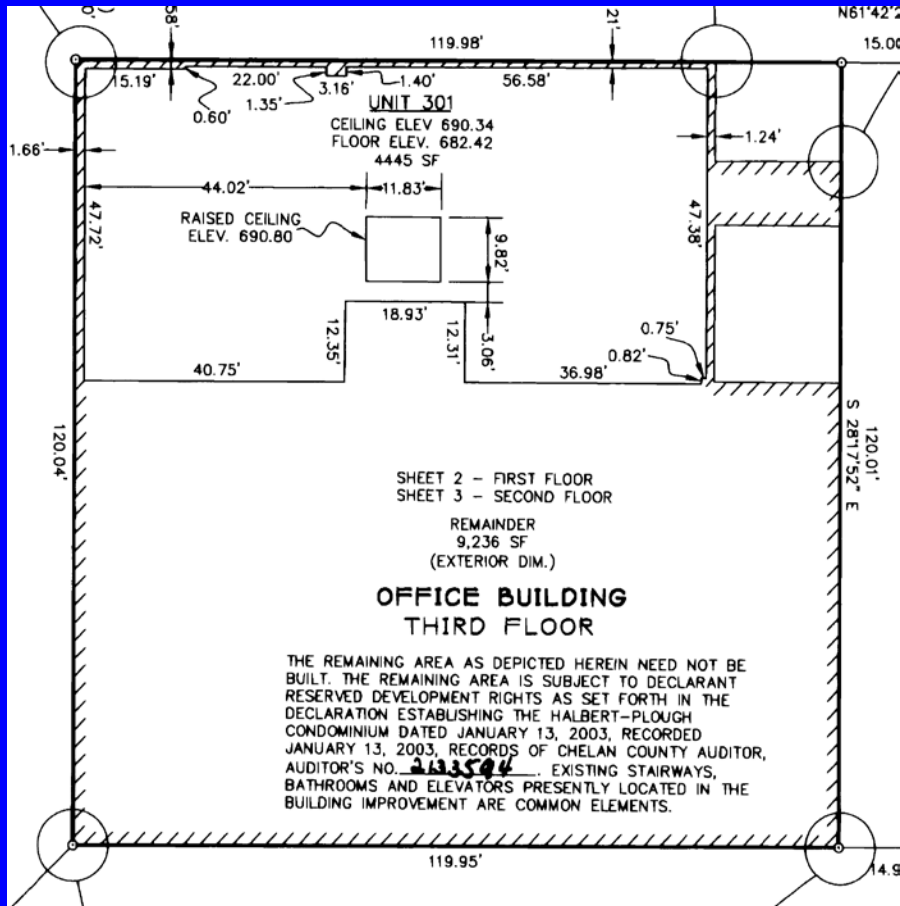
# So Why Discuss Condos Now?

- We are seeing more condos, many a bit different from what we saw before the bust.
- Unused "Development Rights" from old condos are valuable again and being exercised or sold.
- Claims have arisen from unusual problems, usually relating to Development Rights.
- Leasehold condos are expiring or having other issues.
- There have been failed attempts to convert condos to subdivisions.



# Halbert-Plough Condo

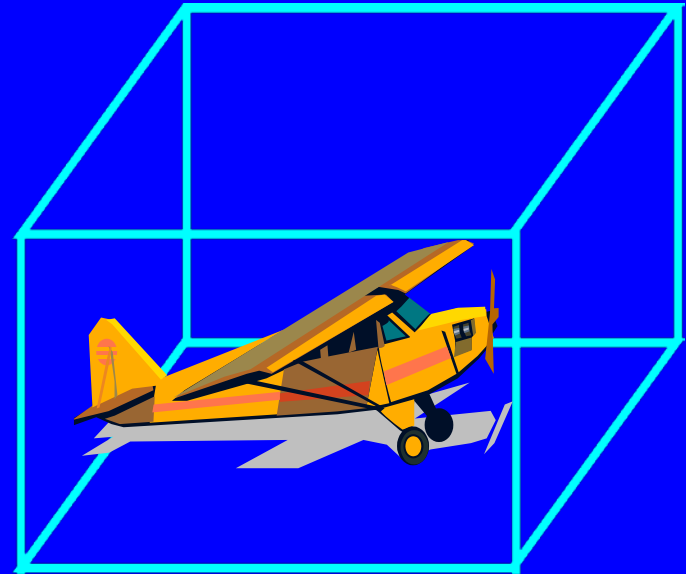
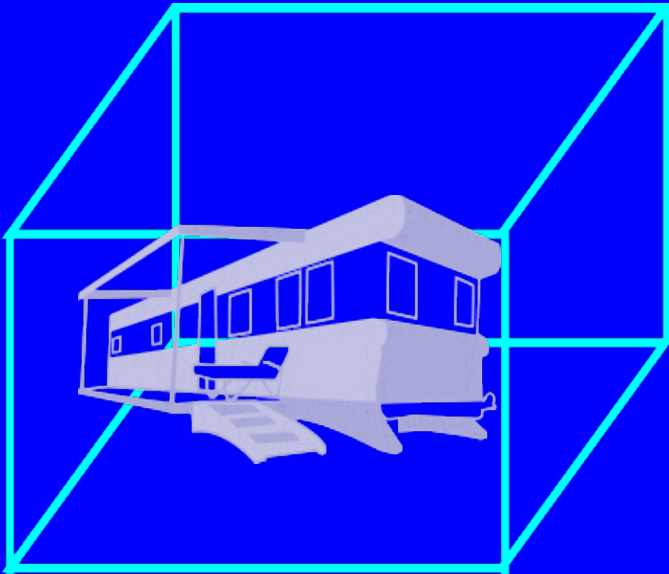
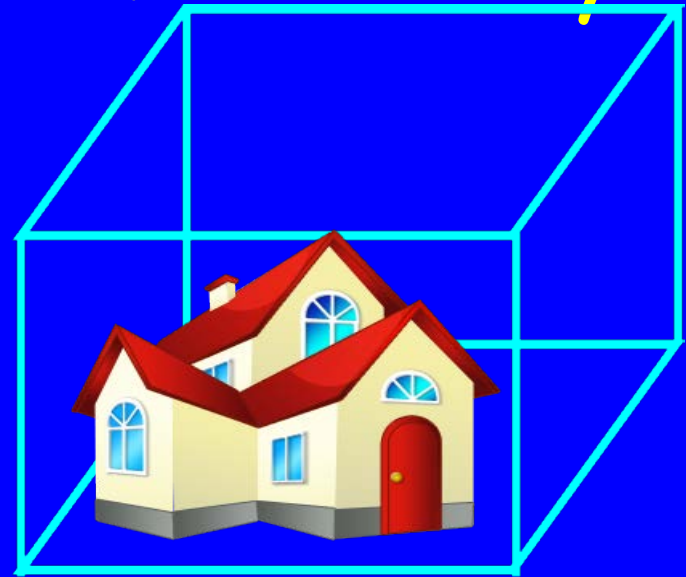
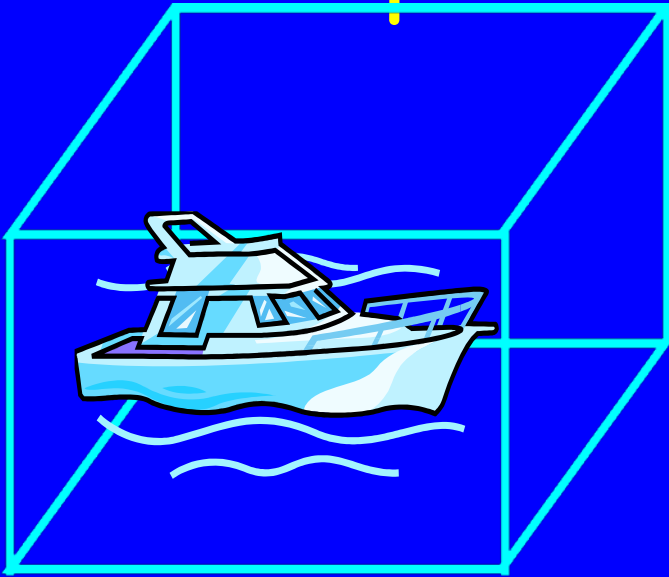
## How did that unit get up in the air? Or ... who gets to use the other floors?



# Quick overview - Traditional Condos vs. Airspace

- The traditional condo unit is the space inside the walls, floor and ceiling, but not including the main structural components which are Common Elements owned by all unit owners as tenants in common.
- An airspace unit is simply space, which might or might not include any of the ground. Any structure inside the space belonging to the unit owner.

# Airspace Units = Flexibility



# Quick Overview - 2 Types of Development Rights

- Originally, the right to add land into the condo and to own any new units located in that added land.
- Since 7/1/1990, the right to create new units within the common elements of a condominium and the right to own those new units.

*The Declaration grants, reserves, limits and terminates development rights. Read it carefully when insuring based upon such rights.*

# Benefits of Airspace Condos:

- Structures don't need to exist at the time of the declaration.
- Construction loans can be obtained on the land/area within the unit, just like for a platted lot.
- Can be re-subdivided into multiple units if the declarant reserves that right.

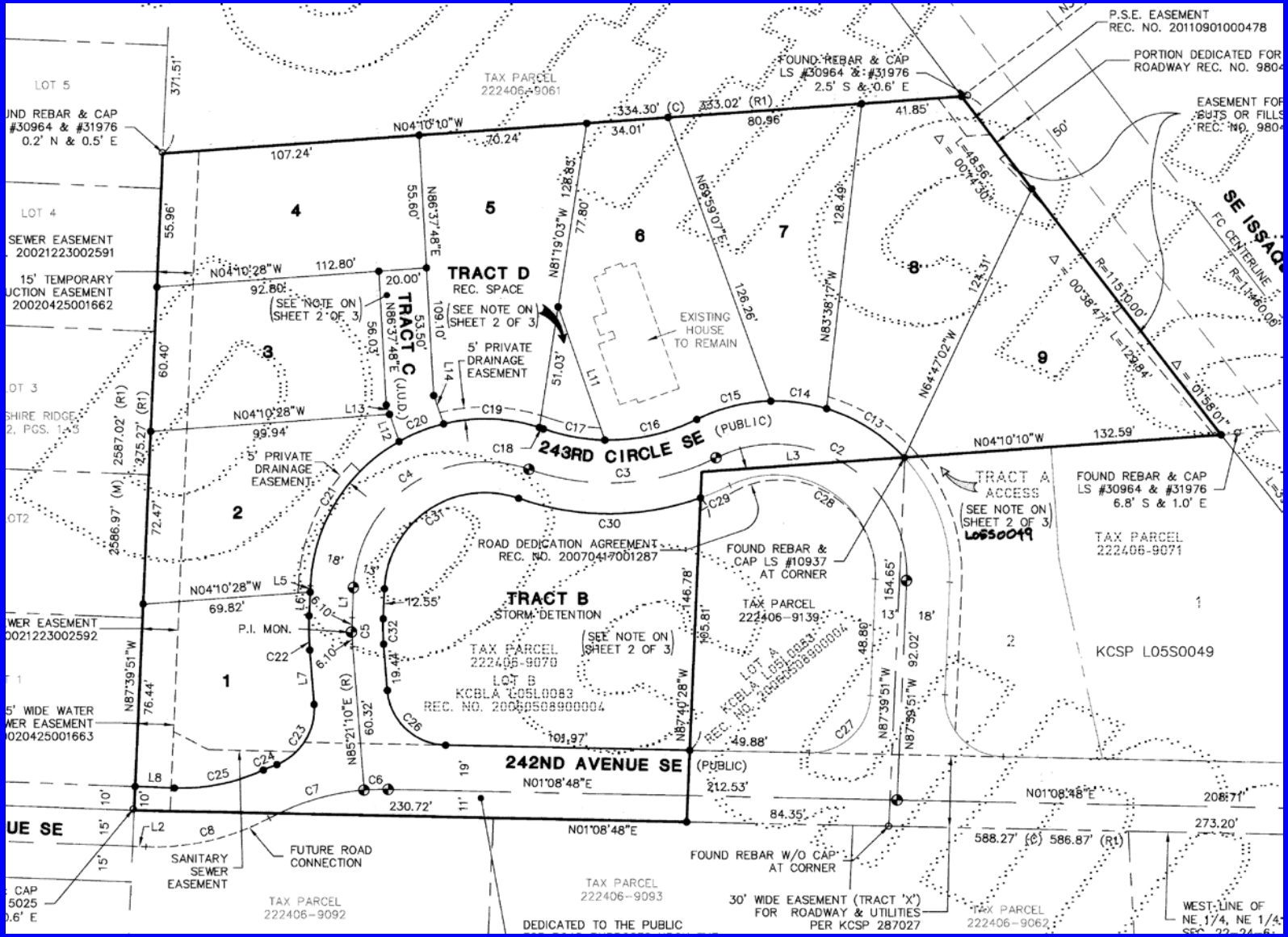


# Air Space Condominium

Issues for improvements inside the "box"

- Houses are "fixtures" and thus "real property", even if built after a unit sale.
- Mobile homes are not automatically "real property", but can have their title eliminated to become real property. The usual insurability rules apply for the mobile/manufactured home.
- Houseboats are vessels, personal property, and normally excepted from coverage.

# Condos that look like Subdivisions



# Condos that look like Subdivisions

The units look like lots in a plat from above, except they are three dimensional "Boxes".

They can be:

Detached (plat style); or

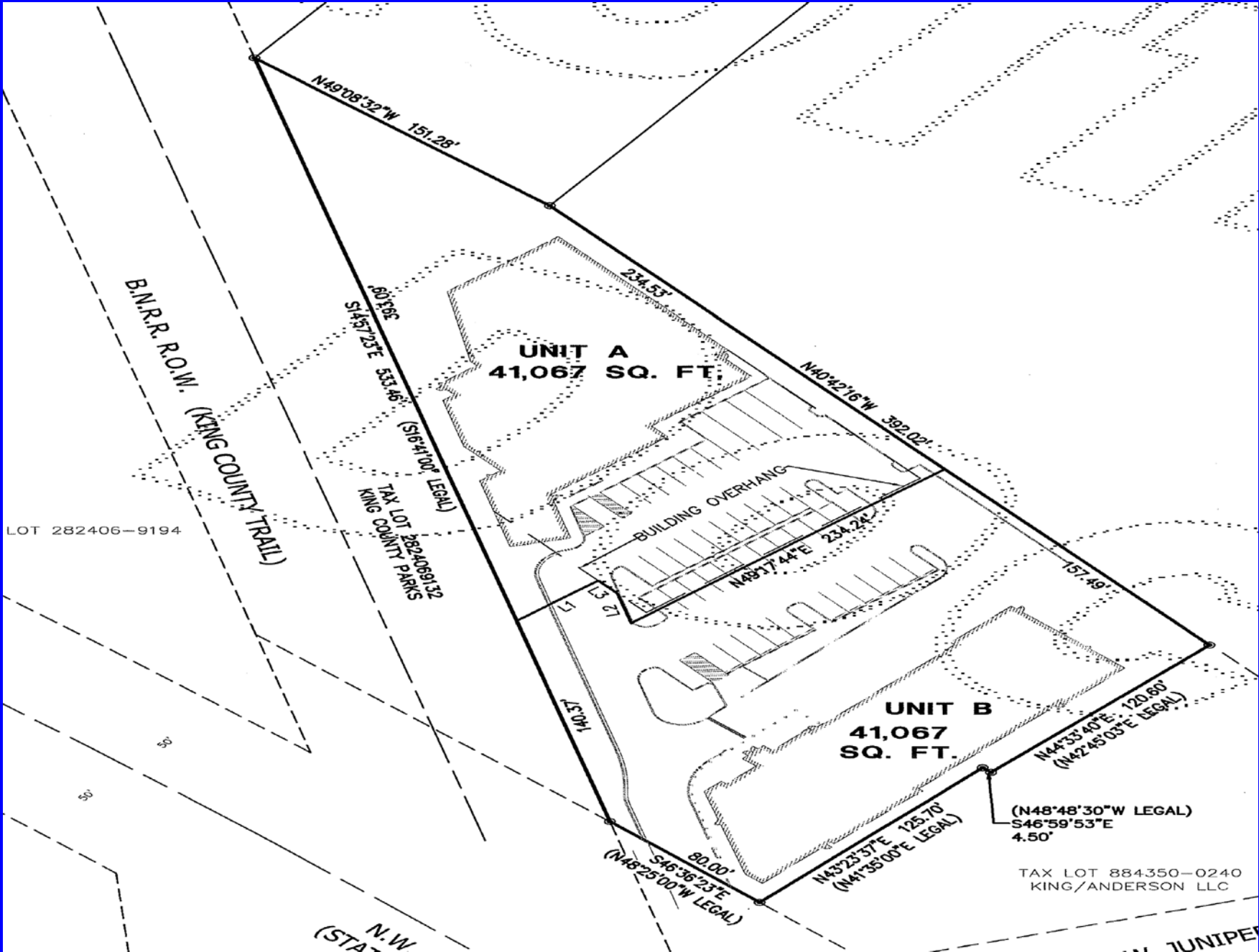
Side-by-side (townhouse style)

# Condos that look like Subdivisions

*Condos are exempt from subdivision regulation under RCW 58.17.*

Carving into "air spaces" with horizontal boundaries is not the same as subdividing into lots with only vertical boundaries and full ownership above and below the surface of the land.

***BEWARE of a condo that looks just like a subdivision without upper or lower elevations!***



But there are disagreements ...  
What does the statute require?

- Elevation limits - Are they required?
- Or even common elements?

We need to be cautious! Remember, the ALTA Homeowner's Policy and lender ALTA Condominium Endorsements provide coverage relating to subdivision compliance. Consult with an underwriter.

# Key Condo Statute Sections

## RCW 64.34.020 - Definitions

- "Condominium": real property, portions of which are designated for separate ownership and the remainder is designated for common ownership solely by the owners of those portions. Real property is not a condominium unless the undivided interests in the common elements are vested in the unit owners.
- "Common elements" means all portions of a condominium other than the units.
- "Leasehold condominium" means a condominium in which all or a portion of the real property is subject to a lease, the expiration or termination of which will terminate the condominium or reduce its size.

RCW 64.34.212 - A description of a unit automatically includes all appurtenant interests in common elements.

# DEVELOPMENT RIGHTS AND PHASING - 2 Main Types

1. Traditional: Submit only a portion of the land, then add more land and units later.
2. Submit all of the land but create only a portion of the units, then add more units within existing land.



# Traditional Phasing - Adding Land

Original Phase 1  
land with  
original units

Land not in the  
condo, but  
which may be  
added later  
with additional  
units

# Phasing within the original condo land

Phase 1 units  
created  
within this  
portion of  
the original  
land

Portion of  
the original  
land where  
development  
rights may  
be exercised

# Phasing within the original condo land via air space unit

Phase 1 units  
created in this  
portion of the  
original land

Air Space  
"Unit" where  
development  
rights may be  
exercised

# REASONS FOR PHASING

They can't subdivide because

- The land is a lot in a recent short plat
- Zoning/setbacks would not permit it
- Amenities are on Phase 2 land

Or, they don't want to expend the time or money to subdivide.

# *Withdrawable Land*

The declarant can reserve the right to withdraw land. But this only works if the declaration properly reserves the right, preempting rights of purchasers and lenders of the units.

Requires subdivision compliance. But lack of subdivision approval is the most common reason the land was originally in the condo!

This right should have an expiration date!

# *Withdrawable Land*

- The declaration must clearly provide for the right to withdraw, and any expiration date or special limitations on that right.
- Legal description for withdrawable land:
  - Must be described in the declaration
  - Must be delineated and labeled on the Survey Map & Plans as:  
"MAY BE WITHDRAWN FROM THE CONDOMINIUM"

## *Can You Add Units or Land or Withdraw Land Without a Current Development Right?*

If a development right for the action has expired or was not expressly reserved, actions require involving all lot owners and lenders.

Remember, they own all common element areas as tenants in common and their lenders encumber that ownership.

And what will be the resulting ownership?

# *Can you insure Development Rights?*

- Ask your underwriter. Some rights or aspects of rights are not “real property”.
- Method of describing rights varies by condo.
  - \*\*\* Read the declaration carefully!
- Be sure rights have not expired and there are no special conditions, such as continuing to own at least one unit.
- Be sure all rights have been properly assigned to any successor to the Declarant.
- Don't issue TSG's or insure through foreclosures without approval.



# How to describe the insured land?

## Definitely not:

*"The additional phase land legal description" if it is inside the condo!!!*

- *Remember, it's all "Common Element" owned by the existing unit owners, even if the developer still owns some units.*
- *Statute prohibits separately selling or encumbering common elements, except by the association under a special provision.*

# How to describe the insured land?

## Definitely not:

*The original pre-condo land, EXCEPT the earlier phases or units!!*

- *The existing unit owners own everything since it is all common element.*
- *There's nothing left! Really!!*
- *RCW 64.34.316(1) requires "an instrument evidencing the transfer" of special declarant and development rights. Clear language must be used.*

# Examples

*(But not always appropriate - check with your underwriter)*

## **Estate or interest:**

Possessory rights, to the extent the same are real property.

*(definitely not "Fee Simple")*

## **Legal description:**

All development rights and special declarant rights (as those terms are defined in the Washington Condominium Act, Chapter 64.34 RCW), established in the condominium declaration for \_\_\_\_\_, a condominium, according to the declaration thereof, recorded \_\_\_\_\_, and amendments thereto recorded \_\_\_\_\_, in \_\_\_\_\_ County, Washington, including but not limited to the right to create additional units within the subsequent phase property as described therein (or "as follows:").

# Claims Issues & Development Rights

- Insuring a legal description of a portion of the common elements where development rights are exercisable.
- Insuring the pre-condo legal description, "Except" all existing phase units.
- Foreclosure documents failing to describe development rights.
- Expiration of development rights.
- Lack of assignment of development rights.
- Missing taxes on future phase land that is within the common elements.

# Leasehold Condos & Special Issues

- Some common types: Boat Slips, Houseboat Moorages, Airplane Hangars.
- Some condos are entirely leasehold, or sometimes part fee and part leasehold.
- Be sure your insured "estate or interest" is accurate.

# Leasehold condos Terminate when the lease expires!

- An extension of the lease would typically extend the term of existence of the condo.
- *But the State of WA currently prefers to grant a new lease, and only to the condo association, not the unit owners.*

# One possible cure with a New Lease

- If the original leasehold estate was owned by the unit owners then a new lease to the Association still leaves the unit owners with no direct ownership.
- The condo declaration should be amended to describe the new leasehold estate, provide for subleases, and have the association grant subleases to the intended unit owners. The Association is the new Declarant.

# Problem: Who can be the "lessee"

Many governmental lessors require the declarant to assign the lease to the Association (HOA).

- Declarant sells units by partial assignment of the lease, then "fully assigns" the lessee's interest to the HOA. *There's a CONFLICT!*
- If the full assignment to the HOA occurs before all units are sold, can the declarant sell more units?



# Attempts to sell "fee title" to leasehold airplane hangar units

## The Declarant:

- built and "owns" a building on leased land,
- wants to sell "fee" to the unit (thinking "building") and assign a leasehold in the land,
- but if the "unit" is really the space inside the building it isn't "fee title".

# Attempts to Convert to Subdivisions

RCW 64.34.268 Termination of condo: ... title to all real property in the condo vests in the unit owners upon termination as tenants in common ...

- Stoneleaf Condo: Created a plat. Thought language inserted in the termination of condo would allow unit owners to automatically be lot owners without deeds. Forgot about lenders' liens on undivided interests, too.
- Orchards at Crescent Bar: Thought they didn't need a plat. Land did not qualify for platting. Had to fully unwind and reinstate condo, deed units back out of undivided interest ownership.

## RCW 64.34.348 - Common elements Conveyance - Encumbrance.

(1) Portions of the common elements ... may be conveyed or subjected to a security interest by the *association* if the owners of units to which at least eighty percent of the votes in the association are allocated, ..., or any larger percentage the declaration specifies, agree to that action; ... Proceeds of the sale or financing are an asset of the association.

# Conveyance of Common Elements by a Condo Association

- Sale by HOA only applies to a Condominium Act condo created 7/1/1990 or newer, or an older Horizontal Property Regimes condo which amended its declaration to take advantage of this portion of the Condominium Act.
- HOA can convey title, but can it convey free and clear of any interest of a lender or judgment creditor? *Consult with your underwriter!*