

# UNIFORM CONDOMINIUM ACT

## ARTICLE 1

### GENERAL PROVISIONS

#### Section

- 1-101. [Short Title].
- 1-102. [Applicability].
- 1-103. [Definitions].
- 1-104. [Variation by Agreement].
- 1-105. [Separate Titles and Taxation].
- 1-106. [Applicability of Local Ordinances, Regulations, and Building Codes].
- 1-107. [Eminent Domain].
- 1-108. [Supplemental General Principles of Law Applicable].
- 1-109. [Construction Against Implicit Repeal].
- 1-110. [Uniformity of Application and Construction].
- 1-111. [Severability].
- 1-112. [Unconscionable Agreement or Term of Contract].
- 1-113. [Obligation of Good Faith].
- 1-114. [Remedies to be Liberally Administered].

## ARTICLE 2

### CREATION, ALTERATION, AND TERMINATION OF CONDOMINIUMS

- 2-101. [Creation of Condominium].
- 2-102. [Unit Boundaries].
- 2-103. [Construction and Validity of Declaration and Bylaws].
- 2-104. [Description of Units].
- 2-105. [Contents of Declaration].
- 2-106. [Leasehold Condominiums].
- 2-107. [Allocation of Common Element Interests, Votes, and Common Expense Liabilities].
- 2-108. [Limited Common Elements].
- 2-109. [Plats and Plans].
- 2-110. [Exercise of Development Rights].
- 2-111. [Alteration of Units].
- 2-112. [Relocation of Boundaries Between Adjoining Units].
- 2-113. [Subdivision of Units].
- 2-114. [Alternative A] [Easement for Encroachments].  
[Alternative B] [Monuments as Boundaries].

- 2-115. [Use for Sales Purposes].
- 2-116. [Easement Rights].
- 2-117. [Amendment of Declaration].
- 2-118. [Termination of Condominium].
- 2-119. [Rights of Secured Lenders].
- 2-120. [Master Associations].
- 2-121. [Merger or Consolidation of Condominiums].

### ARTICLE 3

#### **MANAGEMENT OF CONDOMINIUM**

- 3-101. [Organization of Unit Owners' Association].
- 3-102. [Powers of Unit Owners' Association].
- 3-103. [Executive Board Members and Officers].
- 3-104. [Transfer of Special Declarant Rights].
- 3-105. [Termination of Contracts and Leases of Declarant].
- 3-106. [Bylaws].
- 3-107. [Upkeep of Condominium].
- 3-108. [Meetings].
- 3-109. [Quorums].
- 3-110. [Voting; Proxies].
- 3-111. [Tort and Contract Liability].
- 3-112. [Conveyance or Encumbrance of Common Elements].
- 3-113. [Insurance].
- 3-114. [Surplus Funds].
- 3-115. [Assessments for Common Expenses].
- 3-116. [Lien for Assessments].
- 3-117. [Other Liens Affecting the Condominium].
- 3-118. [Association Records].
- 3-119. [Association as Trustee].

### ARTICLE 4

#### **PROTECTION OF CONDOMINIUM PURCHASERS**

- 4-101. [Applicability; Waiver].
- 4-102. [Liability for Public Offering Statement Requirements].
- 4-103. [Public Offering Statement; General Provisions].
- 4-104. [Same; Condominiums Subject to Development Rights].
- 4-105. [Same; Time-Shares].
- 4-106. [Same; Condominiums Containing Conversion Buildings].
- 4-107. [Same; Condominium Securities].

- 4-108. [Purchaser's Right to Cancel].
- 4-109. [Resales of Units].
- 4-110. [Escrow of Deposits].
- 4-111. [Release of Liens].
- 4-112. [Conversion Buildings].
- 4-113. [Express Warranties of Quality].
- 4-114. [Implied Warranties of Quality].
- 4-115. [Exclusion or Modification of Implied Warranties of Quality].
- 4-116. [Statute of Limitations for Warranties].
- 4-117. [Effect of Violation on Rights of Action; Attorney's Fees].
- 4-118. [Labeling of Promotional Material].
- 4-119. [Declarant's Obligation to Complete and Restore].
- 4-120. [Substantial Completion of Units].

[OPTIONAL]

## ARTICLE 5

### **ADMINISTRATION AND REGISTRATION OF CONDOMINIUMS**

- 5-101. [Administrative Agency].
- 5-102. [Registration Required].
- 5-103. [Application for Registration; Approval of Uncompleted Units].
- 5-104. [Receipt of Application; Order of Registration].
- 5-105. [Cease and Desist Orders].
- 5-106. [Revocation of Registration].
- 5-107. [General Powers and Duties of Agency].
- 5-108. [Investigative Powers of Agency].
- 5-109. [Annual Report and Amendments].
- 5-110. [Agency Regulation of Public Offering Statement].

## ARTICLE 1

### GENERAL PROVISIONS

#### § 1-101. [Short Title]

This Act shall be known and may be cited as the Uniform Condominium Act.

#### § 1-102. [Applicability]

(a) This Act applies to all condominiums created within this State after the effective date of this Act. Sections 1-105 (Separate Titles and Taxation), 1-106 (Applicability of Local Ordinances, Regulations, and Building Codes), 1-107 (Eminent Domain), 2-103 (Construction and Validity of Declaration and Bylaws), 2-104 (Description of Units), 3-102(a)(1) through (6) and (11) through (16) (Powers of Unit Owners' Association), 3-111 (Tort and Contract Liability), 3-116 (Lien for Assessments), 3-118 (Association Records), 4-109 (Resales of Units), and 4-117 (Effect of Violation on Rights of Action; Attorney's Fees), and Section 1-103 (Definitions), to the extent necessary in construing any of those sections, apply to all condominiums created in this State before the effective date of this Act; but those sections apply only with respect to events and circumstances occurring after the effective date of this Act and do not invalidate existing provisions of the (declaration, bylaws, or plats or plans) of those condominiums.

(b) The provisions of (insert reference to all present statutes expressly applicable to condominiums or horizontal property regimes) do not apply to condominiums created after the effective date of this Act and do not invalidate any amendment to the (declaration, bylaws, and plats and plans) of any condominium created before the effective date of this Act if the amendment would be permitted by this Act. The amendment must be adopted in conformity with the procedures and requirements specified by those instruments and by (insert reference to all present statutes expressly applicable to condominiums or horizontal property regimes). If the amendment grants to any person any rights, powers, or privileges permitted by this Act, all correlative obligations, liabilities, and restrictions in this Act also apply to that person.

(c) This Act does not apply to condominiums or units located outside this State, but the public offering statement provisions (Sections 4-102 through 4-108) apply to all contracts for the disposition thereof signed in this State by any party unless exempt under Section 4-101(b) [and the agency regulation provisions under Article 5 apply to any offering thereof in this State.]

### COMMENT

1. The question of the extent to which a state statute should apply to particular condominiums involves two problems: first, the extent to which the statute should require or permit different results for condominiums created before and after the statute becomes effective; and second, whether the statute should impose any or all of its substantive requirements on condominiums located outside the state.

Two conflicting policies are proposed when considering the applicability of this Act to "old" and "new"

condominiums located in the enacting state. On the one hand, it is desirable, for reasons of uniformity, for the Act to apply to all condominiums located in a particular state, regardless of whether the condominium was created before or after adoption of the Act in that state. To the extent that different laws apply within the same state to different condominiums, confusion results in the minds of both lenders and consumers. Moreover, because of the inadequacies and uncertainties of condominiums created under old law, and because of the requirements placed on declarants and unit owners' associations by this Act which might increase the costs of new condominiums, different markets might tend to develop for condominiums created before and after adoption of the Act.

On the other hand, to make all provisions of this Act automatically apply to "old" condominiums might violate the constitutional prohibition of impairment of contracts. In addition, aside from the constitutional issue, automatic applicability of the entire Act almost certainly would unduly alter the legitimate expectations of some present unit owners and declarants.

Accordingly, the philosophy of this section reflects a desire to maximize the uniform applicability of the Act to all condominiums in the enacting state, while avoiding the difficulties raised by automatic application of the entire Act to pre-existing condominiums.

2. In carrying out this philosophy with respect to "new" condominiums, the Act applies to all condominiums "created" within the state after the Act's effective date. This is the effect of the first sentence of subsection (a). The first sentence of subsection (b) makes clear that the provisions of old statutes expressly applicable to condominiums do not apply to condominiums created after the effective date of this Act.

"Creation" of a condominium pursuant to this Act occurs upon recordation of a declaration pursuant to Section 2-101; however, the definition of "condominium" in Section 1-103(7) contemplates that de facto condominiums may exist, if the nature of the ownership interest fits the definition, and the Act would apply to such a condominium. Any real estate project which includes individually owned units and common elements owned by the unit owners as tenants in common is therefore subject to the Act if created within the state after the Act's effective date. No intent to subject the condominium to the Act is required, and an express intention to the contrary would be invalid and ineffective.

3. The section adopts a novel three-step approach to condominiums created before the effective date of the Act. First, certain provisions of the Act automatically apply to "old" condominiums, but only prospectively, and only in a manner which does not invalidate provisions of condominium declarations and bylaws valid under "old" law. Second, "old" law remains applicable to previously created condominiums where not automatically displaced by the Act. Third, owners of "old" condominiums may amend any provisions of their declaration or bylaws, even if the amendment would not be permitted by "old" law, so long as (a) the amendment is adopted in accordance with the procedure required by "old" law and the existing declaration and bylaws, and (b) the substance of the amendment does not violate this Act.

4. Elaboration of the principles described in Comment 3 may be helpful.

First, the second sentence of subsection (a) provides that the enumerated provisions automatically apply

to condominiums created under pre-existing law, even though no action is taken by the unit owners. Many of the sections which do apply should measurably increase the ability of the unit owners to effectively manage the association, and should help to encourage the marketability of condominiums created under early condominium statutes. To avoid possible constitutional challenges, these provisions, as applied to "old" condominiums, apply only to "events and circumstances occurring after the effective date of this Act"; moreover, the provisions of this Act are subject to the provisions of the instruments creating the condominium, and this Act does not invalidate those instruments.

**EXAMPLE 1:**

Under subsection (a), Section 4-109 (Resale Certificates) automatically applies to "old" condominiums. Accordingly, unit owners in condominiums established prior to adoption of the Act would be obligated after the Act's effective date to provide resale certificates to future purchasers of units in "old" condominiums. However, the failure of a unit owner to provide such a certificate to a purchaser who acquired the unit before the effective date of the Act would not create a cause of action in the purchaser, because the conveyance was an event occurring before the effective date of the Act.

**EXAMPLE 2:**

Under subsection (a), Section 3-118 (Association Records) automatically applies to "old" condominiums. As a result, a unit owners' association of an "old" condominium must maintain certain financial records, and all the records of the association "shall be made reasonably available for examination by any unit owner and his authorized agents", even if the "old" law did not require that records be kept, or access provided. If the declaration or bylaws, however, provided that unit owners could not inspect the records of the association without permission of the president of the association, the restriction in the declaration would continue to be valid and enforceable.

Second, the prior laws of the state relating to condominiums are not repealed by this Act because those laws will still apply to previously-created condominiums, except when displaced. Some states, such as Connecticut and Florida, have made certain provisions of their condominium statutes automatically applicable to pre-existing condominiums. In certain instances, this attempted retroactive application has raised serious constitutional questions, has caused doubts to arise as to the continued validity of those condominiums, and has created general confusion as to what statutory rules should be applied.

Third, the Act seeks to alleviate any undesirable consequences of "old" law, by a limited "opt-in" provision. More specifically, subsection (b) permits the owners of a pre-existing condominium to take advantage of the salutary provisions of this statute to the extent that can be accomplished consistent with the procedures for amending the condominium instruments as specified in those instruments and in the pre-existing statute.

**EXAMPLE 3:**

Under most "first generation" condominium statutes, unit owners have no power to relocate boundaries between adjoining units. Under Section 2-112 of this Act, unit owners have such power, unless limited by the

declaration. While Section 2-112 does not automatically apply to "old" condominiums, if the unit owners of a pre-existing condominium amend their condominium instruments in the manner permitted by the old statute and their existing instruments to permit unit owners to relocate boundaries, this section would validate that amendment, even if it were invalid under old law.

5. In considering the permissible amendments under subsection (b), it is important to distinguish between the law governing the procedure for amending declarations, and the substance of the amendments themselves. An amendment to the declaration of the condominium created under "old" law, even if permissible under this Act, must nevertheless be adopted "in conformity with the procedures and requirements specified" by the original condominium instruments, and in compliance with the old law.

**EXAMPLE:**

Suppose an "old" condominium declaration and "old" state law both provide that approval by 100% of the unit owners is required to amend the declaration, but the unit owners wish to amend the declaration to provide for only 67% of the unit owners' approval of future amendments, as permitted by Section 2-117 of this Act. The amendment would not be valid unless 100% of the unit owners approved it, because of the procedural requirement of the declaration and "old" law. Once approved, however, only 67% would be required for subsequent amendments.

6. The last sentence of subsection (b) addresses the potential problem of a declarant seeking to take undue advantage of the amendment provisions to assume a power granted by the Act without being subject to the Act's limitations on the power. The last sentence insures that, if declarants or other persons assume any of the powers and rights which the Act grants, the correlative obligations, liabilities, and restrictions of the Act also apply to that person, even if the amendment itself does not require that result.

**EXAMPLE:**

Assume that, pursuant to the provisions of the "old" law, the declarant may exercise control over the association for only 3 years from the date the condominium is created, but the control may be maintained during that period for so long as declarant owns any units. In the absence of any amendment, a provision in the declaration taking full advantage of the "old" law would be valid and enforceable. Assume further that, in the second year following creation of the condominium in question, this Act is adopted. The declarant then properly amends the declaration pursuant to subsection (b) to extend the period of declarant control for 5 years from the date of creation. The amendment would effectively extend control for 2 additional years, because Section 3-103(d) does not limit the number of the years the declarant may specify as a control period.

Nevertheless, if the declarant, before that extended time limit has expired, conveys 75 percent of the units that may ever be a part of the condominium, or fails for 2 years to exercise development rights or offer units for sale in the ordinary course of business, the period of declarant control would terminate by virtue of the limitations in Section 3-103(d). That limitation is imposed on the declarant even if the amendment called for retaining control for so long as any units were owned by declarant, and despite the provision in the "old" law permitting such a restriction.

7. The reference in subsection (b) to "all present statutes expressly applicable to condominiums or horizontal property regimes" is intended to distinguish between a state's condominium enabling statutes and those statutes which apply not only to condominiums but to other forms of real estate, such as taxation statutes or subdivision statutes. Thus, reference to the state's condominium or horizontal property regime enabling statutes should be included here, while references to taxation, subdivision, or other statutes which are not restricted solely to condominiums should not be included.

8. In place of the words "declaration, bylaws, and plats and plans", each state should insert the appropriate terminology for those documents under the present state law, e.g., "master deed, rules and regulations", etc.

9. This section does not permit a pre-existing condominium to elect to come entirely within the provisions of the Act, disregarding old law. However, the owners of a pre-existing condominium may elect to terminate the condominium under pre-existing law and create a new condominium which would be subject to all the provisions of this Act.

10. Subsection (c) reflects the fact that there are practical as well as constitutional limits regarding the extent to which a state should or may extend its jurisdiction to out-of-state transactions. A state may, of course, properly exercise its authority to protect its citizens from false or misleading information relating to condominiums located in other states but sold in that state. However, where sales contracts are executed wholly outside the enacting state and relate to condominiums located outside the state, it seems more appropriate for the courts of the jurisdiction(s) in which the condominium is located and where the transaction occurs to have jurisdiction over the transaction.

#### § 1-103. [Definitions]

In the declaration and bylaws, unless specifically provided otherwise or the context otherwise requires, and in this Act:

(1) "Affiliate of a declarant" means any person who controls, is controlled by, or is under common control with a declarant. A person "controls" a declarant if the person (i) is a general partner, officer, director, or employer of the declarant, (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than 20 percent of the voting interest in the declarant, (iii) controls in any manner the election of a majority of the directors of the declarant, or (iv) has contributed more than 20 percent of the capital of the declarant. A person "is controlled by" a declarant if the declarant (i) is a general partner, officer, director, or employer of the person, (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than 20 percent of the voting interest in the person, (iii) controls in any manner the election of a majority of the directors of the person, or (iv) has contributed more than 20 percent of the capital of the person. Control does not exist if the powers described in this paragraph are held solely as security for an obligation and are not exercised.

(2) "Allocated Interests" means the undivided interest in the common elements, the common expense liability, and votes in the association allocated to each unit.



(3) "Association" or "unit owners' association" means the unit owners' association organized under Section 3-101.

(4) "Common elements" means all portions of a condominium other than the units.

(5) "Common expenses" means expenditures made by or financial liabilities of the association, together with any allocations to reserves.

(6) "Common expense liability" means the liability for common expenses allocated to each unit pursuant to Section 2-107.

(7) "Condominium" means real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners.

(8) "Conversion building" means a building that at any time before creation of the condominium was occupied wholly or partially by persons other than purchasers and persons who occupy with the consent of purchasers.

(9) "Declarant" means any person or group of persons acting in concert who (i) as part of a common promotional plan, offers to dispose of his or its interest in a unit not previously disposed of, [or] (ii) reserves or succeeds to any special declarant right [, or (iii) applies for registration of a condominium under Article 5.]

(10) "Declaration" means any instruments, however denominated, that create a condominium, and any amendments to those instruments.

(11) "Development rights" means any right or combination of rights reserved by a declarant in the declaration to (i) add real estate to a condominium; (ii) to create units, common elements, or limited common elements within a condominium; (iii) to subdivide units or convert units into common elements; or (iv) to withdraw real estate from a condominium.

(12) "Dispose" or "disposition" means a voluntary transfer to a purchaser of any legal or equitable interest in a unit, but does not include the transfer or release of a security interest.

(13) "Executive board" means the body, regardless of name, designated in the declaration to act on behalf of the association.

(14) "Identifying number" means a symbol or address that identifies only one unit in a condominium.

(15) "Leasehold condominium" means a condominium in which all or a portion of the real estate is subject to a lease the expiration or termination of which will terminate the condominium or reduce its size.

(16) "Limited common element" means a portion of the common elements allocated by the declaration

or by operation of Section 2-102(2) or (4) for the exclusive use of one or more but fewer than all of the units.

(17) "Master association" means an organization described in Section 2-120, whether or not it is also an association described in Section 3-101.

(18) "Offering" means any advertisement, inducement, solicitation, or attempt to encourage any person to acquire any interest in a unit, other than as security for an obligation. An advertisement in a newspaper or other periodical of general circulation, or in any broadcast medium to the general public, of a condominium not located in this State, is not an offering if the advertisement states that an offering may be made only in compliance with the law of the jurisdiction in which the condominium is located.

(19) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or other legal or commercial entity. [In the case of a land trust, however, "person" means the beneficiary of the trust rather than the trust or the trustee.]

(20) "Purchaser" means any person, other than a declarant or a person in the business of selling real estate for his own account, who by means of a voluntary transfer acquires a legal or equitable interest in a unit other than (i) a leasehold interest (including renewal options) of less than 20 years, or (ii) as security for an obligation.

(21) "Real estate" means any leasehold or other estate or interest in, over, or under land, including structures, fixtures, and other improvements and interests which by custom, usage, or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance. "Real estate" includes parcels with or without upper or lower boundaries, and spaces that may be filled with air or water.

(22) "Residential purposes" means use for dwelling or recreational purposes, or both.

(23) "Special declarant rights" means rights reserved for the benefit of a declarant to (i) complete improvements indicated on plats and plans filed with the declaration (Section 2-109); (ii) to exercise any development right (Section 2-110); (iii) to maintain sales offices, management offices, signs advertising the condominium, and models (Section 2-115); (iv) to use easements through the common elements for the purpose of making improvements within the condominium or within real estate which may be added to the condominium (Section 2-116); (v) to make the condominium part of a larger condominium or a planned community (Section 2-121); (vi) to make the condominium subject to a master association (Section 2-120); (vii) or to appoint or remove any officer of the association or any master association or any executive board member during any period of declarant control (Section 3-103(c)).

(24) "Time share" means a right to occupy a unit or any of several units during [5] or more separated time periods over a period of at least [5] years, including renewal options, whether or not coupled with an estate or interest in a condominium or a specified portion thereof.

(25) "Unit" means a physical portion of the condominium designated for separate ownership or occupancy, the boundaries of which are described pursuant to Section 2-105(a)(5).

(26) "Unit owner" means a declarant or other person who owns a unit, or a lessee of a unit in a leasehold condominium whose lease expires simultaneously with any lease the expiration or termination of which will remove the unit from the condominium, but does not include a person having an interest in a unit solely as security for an obligation.

#### COMMENT

1. The first clause of this section permits the defined terms used in the Act to be defined differently in the declaration and bylaws. Regardless of how terms are used in those documents, however, terms have an unvarying meaning in the Act, and any restricted practice which depends on the definition of a term is not affected by a changed term in the documents.

#### EXAMPLE:

A declarant might vary the definition of "unit owner" in the declaration to exclude himself in an attempt to avoid assessments for units which he owns. The attempt would be futile, since the Act defines a declarant who owns a unit as a unit owner and defines the liabilities of a unit owner.

2. The definition of "affiliate of a declarant" (Section 1-103(1)) is similar to the definitions in 12 U.S.C. § 1730(a), which prescribes the authority of the Federal Savings and Loan Insurance Corporation to regulate the activities of savings and loan holding companies, and in 15 U.S.C. § 78(c)(18), which defines persons deemed to be associated with a broker or dealer for purposes of the federal securities laws.

The objective standards of the definition permit a ready determination of the existence of affiliate status to be made. Unlike 12 U.S.C. § 1730(a)(2)B, no power is vested in an agency to subjectively determine the existence of "control" necessary to establish affiliate status. Thus, affiliate status does not exist under the Act unless these objective criteria are met.

3. Definition (2), "allocated interests," refers to all of the interests which this Act requires the declaration to allocate. See Section 2-107.

4. Definitions (4) and (25), treating "common elements" and "units," should be examined in light of Section 2-102, which specifies in detail how the precise differentiation between units and common elements is to be determined in any given condominium to the extent that the declaration does not provide a different scheme. No exhaustive list of items comprising the common elements is necessary in this Act or in the declaration; as long as the boundaries between units and common elements can be ascertained with certainty, the common elements include by definition all of the real estate in the condominium not designated as part of the units.

5. Definition (7), "condominium," makes clear that, unless the ownership interest in the common elements is vested in the owners of the units, the project is not a condominium. Thus, for example, if the common elements were owned by an association in which each unit owner was a member, the project would not be a condominium. Similarly, if a declarant sold units in a building but retained title to the common areas, granting easements over them to unit owners, no condominium would have been created. Such projects have many of the

attributes of condominiums, but they are not covered by this Act.

6. Definition (8), "conversion building," is important because of the protection which the Act provides in Section 1-112 for tenants of buildings which are being converted into a condominium. The definition distinguishes between buildings which have never been occupied by any person before the time that the building is submitted to the condominium form of ownership, and buildings, whether new or old, which have been previously occupied by tenants. In the former case, because there have been no tenants in the building, the building would not be a conversion building, and no protection of tenants is necessary.

7. Definition (9), "declarant," is designed to exclude persons who may be called upon to execute the declaration in order to ratify the creation of the condominium, but who are not intended to be charged with the responsibilities imposed on declarants by this Act if that is all they do. Examples of such persons include holders of pre-existing liens and, in the case of leasehold condominiums, ground lessors. (Of course, such a person could become a declarant by subsequently succeeding to a special declarant right.) Other persons similarly protected by the narrow wording of this definition include real estate brokers, because they do not offer to dispose of their own interest in a unit. Similarly, unit owners reselling their units are not declarants because their units were "previously disposed of" when originally conveyed.

The last bracketed clause in this definition must be deleted in any state which chooses not to enact Article 5 of the Act.

8. Definition (11), "development rights," includes a panoply of sophisticated development techniques that have evolved over time throughout the United States and which have been expressly recognized (and regulated) in an increasing number of jurisdictions, beginning with Virginia in 1974.

Some of these techniques relate to the phased (or incremental) development of condominiums which the declarant hopes, but cannot be sure, will be successful enough to grow to include more land than he is initially willing to commit to the condominium. For example, a declarant may be building (or converting) a 50-unit building on Parcel A with the intention, if all goes well, to "expand" the condominium by adding an additional building on Parcel B, containing additional units, as part of the same condominium. If he reserves the right to do so, i.e., to "add real estate to a condominium," he has reserved a "development right."

In certain cases, however, the declarant may desire, for a variety of reasons, to include both parcels in the condominium from the outset, even though he may subsequently be obliged to withdraw all or part of one parcel. Assume, for example, that in the example just given the declarant intends to build an underground parking garage that will extend into both parcels. If the project is a success, his documentation will be simpler if both parcels were included in the condominium from the beginning. If his hopes are not realized, however, and it becomes necessary to withdraw all or part of Parcel B from the condominium and devote it to some other use, he may do so if he has reserved such a development right "to withdraw real estate from a condominium." The portion of the garage which extends into Parcel B may be left in the condominium (separated from the remainder of Parcel B by a horizontal boundary), or the garage may be divided between Parcels A and B with appropriate cross-easement agreements.

The right "to create units, common elements, or limited common elements" is frequently useful in commercial or mixed-use condominiums where the declarant needs to retain a high degree of flexibility to meet the space requirements of prospective purchasers who may not approach him until the condominium has already been created. For example, an entire floor of a high-rise building may be intended for commercial buyers, but the declarant may not know in advance whether one purchaser will want to buy the whole floor as a single unit or whether several purchasers will want the floor divided into several units, separated by common element walls and served by a limited common element corridor. This development right is sometimes useful even in purely residential condominiums, especially those designed to appeal to affluent buyers. Similarly, the development rights "to subdivide units or convert units into common elements" is most often of value in commercial condominiums, but can occasionally be useful in certain kinds of residential condominiums as well.

9. Definition (12), "dispose" or "disposition," includes voluntary transfers to purchasers of any interest in a unit, other than as security for an obligation. Consequently, the grant of a mortgage or other security interest is not a "disposition," nor is any transfer of any interest to a person who is excluded from the definition of "purchaser," infra. However, the term includes more than conveyances and would, for example, cover contracts of sale.

10. Definition (15), "leasehold condominium," should be distinguished from land which is leased to a condominium but not subjected to the condominium regime. A leasehold condominium means, by definition, real estate which has been subjected to the condominium form of ownership. In such a case, units located on the leasehold real estate are typically leased for long terms. At the expiration of such a lease, the condominium unit or the real estate underlying the unit would be removed from the condominium if the lease were not extended or renewed. On the other hand, real estate may not be subjected to condominium ownership, but may be leased directly to the association or to one or more unit owners for a term of years.

This distinction is very significant. Under Section 3-105, the unit owners' association is empowered, following expiration of the period of declarant control, to cancel any lease of recreational or parking areas or facilities to which it is a party, regardless of who the lessor is. The association also has the power to cancel any lease for any land if the declarant or an affiliate of the declarant is a party to that lease. If the leased real estate, however, is subjected by the declarant to condominium form of ownership, that lease may not be cancelled unless it is unconscionable or unless the real estate was submitted to the condominium regime for the purpose of avoiding the right to terminate the lease. See Section 3-105.

While the subjective test of declarant's "purpose" may not always be clear, the rights of the association to cancel a lease depend upon the test. Thus, for example, a declarant who wishes to lease a swimming pool to the unit owners would have a choice of subjecting the pool for, say, a term of 20 years to the condominium form of ownership as a common element. At the end of the term, the lease would terminate and the real estate containing the pool would be automatically removed from the condominium unless there were a right to renew the lease. During the 20-year term, the lease would not be cancellable, regardless of the terms, unless it were found to be unconscionable under Section 1-112, or cancellable because submitted for the purpose of avoiding the right to cancel. On the other hand, if the pool were not submitted to the condominium form of ownership and was leased directly to the association for a 20-year term, the association could cancel that lease 90 days after the period of declarant control expired, even if, for example, 18 years remained of the term.

In either case, the terms of the lease would have to be disclosed in the public offering statement.

11. Definition (20), "purchaser," includes a person who acquires any interest in a unit, even as a tenant, if his tenancy entitles him to occupy the premises for more than 20 years. This would include a tenant who holds a lease of a unit in a fee simple condominium for one year, if the lease entitles the tenant to renew the lease for more than 4 additional years. Excluded from the definition, however, are mortgagees, declarants, and people in the business of selling real estate for their account. Persons excluded from the definition of "purchaser" do not receive certain benefits under Article 4, such as the right to a public offering statement (Section 4-102(c) ) and the right to rescind (Section 4-108).

12. Definition (21), "real estate," is very broad, and is very similar to the definition of "real estate" in Section 1-201(16) of the Uniform Land Transactions Act.

Although often thought of in two-dimensional terms, real estate is a three-dimensional concept and the third dimension is unusually important in the condominium context. Where real estate is described in only two dimensions (length and width), it is correctly assumed that the property extends indefinitely above the earth's surface and downwards toward a point in the center of the planet. In most condominiums, however, as in so-called "air rights" projects, ownership does not extend ab solo usque ad coelum, because units are stacked on top of units or units and common elements are interstratified. In such cases the upper and lower boundaries must be identified with the same precision as the other boundaries.

13. Definition (23), "special declarant rights," seeks to isolate those rights reserved for the benefit of a declarant which are unique to the declarant and not shared in common with other unit owners. The list, while short, encompasses virtually every significant right which a declarant might seek in the course of creating or expanding a condominium.

Any person who possesses a special declarant right would be a "declarant", including any who succeed under Section 3-104 to any of those rights. Thus, the concept of special declarant rights triggers the imposition of obligations on those who possess the rights. Under Section 3-104, those obligations vary significantly, depending upon the particular special declarant rights possessed by a particular declarant. These circumstances are described more fully in the comments to Section 3-104.

14. Definition (24), "time share," is based on Section 1-102(14) and (18) of the Uniform Law Commissioners' Model Real Estate Time-Share Act.

15. Definition (25), "unit," describes a tangible, physical part of the project, rather than a right in, or claim to, a tangible physical part of the property. Therefore, for example, a "time-share" arrangement in which a unit is sold to 12 different persons each of whom has the right to occupy the unit for one month does not create 12 new units-there are, rather, 12 owners of the unit. (Under the section on voting (Section 2-110), a majority of the time-share owners of a unit are entitled to cast the votes assigned to that unit.)

While a separately described part of the project is not a unit unless it is designed for, and is subject to, separate ownership by persons other than the association, the association developer can hold or acquire units

unless otherwise provided in the declaration. See, also, Comment 4.

16. Definition (26), "unit owners," contemplates that a seller under a land installment contract would remain the unit owner until the contract is fulfilled. As between the seller and the buyer, various rights and responsibilities might be assigned to the buyer by the contract itself, but the association would continue to look to the seller (for payment of any arrears in common expense assessments, for example) as long as the seller holds title.

The definition makes it clear that declarants, so long as they own units in the condominium, are unit owners and are therefore subject to all of the obligations imposed on other unit owners, including the obligation to pay common expense assessments against those units. This provision is designed to resolve ambiguities on this point which have arisen under several existing state statutes.

§ 1-104. [Variation by Agreement]

Except as expressly provided in this Act, provisions of this Act may not be varied by agreement, and rights conferred by this Act may not be waived. A declarant may not act under a power of attorney, or use any other device, to evade the limitations or prohibitions of this Act or the declaration.

COMMENT

1. The Act is generally designed to provide great flexibility in the creation of condominiums and, to that end, the Act permits the parties to vary many of its provisions. In many instances, however, provisions of the Act may not be varied, because of the need to protect purchasers, lenders, and declarants. Accordingly, this section adopts the approach of prohibiting variation by agreement except in those cases where it is expressly permitted by the terms of the Act itself.

2. One of the consumer protections in this Act is the requirement for consent by specified percentages of unit owners to particular actions or changes in the declaration. In order to prevent declarants from evading these requirements by obtaining powers of attorney from all unit owners, or in some other fashion controlling the votes of unit owners, this section forbids the use by a declarant of any device to evade the limitations or prohibitions of the Act or of the declaration.

3. The following sections permit variation:

Section 1-102. [Applicability.] Preexisting condominiums may elect to conform to the Act.

Section 1-103. [Definitions.] All definitions used in the declaration and bylaws may be varied in the declaration, but not in interpretation of the Act.

Section 1-107. [Eminent Domain.] The formulas for reallocation upon taking a part of a unit, and for allocation of proceeds attributable to limited common elements, may be varied.

Section 2-102. [Unit Boundaries.] ] The declaration may vary the distinctions as to what constitutes the units and common elements.

Section 2-105. [Contents of Declaration.] ] A declarant may add any information he desires to the required content of the declaration.

Section 2-107. [Allocation of Common Element Interests, Votes, and Common Expense Liabilities.] ] A declarant may allocate the interests in any way desired, subject to certain limitations.

Section 2-108. [Limited Common Elements.] ] The Act permits reallocation of limited common elements unless prohibited by the declaration.

Section 2-109. [Plats and Plans.] ] There is a presumption regarding horizontal boundaries of units, unless the declaration provides otherwise.

Section 2-111. [Alterations Within Units.] ] Subject to the provisions of the declaration, unit owners may make alterations and improvements to units.

Section 2-112. [Relocation of Boundaries Between Adjoining Units.] ] Subject to the provisions of the declaration, boundaries between adjoining units may be relocated by affected unit owners.

Section 2-113. [Subdivision of Units.] ] If the declaration expressly so permits, a unit may be subdivided into two or more units.

Section 2-115. [Use for Sales Purposes.] ] The declarant may maintain sales offices, management offices, and model units only if the declaration so provides. Unless the declaration provides otherwise, the declarant may maintain advertising on the common elements.

Section 2-116. [Easement to Facilitate Exercise of Special Declarant Rights.] ] Subject to the provisions of the declaration, the declarant has an easement for these purposes.

Section 2-117. [Amendment of Declaration.] ] The declaration of a non-residential condominium may specify less than a two-thirds vote to amend the declaration. Any declaration may require a larger majority.

Section 2-118. [Termination of Condominium.] ] The declaration may specify a majority larger than 80 percent to terminate and, in a non-residential condominium, a smaller majority. The declarant may require that the units be sold following termination even though none of them have horizontal boundaries.

Section 2-120. [Master Associations.] ] The declaration may provide for some of the powers of the Executive Board to be exercised by a master association.

Section 3-102. [Powers of the Association.] ] The declaration may limit the right of the association to exercise any of the listed powers, except in a manner which discriminates in favor of a declarant. The declaration may



authorize the association to assign its rights to future income.

Section 3-103. [Executive Board Members and Officers.] Except as limited by the declaration or bylaws, the Executive Board may act for the association.

Section 3-106. [Bylaws.] Subject to the provisions of the declaration, the bylaws may contain any matter in addition to that required by the Act.

Section 3-107. [Upkeep of the Condominium.] Except to the extent otherwise provided by the declaration, maintenance responsibilities are set forth in this section, and income from real estate subject to development rights inures to the declarant.

Section 3-108. [Meetings.] The bylaws may provide for special meetings at the call of less than 20 percent of the Executive Board or the unit owners.

Section 3-109. [Quorums.] This section permits statutory quorum requirements to be varied by the bylaws.

Section 3-110. [Voting; Proxies.] A majority in interest of the multiple owners of a single unit determine how that unit's vote is to be cast unless the declaration provides otherwise. The declaration may require that lessees vote on specified matters.

Section 3-113. [Insurance.] The declaration may vary the provisions of this section in non-residential condominiums, and may require additional insurance in any condominium.

Section 3-114. [Surplus Funds.] Unless otherwise provided in the declaration, surplus funds are paid or credited to unit owners in proportion to common expense liability.

Section 3-115. [Assessments for Common Expenses.] To the extent otherwise provided in the declaration, common expenses for limited common elements must be assessed against the units to which they are assigned, common expenses benefiting fewer than all the units must be assessed only against the units benefited, insurance costs must be assessed in proportion to risk, and utility costs must be assessed in proportion to usage.

Section 4-101. [Applicability; Waiver.] All of Article 4 is modifiable or waivable by agreement in a condominium restricted to non-residential use.

Section 4-115. [Warranties.] Implied warranties of quality may be excluded or modified by agreement.

Section 4-116. [Statute of Limitations on Warranties.] The 6-year limitation may be modified by agreement of the parties.

4. The second sentence of the section is an important limitation upon the rights of a declarant. It is the practice in many jurisdiction today, particularly jurisdictions which do not permit expansion of a condominium by statute, for a declarant to secure powers of attorney from all unit purchasers permitting the declarant

unilaterally to expand the condominium by "unanimous consent" to include new units and to reallocate common element interests, common expense liability, and votes. With such powers of attorney, many declarants have purported to comply with the typical provision of "first generation" condominium statutes requiring unanimous consent for amendments of the declaration concerning such matters.

Section 2-117 requires unanimous consent to make certain amendments to the declaration and bylaws. If a declarant were permitted to use powers of attorney to accomplish such changes, the substantial protection which Section 2-117(d) provides to unit owners would be illusory. Section 1-104 prohibits the declarant from using powers of attorney for such purposes.

5. While freedom of contract is a principle of this Act, and variation by agreement is accordingly widely available, freedom of contract does not extend so far as to permit parties to disclaim obligations of good faith, see Section 1-113, or to enter into contracts which are unconscionable when viewed as a whole, or which contain unconscionable terms. See Section 1-112. This section derives from Section 1-102(3) of the Uniform Commercial Code.

§ 1-105. [Separate Titles and Taxation]

(a) If there is any unit owner other than a declarant, each unit that has been created, together with its interest in the common elements, constitutes for all purposes a separate parcel of real estate.

(b) If there is any unit owner other than a declarant, each unit must be separately taxed and assessed, and no separate tax or assessment may be rendered against any common elements for which a declarant has reserved no development rights.

(c) Any portion of the common elements for which the declarant has reserved any development right must be separately taxed and assessed against the declarant, and the declarant alone is liable for payment of those taxes.

(d) If there is no unit owner other than a declarant, the real estate comprising the condominium may be taxed and assessed in any manner provided by law.

COMMENT

1. A condominium may be created, by the recordation of a declaration, long before the first unit is conveyed. This happens frequently with existing rental apartment projects which are converted into condominiums. Subsection (d) spares the local taxing authorities from having to assess each unit separately until such time as the declarant begins conveying units, although separate assessment from the date the condominium is created may be permitted under other law. See subsection (d). When separate tax assessments become mandatory under this section, the assessment for each unit must include the value of that unit's common element interest, and no separate tax bill on the common elements is to be rendered to the association or the unit owners collectively. Any common elements subject to development rights, however, are separately taxed to the declarant.

2. Even if real estate subject to development rights is a part of the condominium and lawfully "owned"

by the unit owners in common, it is in fact an asset of the declarant, and must not be taxed and assessed against unit owners. Under subsection (c), the declarant is exclusively liable for those taxes.

3. If there is any question in a particular state that a unit occupied as a residential dwelling is not entitled to treatment as any other residential single-family detached dwelling under the homestead statutes, this section should be modified to insure that units are similarly treated.

4. Unlike the law of New York and perhaps other states, this section imposes no limitation on the power of a jurisdiction to tax the condominium unit based on its fair market value. In most jurisdictions, experience has shown that the conversion of an apartment building to the condominium form of ownership greatly increases the fair market value of that building. Accordingly, a jurisdiction under this Act may impose real estate taxes on condominium units which reflect the fair market value of those units in the same way that the jurisdiction taxes other forms of real estate.

#### § 1-106. [Applicability of Local Ordinances, Regulations, and Building Codes]

A zoning, subdivision, building code, or other real estate use law, ordinance, or regulation may not prohibit the condominium form of ownership or impose any requirement upon a condominium which it would not impose upon a physically identical development under a different form of ownership. Otherwise, no provision of this Act invalidates or modifies any provision of any zoning, subdivision, building code, or other real estate use law, ordinance, or regulation.

#### COMMENT

1. The first sentence of this section prohibits discrimination against condominiums by local law-making authorities. Thus, if a local law, ordinance, or regulation imposes a requirement which cannot be met if property is subdivided as a condominium but which would not be violated if all of the property constituting the condominium were owned by a single owner, this section makes it unlawful to apply that requirement or restriction to the condominium. For example, in the case of a high-rise apartment building, if a local requirement imposing a minimum number of parking spaces per apartment would not prevent a rental apartment building from being built, this Act would override any requirement that might impose a higher number of spaces per apartment merely by virtue of the same building being owned as a condominium.

2. The second sentence makes clear that, except for the prohibition on discrimination against condominiums, the Act has no effect on real estate use laws. For example, a particular piece of real estate submitted to the condominium form of ownership might be of such size that all of the real estate is required to support a proposed density of units or to satisfy minimum setback requirements. Under this Act, part of the submitted real estate might be subject to a development right entitling the declarant to withdraw it from the condominium but the mere reservation of this right would not constitute a subdivision of the parcel into separate ownership. If a declarant or foreclosing lender at a later time sought to exercise the option to withdraw the real estate, however, withdrawal would constitute a subdivision and would be illegal if the effect of withdrawal would be to violate setback requirements, or to exceed the density of units permitted on the remaining parcel.

§ 1-107. [Eminent Domain]

(a) If a unit is acquired by eminent domain, or if part of a unit is acquired by eminent domain leaving the unit owner with a remnant which may not practically or lawfully be used for any purpose permitted by the declaration, the award must compensate the unit owner for his unit and its interest in the common elements, whether or not any common elements are acquired. Upon acquisition, unless the decree otherwise provides, that unit's allocated interests are automatically reallocated to the remaining units in proportion to the respective allocated interests of those units before the taking, and the association shall promptly prepare, execute, and record an amendment to the declaration reflecting the reallocations. Any remnant of a unit remaining after part of a unit is taken under this subsection is thereafter a common element.

(b) Except as provided in subsection (a), if part of a unit is acquired by eminent domain, the award must compensate the unit owner for the reduction in value of the unit and its interest in the common elements, whether or not any common elements are acquired. Upon acquisition, unless the decree otherwise provides, (1) that unit's allocated interests are reduced in proportion to the reduction in the size of the unit, or on any other basis specified in the declaration, and (2) the portion of the allocated interests divested from the partially acquired unit are automatically reallocated to that unit and the remaining units in proportion to the respective allocated interests of those units before the taking, with the partially acquired unit participating in the reallocation on the basis of its reduced allocated interests.

(c) If part of the common elements is acquired by eminent domain the portion of the award attributable to the common elements taken must be paid to the association. Unless the declaration provides otherwise, any portion of the award attributable to the acquisition of a limited common element must be equally divided among the owners of the units to which that limited common element was allocated at the time of acquisition.

(d) The court decree shall be recorded in every (county) in which any portion of the condominium is located.

COMMENT

1. The provisions of this statute are not intended to supplant the usual rules of eminent domain but merely to supplement the rules to address the unique problems which eminent domain raises in the context of a condominium. Nevertheless, because the law of eminent domain differs widely among the various states, the law of each state should be reviewed to ensure that the eminent domain code and this section are properly integrated.

2. When a unit is taken or partially taken by eminent domain, this section provides for a recalculation of the allocated interests of all units.

**EXAMPLE 1:**

Suppose that all allocated interests in a 9-unit condominium were originally allocated to the units on the basis of size. If eight of the units are equal in size and one is twice as large as the others, the allocated interests would be 20% for the largest unit and 10% for each of the other eight units.

Suppose that one of the smaller units is taken out of the condominium by a condemning authority. Subsection (a) provides that the allocated interests would automatically shift, at the time of the taking, so that the larger unit would have 22 2/9% while each of the small units would have 11 1/9%.

#### **EXAMPLE 2:**

Suppose, in Example 1, that the condemnation only reduced the size of one of the smaller units by 50%, leaving the remaining half of the unit usable. Subsection (b) provides that the allocated interests would automatically shift to 5 5/19% for the partially taken unit, 21 1/19% for the largest unit, and 10 10/19% for each of the other units. Note that the fact that the partially taken unit was reduced to half its former size does not mean that its allocated interests are only half as large as before the taking. Rather, that unit participates in the reallocation in proportion to its reduced size. That is why the partially taken unit's reallocated interests are 5 5/19% rather than 5%.

3. An important issue raised by this section is whether or not a governmental body acquiring a unit by eminent domain has a right to also take that unit's allocated interests and thereby assume membership in the association by virtue of its power of eminent domain. While there is no question that a governmental body may acquire any real property by eminent domain, there is no case law on the question of whether or not the governmental body may take a condominium unit as a part of the condominium or must take the unit and have the unit excluded from the condominium.

Subsection (a) merely requires that the taking body compensate the unit owner for all of his unit and its interest in the common element, whether or not the common element interest is acquired. The Act also requires that the allocated interests are automatically reallocated upon taking to the remaining units unless the decree provides otherwise. Whether or not the decree may constitutionally provide otherwise in the case of a particular taking (for example, by allocating the common element interest, votes, and common expense liability to the government) is an unanswered question.

4. In the circumstances of a taking of part of a unit, it is important to have some objective test by which to measure the portion of allocated interest to be reallocated. Subsection (b) sets forth a formula based on relative size, but permits the declaration to vary that formula to some other more appropriate formula in a particular circumstance. This right to vary the formula in the declaration is important, since it is clear that the formula set forth in the statute may in some instances result in gross inequities.

#### **EXAMPLE 1:**

Suppose, in a commercial condominium consisting of four units, each unit consists of a factory and parking lot, and that the declaration provides that each unit's common expense liability, including utilities, is equal. Suppose further that the area of the factory building and parking lot in unit #1 are equal, and that 1/2 the parking lot is taken by eminent domain, leaving the factory and 1/2 the lot intact. Under the formula set out in the statute, unit #1's common expense liability would be reduced even though its utilities might not be reduced at all, thus resulting in a windfall for the unit owner.

## EXAMPLE 2:

Suppose that a condominium contains ten units, each of which is allocated at 1/10 undivided interest in the common elements. Suppose further that a taking by eminent domain reduces the size of one of the units by 50%. In such case, the common element interest of all the units will be reallocated so that the partially-taken unit has a 1/19 undivided interest in the common elements and the remaining 9 units each a 2/19 undivided interest in the common elements. Thus, the partially-taken unit has a common element interest equal to 1/2 of the common element interest allocated to each of the other units. Note that this is not equivalent to the partially-taken unit having a 5% undivided interest and the remaining 9 units each having a 10% undivided interest.

5. Even before the amendment formally acknowledging the reallocation of percentages required by this section is recorded, the reallocation is deemed to have occurred simultaneously with the taking. This rule is necessary to avoid the hiatus that otherwise could occur between the taking and reallocation of interests, votes, and liabilities.

6. Subsection (c) provides that, if part of the common elements is acquired, the award is paid to the association. This would not normally be the rule in the absence of such a provision.

### § 1-108. [Supplemental General Principles of Law Applicable]

The principles of law and equity, including the law of corporations (and unincorporated associations), the law of real property and the law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance, or other validating or invalidating cause supplement the provisions of this Act, except to the extent inconsistent with this Act.

### COMMENT

1. This Act displaces existing law relating to condominiums and other law only as stated by specific sections and by reasonable implication therefrom. Moreover, unless specifically displaced by this statute, common law rights are retained. The listing given in this section is merely an illustration: no listing could be exhaustive.

2. The bracketed language concerning unincorporated associations should be deleted in the event the enacting state requires incorporation of a unit owners' association. See the parallel language contained in Section 3-101.

### § 1-109. [Construction Against Implicit Repeal]

This Act being a general act intended as a unified coverage of its subject matter, no part of it shall be construed to be impliedly repealed by subsequent legislation if that construction can reasonably be avoided.

### COMMENT

This section derives from Section 1-104 of the Uniform Commercial Code.

§ 1-110. [Uniformity of Application and Construction]

This Act shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

COMMENT

This Act should be construed in accordance with its underlying purpose of making uniform the law with respect to condominiums, as well as the purposes stated in the Prefatory Note of simplifying, clarifying, and modernizing the law of condominiums, promoting the interstate flow of funds to condominiums, and protecting consumers, purchasers and borrowers against condominium practices which may cause unreasonable risk of loss to them. Accordingly, the text of each section should be read in light of the purpose and policy of the rule or principle in question, and also of the Act as a whole.

§ 1-111. [Severability]

If any provision of this Act or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provisions or applications, and to this end the provisions of this Act are severable.

§ 1-112. [Unconscionable Agreement or Term of Contract]

(a) The court, upon finding as a matter of law that a contract or contract clause was unconscionable at the time the contract was made, may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause in order to avoid an unconscionable result.

(b) Whenever it is claimed, or appears to the court, that a contract or any contract clause is or may be unconscionable, the parties, in order to aid the court in making the determination, shall be afforded a reasonable opportunity to present evidence as to:

(1) the commercial setting of the negotiations;

(2) whether a party has knowingly taken advantage of the inability of the other party reasonably to protect his interests by reason of physical or mental infirmity, illiteracy, or inability to understand the language of the agreement or similar factors;

(3) the effect and purpose of the contract or clause; and

(4) if a sale, any gross disparity, at the time of contracting, between the amount charged for the real estate and the value of the real estate measured by the price at which similar real estate

was readily obtainable in similar transactions, but a disparity between the contract price and the value of the real estate measured by the price at which similar real estate was readily obtainable in similar transactions does not, of itself, render the contract unconscionable.

#### COMMENT

This section is similar to Section 2-302 of the Uniform Commercial Code and Section 1-311 of the Uniform Land Transactions Act. The rationale and comments provided in those sections are equally applicable to this section.

#### § 1-113. [Obligation of Good Faith]

Every contract or duty governed by this Act imposes an obligation of good faith in its performance or enforcement.

#### COMMENT

This section sets forth a basic principle running throughout this Act: in condominium transactions, good faith is required in the performance and enforcement of all agreements and duties. Good faith, as used in this Act, means observance of two standards, "honesty in fact" and observance of reasonable standards of fair dealing. While the term is not defined, the term is derived from and used in the same manner as in Section 1-201 of the Uniform Simplification of Land Transfers Act, and Sections 2-103(i)(b) and 7-404 of the Uniform Commercial Code.

#### § 1-114. [Remedies To Be Liberally Administered]

(a) The remedies provided by this Act shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. However, consequential, special, or punitive damages may not be awarded except as specifically provided in this Act or by other rule of law.

(b) Any right or obligation declared by this Act is enforceable by judicial proceeding.



## ARTICLE 2

### CREATION, ALTERATION, AND TERMINATION OF CONDOMINIUMS

#### § 2-101. [Creation of Condominium]

(a) A condominium may be created pursuant to this Act only by recording a declaration executed in the same manner as a deed. The declaration must be recorded in every [county] in which any portion of the condominium is located, and must be indexed [in the Grantee's index] in the name of the condominium and the association and [in the Grantor's index] in the name of each person executing the declaration.

(b) A declaration or an amendment to a declaration adding units to a condominium, may not be recorded unless all structural components and mechanical systems of all buildings containing or comprising any units thereby created are substantially completed in accordance with the plans, as evidenced by a recorded certificate of completion executed by an independent (registered) engineer, surveyor, or architect [, or unless the agency has approved the declaration or amendment in the manner prescribed in Section 5-103(b).]

#### COMMENT

1. A condominium is created pursuant to this Act only by recording a declaration. As with any instrument affecting real estate, the declaration must be recorded in every recording district in which any portion of the condominium is located and must be indexed in the manner described in subsection (a). Specific indexing rules are suggested in brackets and should be used in those states where this result would not otherwise occur. For example, the declaration commonly has not been indexed in the grantee's index in the name of the condominium. Moreover, when multiple persons execute the declaration, the declaration has often been indexed solely in the name of the declarant and not in the name, for example, of lenders and other persons who might have executed the declaration. Because it is important that the names of the association and all persons executing the declaration appear in the index in order to locate all instruments in the land records, that language is not included in brackets.

2. In Section 1-103, the Act defines the term "Declaration" as any instruments, however denominated, which create a condominium, and any amendments to those instruments. "Condominium," in turn, is defined as "real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions." It is important to emphasize that other covenants, conditions or restrictions applicable to the real estate in the condominium might be recorded before or after the instruments are recorded which divide the real estate into units and common elements, thereby creating the condominium.

Until the actual recordation of the document which accomplished that result, however, the condominium has not been created.

3. A condominium has not been lawfully created unless the requirements of this section have been complied with. Nevertheless, a project which meets the definition of "condominium" in Section 1-103(7) is subject to this Act even if this or other sections of the Act have not been complied with.

4. Mortgagees and other lienholders need not execute the declaration, and foreclosure of a mortgage or other lien will not, of itself, terminate the condominium. However, if that lien is prior to the declaration itself, the lienholder may exclude that real estate from the condominium. See Sections 2-118(i) and (j). Moreover, the declarant may wish to obtain agreements from mortgagees or other lienholders that they will give partial releases permitting lien-free conveyance of the condominium units. See Section 4-111(a).

5. Except when development proceeds pursuant to Section 5-103, this Act contemplates that two different stages of construction must be reached before (1) a condominium may be created or (2) a unit in the condominium may be conveyed. These stages are described, respectively, in subsection (b) and Section 4-120. The purpose of imposing these requirements is to insure that a purchaser will in fact take title to a unit which may be used for its intended purpose.

If a condominium were said to consist from the beginning of a certain number of units, even though some of those units had not yet been completed or even begun, serious problems would arise if the remaining units were never constructed and if no obligation to complete the construction could be enforced against any solvent person. If the insolvent owner of the unbuilt units failed to pay his common expense assessments for example, the unit owners' association might be left with no remedy except a lien of doubtful value against mere cubicles of airspace. Moreover, votes in the unit owners' association could be assigned to units, and those votes could be cast, even though the units were never built. The Act therefore requires that significant construction take place before units are assigned an interest in the common elements, a vote in the association, and a share of the common expense liabilities, and before units are conveyed. This requirement of substantial completion [or the alternative bonding procedure and other assurances required by Section 5-103] reduces the possibility that a failure to complete will upset the expectations of purchasers or otherwise harm their interests in case the declarant becomes insolvent and no solvent person has the obligation to complete the unit.

6. Section 2-101(b) requires that "all structural components and mechanical systems of all buildings containing or comprising any units" which will be created by recording a declaration, must be substantially completed in accordance with the plans. The intent of subsection (b) is that if any buildings are depicted on the plats and plans which are required by Section 2-109, and these buildings contain or comprise spaces which become units by virtue of recording the declaration, the structural components and mechanical systems of these buildings must be substantially complete before the declaration is recorded. This is required even though the plats and plans recorded pursuant to Section 2-109 depict only the boundaries of the buildings and the units created in those buildings, and not the structural components or mechanical systems (which need not be shown). If the boundaries of units are not depicted, of course, then no units are created. If the declarant fails to comply with this section, title is not affected. See Comment 8, below.

The concept of "structural components and mechanical systems" is one commonly understood in the construction field and this comment is not intended as a comprehensive list of those components. For example, however, the term "structural components" is generally understood to include those portions of a building necessary to keep any part of the building from collapsing, and to maintain the building in a weathertight condition. This would include the foundations, bearing walls and columns, exterior walls, roof, floors and similar components. It would clearly not include such components as interior non-bearing partitions, surface finishes, interior doors, carpeting, and the like. Similarly, typical examples of "mechanical systems" include the plumbing,

heating, air conditioning and other like systems. Whether or not "electrical systems" are included within the meaning of the term depends on local practice.

7. Section 4-120, requires that, before an individual unit is conveyed, the unit must be "substantially completed." "Substantial completion" is a well understood term in the construction industry. For example, the American Institute of Architects Document A201, General Conditions of the Contract for Construction (1976 Ed.) at para. 8.1.3, states:

The Date of Substantial Completion of the Work . . . is the date certified by the Architect when construction is sufficiently complete, in accordance with the Contract Documents (that is, the owner-contractor agreement, the conditions of the contract, and the specifications and all addenda and modifications), so the Owner can occupy or utilize the Work . . . for the use for which it is intended.

This standard is also one often used by building officials in issuing certificates of occupancy. It does not suggest that the unit is "entirely completed" as that term is understood in the construction industry; lesser details, such as sticking doors, leaking windows, or some decorative items, might still remain, and the Act contemplates that they need not be completed prior to lawful conveyance.

8. Section 2-101(b) and 4-120 require that completion certificates be recorded, or local certificates of occupancy be issued, as evidence of the fact that the required levels of construction have been met. In the case of "substantial completion," issuance of "a certificate of occupancy authorized by law," as is commonly required by local ordinance or state building codes, will suffice. Once the certificates have been recorded, or issued, as the case may be, good title to the units may be conveyed in reliance on the record. It is possible, of course, that the declarant may have failed to complete the required levels of construction; the architect, surveyor or engineer (whichever is appropriate in a particular jurisdiction) may have filed a false certificate. Such acts would create a cause of action in the purchaser under Section 4-115, but would not affect the validity of the purchasers' title to the condominium.

9. The requirement of "substantial completion" does not mean that the declarant must complete all buildings in which all possible units would be located before creating the condominium. If only some of the buildings in which units which may ultimately be located have been "structurally" completed, the declarant may create a condominium in which he reserves particular development rights (Section 2-105(a)(8) ). In such a project, only the completed units might be treated as units from the outset, and the development rights would be reserved to create additional units, either by adding additional real estate and units to the condominium, by creating new units on common elements, or by subdividing units previously created. The optional units may never be completed or added to the condominium; however, this will not affect the integrity of the condominium as originally created.

10. Requiring "substantial completion" of the structural components and mechanical systems in the buildings containing or comprising the units in a condominium may encourage creation of more phased condominiums under Section 2-105 in projects which once were in fact built in phases, but under a single nonexpandable declaration. Experience in the several states where significantly more rigorous requirements are

imposed by statute, however, has shown that this does not create a difficult situation either for the developer or the lender. Moreover, it appears likely that the size of the initial phase of a multi-building project will be dictated largely by economics, as occurs in most jurisdictions today, rather than this Act. Finally, many lenders and developers are increasingly sensitive to the secondary mortgage market requirements particularly those of the Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (FHLMC). Experience indicates that the pre-sale requirements imposed by FNMA and FHLMC frequently dictate that multi-building condominium projects be structured on a phased or expandable condominium basis.

11. The requirement of completion would be irrelevant in some types of condominiums, such as campsite condominiums or some subdivision condominiums where the units might consist of unimproved lots, and the airspace above them, within which each purchaser would be free to construct or not construct a residence. Any residence actually constructed would ordinarily become a part of the "unit" by the doctrine of fixtures, but nothing in this Act would require any residence to be built before the lots could be treated as units.

12. The term "independent" architect, surveyor or engineer in subsection (b) and elsewhere in the Act distinguishes any such professional person who acts as an independent contractor in his relationship to the declarant or lender.

§ 2-102. [Unit Boundaries]

Except as provided by the declaration:

(1) If walls, floors or ceilings are designated as boundaries of a unit, all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other materials constituting any part of the finished surfaces thereof are a part of the unit, and all other portions of the walls, floors, or ceilings are a part of the common elements.

(2) If any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture lies partially within and partially outside the designated boundaries of a unit, any portion thereof serving only that unit is a limited common element allocated solely to that unit, and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements.

(3) Subject to the provisions of paragraph (2), all spaces, interior partitions, and other fixtures and improvements within the boundaries of a unit are a part of the unit.

(4) Any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, and all exterior doors and windows or other fixtures designed to serve a single unit, but located outside the unit's boundaries, are limited common elements allocated exclusively to that unit.

COMMENT

1. It is important for title purposes and other reasons to have a clear guide as to precisely which parts of a condominium constitute the units and which parts constitute the common elements. This section fills the gap

left when the declaration merely defines unit boundaries in terms of floor, ceilings, and perimetric walls.

The provisions of this section may be varied, of course, to the extent that the declarant wishes to modify the details for a particular condominium.

For example, in a townhouse project structured as a condominium, it may be desirable that the boundaries of the unit constitute the exterior surfaces of the roof and exterior walls, with the center line of the party walls constituting the perimetric boundaries of the units in that plane, and the undersurface of the bottom slab dividing the unit itself from the underlying land. Alternatively, the boundaries of the units at the party walls might be extended to include actual division of underlying land itself. In those cases it would not be appropriate for walls, floors and ceilings to be designated as boundaries, and the declaration would describe the boundaries in the above manner. The differentiations made clear here, in conjunction with the provisions of Section 3-107, will assist in minimizing disputes which have historically arisen in association administration with respect to liability for repair of such things as pipes, porches and other components of a building which unit owners may expect the association to pay for and which the association may wish to have repaired by unit owners. Problems which may arise as a result of negligence in the use of components-such as stoops and pipes-are resolved by Section 3-107, which imposes liability on the unit owner who causes damage to common elements, or under the broader provisions of Section 3-115(e), which permits the association to assess common expenses "caused by the misconduct of any unit owner" exclusively against that owner. This would include, of course, not only damages to common elements, but fines or unusual service fees, such as clean-up costs, incurred as a result of the unit owner's misuse of common elements.

2. The differentiation between components constituting common elements and components which are part of the units is particularly important in light of Section 3-107(a), which (subject to the exceptions therein mentioned) makes the association responsible for upkeep of common elements and each unit owner individually responsible for upkeep of his unit.

3. The differentiation between unit components and common element components may or may not be important for insurance purposes under this Act. While the common elements in a project must always be insured, the units themselves need not be insured by the association unless the project contains units divided by horizontal boundaries; see Section 3-113(b). In a "high rise" configuration, however, Section 3-113(a) contemplates that both will normally be insured by the association (exclusive of improvements and betterments in individual units) and that the cost of such insurance will be a common expense. That common expense may be allocated, however, on the basis of risk if the declaration so requires. See Section 3-115(c)(3).

§ 2-103. [Construction and Validity of Declaration and By-Laws]

(a) All provisions of the declaration and bylaws are severable.

(b) The rule against perpetuities may not be applied to defeat any provision of the declaration, bylaws, rules, or regulations adopted pursuant to Section 3-102(a)(1).

(c) In the event of a conflict between the provisions of the declaration and the bylaws, the declaration

prevails except to the extent the declaration is inconsistent with this Act.

(d) Title to a unit and common elements is not rendered unmarketable or otherwise affected by reason of an insubstantial failure of the declaration to comply with this Act. Whether a substantial failure impairs marketability is not affected by this Act.

#### COMMENT

1. Subsection (b) does not totally invalidate the rule against perpetuities as applied to condominiums. The language does provide that the rule against perpetuities is ineffective as to documents which would govern the condominium during the entire life of the project, regardless of how long that should be. With respect to deeds or devises of units, however, the policies underlying the rule against perpetuities continue to have validity and remain applicable under this Act.

2. In considering the effect of failures to comply with this Act on title matters, subsection (d) refers only to defects in the declaration-which includes the plats and plans-because the declaration is the instrument which creates and defines the units and common elements. No reference is made to other instruments, such as bylaws, because these instruments have no impact on title, whether or not recorded. However, in all cases of violations of the Act, a failure of the bylaws-or any other instrument-to comply with the Act, would entitle any affected persons to appropriate relief under Section 4-117.

3. No special prohibition against racial or other forms of discrimination is included in this Act because the provisions of generally applicable federal and state law apply as much to condominiums as to other forms of real estate.

4. Some examples may help to clarify what sorts of defects in the declaration are to be regarded as "insubstantial" within the meaning of the first sentence of subsection (d).

Suppose the declaration allocates common element interests to all the units, but fails to indicate the formula for the allocation as required by Section 2-107. This would be a substantial defect if the assigned interests were unequal, but if all units were assigned identical interests it would be possible to infer that the basis of allocation was equality-and the failure of the declaration to say so would be an insubstantial defect. Were this to happen in a condominium where the right to add new units is reserved, however, it should be noted that a subsequent amendment to the declaration adding new units could not use any formula other than equality for reallocating the common element interests unless a different formula were specified pursuant to Section 2-107(b).

Other examples of insubstantial defects that might occur include failure of the declaration to include the word "condominium" in the name of the project, as required by Section 2-105(1), or failure of the plats and plans to comply satisfactorily with the requirement of Section 2-109(a) that they be "clear and legible," so long as they can at least be deciphered by persons with proper expertise. Failure to organize the unit owners' association at the time specified in Section 3-101 would not be a defect in the declaration at all, and would not affect the validity or marketability of titles in the condominium. It would, however, be a violation of this Act, and create a claim for relief under Section 4-117.

5. Each state has case or statutory law dealing with marketability of titles, and the question of whether substantial failures of the declaration to comply with the Act affect marketability of title should be determined by that law and not by this Act.

§ 2-104. [Description of Units]

A description of a unit which sets forth the name of the condominium, the [recording data] for the declaration, the [county] in which the condominium is located, and the identifying number of the unit, is a sufficient legal description of that unit and all rights, obligations, and interests appurtenant to that unit which were created by the declaration or bylaws.

COMMENT

1. The intent of this section is that no description of a unit in a deed, lease, deed of trust, mortgage, or any other instrument or document shall be subject to challenge for failure to meet any common law or other requirements so long as the requirements of this section are satisfied, and so long as the declaration itself, together with the plats and plans which are a part of the declaration, provides a legally sufficient description.

2. The last sentence makes clear that an instrument which does meet those requirements includes all interest appurtenant to the unit. As a result, it will not be necessary under this Act to continue the practice, common in some jurisdictions, of describing the common element interests, or limited common elements, that are appurtenant to a unit in the instrument conveying title to that unit.

§ 2-105. [Contents of Declaration]

(a) The declaration for a condominium must contain:

(1) the names of the condominium, which must include the word "condominium" or be followed by the words "a condominium", and the association;

(2) the name of every [county] in which any part of the condominium is situated;

(3) a legally sufficient description of the real estate included in the condominium;

(4) a statement of the maximum number of units which the declarant reserves the right to create;

(5) a description of the boundaries of each unit created by the declaration, including the unit's identifying number;

(6) a description of any limited common elements, other than those specified in Section 2-102(2) and (4), as provided in Section 2-109(b)(10);

(7) a description of any real estate (except real estate subject to development rights) which may be

allocated subsequently as limited common elements, other than limited common elements specified in Section 2-102(2) and (4), together with a statement that they may be so allocated;

(8) a description of any development rights and other special declarant rights (Section 1-103(23) ) reserved by the declarant, together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised;

(9) if any development right may be exercised with respect to different parcels of real estate at different times, a statement to that effect together with (i) either a statement fixing the boundaries of those portions and regulating the order in which those portions may be subjected to the exercise of each development right, or a statement that no assurances are made in those regards, and (ii) a statement as to whether, if any development right is exercised in any portion of the real estate subject to that development right, that development right must be exercised in all or in any other portion of the remainder of that real estate;

(10) any other conditions or limitations under which the rights described in paragraph (8) may be exercised or will lapse;

(11) an allocation to each unit of the allocated interests in the manner described in Section 2-107;

(12) any restrictions on use, occupancy, and alienation of the units;

(13) the [recording data] for recorded easements and licenses appurtenant to or included in the condominium or to which any portion of the condominium is or may become subject by virtue of a reservation in the declaration; and

(14) all matters required by Sections 2-106, 2-107, 2-108, 2-109, 2-115, 2-116, and 3-103(d).

(b) The declaration may contain any other matters the declarant deems appropriate.

#### COMMENT

1. Many statutes and other regulatory schemes in the multi-owner project field do not separate the functions of a recorded declaration and unrecorded public offering statements or disclosure documents. As a result, many of the developer's representations and assurances concerning his future plans must appear in the declaration as well as the public offering statement, even though they may have nothing to do with the legal structure or title of the project. See e.g., Section 47-70, Conn.Gen.Stat. (1980). This results in duplicative requirements and unnecessarily complex declarations.

This Act seeks functionally to distinguish between the declaration and the public offering statement. It requires the declaration to contain only those matters which affect the legal structure or title of the condominium. This includes the reserved powers of the declarant to exercise development rights within the condominium. A narrative description of those rights, however, and the possible consequences flowing from their exercise, are required to be disclosed only in the public offering statement and not in the declaration.



2. This section requires a statement of the name of the association for the condominium as well as the name of the condominium itself, in order that the declaration may be indexed in the name of the association. See Section 2-101.

3. The Act requires that the declaration for a condominium situated in two or more recording districts be recorded in each of those districts. While the bracketed language refers to the "county" as the recording district in which the declaration is to be recorded, it would be appropriate in states where recording is done at the city, town, or parish level to amend the bracketed language accordingly.

4. Paragraph (a)(5) requires the declarant to state the largest number of units he reserves the right to build. Unlike many current condominium statutes, this Act imposes no time limit, measured by an absolute number of years, at the expiration of which the declarant must relinquish control of the association. Instead, declarant control ends when 75% of the maximum number of units which may be created by the declarant have been sold, or at the end of a 2-year period during which development is not proceeding. See Section 3-103(d). The flexibility afforded by this section may be important to a declarant as he responds to unanticipated future changes in his market.

In theory, a declarant might overstate the maximum number of units in an attempt to artificially extend the period of declarant control, since the time might never come when a declarant had sold 75% of that number of units. As a practical matter, however, such a practice would not likely achieve long-term control.

**EXAMPLE:**

A declarant reserves the right to build 100 units, even though zoning would permit only 75 units on the site, and the declarant actually plans on building only 50 units. As a result of the reservation, the declarant would not lose control of the association under the 75% rule stated in Section 3-103(d)(i) even when all 50 units had been built and sold, because that percentage applies to all potential units, not units actually built. See Section 3-103(d)(i).

However, there are practical constraints on the declarant's decision in this matter. Substantial exaggeration of the future density of the development might tend to impede sales of units in that project. Moreover, such a statement might also produce negative governmental reaction to proposals which might require local approval.

Even if the declarant did overstate the number of units to retain control, however, other limitations imposed by Section 3-103(d) will require turnover at an appropriate time. In the example, once the declarant had exercised the right to add the last of the 50 units which he intends to build, the 2-year period imposed by Section 3-103(d)(ii) and (iii) would begin to run, and the declarant would lose the right to control the association 2 years from the time the last units were added, even though he had reserved the right to add more units.

5. Paragraph (a)(5) requires that the boundaries of each unit created by the declaration be identified. The words "created by the declaration" emphasize that in an expandable project, new units may be created in the future by amendments to the declaration. Until those new units are actually added to the project by amending

the declaration, however, they are not units within the meaning of that defined term, and they need not be described.

6. Section 2-102 makes it possible in many projects to satisfy paragraph (a)(5) of this section by merely providing the identifying number of the units and stating that each unit is bounded by its ceiling, floor, and walls. The plats and plans will show where those ceilings, floors, and perimetric walls are located, and Section 2-102 provides all other details, except to the extent the declaration may make additional or contradictory specifications because of the unique nature of the project.

7. Paragraph (a)(6) makes clear that the limited common elements described in Section 2-102(2) and (4) need not be described in the declaration. These limited common elements are typically porches, balconies, patios, or other amenities which may be included in a project. Such improvements are treated by the Act as limited common elements, rather than either common elements or parts of units, in order to minimize the attention which the documents need to give them, and to secure the result that would be desired in the usual case. Thus, if these improvements remain limited common elements, and no special provisions concerning them are included in the declaration, they may be used only by the units to which they are physically attached; maintenance of those improvements must be paid for by the association; and such improvements need not be specially referred to in the declaration. Porches, balconies and patios must be shown on the plats and plans (see Section 2-109(b)(10)), but other limited common elements described in Section 2-102(2) and (4) need not be shown.

8. Paragraph (a)(7) contemplates that the common elements in the project may be allocated as limited common elements at some future time, either by the declarant or the association. For example, a swimming pool might serve an entire project during early phases of development. At the outset, that pool might be a common element which all the unit owners may use. At a later time, with more units and additional pools built in subsequent phases, either the declarant or the association might determine that the first pool should become a limited common element reserved for the use only of units in the first phase, while the other pools should be reserved exclusively for units in the subsequent phases. Such a potential allocation should be described in the declaration pursuant to this section.

9. Paragraph (a)(8) requires the declaration to describe all development rights and other special declarant rights which the declarant reserves. The declaration must describe the real estate to which each right applies, and state the time limit within which each of those rights must be exercised. The Act imposes no maximum time limit for the exercise of those rights, and the particular language of a declaration will vary from project to project depending on the requirements of each project. This Act contemplates that those rights may be exercised after the period of declarant control terminates.

10. Plats and plans are made a part of the declaration for legal purposes by Section 2-110, and their content may in part provide some of the information required by this section.

11. Paragraph (a)(14) is a cross-reference to other sections of the Act which require the declaration to contain particular matters. Some of these sections, such as 2-107 on the allocations of allocated interests or 2-109 on plats and plans, will affect all projects. Others, such as 2-106 on leasehold condominiums, will apply only to particular kinds of projects.

12. Subsection (b) contemplates that, in addition to the content required by subsection (a), other matters may also be included in the declaration if the declarant or lender feel they are appropriate to the particular project. In particular, the draftsman should carefully consider any desired provisions which would vary any of the many sections of the Act where variation is permitted, including such matters as expanding or restricting the association's powers. A list of sections which may be varied appears in the comment to Section 1-104.

§ 2-106. [Leasehold Condominiums]

(a) Any lease the expiration or termination of which may terminate the condominium or reduce its size [, or a memorandum thereof,] shall be recorded. Every lessor of those leases must sign the declaration, and the declaration shall state:

(1) the [recording data] for the lease [or a statement of where the complete lease may be inspected];

(2) the date on which the lease is scheduled to expire;

(3) a legally sufficient description of the real estate subject to the lease;

(4) any right of the unit owners to redeem the reversion and the manner whereby those rights may be exercised, or a statement that they do not have those rights;

(5) any right of the unit owners to remove any improvements within a reasonable time after the expiration or termination of the lease, or a statement that they do not have those rights; and

(6) any rights of the unit owners to renew the lease and the conditions of any renewal, or a statement that they do not have those rights.

(b) After the declaration for a leasehold condominium is recorded, neither the lessor nor his successor in interest may terminate the leasehold interest of a unit owner who makes timely payment of his share of the rent and otherwise complies with all covenants which, if violated, would entitle the lessor to terminate the lease. A unit owner's leasehold interest is not affected by failure of any other person to pay rent or fulfill any other covenant.

(c) Acquisition of the leasehold interest of any unit owner by the owner of the reversion or remainder does not merge the leasehold and fee simple interests unless the leasehold interests of all unit owners subject to that reversion or remainder are acquired.

(d) If the expiration or termination of a lease decreases the number of units in a condominium, the allocated interests shall be reallocated in accordance with Section 1-107(a) as though those units had been taken by eminent domain. Reallocations shall be confirmed by an amendment to the declaration prepared, executed, and recorded by the association.

## COMMENT

1. Subsection (a) requires that the lessor of any lease, which upon termination will terminate the condominium or reduce its size, must sign the declaration. This requirement insures that the lessor has consented to use of his land as a condominium.

2. Subsection (a)(1) provides alternative bracketed language which should be considered by each state based on its practice. In any state where the recording acts do not specify the essential terms which must be included in a memorandum of lease, either this section should be supplemented to specify the essential terms or else the bracketed language relating to such memoranda should be deleted.

3. This section sets out requirements concerning leasehold condominiums which are not typically contained in the statutes of most states. In particular, it requires that the declaration describe the rights of the unit owners, or state that they have no rights concerning a variety of significant matters. The section also contains a number of other consumer protection provisions. However, in contrast to the result under some states' laws, unit owners have no statutory right to renewal of a lease upon termination.

4. The most significant matter of consumer protection in this section is subsection (b), which provides that unit owners who pay their share of the rent of the underlying lease may not be deprived of their enjoyment of the leasehold premises.

Subsection (b) is intended to protect the "unit owner" regardless of whether he is a lessee, sublessee, or even further down in a chain of transfer of leasehold interests. Thus, for example, if the "unit owner" is a sublessee, the term "lessor (or) his successor in interest" includes not only the lessor, but also the lessee.

Subsection (b) further protects the unit owner by assuring that he will not share with his fellow unit owners any collective obligations toward their common lessor. All obligations are instead fractionalized so that no unit owner can be made liable or otherwise penalized for a default by any of his fellows. Thus, a default by the association in payment of the rent due the lessor, in a case where the lease of common elements ran to the association, would not permit the lessor to terminate continued use of those common elements by those unit owners who then pay their share of the rent.

5. Subsection (d) considers the problems created when termination of a lease reduces the size of a condominium. In the event that some units are thereby withdrawn from the condominium, reallocation of the allocated interests would be required; the section describes how that reallocation would occur.

### § 2-107. [Allocation of Common Element Interests, Votes, and Common Expense Liabilities]

(a) The declaration shall allocate a fraction or percentage of undivided interests in the common elements and in the common expenses of the association, and a portion of the votes in the association, to each unit and state the formulas used to establish those allocations. Those allocations may not discriminate in favor of units owned by the declarant.

(b) If units may be added to or withdrawn from the condominium, the declaration must state the formulas to be used to reallocate the allocated interests among all units included in the condominium after the addition or withdrawal.

(c) The declaration may provide: (i) that different allocations of votes shall be made to the units on particular matters specified in the declaration; (ii) for cumulative voting only for the purpose of electing members of the executive board; and (iii) for class voting on specified issues affecting the class if necessary to protect valid interests of the class. A declarant may not utilize cumulative or class voting for the purpose of evading any limitation imposed on declarants by this Act, nor may units constitute a class because they are owned by a declarant.

(d) Except for minor variations due to rounding, the sum of the undivided interests in the common elements and common expense liabilities allocated at any time to all the units must each equal one if stated as fractions or 100 percent if stated as percentages. In the event of discrepancy between an allocated interest and the result derived from application of the pertinent formula, the allocated interest prevails.

(e) The common elements are not subject to partition, and any purported conveyance, encumbrance, judicial sale, or other voluntary or involuntary transfer of an undivided interest in the common elements made without the unit to which that interest is allocated, is void.

#### COMMENT

1. Most existing condominium statutes require a single common basis, usually related to the "value" of the units, to be used in the allocation of common element interests, votes in the association, and common expense liabilities. This Act departs radically from such requirements by permitting each of these allocations to be made on different bases, and by permitting allocations which are unrelated to value.

Thus, all three allocations might be made equally among all units, or in proportion to the relative size of each unit, or on the basis of any other formula the declarant may select, regardless of the values of those units. Moreover, "size" might be used, for example, in allocating common expenses and common element interests, while equality is used in allocating votes in the association. This section does not require that the formulas used by the declarant be justified, but it does require that the formulas be explained. The sole restriction on the formulas to be used in these allocations is that they not discriminate in favor of the units owned by the declarant. Otherwise, each of the separate allocations may be made on any basis which the declarant chooses, and none of the allocations need be tied to any other allocation.

2. While the flexibility permitted in allocations is broader than that permitted by any present statutes, it is likely that the traditional bases for allocation will continue to be used, and that the allocations for all allocated interests will often be based on the same formulas. Most commonly, those bases include size, equality, or value of units. Each of these is discussed below.

3. If size is chosen as a basis of allocation, the declarant must choose between reliance on area or volume, and the choice must be indicated in the declaration. The declarant might further refine the formula by, for

example, excluding unheated areas from the calculation or by partially discounting such areas by means of a ratio. Again, the declarant must indicate the choices he has made and explain the formulas he has chosen.

4. Most existing condominium statutes require that "value" be used as the basis of all allocations. Under this Act a declarant is free to select such a basis if he wishes to do so. For example, he might designate the "par value" of each unit as a stated number of dollars or points. However, the formula used to develop the par values of the various units would have to be explained in the declaration. For example, the declaration for a high-rise condominium might disclose that the par value of each unit is based on the relative area of each unit on the lower floors, but increases by specified percentages at designated higher levels. The formula for determining area in this example could be further refined in the manner suggested in Comment 2, above, and any other factors (such as the direction in which a unit faces) could also be given weight so long as the weight given to each factor is explained in the declaration.

5. The purpose of subsection (b) is to afford some advance disclosure to purchasers of units in the first phase of a flexible condominium of how common element interests, votes and common expense liabilities will be reallocated if additional units are added.

6. Subsection (e) means what it says when it states that a lien or encumbrance on a common element interest without the unit to which that common element interest is allocated is void. Thus, consider the case of a flexible condominium in which there are 50 units in the first phase, each of which initially has a 2 percent undivided interest in the common elements. The declarant borrows money by mortgaging additional real estate. When the declarant expands the condominium by adding phase 2 containing an additional 50 units, he reallocates the common element interests in the manner described in his original declaration, to give each of the 100 units a 1 percent undivided interest in the common elements in both phases of the condominium. At this point, the construction lender cannot have a lien on the undivided interest of phase 1 owners in the common elements of phase 2 because of the wording of the statute. Thus, the most that the construction lender can have is a lien on the phase 2 units together with their common element interests. The mortgage documents may be written to reflect the fact that upon the addition of phase 2 of the condominium, the lien on the additional real estate will be converted into a lien on the phase 2 units and on the common element interest as they pertain to those units in both phase 1 and phase 2; however, see Comment to Section 2-110.

Unless the lender also requires phase 2 to be designated as withdrawable real estate, the phase 2 portion may not be foreclosed upon other than as condominium units and the construction lender may not dispose of phase 2 other than as units which are a part of the condominium. In the event that phase 2 is designated as withdrawable land, then the construction lender may force withdrawal of phase 2 and dispose of it as he wishes, subject to the provisions of the declaration. If one unit in phase 2, however, has been sold to anyone other than the declarant, then phase 2 ceases to be withdrawable land by operation of Section 2-110(d)(2).

7. If a unit owned only by the declarant-as opposed to the same unit if owned by another person-may be subdivided into 2 or more units but cannot be converted in whole or in part into common elements, it is still a unit that may be subdivided or converted into 2 or more units or common elements, within the meaning of the definition of development rights, and is not governed by Section 2-113 (Subdivision of Units).

8. Subsection (c) represents a significant departure from practice in most states concerning the allocation of votes. The usual rule is that a single allocation of votes is made to each unit, and that allocation applies to all matters on which those votes may be cast. This section recognizes that the increasingly complex nature of some projects requires different allocation on particular questions. It may be appropriate, for example, in a project where common expense liabilities, or questions concerning rules and regulations, affect different units differently.

**EXAMPLE:**

In a mixed commercial and residential project, the declaration might provide that each unit owner would have an equal vote for the election of the Board of Directors. However, on matters concerning ratification of the common expense budget, where the commercial unit owners paid a much larger share than their proportion of the total units, the vote of commercial unit owners would be increased to 3 times the number of votes the residential owners held. Alternatively, of course, it might be possible to treat this question as a class voting matter, but the draftsman is provided flexibility in this section to choose the most appropriate solution.

9. This section recognizes that there may be certain instances in which class voting in the association would be desirable. For example, in a mixed-use condominium consisting of both residential and commercial units, there may be certain kinds of issues upon which the residential or commercial unit owners should have a special voice, and the device described in Comment 9 was not desired. To prevent abuse of class voting by the declarant, subsection (c) permits class voting only with respect to specified issues directly affecting the designated class and only insofar as necessary to protect valid interests of the designated class.

**EXAMPLE:**

Owners of town house units, in a single project consisting of both town house and high-rise buildings, might properly constitute a separate class for purposes of voting on expenditures affecting just the town house units, but they might not be permitted to vote by class on rules for the use of facilities used by all the units.

The subsection further provides that the declarant may not use the class voting device for the purpose of evading any limitation imposed on declarants by this Act (e.g., to maintain declarant control beyond the period permitted by Section 3-103).

10. The last clause of subsection (c) prohibits a practice common in the planned community or other non-condominium multi-ownership projects, where units owned by declarant constitute a separate class of units for voting and other purposes. Upon transfer of title, those units lose these more favorable voting rights. This section makes clear that the votes and other attributes of ownership of a unit may not change by virtue of the identity of the owner. In those circumstances which such classes were legitimately intended to address, principally control of the association, the Act provides other, more balanced devices for declarant control. See Section 3-103(d).

§ 2-108. [Limited Common Elements]

(a) Except for the limited common elements described in Section 2-102(2) and (4), the declaration shall

specify to which unit or units each limited common element is allocated. That allocation may not be altered without the consent of the unit owners whose units are affected.

(b) Except as the declaration otherwise provides, a limited common element may be reallocated by an amendment to the declaration executed by the unit owners between or among whose units the reallocation is made. The persons executing the amendment shall provide a copy thereof to the association, which shall record it. The amendment shall be recorded in the names of the parties and the condominium.

(c) A common element not previously allocated as a limited common element may not be so allocated except pursuant to provisions in the declaration made in accordance with Section 2-105(a)(7). The allocations shall be made by amendments to the declaration.

#### COMMENT

1. Like all other common elements, limited common elements are owned in common by all unit owners. The use of a limited common element, however, is reserved to less than all of the unit owners. Unless the declaration provides otherwise, the association is responsible for the upkeep of a limited common element and the cost of such upkeep is assessed against all the units. See Sections 3-107(a) and 3-115(c)(1). This might include the costs of repainting all shutters, or balconies, for example, which are limited common elements pursuant to Section 2-102(4). Accordingly, there may be occasions where, to meet the expectations of owners and to have costs borne directly by those who benefit from those amenities, the declaration might provide that the costs will be borne, not by all unit owners as part of their common expense assessments, but only by the owners to which the limited common elements are assigned.

2. Even common elements which are not "limited" within the meaning of this Act may nevertheless be restricted by the unit owners' association pursuant to the powers set forth in Section 3-102(6) and (10), unless that power is limited in the declaration. For example, the association might assign reserved parking spaces to designated unit owners, or even to persons who are not unit owners. Such a parking space would differ from a limited common element in that its use would be merely a personal right of the person to whom it is assigned and this section would not have to be complied with to allocate it or to reallocate it.

3. Because a mortgage or deed of trust may restrict the borrower's right to transfer the use of a limited common element without the lender's consent, the terms of the encumbrance should be examined to determine whether the lender's consent or release is needed to transfer that right of use to another person.

#### § 2-109. [Plats and Plans]

(a) Plats and plans are a part of the declaration. Separate plats and plans are not required by this Act if all the information required by this section is contained in either a plat or plan. Each plat and plan must be clear and legible and contain a certification that the plat or plan contains all information required by this section.

(b) Each plat must show:



(1) the name and a survey or general schematic map of the entire condominium;

(2) the location and dimensions of all real estate not subject to development rights, or subject only to the development right to withdraw, and the location and dimensions of all existing improvements within that real estate;

(3) a legally sufficient description of any real estate subject to development rights, labeled to identify the rights applicable to each parcel;

(4) the extent of any encroachments by or upon any portion of the condominium;

(5) to the extent feasible, a legally sufficient description of all easements serving or burdening any portion of the condominium;

(6) the location and dimensions of any vertical unit boundaries not shown or projected on plans recorded pursuant to subsection (d) and that unit's identifying number;

(7) the location with reference to an established datum of any horizontal unit boundaries not shown or projected on plans recorded pursuant to subsection (d) and that unit's identifying number;

(8) a legally sufficient description of any real estate in which the unit owners will own only an estate for years, labeled as "leasehold real estate";

(9) the distance between non-contiguous parcels of real estate comprising the condominium;

(10) the location and dimensions of limited common elements, including porches, balconies and patios, other than parking spaces and the other limited common elements described in Sections 2-102(2) and (4);

(11) in the case of real estate not subject to development rights, all other matters customarily shown on land surveys.

(c) A plat may also show the intended location and dimensions of any contemplated improvement to be constructed anywhere within the condominium. Any contemplated improvement shown must be labeled either "MUST BE BUILT" or "NEED NOT BE BUILT".

(d) To the extent not shown or projected on the plats, plans of the units must show or project:

(1) the location and dimensions of the vertical boundaries of each unit, and that unit's identifying number;

(2) any horizontal unit boundaries, with reference to an established datum, and that unit's identifying number; and

(3) any units in which the declarant has reserved the right to create additional units or common elements (Section 2-110(c) ), identified appropriately.

(e) Unless the declaration provides otherwise, the horizontal boundaries of part of a unit located outside of a building have the same elevation as the horizontal boundaries of the inside part, and need not be depicted on the plats and plans.

(f) Upon exercising any development right, the declarant shall record either new plats and plans necessary to conform to the requirements of subsections (a), (b), and (d), or new certifications of plats and plans previously recorded if those plats and plans otherwise conform to the requirements of those subsections.

(g) Any certification of a plat or plan required by this Section or Section 2-101(b) must be made by an independent (registered) surveyor, architect, or engineer.

#### COMMENT

1. The terms "plat" or "plan" have been given a variety of meanings by custom and usage in the various jurisdictions. Under this Act, it is important to recognize that a "plat" need not mean a "survey" of the entire real estate constituting a project at the time the initial plat is recorded, although, through amendments to the plat as development proceeds, it ultimately becomes a survey of the entire project.

As to "plan," the Act does not use that term to mean the actual building plans used for construction of the project. Instead, the required content of the plans in this Act is described in subsection (d). Essentially, the plans constitute a boundary survey of each unit. Typically, the walls will be the vertical ("up and down" or "perimetric") boundaries, and the floors and ceilings will be the horizontal boundaries. Importantly, these boundaries need not be physically measured, but may instead be projected from the plat or from actual building construction plans. Thus, the plans under this Act are not conceived to be "as built" plans.

2. Subsection (c) permits, but does not require, the plats to show the location of contemplated improvements. Since construction of contemplated improvements by a declarant involves the exercise of development rights, a declarant may not create any improvement within real estate where no development rights have been reserved, unless the plats actually show that proposed improvement or unless the association (which the declarant may control) makes the improvement pursuant to Section 3-102(7). Should the association attempt that improvement, in the face of unit owner's objections, it may involve risk of challenge. Within land subject to development rights, of course, construction may take place in accordance with the reserved rights, even if no contemplated improvements are shown on the plats. As to the declarant's obligation to complete an improvement that is shown, see Section 4-118(a).

3. As noted in the Comments to Section 2-101, a condominium unit may consist of unenclosed ground and/or airspace, with no "building" involved. If this were true of all units in a particular condominium, the

provisions of Section 2-109 relating to plans (but not plats) would be inapplicable.

4. In detailing the required contents of the plats, two different types of legal description are contemplated. First, in subsection (b)(1), the plat must show at least a general schematic map of the entire project. While this may be by survey, the Act recognizes that a survey may be unduly expensive or impractical in a large project, and accordingly permits a general schematic map of the entire project at the commencement of development. With respect to those portions of the project, however, where no future development may take place, the flexibility of a general schematic map is not necessary. At the same time, it becomes important for title purposes to be able to identify precisely that portion of the project which is essentially completed. Accordingly, as development ceases in particular phases, subsection (b)(2) contemplates that the locations and dimensions of that real estate will be identified. As this process continues, all of the real estate originally shown in a general schematic map will have been surveyed, and the location and dimensions of that real estate identified, at the expiration of development rights. In addition, subsection (2) contemplates that existing improvements must be shown within real estate where no further development will take place. This does not mean the units which may be within each building, but it does mean the external physical dimensions of the buildings themselves. As implied by subsection (11), the nature of "existing improvements" required to be surveyed under subsection (2) should be determined by local practices in the particular state.

5. Subsection (b)(3) requires that the real estate which is subject to development rights must be identified with a legally sufficient description, that is, either a metes and bounds description, or reference to the deeds of that real estate. Since different portions of the real estate may be subject to differing development rights-for example, only a portion of the total real estate may be added as well as withdrawn from the project-the plat must identify the rights applicable to each portion of that real estate. The same reasoning applies to the legally sufficient description of easements affecting the condominium and any leasehold real estate.

6. Subsection (f) describes the amendments to the plats and plans which must be made as development rights are exercised. This section requires that the plats and plans be amended at each stage of development to reflect actual progress to date. If an original schematic map was initially recorded as required by subsection (b)(1), the survey required by (b)(2) would also constitute the amendments required by subsection (f).

7. The terms "horizontal" and "vertical" are now commonly understood in condominium parlance to refer, respectively, to "upper and lower" and "lateral or perimetric." Thus, Section 2-102 contemplates that the perimetric walls may be designated as the "vertical" boundaries of a unit and the floor and ceiling as its "horizontal" boundaries. That is the sense in which the words "horizontal" and "vertical" are to be understood in this section and throughout this Act.

8. Sections 4-118 and 4-119 reveal the effect of labeling an improvement "MUST BE BUILT" or "NEED NOT BE BUILT," as required by subsection (b)(3).

#### § 2-110. [Exercise of Development Rights]

(a) To exercise any development right reserved under Section 2-105(a)(8), the declarant shall prepare, execute, and record an amendment to the declaration (Section 2-117) and comply with Section 2-109. The

declarant is the unit owner of any units thereby created. The amendment to the declaration must assign an identifying number to each new unit created, and, except in the case of subdivision or conversion of units described in subsection (b), reallocate the allocated interests among all units. The amendment must describe any common elements and any limited common elements thereby created and, in the case of limited common elements, designate the unit to which each is allocated to the extent required by Section 2-108 (Limited Common Elements).

(b) Development rights may be reserved within any real estate added to the condominium if the amendment adding that real estate includes all matters required by Section 2-105 or 2-106, as the case may be, and the plats and plans include all matters required by Section 2-109. This provision does not extend the time limit on the exercise of development rights imposed by the declaration pursuant to Section 2-105(a)(8).

(c) Whenever a declarant exercises a development right to subdivide or convert a unit previously created into additional units, common elements, or both:

(1) If the declarant converts the unit entirely to common elements, the amendment to the declaration must reallocate all the allocated interests of that unit among the other units as if that unit had been taken by eminent domain (Section 1-107).

(2) If the declarant subdivides the unit into 2 or more units, whether or not any part of the unit is converted into common elements, the amendment to the declaration must reallocate all the allocated interests of the unit among the units created by the subdivision in any reasonable manner prescribed by the declarant.

(d) If the declaration provides, pursuant to Section 2-105(a)(8), that all or a portion of the real estate is subject to the development right of withdrawal:

(1) If all the real estate is subject to withdrawal, and the declaration does not describe separate portions of real estate subject to that right, none of the real estate may be withdrawn after a unit has been conveyed to a purchaser; and

(2) If a portion or portions are subject to withdrawal, no portion may be withdrawn after a unit in that portion has been conveyed to a purchaser.

#### COMMENT

1. This section generally describes the method by which any development right may be exercised. Importantly, while new development rights may be reserved within new real estate which is added to the condominium, the original time limits on the exercise of these rights which the declarant must include in the original declaration may not be extended. Thus, the development process may continue only within the self-determined constraints originally described by the declarant.

2. The reservation and exercise of development rights is and must be closely co-ordinated with financing

for the project. As a result, lender review and control of that process is common, and the financing documents should reflect the proposed development process.

A typical construction loan mortgage on a portion of a phased condominium might provide that as soon as new units are built on new land to be added (or, if the portion is also designated withdrawable land, as soon thereafter as anyone other than the declarant becomes the unit owner of a unit in the withdrawable land) the mortgage on that land converts into a mortgage on all of the units located within that portion, together with their respective common element interests. The common element interest of those units will, of course, extend to the common elements in other sections of the condominium. However, failure of a construction loan mortgage to so provide is inconsequential, because conveyance of the units in that phase to the lender or to a purchaser at a foreclosure sale would automatically transfer all of those units' common element interests, as a result of the requirements of Sections 2-108(d) and 2-111(a).

3. A lender who holds a mortgage lien on one portion of a condominium may not cause that portion to be withdrawn from the condominium unless the portion constitutes withdrawable real estate in which there is no unit owner other than the declarant. Even then, the amendment effectuating the withdrawal must be executed by the declarant. Consequently, unless the lender wishes to become a declarant subsequent to foreclosure or a deed in lieu of foreclosure in order to execute the amendment, or forecloses in order to require an amendment from the association under Section 2-118(i), a lender might require that the signed amendment be deposited in escrow at the time the loan is made in order to protect against a recalcitrant borrower.

4. As indicated in the Comments to Sections 1-103(24) and 1-106, the withdrawal of real estate from a condominium may constitute a subdivision of land under the applicable subdivision ordinance. Under most subdivision ordinances, the owner of the real estate is regarded as the "subdivider." In the event of a withdrawal under this section, however, the declarant is in fact the subdivider because of his unique interest in and control over the real estate, even though the real estate, for title purposes, is a common element until withdrawn. Accordingly, he would bear the cost of compliance with any subdivision ordinance required to withdraw a part of the real estate from the condominium.

5. Subsection (c) deals with special problems surrounding allocated interests when the declarant subdivides or converts units which were originally created in the declaration into additional units, common elements or both. This development right permits the declarant to defer a final decision as to the size of certain units by permitting the subdivision of larger interior spaces into smaller units. The declarant may thus "build to suit" for purchasers' needs or to meet changing market demand. The concept is called "convertible space" in several existing state statutes.

For example, a declarant of a 5-story office building condominium may have purchasers committed at the time of the filing of the condominium declaration but a lack of purchasers for the upper 2 floors. In such a circumstance, the declarant could designate the upper 2 floors as a unit, reserving to himself the right to subdivide or convert that unit into additional units, common elements or a combination of units and common elements as needed to suit the requirements of ultimate purchasers.

If, at a later time, a purchaser wishes to purchase half of one floor as a unit, the declarant could exercise

the development right to subdivide his 2-floor unit into 2 or more units. He may also wish to reserve a portion of the divided floor as a corridor which will constitute common elements. In that case, he would proceed pursuant to this subsection to reallocate the allocated interests among the units in the manner described in this section.

Alternatively, the declarant may ultimately decide that the entire 2 floors should be turned over to the unit owners' association not as a unit but as common elements to be used perhaps as a cafeteria serving the balance of the building, or for retail space to be rented by the association. In that case, should he choose to make the entire 2 floors common elements, the provisions of paragraph (c)(1) would apply.

#### § 2-111. [Alterations of Units]

Subject to the provisions of the declaration and other provisions of law, a unit owner:

(1) may make any improvements or alterations to his unit that do not impair the structural integrity or mechanical systems or lessen the support of any portion of the condominium;

(2) may not change the appearance of the common elements, or the exterior appearance of a unit or any other portion of the condominium, without permission of the association;

(3) after acquiring an adjoining unit or an adjoining part of an adjoining unit, may remove or alter any intervening partition or create apertures therein, even if the partition in whole or in part is a common element, if those acts do not impair the structural integrity or mechanical systems or lessen the support of any portion of the condominium. Removal of partitions or creation of apertures under this paragraph is not an alteration of boundaries.

#### COMMENT

1. This section deals with permissible alterations of the interior of a unit, and impermissible alterations of the exterior of a unit and the common elements, in ways which reflect common practice. The stated rules, of course, may be varied by the declaration where desired.

2. Subsection (3) deals in a unique manner with the problem of creating access between adjoining units owned by the same person. The subsection provides a specific rule which would permit a door, stairwell, or removal of a partition wall between those units, so long as structural integrity is not impaired. That alteration would not be an alteration of boundaries, but would be an exception to the basic rule stated in subsection (2).

3. In considering permissible alteration of the interior of a unit, an example may be useful. A nail driven by a unit owner to hang a picture might enter a portion of the wall designated as part of the common elements, but this section would not be violated because structural integrity would not be impaired. Moreover, no trespass would be committed because each unit owner, as a part owner of the common elements, has a right to utilize them subject only to such restrictions as may be created by the Act, the declaration, bylaws, and the unit owners' association pursuant to Section 3-102.

4. Removal of a partition or the creation of an aperture between adjoining units would permit the units to be used as one, but they would not become one unit. They would continue to be separate units within the meaning of Section 1-104 and would continue to be treated separately for the purposes of this Act.

5. In addition to the restrictions placed on unit owners by this section, the declaration or bylaws may restrict a unit owner from altering the interior appearance of his unit. Although this might be an undue restriction if imposed upon the primary residence of a unit owner, it may be appropriate in the case of time-share or other condominiums.

§ 2-112. [Relocation of Boundaries Between Adjoining Units]

(a) Subject to the provisions of the declaration and other provisions of law, the boundaries between adjoining units may be relocated by an amendment to the declaration upon application to the association by the owners of those units. If the owners of the adjoining units have specified a reallocation between their units of their allocated interests, the application must state the proposed reallocations. Unless the executive board determines, within 30 days, that the reallocations are unreasonable, the association shall prepare an amendment that identifies the units involved, states the reallocations, is executed by those unit owners, contains words of conveyance between them, and upon recordation, is indexed in the name of the grantor and the grantee.

(b) The association shall prepare and record plats or plans necessary to show the altered boundaries between adjoining units, and their dimensions and identifying numbers.

COMMENT

1. This section changes the effect of most current condominium statutes, under which the boundaries between units may not be altered without unanimous or nearly unanimous consent of the unit owners. As the section makes clear, this result may be varied by restrictions in the declaration.

2. This section contemplates that, upon relocation of the unit boundaries, no reallocation of allocated interests will occur if none is specified in the application. If a reallocation is specified but the executive board deems it unreasonable, then the applicants have the choice of resubmitting the application with a reallocation more acceptable to the board, or going to court to challenge the board's finding as unreasonable.

§ 2-113. [Subdivision of Units]

(a) If the declaration expressly so permits, a unit may be subdivided into 2 or more units. Subject to the provisions of the declaration and other provisions of law, upon application of a unit owner to subdivide a unit, the association shall prepare, execute, and record an amendment to the declaration, including the plats and plans, subdividing that unit.

(b) The amendment to the declaration must be executed by the owner of the unit to be subdivided, assign an identifying number to each unit created, and reallocate the allocated interests formerly allocated to the subdivided unit to the new units in any reasonable manner prescribed by the owner of the subdivided unit.

## COMMENT

1. This section provides for subdivision of units by unit owners, thereby creating more and smaller units than were originally created. The underlying policy of this section is that the original development plan of the project must be followed, and the expectations of unit owners realized. Accordingly, unless subdivision of the units is expressly permitted by the original declaration, a unit may not be subdivided into 2 or more units unless the declaration is amended to permit it. A subdivision itself is accomplished by an amendment to the declaration.

2. At the same time, situations will often occur where future subdivision is appropriate, and this section permits the declaration to provide for it. Most state statutes do not presently provide for subdivision of units.

An analogous concept in the context of development rights is subdivision of units by a declarant. The development right is described in Section 2-110.

### § 2-114. [ALTERNATIVE A] [Easement for Encroachments]

[To the extent that any unit or common element encroaches on any other unit or common element, a valid easement for the encroachment exists. The easement does not relieve a unit owner of liability in case of his willful misconduct nor relieve a declarant or any other person of liability for failure to adhere to the plats and plans.]

### § 2-114. [ALTERNATIVE B] [Monuments as Boundaries]

[The existing physical boundaries of a unit or the physical boundaries of a unit reconstructed in substantial accordance with the original plats and plans thereof become its boundaries rather than the metes and bounds expressed in the deed or plat or plan, regardless of settling or lateral movement of the building, or minor variance between boundaries shown on the plats or plans or in the deed and those of the building. This section does not relieve a unit owner of liability in case of his willful misconduct nor relieve a declarant or any other person of liability for failure to adhere to the plats and plans.]

## COMMENT

Two approaches are presented here as alternatives, since uniformity on this issue is not essential, and various states have adopted one approach or the other. Both theories recognize the fact that the actual physical boundaries may differ somewhat from what is shown on the plats and plans, and the practical effect of both is the same.

The easement approach of Alternative A creates easements for whatever discrepancies may arise, while the "monuments as boundaries" approach of Alternative B would make the title lines move to follow movement of the physical boundaries caused by such discrepancies or subsequent settling or shifting.

### § 2-115. [Use for Sales Purposes]



A declarant may maintain sales offices, management offices, and models in units or on common elements in the condominium only if the declaration so provides and specifies the rights of a declarant with regard to the number, size, location, and relocation thereof. Any sales office, management office, or model not designated a unit by the declaration is a common element, and if a declarant ceases to be a unit owner, he ceases to have any rights with regard thereto unless it is removed promptly from the condominium in accordance with a right to remove reserved in the declaration. Subject to any limitations in the declaration, a declarant may maintain signs on the common elements advertising the condominium. The provisions of this section are subject to the provisions of other state law, and to local ordinances.

#### COMMENT

1. This section prescribes the circumstances under which portions of the condominium-either units or common elements-may be used for sales offices, management offices, or models. The basic requirement is that the declarant must describe his rights to maintain such offices in the declaration. There are no limitations on that right, so that either units owned by the declarant or other persons, or the common elements themselves, may be used for that purpose. Typical common element uses might include a sales booth in the lobby of the building, or a trailer or temporary building located outside the buildings on the grounds of the property.

2. In addition, this section contains a permissive provision permitting advertising on the common elements. The declarant may choose to limit his rights in terms of the size, location, or other matters affecting the advertising. The Act, however, imposes no limitation. At the same time, the last sentence of the section recognizes that state or local zoning or other laws may limit advertising, both in terms of size and content of the advertising, or the use of the units or common elements for such purposes. This section makes it clear that local law would apply in those cases.

#### § 2-116. [Easement Rights]

Subject to the provisions of the declaration, a declarant has an easement through the common elements as may be reasonably necessary for the purpose of discharging a declarant's obligations or exercising special declarant rights, whether arising under this Act or reserved in the declaration.

#### COMMENT

1. This section grants to declarant an easement across the common elements, subject to any self-imposed restrictions on that easement contained in the declaration. At the same time, the easement is not an easement for all purposes and under all circumstances, but only a grant of such rights as may be reasonably necessary for the purpose of exercising the declarant's rights. Thus, for example, if other access were equally available to the land where new units are being created, which did not require the declarant's construction equipment to pass and repass over the common elements in a manner which significantly inconvenienced the unit owners, a court might apply the "reasonably necessary" test contained in this section to consider limitations on the declarant's easement. The rights granted by this section may be enlarged by a specific reservation in the declaration.

2. The declarant is also required to repair and restore any portion of the condominium used for the

easement granted under this section. See Section 4-119(b).

§ 2-117. [Amendment of Declaration]

(a) Except in cases of amendments that may be executed by a declarant under Section 2-109(f) or 2-110; the association under Section 1-107, 2-106(d), 2-108(c), 2-112(a), or 2-113; or certain unit owners under Section 2-108(b), 2-112(a), 2-113(b), or 2-118(b), and except as limited by subsection (d), the declaration, including the plats and plans, may be amended only by vote or agreement of unit owners of units to which at least [67] percent of the votes in the association are allocated, or any larger majority the declaration specifies. The declaration may specify a smaller number only if all of the units are restricted exclusively to non-residential use.

(b) No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded.

(c) Every amendment to the declaration must be recorded in every [county] in which any portion of the condominium is located, and is effective only upon recordation. An amendment shall be indexed [in the Grantee's index] in the name of the condominium and the association and [in the Grantor's index] in the name of the parties executing the amendment.

(d) Except to the extent expressly permitted or required by other provisions of this Act, no amendment may create or increase special declarant rights, increase the number of units, change the boundaries of any unit, the allocated interests of a unit, or the uses to which any unit is restricted, in the absence of unanimous consent of the unit owners.

(e) Amendments to the declaration required by this Act to be recorded by the association shall be prepared, executed, recorded, and certified on behalf of the association by any office of the association designated for that purpose or, in the absence of designation, by the president of the association.

COMMENT

1. This section recognizes that the declaration, as the perpetual governing instrument for the condominium, may be amended by various parties at various times in the life of the project. The basic rule, stated in subsection (a), is that the declaration, including the plats and plans, may only be amended by vote of 67% of the unit owners. The section permits a larger percentage to be required by the declaration, and also recognizes that, in an entirely non-residential condominium, a smaller percentage might be appropriate.

In addition to that basic rule, subsection (a) lists those other instances where the declaration may be amended by the declarant alone without association approval, or by the association acting through its board of directors.

2. Section 1-104 does not permit the declarant to use any device, such as powers of attorney executed by purchasers at closings, to circumvent subsection (d)'s requirement of unanimous consent. This section does not supplant any requirements of common law or of other statutes with respect to conveyancing if title to real

property is to be affected.

3. Subsection (e) describes the mechanics by which amendments recorded by the association are filed, and resolves a number of matters often neglected by bylaws.

§ 2-118. [Termination of Condominium]

(a) Except in the case of a taking of all the units by eminent domain (Section 1-107), a condominium may be terminated only by agreement of unit owners of units to which at least 80 percent of the votes in the association are allocated, or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the units in the condominium are restricted exclusively to non-residential uses.

(b) An agreement to terminate must be evidenced by the execution of a termination agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of unit owners. The termination agreement must specify a date after which the agreement will be void unless it is recorded before that date. A termination agreement and all ratifications thereof must be recorded in every [county] in which a portion of the condominium is situated, and is effective only upon recordation.

(c) In the case of a condominium containing only units having horizontal boundaries described in the declaration, a termination agreement may provide that all the common elements and units of the condominium shall be sold following termination. If, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement must set forth the minimum terms of the sale.

(d) In the case of a condominium containing any units not having horizontal boundaries described in the declaration, a termination agreement may provide for sale of the common elements, but may not require that the units be sold following termination, unless the declaration as originally recorded provided otherwise or unless all the unit owners consent to the sale.

(e) The association, on behalf of the unit owners, may contract for the sale of real estate in the condominium, but the contract is not binding on the unit owners until approved pursuant to subsections (a) and (b). If any real estate in the condominium is to be sold following termination, title to that real estate, upon termination, vests in the association as trustee for the holders of all interests in the units. Thereafter, the association has all powers necessary and appropriate to effect the sale. Until the sale has been concluded and the proceeds thereof distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale must be distributed to unit owners and lien holders as their interests may appear, in proportion to the respective interests of unit owners as provided in subsection (h). Unless otherwise specified in the termination agreement, as long as the association holds title to the real estate, each unit owner and his successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted his unit. During the period of that occupancy, each unit owner and his successors in interest remain liable for all assessments and other obligations imposed on unit owners by this Act or the declaration.

(f) If the real estate constituting the condominium is not to be sold following termination, title to the common elements and, in a condominium containing only units having horizontal boundaries described in the

declaration, title to all the real estate in the condominium, vests in the unit owners upon termination as tenants in common in proportion to their respective interests as provided in subsection (h), and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and his successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted his unit.

(g) Following termination of the condominium, the proceeds of any sale of real estate, together with the assets of the association, are held by the association as trustee for unit owners and holders of liens on the units as their interests may appear. Following termination, creditors of the association holding liens on the units, which were [recorded] [docketed] [ (insert other procedures required under state law to perfect a lien on real estate as a result of a judgment) ] before termination, may enforce those liens in the same manner as any lien holder. All other creditors of the association are to be treated as if they had perfected liens on the units immediately before termination.

(h) The respective interests of unit owners referred to in subsections (e), (f) and (g) are as follows:

(1) Except as provided in paragraph (2), the respective interests of unit owners are the fair market values of their units, limited common elements, and common element interests immediately before the termination, as determined by one or more independent appraisers selected by the association. The decision of the independent appraisers shall be distributed to the unit owners and becomes final unless disapproved within 30 days after distribution by unit owners of units to which 25 percent of the votes in the association are allocated. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the fair market value of that unit owner's unit and common element interest by the total fair market values of all the units and common elements.

(2) If any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value thereof before destruction cannot be made, the interests of all unit owners are their respective common element interests immediately before the termination.

(i) Except as provided in subsection (j), foreclosure or enforcement of a lien or encumbrance against the entire condominium does not of itself terminate the condominium, and foreclosure or enforcement of a lien or encumbrance against a portion of the condominium, other than withdrawable real estate, does not withdraw that portion from the condominium. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate does not of itself withdraw that real estate from the condominium, but the person taking title thereto has the right to require from the association, upon request, an amendment excluding the real estate from the condominium.

(j) If a lien or encumbrance against a portion of the real estate comprising the condominium has priority over the declaration, and the lien or encumbrance has not been partially released, the parties foreclosing the lien or encumbrance may upon foreclosure, record an instrument excluding the real estate subject to that lien or encumbrance from the condominium.

COMMENT

1. While few condominiums have yet been terminated under present state law, a number of problems are certain to arise upon termination which have not been adequately addressed by most of those statutes. These include such matters as the percentage of unit owners which should be required for termination; the time frame within which written consents from all unit owners must be secured; the manner in which common elements and units should be disposed of following termination, both in the case of sale and non-sale of all of the real estate; the circumstances under which sale of units may be imposed on dissenting owners; the powers held by the Board of Directors on behalf of the association to negotiate a sales agreement; the practical consequences to the project from the time the unit owners approve the termination until the transfer of title and occupancy actually occurs; the impact of termination on liens on the units and common elements; distribution of sales proceeds; the effect of foreclosure or enforcement of liens against the entire condominium with respect to the validity of the project; and other matters.

2. Recognizing that unanimous consent from all unit owners would be impossible to secure as a practical matter on a project of any size, subsection (a) states a general rule that 80% consent of the unit owners would be required for termination of a project. The declaration may require a larger percentage of the unit owners and, in a non-residential project, it may also require a smaller percentage. Pursuant to Section 2-119 (Rights of Secured Lenders), lenders may require that the declaration specify a larger percentage of unit owner consent or, more typically, will require the consent of a percentage of the lenders before the project may be terminated.

3. As a result of subsection (d), unless the declaration requires unanimous consent for termination, the declarant may be able to terminate the condominium despite the unanimous opposition of other unit owners if the declarant owns units to which the requisite number of votes are allocated. Such a result might occur, for example, should a declarant be unable to continue sales in a project where some sales have been made.

4. Subsection (a) describes the procedure for execution of the termination agreement. It recognizes that not all unit owners will be able to execute the same instrument, and permits execution or ratification of the master termination agreement. Since the transfer of an interest in real estate is being accomplished by the agreements, each of the ratifications must be executed in the same manner as a deed. Importantly, the agreement must specify the time within which it will be effective; otherwise, the project might be indefinitely in "limbo" if ratifications had been signed by some, but not all, required unit owners, and the signing unit owners fail to revoke their agreements. Importantly, the agreement becomes effective only when it is recorded.

5. Subsections (c) and (d) deal with the question of when all the real estate in the condominium, or the common elements, may be sold without unanimous consent of the unit owners. The section reaches a different result based on the physical configuration of the project.

Subsection (c) states that if a condominium contains only units having horizontal boundaries-a typical high rise building-the unit owners may be required to sell their units upon termination despite objection. Under subsection (d), however, if the project contains any units which do not have horizontal boundaries-for example, a single family home project where some of the units include title to land and could theoretically continue apart from a condominium as a title matter-then the termination agreement may not force dissenting unit owners to sell their units unless the declaration as originally recorded provided otherwise. Obviously, of course, if all the unit owners consent to the sale of the units, sale of the entire development would be possible.

6. Subsection (e) describes the powers of the association during the pendency of the termination proceedings. It empowers the association to negotiate for the sale, but makes the validity of any contract dependent on unit owner approval. This section also makes clear that, upon termination, title to the real estate shall be held by the association, so that the association may convey title without the necessity of each unit owner signing the deed. Finally, this section makes clear that, until the association delivers title to the condominium property, the project will continue to operate as it had prior to the termination, thus insuring that the practical necessities of operation of the real estate will not be impaired.

7. Subsection (f) contemplates the possibility that a condominium might be terminated but the real estate not sold. While this is not likely to be the usual case, it is important to provide for the possibility.

8. A complex series of creditors' rights questions may arise upon termination. Those questions involve competing claims of first mortgage holders on individual units, other secured and unsecured creditors of individual unit owners, judgment creditors of the association, creditors of the association to whom a security interest in the common elements has been granted, and unsecured creditors of the association. Subsection (g) attempts to establish general rules with respect to these competing claims, but leaves to state law the resolution of the priorities of those competing claims.

The examples which follow illustrate the relative effects of several provisions set out in the Act, based on application of an assumed state lien priority rule of "first in time, first in right." In those instances, particularly involving mechanics' liens, where state law often establishes priorities at variance with that rule, that result is also indicated.

**EXAMPLE 1:**

HYPOTHETICAL FOR EXAMPLES 1A-1H: A condominium consists of 5 detached single family homes on 5 individually owned lots, together with a 6th lot which is undeveloped but intended for future construction of a swimming pool serving all units. The development is served by a private road. Lot 6 and the private road are common elements owned on an undivided interest basis by the unit owners.

The declaration provides that: (1) upon termination, all units and the common elements must be sold; (2) the association is permitted to encumber Lot 6, and to grant a security interest in that lot for any purpose; and (3) common element interest votes and common expense liabilities are allocated equally among the units. For purposes of the example, we have assumed that the documents do not require the consent of first mortgage holders before the unit owners may vote to terminate.

The 5 units were originally sold at equal prices of \$50,000. Common expenses in the project are \$100 per unit, per month, and are used for a variety of purposes, including insurance and upkeep of the units and common elements. At the time the units were conveyed, each of them was released from all liens affecting the condominium which were senior to the declaration.

A shopping center developer has offered \$380,000 for the purchase of the entire condominium. The association's members unanimously vote in favor of termination, and otherwise comply with Section 2-118. The

appraisal required by Section 2-118(h) shows that the units are still of equal value.

**EXAMPLE 1A:**

At the time of termination, the 5 units were financed as follows:

Unit 1: The owner's first mortgage had an unpaid balance of \$50,000.

Unit 2: The owner's first mortgage had an unpaid balance of \$40,000.

Unit 3: The owner's first mortgage had an unpaid balance of \$25,000.

Units 4 and 5: The owners paid cash, and there is no mortgage on either unit.

In addition, all common expenses had been paid when due. The other assets of the association, including reserves, bank account, and all other personal property, total \$20,000.

Under the Act (Section 2-118(e)), the association, following sale, holds the proceeds of sale together with the assets of the association, "as trustee for the holders of all interests in the units." In these circumstances, the interests of each party in the total value of \$400,000 would be as follows:

---

<u>UNIT #</u>	1	2	3	4	5						
Share of	Proceeds	80,000	80,000	80,000	80,000	80,000	Due 1st			Mortgage Holders	
50,000	40,000	25,000	-0-	-0-	Due Owners	30,000	40,000	55,000	80,000	80,000	

**EXAMPLE 1B:**

The facts stated in Example 1A remain true. However, at termination, Unit 1 has failed to pay its common expenses for 12 months. In these circumstances, the interests of each party would be as follows:

---

<u>UNIT #</u>	1	2	3	4	5						
Share of	Proceeds	80,000	80,000	80,000	80,000	80,000	Due Association			(Priming	
1st	Mortgage)	600	-0-	-0-	-0-	-0-	Due 1st			Mortgage Holders	50,000
25,000	-0-	-0-	Due Association		(Not Priming		1st Mortgage)	600	-0-	-0-	-0-
Due Owners	28,000	40,000	55,000	80,000	80,000						

In this example, both the lenders and the association are fully paid because the sales proceeds exceed the liens on the units. Note, however, that 6 months of the unpaid assessments prime the first mortgage pursuant to Section 3-116(b). Thus, if the sales proceeds had been only \$50,000 per unit, rather than \$80,000, the results with respect to Unit 1 would have been as follows:

Sales Proceeds \$50,000 6-Month Assessment Due Association 600 Balance \$49,400 Paid to 1st Mortgage Holder \$49,400 Loss to 1st Mortgage Lender (600) Loss to Association (600)

Of course, the association has, and the lender may have, a claim against the unit owner, personally, for the unpaid sums due them. Importantly, however, neither the other unit owners nor their units are subject to any liability for those claims.

Because the lien of the first mortgage holder, at termination or foreclosure, is junior to the first 6 months of unpaid assessments due the association, lenders may protect themselves under the Act by requiring the escrow of 6 months' common expense assessments, as they often do for real property taxes.

**EXAMPLE 1C:**

The facts stated in Example 1B remain true. However, after all the units were initially sold, but before termination, 80% of the unit owners agree to build a swimming pool on Lot 6. The association contracts with XYZ Pool Company to build the pool for \$100,000. XYZ does not take a security interest in the common elements, as it might have done under Section 3-112, and does not act to perfect any available mechanics' lien under state law. The pool is properly completed. When the association fails to pay, XYZ sues the association, secures a judgment, and properly perfects its judgment pursuant to Section 3-111 (Tort and Contract Liability). As provided in Section 3-111, liens resulting from judgments against the association are governed by Section 3-117. At the time of termination, XYZ has not been paid, and its claim amounts to \$100,000.

Section 3-117(a) provides that a "judgment for money against the association," if perfected as a lien on real property under state law, "is a lien in favor of the judgment lienholder against all of the units." However, the last sentence also provides that the judgment is not a lien on the common elements. Accordingly, XYZ holds a \$20,000 lien on each of the units as of the date the lien is perfected. In these circumstances, the interests of the parties are as follows:

_____											
<u>UNIT #</u>	1	2	3	4	5						
_____											
Share of	Proceeds	80,000	80,000	80,000	80,000	80,000	Due Association	(Priming			
1st	Mortgage)	600	-0-	-0-	-0-	-0-	Due 1st	Mortgage Holders	50,000	40,000	
25,000	-0-	-0-	Due Association	(Not Priming			1st Mortgage)	600	-0-	-0-	-0-
Due XYZ	20,000	20,000	20,000	20,000	20,000	Due Owners	8,800	20,000	35,000	60,000	60,000



**EXAMPLE 1D:**

All facts stated in example 1C remain true, except that XYZ Pool Company, at the time it contracts to build the pool, takes a security interest in Lot 6, pursuant to Section 3-112, and that security interest includes a release of that real estate, upon default, from all restrictions imposed on the real estate by the declaration. At termination, XYZ has not instituted any action against the association to enforce its claim.

In these circumstances, XYZ, as a secured creditor with respect to Lot 6, holds an interest superior to the declaration, and would have the right to exclude that real estate from the project. Any sale of the entire condominium would be subject to the superior interest of XYZ. For that reason, in the normal circumstances, the association would not be able to secure a release of that lien unless XYZ were paid in full from the proceeds of the sale, which would have the effect of reducing the value of the sale to \$280,000. Note that this has the economic effect of placing the XYZ claim, at termination, ahead of prior first mortgages. For this reason, first mortgage holders will typically require their consent before common elements may be subjected to a lien.

**EXAMPLE 1E:**

The facts stated in Example 1C remain true so that XYZ holds only a perfected judgment lien, not a security interest in the common elements.

After the XYZ lien was perfected, a \$50,000 uninsured judgment is entered against the owner of Unit 4, resulting from his personal business. The lien is perfected, and rests only against Unit 4. In these circumstances, the interests of the parties are as follows:

_____													
<u>UNIT #</u>	1	2	3	4	5								
_____													
Share of	Proceeds	80,000	80,000	80,000	80,000	80,000	Due Association						(Priming
1st	Mortgage)	600	-0-	-0-	-0-	-0-	Due 1st	Mortgage Holders	50,000	40,000			
25,000	-0-	-0-	Due Association	(Not Priming			1st Mortgage)	600	-0-	-0-	-0-	-0-	
Due XYZ	20,000	20,000	20,000	20,000	20,000	Personal	Lien, Unit 4	-0-	-0-	-0-	50,000		
-0-	Due Owners	8,800	20,000	35,000	10,000	60,000							

**EXAMPLE 1F:**

The facts stated in Example 1E remain true. After the swimming pool is built, a neighbor's child falls into the untended and unfenced pool, and is injured. The child sues the association. One month after the personal judgment against Unit 4 is perfected, the child secures a judgment against the association for \$100,000 more than the association's insurance. Under state law, the tort judgment, when perfected, constitutes a lien only from the date judgment is entered, and does not enjoy a higher priority. In these circumstances, the interests of the parties are as follows:

UNIT # 1 2 3 4 5

Share of	Proceeds	80,000	80,000	80,000	80,000	80,000	Due Association	(Priming
1st	Mortgage)	600	-0-	-0-	-0-	-0-	Due 1st	Mortgage Holders
25,000	-0-	-0-	Due Association	(Not Priming	1st Mortgage)	600	-0-	-0-
Due XYZ	20,000	20,000	20,000	20,000	20,000	Personal	Lien, Unit 4	-0-
-0-	Tort Lien	8,800	20,000	20,000	10,000	20,000	Due Owners	-0-
								15,000
								-0-
								40,000

Note that the child's lien realizes only \$78,800; the estate is not entitled to participate in the proceeds available to Units 3 and 5 to satisfy the unmet claims against Units 1 and 4, because those units are liable only for their pro rata share of the claim, which is the same amount any of those units would have had to pay prior to termination in order to secure a partial release. Thus, if Unit 5, prior to termination, had secured a partial release for \$20,000 from the estate, the result would be the same.

Note also that the value of the common elements is not segregated from the values of the units, since the sales' values of the units reflect all of the value of the real estate. Similarly, note that, after termination, the tort claimant is not entitled to reach or segregate the personal property of the corporation, valued before termination at \$20,000, even though he could have reached the bank account or other assets prior to termination. Any other rule would create enormous complexity, would impose arbitrary losses on creditors out of priority, and would tend to shift economic losses to unit owners who had paid their share of claims.

**EXAMPLE 1G:**

The facts stated in Example 1F remain true. After the Unit 4 personal lien is perfected, but, one week before the tort judgment against the association is perfected, P Paving Company begins repaving the private road. Work is completed one week after the tort judgment is perfected. The association fails to pay P \$50,000 upon completion as agreed, and P immediately records its mechanics' lien. Under state law, a mechanics' lien, if recorded within 60 days of the time work is completed, holds priority as of the day work began. State law does not, however, grant the mechanics' lien priority over any liens perfected before work began. P Paving sues on its lien, and secures a judgment. In these circumstances, the interests of the parties are as follows:

UNIT # 1 2 3 4 5

Share of	Proceeds	80,000	80,000	80,000	80,000	80,000	Due Association	(Priming
1st	Mortgage)	600	-0-	-0-	-0-	-0-	Due 1st	Mortgage Holders
25,000	-0-	-0-	Due Association	(Not Priming	1st Mortgage)	600	-0-	-0-
XYZ Pool	Lien	20,000	20,000	20,000	20,000	20,000	Personal	Lien, Unit 4
								-0-
								-0-
								-0-

50,000 -0- P Paving Lien 8,800 10,000 10,000 10,000 10,000 Tort Lien -0- 10,000 20,000 -0-  
 20,000 Due Owners -0- -0- 5,000 -0- 30,000

Note that, just as in the case of the tort lien, when Unit 1 could not contribute its share of the mechanics' lien, the remaining units were not liable for the balance.

In the example, the common expense lien arises before P Paving lien had arisen. If the common expense lien arose after the P Paving lien, we would be faced with circular liens, where: (a) the P Paving lien would prime the common expense lien; (b) 6 months of the common expense lien would prime the mortgage; and (c) the mortgage would prime the P Paving lien. Such circular lien problems, however, are not unique in the law.

**EXAMPLE 1H:**

The facts stated in example 1G remain true. Assume Unit 5, before termination, paid its pro rata share of both the P Paving lien and the tort lien. This reduces the P Paving lien to \$40,000, and the tort lien to \$80,000. Under Section 3-117, this entitles Unit 5 to a partial release of both claims, and neither P Paving nor the child has a further claim against Unit 5. The interests of the parties are as follows:

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UNIT # 1 2 3 4 5

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Share	of Proceeds	80,000	80,000	80,000	80,000	80,000	Common	Expense Lien				
600	-0-	-0-	-0-	-0-	First	Mortgage Liens	50,000	40,000	25,000	-0-	-0-	Common
Expense Lien	600	-0-	-0-	-0-	-0-	XYZ Pool Lien	20,000	20,000	20,000	20,000	-0-	Personal
Lien, Unit 4	-0-	-0-	-0-	50,000	-0-	P Paving Lien	8,800	10,000	10,000	10,000	-0-	Tort
Lien	-0-	10,000	20,000	-0-	-0-	Due Owners	-0-	-0-	5,000	-0-	80,000	

**EXAMPLE 2:**

The facts stated in example 1G remain true. Assume, however, that, at the outset, Unit 5 was twice as large as the others, sold for \$100,000, or twice as much as the others, and twice the common expense liability was allocated to it. At termination, it remains twice as valuable. In those circumstances, the results on sale are as follows:

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UNIT # 1 2 3 4 5

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Sale Proceeds	66,666	66,666	66,666	66,666	133,332	Common	Expense Lien	600	-0-	-0-
-0-	-0-	First	Mortgage Lien	50,000	40,000	25,000	-0-	-0-	Common	Expense Lien

600 -0- -0- -0- -0- XYZ Pool Lien 15,466 16,666 16,666 16,666 33,333 Personal Lien,  
 Unit 4 -0- -0- -0- 50,000 -0- P Paving Lien -0- 10,000 13,333 -0- 26,666 Tort Lien -0- 1,667  
 16,666 -0- 33,333 Due Owners -0- -0- -0- -0- 50,000

Note that all the liens are allocated in accordance with each unit's common expense liability, since no special provision was made for allocating the costs of the pool, the paving or the tort claim. Unit 5 probably did not contemplate the size of its exposure; nevertheless, fewer dollars were available to creditors upon termination than in Example 1G.

**EXAMPLE 3:**

The facts stated in Example 1G remain true, including the fact that Unit 5 was originally sold at the same price (\$50,000) as the remaining units. Upon appraisal, however, assume that, because of improvements, Unit 5 is now worth \$75,000. Three other units have remained at \$50,000, while Unit 1 was neglected, and is now worth only \$40,000. Common expense liabilities never changed. In this example, the total value of the units is now \$265,000. Since sales proceeds are distributed in accordance with fair market values, the following distribution of proceeds would apply:

Unit 1: (15.094331) \$ 60,377 Unit 2: (18.867931) \$ 75,472 Unit 3: (18.867931) \$ 75,472 Unit 4:  
 (18.867931) \$ 75,472 Unit 5: (28.301881) \$113,207 100.000001 \$400,000

UNIT # 1 2 3 4 5

Sales	Proceeds	60,377	75,472	75,472	75,472	113,207	Common	Expense Lien	600
-0-	-0-	-0-	-0-	First	Mortgage Lien	50,000	40,000	25,000	-0-
Expense Lien	600	-0-	-0-	-0-	XYZ Pool Lien	9,177	20,000	20,000	20,000
Lien	Unit 4	-0-	-0-	-0-	50,000	-0-	P Paving Lien	-0-	10,000
Lien	-0-	5,472	20,000	-0-	20,000	Due Owners	-0-	-0-	472
								-0-	63,207

In this example, the equal distribution of common expense liability coupled with the "fair value" distribution of sales proceeds create the greatest losses for the creditors of the association.

9. Subsection (h) departs significantly from the usual result under most condominium acts. Under those acts the proceeds of the sale of the entire project are distributed upon termination to each unit owner in accordance with the common element interest which was allocated at the outset of the project. Of course, in an older development, those original allocations will bear little resemblance to the actual value of the units. For that reason, the Act adopts an appraisal procedure for distribution of the sales proceeds. As suggested in the examples on the distribution of proceeds, this appraisal may dramatically affect the amount of dollars actually received by unit owners. Accordingly, it is likely the appraisal will be required to be distributed prior to the time the termination agreement is approved, so that unit owners may understand the likely financial consequences of the termination.

10. Subsection (h)(2) is an exception to the "fair market value" rule. It provides that, if appraisal of any unit cannot be made, either through pictures or comparison with other units, so that any unit's appropriate share in the overall proceeds cannot be calculated, then the distribution will fall back on the only objective, albeit artificial, standard available, which is the common element interest allocated to each unit.

11. Foreclosure of a mortgage or other lien or encumbrance does not automatically terminate the condominium, but, if a mortgagee or other lienholder (or any other party) acquires units with a sufficient number of votes, that party can cause the condominium to be terminated pursuant to subsection (a) of this section.

12. A mortgage or deed of trust on a condominium unit may provide for the lien to shift, upon termination, to become a lien on what will then be the borrower's undivided interest in the whole property. However, such a shift would be deemed to occur even in the absence of express language, pursuant to the first sentence of subsection (d).

13. With respect to the association's role as trustee under subsection (c), see Section 3-117.

14. If an initial appraisal made pursuant to subsection (h) were rejected by vote of the unit owners, the association would be obligated to secure a new appraisal.

15. "Foreclosure" in subsection (i) includes deeds in lieu of foreclosure, and "liens" includes tax and other liens on real estate which may be converted or withdrawn from the project.

16. The termination agreement should adopt or contain any restrictions, covenants and other provisions for the governance and operation of the property formerly constituting the condominium which the owners deem appropriate. These might closely parallel the provisions of the declaration and bylaws. This is particularly important in the case of a condominium which is not to be sold pursuant to the terms of the termination agreement. In the absence of such provisions, the general law of the state governing tenancies in common would apply.

17. Subsection (j) recognizes the possibility that a pre-existing lien might not have been released prior to the time the condominium declaration was recorded. In the absence of a provision such as subsection (j), recordation of the declaration would constitute a changing of the priority of those liens; and it is contrary to all expectations that a prior lienholder may be involuntarily subjected to the condominium documents. For that reason, this section permits the nonconsenting prior lienholder upon foreclosure to exclude the real estate subject to his lien from the condominium.

#### § 2-119. [Rights of Secured Lenders]

The declaration may require that all or a specified number or percentage of the mortgagees or beneficiaries of deeds of trust encumbering the units approve specified actions of the unit owners or the association as a condition to the effectiveness of those actions, but no requirement for approval may operate to (i) deny or delegate control over the general administrative affairs of the association by the unit owners or the executive board, or (ii) prevent the association or the executive board from commencing, intervening in, or settling any

litigation or proceeding, or receiving and distributing any insurance proceeds except pursuant to Section 3-113.

#### COMMENT

1. In a number of instances, particularly sale or encumbrance of common elements, or termination of a condominium, a lender's security may be dramatically affected by acts of the association. For that reason, this section permits ratification of those acts of the association which are specified in that declaration as a condition of their effectiveness.

2. There are three important limitations on the rights of lender consent. They are: (1) a prohibition on control over the general administrative affairs of the association; (2) restrictions on control over the association's powers during litigation or other proceedings; and (3) prohibition of receipt or distribution of insurance proceeds prior to application of those proceeds for rebuilding.

3. It is important that lenders not be able to step in and unilaterally act as receiver or trustee of the association. There may, of course, be occasions when a court of competent jurisdiction would order appointment of a receiver for an association. While this would be possible in a court proceeding, the Act prohibits private contractual granting of such a power.

4. Since it may well be that the association might find itself involved in litigation which would be adverse to the interests of the lender or the declarant, it is inappropriate for a secured party to be able to control the course of litigation in the absence of the consent of the other parties. In an appropriate case, of course, where the lenders' interests are affected, a lender might seek to intervene as a party in that proceeding.

5. Section 3-113 provides for the distribution of insurance proceeds in a particular manner. In particular, it prevents distribution of those proceeds to lenders until the intended purpose of the insurance has been met. For that reason, under this section the declaration may not provide the lender a right to receive insurance proceeds in any manner except the manner provided in Section 3-113.

6. In addition to the provision of the declaration, the provisions of individual deeds to units may require that unit owner to secure his lender's consent before taking particular actions.

#### § 2-120. [Master Associations]

(a) If the declaration for a condominium provides that any of the powers described in Section 3-102 are to be exercised by or may be delegated to a profit or nonprofit corporation (or unincorporated association) which exercises those or other powers on behalf of one or more condominiums or for the benefit of the unit owners of one or more condominiums, all provisions of this Act applicable to unit owners' associations apply to any such corporation (or unincorporated association), except as modified by this Section.

(b) Unless a master association is acting in the capacity of an association described in Section 3-101, it may exercise the powers set forth in Section 3-102(a)(2) only to the extent expressly permitted in the declarations of condominiums which are part of the master association or expressly described in the delegations of power from

those condominiums to the master association.

(c) If the declaration of any condominium provides that the executive board may delegate certain powers to a master association, the members of the executive board have no liability for the acts or omissions of the master association with respect to those powers following delegation.

(d) The rights and responsibilities of unit owners with respect to the unit owners' association set forth in Sections 3-103, 3-108, 3-109, 3-110, and 3-112 apply in the conduct of the affairs of a master association only to those persons who elect the board of a master association, whether or not those persons are otherwise unit owners within the meaning of this Act.

(e) Notwithstanding the provisions of Section 3-103(f) with respect to the election of the executive board of an association, by all unit owners after the period of declarant control ends, and even if a master association is also an association described in Section 3-101, the certificate of incorporation or other instrument creating the master association and the declaration of each condominium the powers of which are assigned by the declaration or delegated to the master association, may provide that the executive board of the master association must be elected after the period of declarant control in any of the following ways:

(1) All unit owners of all condominiums subject to the master association may elect all members of that executive board.

(2) All members of the executive boards of all condominiums subject to the master association may elect all members of that executive board.

(3) All unit owners of each condominium subject to the master association may elect specified members of that executive board.

(4) All members of the executive board of each condominium subject to the master association may elect specified members of that executive board.

#### COMMENT

1. It is very common in large or multi-phased condominiums, particularly those developed under existing laws, for the declarant to create a master or umbrella association which provides management services or decision-making functions for a series of smaller condominiums. While it is expected that this phenomenon will be less necessary under this Act because of the permissible period of time for declarant control over the project, it is nonetheless possible in larger developments that this form of management will continue. Moreover, this section should be of significant benefit to the large number of condominiums created under prior law which have need for the benefits of a provision on master associations.

2. Subsection (a) states the general rule that the powers of a unit owners' association may only be exercised by, or delegated to, a master association by, the declaration for the condominium permits that result. The declaration may have originally provided for a master association; alternatively, the unit owners of several

condominiums may amend their declarations in similar fashion to provide for this power. Subsection (a) makes it clear that, if any of the powers of the unit owners' association may be exercised by, or delegated to, a master association, all other provisions of this Act which apply to a unit owners' association apply to that master association except as modified by this section. Accordingly, such provisions on notice, voting, quorums, records, meetings, and other matters which apply to the unit owners' association would apply with equal validity to such a master association.

3. Subsection (b) changes the usual presumption with respect to the powers of the unit owners' association, except in those cases where the master association is actually acting as the only association for one or more condominiums. In those cases where it is not so acting. However, the only powers of the unit owners' association which the master association may exercise are the ones expressly permitted in the declaration or in the delegation of power. This is in significant contrast with the rule of Section 3-102 that all of the powers described in that section may be exercised unless limited by the declaration.

4. Subsection (c) clarifies the liability of the members of the executive board of a unit owners' association when the condominium for which the unit owners' association acts has delegated some of its powers to a master association. In that instance, subsection (c) makes it clear that the members of the executive board of the unit owners' association have no liability for acts and omissions of the master association board; under subsection (a), that liability lies with the members of the master association.

5. Subsection (d) addresses the question of the rights and responsibilities of the unit owners in their dealings with the master board. A variety of sections enumerated in subsection (d) provide certain rights and powers to unit owners in their dealings with their association. In the affairs of the master association, however, it would be incongruous for the unit owners to maintain those same rights if those unit owners were not in fact electing the master board. Thus, for example, the question of election of directors, meetings, notice of meetings, quorums, and other matters enumerated in those sections would have little meaning if those sections were read literally when applied to a master board which was not elected by all members of the condominiums subject to the master board. For that reason, the rights of notice, voting, and other rights enumerated in the Act are available only to the persons who actually elect the board.

6. Subsection (e) recognizes that there may be reasons for a representative form of election of directors of the master association. Alternatively, there may be cases where at-large election is reasonable. For that reason, subsection (e) provides that, after the period of declarant control has terminated, there may be 4 ways of electing the master association board. Those four ways are: (1) at-large election of the master board among all the condominiums subject to the master association; (2) at-large election of the master board only among the members of the executive boards of all condominiums subject to the master association; (3) each condominium might have designated positions on the master board, and those spaces could be filled by an at-large election among all the members of each condominium; or (4) the designated positions could be filled by an election only among the members of the executive board of the unit owners' association for each condominium. It would only be in the case of an at-large election of the master board among all condominiums that subsection (d) would have no relevance.

§ 2-121. [Merger or Consolidation of Condominiums]



(a) Any 2 or more condominiums, by agreement of the unit owners as provided in subsection (b), may be merged or consolidated into a single condominium. In the event of a merger or consolidation, unless the agreement otherwise provides, the resultant condominium is, for all purposes, the legal successor of all of the preexisting condominiums and the operations and activities of all associations of the preexisting condominiums shall be merged or consolidated into a single association which shall hold all powers, rights, obligations, assets and liabilities of all preexisting associations.

(b) An agreement of two or more condominiums to merge or consolidate pursuant to subsection (a) must be evidenced by an agreement prepared, executed, recorded and certified by the president of the association of each of the pre-existing condominiums following approval by owners of units to which are allocated the percentage of votes in each condominium required to terminate that condominium. Any such agreement must be recorded in every (county) in which a portion of the condominium is located and is not effective until recorded.

(c) Every merger or consolidation agreement must provide for the reallocation of the allocated interests in the new association among the units of the resultant condominium either (i) by stating the reallocations or the formulas upon which they are based or (ii) by stating the percentage of overall allocated interests of the new condominium which are allocated to all of the units comprising each of the preexisting condominiums, and providing that the portion of the percentages allocated to each unit formerly comprising a part of the preexisting condominium must be equal to the percentages of allocated interests allocated to that unit by the declaration of the preexisting condominium.

#### COMMENT

1. There may be circumstances where condominiums may wish to merge or consolidate their activities by the creation of a single condominium; this section provides for that possibility.

Subsection (a) makes it clear that a merger or consolidation may occur by the same vote of the unit owners necessary to terminate the condominium. If 2 or more condominiums are merged or consolidated, the resulting condominium is for all purposes the legal successor of the pre-existing condominiums, with a single association for all purposes. In the event condominiums did not wish to completely merge or consolidate their affairs, it would also be possible for them to create a master association pursuant to Section 2-120.

2. Under subsection (b), the merger or consolidation agreement is treated for recording purposes as an amendment to the declaration, and the same requirements for approval are mandated as for termination.

3. Subsection (c) does not state a minimum requirement for the contents of a merger or consolidation agreement, and any additional clauses not inconsistent with subsection (c) may be included. The important point that subsection (c) makes is that the reallocation of the common element interests, common expense liabilities and votes in the new association must be carefully stated.

Subsection (c) states 2 alternative rules in this respect. First, the reallocations may be accomplished by stating specifically the allocation of common element interests, common expense liability, and votes in the association to each unit, or by stating the formulas by which those interests may be allocated to each unit in all

of the pre-existing condominiums.

Alternatively, the merger or consolidation agreement may state the percentage of overall common element interests, common expense liabilities, and votes in the association allocated to "all of the units comprising each of the pre-existing condominiums." The agreement might then also provide that the portion of the percentage allocated to each unit from among the shares allocated to each condominium will be equal to the percentage of common expense liability and votes in the association allocated to that unit by the declaration of the pre-existing condominium. An example of how this alternative formulation would operate may be useful.

#### **EXAMPLE:**

Assume that 2 adjoining condominiums wish to merge their activities into one condominium. Assume that the first condominium consists of 10 one-bedroom units, with an annual budget of \$10,000. Assume further that each of the units, being identical, has a common element interest of 10%, equal common expense liability of 10%, and one vote per unit.

The second condominium consists of 40 units, with 20 2-bedroom units and 20 3-bedroom units. The budget of the second condominium consists of \$70,000 per year. Each of the 2-bedroom units has been allocated a 2% interest in the common elements and a 2% common expense liability, while each of the 3-bedroom units has been allocated a 3% interest in the common elements, and a 3% common expense liability. Finally, each of the units in the second condominium also has an equal vote.

There is no provision in the Act which mandates a particular allocation among condominiums 1 and 2 as to either common element interest, common expense liabilities or votes. Should the unit owners wish to retain as much similarity to their previous common element interests and common expense liabilities, however, and should they wish to retain equal voting in a merged project, it would be possible for them, pursuant to subsection (c)(ii), to state "the percentage of overall allocated interests of the new condominium" as follows: as to common element interests and common expense liabilities, they might allocate 12.5% of those interests in the merged project to condominium 1, and 87.5% thereof to condominium 2. If the agreement further provided that "the portion of the percentages allocated to each unit formerly comprising a part of the pre-existing condominium must be equal to the percentages of allocated interests allocated to that unit by the declaration of the pre-existing condominium" as required by subsection (c), each unit in condominium 1 would then have allocated to it 1.25% of both the common element interests and common expense liabilities in the new condominium. It happens that 1.25% of the common expenses of a merged condominium which has a budget of \$80,000 equals \$1,000.

Under the same rationale, if each of the 2-bedroom units in the second condominium to which were formerly allocated 2% of the common element interests and common expense liabilities, now has allocated 2% of the 87.5% allocated to the second condominium, each of those units would then have allocated to it 1.75% of the common element interest and common expense liabilities of the new condominium. 1.75% of \$80,000 is \$1,400. Similarly, each of the 3-bedroom units would then have allocated to it 2.625% of the common element interest and common expense liabilities in the merged condominium. That percentage of the common expense liabilities of \$80,000 would yield an annual cost of \$2,100, the same cost as previously obtained in this condominium.

Further, the unit owners are free to allocate votes among the units in any way which they see fit. Of course, if they choose to allocate equal votes to all the units, which was the method previously used in both condominiums, this would have the effect of giving 20% of the votes to condominium 1, even though condominium 1 had only 12.5% of the common expense liabilities. It may be, however, that this tracks with the expectations of the unit owners in both condominiums. Alternatively, condominium 1 might be allocated 12.5% of the votes, which, when divided up among the 10 units, would give each one-bedroom unit a .125 vote. If 87.5% of the votes were allocated equally among the unit owners in the second condominium, then each of the unit owners in condominium 2 would have .21875 votes.

If some other configuration was to be desired, then the allocations would of necessity be made pursuant to paragraphs (c)(i) rather than (c)(ii).

## ARTICLE 3

### MANAGEMENT OF CONDOMINIUM

#### § 3-101. [Organization of Unit Owners' Association]

A unit owners' association must be organized no later than the date the first unit in the condominium is conveyed. The membership of the association at all times shall consist exclusively of all the unit owners or, following termination of the condominium, of all former unit owners entitled to distributions of proceeds under Section 2-118, or their heirs, successors, or assigns. The association shall be organized as a profit or nonprofit corporation [or as an unincorporated association.]

#### COMMENT

1. The first purchaser of a unit is entitled to have in place the legal structure of the unit owners' association. The existence of the structure clarifies the relationship between the developer and other unit owners and makes it easy for the developer to involve unit owners in the governance of the condominium even during a period of declarant control reserved pursuant to Section 3-103(d).

2. The bracketed language preserves the flexibility existing under the vast majority of present condominium statutes to organize the association as a profit or non-profit corporation or as an unincorporated association. Although at least one state (Georgia) requires the organization of the association in corporate form, it is not desirable to mandate this result in a uniform act. If a state wishes to mandate incorporation, it should delete the bracketed language.

#### § 3-102. [Powers of Unit Owners' Association]

(a) Except as provided in subsection (b), and subject to the provisions of the declaration, the association [, even if unincorporated,] may:

(1) adopt and amend bylaws and rules and regulations;

(2) adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from unit owners;

(3) hire and discharge managing agents and other employees, agents, and independent contractors;

(4) institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or 2 or more unit owners on matters affecting the condominium;

(5) make contracts and incur liabilities;

(6) regulate the use, maintenance, repair, replacement, and modification of common elements;

(7) cause additional improvements to be made as a part of the common elements;

(8) acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property, but common elements may be conveyed or subjected to a security interest only pursuant to Section 3-112;

(9) grant easements, leases, licenses, and concessions through or over the common elements;

(10) impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements (other than limited common elements described in Sections 2-102(2) and (4) ) and for services provided to unit owners;

(11) impose charges for late payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines for violations of the declaration, bylaws, and rules and regulations of the association;

(12) impose reasonable charges for the preparation and recordation of amendments to the declaration, resale certificates required by Section 4-109, or statements of unpaid assessments;

(13) provide for the indemnification of its officers and executive board and maintain directors' and officers' liability insurance;

(14) assign its right to future income, including the right to receive common expense assessments, but only to the extent the declaration expressly so provides;

(15) exercise any other powers conferred by the declaration or bylaws;

(16) exercise all other powers that may be exercised in this State by legal entities of the same type as the association; and

(17) exercise any other powers necessary and proper for the governance and operation of the association.

(b) The declaration may not impose limitations on the power of the association to deal with the declarant which are more restrictive than the limitations imposed on the power of the association to deal with other persons.

#### COMMENT

1. This section permits the declaration, subject to the limitations of subsection (b), to include limitations

on the exercise of any of the enumerated powers. The bracketed language making a specific reference to unincorporated associations is not intended to exclude other forms of association; the unincorporated association would have such powers, subject to the declaration, regardless of the legal status of an unincorporated association in the state. If a state wishes to permit the association to be unincorporated and the law of the state is unclear whether an unincorporated association would have such powers in the absence of the language, the bracketed language should be retained and the brackets removed.

2. Required provisions of the bylaws of the association, referenced in paragraph (1), are set forth in Section 3-106.

3. Many state condominium statutes give the association the power to sue and be sued in its own name. In the absence of a statutory grant of standing such as that set forth in paragraph (4), some courts have held that the association, because it has no ownership interest in the condominium, has no standing to bring, defend, or to intervene in litigation or administrative proceedings in its own name.

4. Paragraph (8) refers to the power granted by Section 3-112 to sell or encumber common elements without a termination of the condominium upon a vote of the requisite number of unit owners. Paragraph (9) permits the association to grant easements, leases, licenses, and concessions with respect to the common elements without a vote of the unit owners.

5. The powers granted the association in paragraph (11) to impose charges for late payment of assessments and to levy reasonable fines for violations of the association's rules reflect the need to provide the association with sufficient powers to exercise its "governmental" functions as the ruling body of the condominium community. These powers are intended to be in addition to any rights which the association may have under other law.

6. Under paragraph (14), the declaration may provide for the assignment of income of the association, including common expense assessment income, as security for, or payment of, debts of the association. The power may be limited in any manner specified in the declaration—for example, the power might be limited to specified purposes such as repair of existing structures, or to income from particular sources such as income from tenants, or to a specified percentage of common expense assessments. The power, in many instances, should help materially in securing credit for the association at favorable interest rates. The inability of associations to borrow because of a lack of assets, in spite of its income stream, has been a significant problem.

7. If the association is incorporated, it may, pursuant to paragraph (16), exercise all other powers of a corporation. Similarly, if the association is unincorporated, the association may, by virtue of paragraph (16), exercise all other powers of an unincorporated association. Inconsistent provisions of state corporation or unincorporated association law are subject to the provisions of this Act, as provided in Section 1-108.

#### § 3-103. [Executive Board Members and Officers]

(a) Except as provided in the declaration, the bylaws, in subsection (b), or other provisions of this Act, the executive board may act in all instances on behalf of the association. In the performance of their duties, the officers and members of the executive board are required to exercise (i) if appointed by the declarant, the care

required of fiduciaries of the unit owners and (ii) if elected by the unit owners, ordinary and reasonable care.

(b) The executive board may not act on behalf of the association to amend the declaration (Section 2-117), to terminate the condominium (Section 2-118), or to elect members of the executive board or determine the qualifications, powers and duties, or terms of office of executive board members (Section 3-103(f) ), but the executive board may fill vacancies in its membership for the unexpired portion of any term.

(c) Within [30] days after adoption of any proposed budget for the condominium, the executive board shall provide a summary of the budget to all the unit owners, and shall set a date for a meeting of the unit owners to consider ratification of the budget not less than 14 nor more than 30 days after mailing of the summary. Unless at that meeting a majority of all the unit owners or any larger vote specified in the declaration reject the budget, the budget is ratified, whether or not a quorum is present. In the event the proposed budget is rejected, the periodic budget last ratified by the unit owners shall be continued until such time as the unit owners ratify a subsequent budget proposed by the executive board.

(d) Subject to subsection (e), the declaration may provide for a period of declarant control of the association, during which period a declarant, or persons designated by him, may appoint and remove the officers and members of the executive board. Regardless of the period provided in the declaration, a period of declarant control terminates no later than the earlier of: (i) [60] days after conveyance of [75] percent of the units which may be created to unit owners other than a declarant; (ii) [2] years after all declarants have ceased to offer units for sale in the ordinary course of business; or (iii) [2] years after any development right to add new units was last exercised. A declarant may voluntarily surrender the right to appoint and remove officers and members of the executive board before termination of that period, but in that event he may require, for the duration of the period of declarant control, that specified actions of the association or executive board, as described in a recorded instrument executed by the declarant, be approved by the declarant before they become effective.

(e) Not later than [60] days after conveyance of [25] percent of the units which may be created to unit owners other than a declarant, at least one member and not less than [25] percent of the members of the executive board must be elected by unit owners other than the declarant. Not later than [60] days after conveyance of [50] percent of the units which may be created to unit owners other than a declarant, not less than [33 1/3] percent of the members of the executive board must be elected by unit owners other than the declarant.

(f) Not later than the termination of any period of declarant control, the unit owners shall elect an executive board of at least 3 members, at least a majority of who must be unit owners. The executive board shall elect the officers. The executive board members and officers shall taken office upon election.

(g) Notwithstanding any provision of the declaration or bylaws to the contrary, the unit owners, by a two-thirds vote of all persons present and entitled to vote at any meeting of the unit owners at which a quorum is present, may remove any member of the executive board with or without cause, other than a member appointed by the declarant.

COMMENT

1. Subsection (a) makes members of the executive board appointed by the declarant liable as fiduciaries of the unit owners with respect to their actions or omissions as members of the board. This provision imposes a very high standard of duty because the board is vested with great power over the property interests of unit owners, and because there is a great potential for conflicts of interest between the unit owners and the declarant.

Officers and board members elected by the unit owners are required only to exercise ordinary and reasonable care. This lower standard of care should increase the willingness of unit owners to serve as officers and members of the board.

2. The provisions of paragraph (c) permit the unit owners to disapprove any proposed budget, but a rejection of the budget does not result in cessation of assessments until a budget is approved. Rather, assessments continue on the basis of the last approved periodic budget until the new budget is in effect.

3. Subsection (d) and (e) recognize the practical necessity for the declarant to control the association during the developmental phases of a condominium project. However, any executive board member appointed by the declarant pursuant to subsection (d) is liable as a fiduciary to any unit owner for his acts or omissions in such capacity.

4. Subsection (d) permits a declarant to surrender his right to appoint and remove officers and executive board members prior to the termination of the period of declarant control in exchange for a veto right over certain actions of the association or its executive board. This provision is designed to encourage transfer of control by declarants to unit owners as early as possible, without impinging upon the declarant's rights (for the duration of the period of declarant control) to maintain ultimate control of those matters which he may deem particularly important to him. It might be noted that the declarant at all times (even after the expiration of the period of declarant control) is entitled to cast the votes allocated to his units in the same manner as any other unit owner.

5. Subsection (e), in combination with subsection (d), provides for a gradual transfer of control of the association to the unit owners from the declarant. Such a gradual transfer is preferable to a one-time turnover of control since it assures that the unit owners will be involved, to some extent, in the affairs of the association from a relatively early date and that some unit owners will acquire experience in dealing with association matters.

#### § 3-104. [Transfer of Special Declarant Rights]

(a) No special declarant right (Section 1-103(23) ) created or reserved under this Act may be transferred except by an instrument evidencing the transfer recorded in every (county) in which any portion of the condominium is located. The instrument is not effective unless executed by the transferee.

(b) Upon transfer of any special declarant right, the liability of a transferor declarant is as follows:

(1) A transferor is not relieved of any obligation or liability arising before the transfer and remains liable for warranty obligations imposed upon him by this Act. Lack of privity does not deprive any unit owner of standing to maintain an action to enforce any obligation of the transferor.



(2) If a successor to any special declarant right is an affiliate of a declarant (Section 1-103(1) ), the transferor is jointly and severally liable with the successor for any obligations or liabilities of the successor relating to the condominium.

(3) If a transferor retains any special declarant right, but transfers other special declarant rights to a successor who is not an affiliate of the declarant, the transferor is liable for any obligations or liabilities imposed on a declarant by this Act or by the declaration relating to the retained special declarant rights and arising after the transfer.

(4) A transferor has no liability for any act or omission or any breach of a contractual or warranty obligation arising from the exercise of a special declarant right by a successor declarant who is not an affiliate of the transferor.

(c) Unless otherwise provided in a mortgage instrument or deed of trust, in case of foreclosure of a mortgage, tax sale, judicial sale, sale by a trustee under a deed of trust, or sale under Bankruptcy Code or receivership proceedings, of any units owned by a declarant or real estate in a condominium subject to development rights, a person acquiring title to all the real estate being foreclosed or sold, but only upon his request, succeeds to all special declarant rights related to that real estate held by that declarant, or only to any rights reserved in the declaration pursuant to Section 2-115 and held by that declarant to maintain models, sales offices and signs. The judgment or instrument conveying title shall provide for transfer of only the special declarant rights requested.

(d) Upon foreclosure, tax sale, judicial sale, sale by a trustee under a deed of trust, or sale under Bankruptcy Code or receivership proceedings, of all units and other real estate in a condominium owned by a declarant:

(1) the declarant ceases to have any special declarant rights, and

(2) the period of declarant control (Section 3-103(d) ) terminates unless the judgment or instrument conveying title provides for transfer of all special declarant rights held by that declarant to a successor declarant.

(e) The liabilities and obligations of a person who succeeds to special declarant rights are as follows:

(1) A successor to any special declarant right who is an affiliate of a declarant is subject to all obligations and liabilities imposed on the transferor by this Act or by the declaration.

(2) A successor to any special declarant right, other than a successor described in paragraphs (3) or (4), who is not an affiliate of a declarant, is subject to all obligations and liabilities imposed by this Act or the declaration:

(i) on a declarant which relate to his exercise or non-exercise of special declarant rights; or

(ii) on his transferor, other than;

(A) misrepresentations by any previous declarant;

(B) warranty obligations on improvements made by any previous declarant, or made before the condominium was created;

(C) breach of any fiduciary obligation by any previous declarant or his appointees to the executive board; or

(D) any liability or obligation imposed on the transferor as a result of the transferor's acts or omissions after the transfer.

(3) A successor to only a right reserved in the declaration to maintain models, sales offices, and signs (Section 2-115), if he is not an affiliate of a declarant, may not exercise any other special declarant right, and is not subject to any liability or obligation as a declarant, except the obligation to provide a public offering statement[, ] [and] any liability arising as a result thereof [, and obligations under Article 5.]

(4) A successor to all special declarant rights held by his transferor who is not an affiliate of that declarant and who succeeded to those rights pursuant to a deed in lieu of foreclosure or a judgment or instrument conveying title to units under subsection (c), may declare his intention in a recorded instrument to hold those rights solely for transfer to another person. Thereafter, until transferring all special declarant rights to any person acquiring title to any unit owned by the successor, or unit recording an instrument permitting exercise of all those rights, that successor may not exercise any of those rights other than any right held by his transferor to control the executive board in accordance with the provisions of Section 3-103(d) for the duration of any period of declarant control, and any attempted exercise of those rights is void. So long as a successor declarant may not exercise special declarant rights under this subsection, he is not subject to any liability or obligation as a declarant other than liability for his acts and omissions under Section 3-103(d).

(f) Nothing in this section subjects any successor to a special declarant right to any claims against or other obligations of a transferor declarant, other than claims and obligations arising under this Act or the declaration.

#### COMMENT

1. This section deals with the issue of the extent to which obligations and liabilities imposed upon a declarant by this Act are transferred to a third party by a transfer of the declarant's interest in a condominium. There are two parts to be problem. First, what obligations and liabilities to unit owners (both existing unit owners and persons who become unit owners in the future) should a declarant retain, notwithstanding his transfer of interests. Second, what obligations and liabilities may fairly be imposed upon the declarant's successor in interest. No present condominium state adequately addresses these issues.

2. This section strikes a balance between the obvious need to protect the interests of unit owners and the equally important need to protect innocent successors to a declarant's rights, especially persons such as mortgagees whose only interest in the condominium project is to protect their debt security. The general scheme of the section is to impose upon a declarant continuing obligations and liabilities for promises, acts, or omissions undertaken during the period that he was in control of the condominium, while relieving a declarant who transfers all or part of his special declarant rights in a project of such responsibilities with respect to the promises, acts, or omissions of a successor over whom he has no control. Similarly, the section imposes obligations and liabilities arising after the transfer upon a non-affiliated successor to a declarant's interests, but absolves such a transferee of responsibility for the promises, acts, or omissions of a transferor declarant over which he had no control. Finally, the section makes special provision for the interests of certain successor declarants (e.g., a mortgagee who succeeds to the rights of the declarant pursuant to a "deed in lieu of foreclosure" and who holds the project solely for transfer to another person) by relieving such persons of virtually all of the obligations and liabilities imposed upon declarants by this Act.

3. Subsection (a) provides that a successor in interest to a declarant may acquire the special rights of the declarant only by recording an instrument which reflects a transfer of those rights. This recordation requirement is important to determine the duration of the period of declarant control pursuant to Section 3-103(d) and (e), as well as to place unit owners on notice of all persons entitled to exercise the special rights of a declarant under this Act. The transfer by a declarant of all of his interest in a condominium project to a successor, without a concomitant transfer of the special rights of a declarant pursuant to this subsection, results in the automatic termination of such special declarant rights and of any period of declarant control.

4. Under subsection (b), a transferor declarant remains liable to unit owners (both existing unit owners and persons who subsequently become unit owners) for all obligations and liabilities, including warranty obligations on all improvements made by him, arising prior to the transfer. If a declarant transfers any special declarant right to an affiliate (as defined in Section 1-103(1) ), the transferor remains subject to all liabilities specified in paragraph (1) of subsection (b) and, in addition, is jointly and severally liable with his successor in interest for all obligations and liabilities of the successor.

5. The obligations and liabilities imposed upon transferee declarants under the Act are set forth in subsection (e). In general, a transferee declarant (other than an affiliate of the original declarant and other than a successor whose interest in the project is solely for the protection of debt security) becomes subject to all obligations and liabilities imposed upon a declarant by the Act or by the declaration with respect to any promises, acts, or omissions undertaken subsequent to the transfer which relate to the rights he holds. Such a transferee is liable for the promises, acts, or omissions of the original declarant undertaken prior to the transfer, except as set forth in paragraph (e)(2)(ii). For example, a successor declarant would not be liable for the warranty obligations of the original declarant with respect to improvements to the project made by the original declarant. Similarly, a successor would not be liable, under normal circumstances, for any misrepresentation or breach of fiduciary duty by the original declarant prior to the transfer. The successor is liable, however, to complete improvements labeled "MUST BE BUILT" on the original plans.

6. To preclude declarants from evading their obligations and liabilities under this Act by transferring their interests to affiliated companies, paragraph (1) of subsection (e) makes clear that any successor declarant who

is an affiliate of the original declarant is subject to all obligations and liabilities imposed upon the original declarant by the Act or by the declaration. Similarly, as previously noted, paragraph (2) of subsection (b) provides that an original declarant who transfers his rights to an affiliate remains jointly and severally liable with his successor for all obligations and liabilities imposed upon declarants by the Act or by the declaration.

7. The section handles the problem of certain successor declarants (i.e., persons whose sole interest in the condominium project is the protection of debt security) in three ways. First, subsection (c) provides that, in the case of a foreclosure of a mortgage, a sale by a trustee under a deed of trust, or a sale by a trustee in bankruptcy of any units owned by a declarant, any person acquiring title to all of the units being foreclosed or sold may request the transfer of special declarant rights. In that event, and only upon such request, such rights will be transferred in the instrument conveying title to the units and such transferee will thereafter become a successor declarant subject to the other provisions of this section. In the event of a foreclosure, sale by a trustee under a deed of trust, or sale by a trustee in bankruptcy of all units owned by a declarant, if the transferee of such units does not request the transfer of special declarant rights, then, under subsection (d), such special declarant rights cease to exist and any period of declarant control terminates.

Second, any person who succeeds to special declarant rights as a result of the transfers just described or by deed in lieu of foreclosure, may, pursuant to paragraph (4) of subsection (e), declare his intention (in a recorded instrument) to hold those rights solely for transfer to another person. Thereafter, such a successor may transfer all special declarant rights to a third party acquiring title to any units owned by the successor but may not, prior to such transfer, exercise any special declarant rights other than the right to control the executive board of the association in accordance with the provisions of Section 3-103(c). A successor declarant who exercises such a right is relieved of any liability under the Act except liability for any acts or omissions related to his control of the executive board of the association. This provision is designed to deal with the typical problem of a foreclosing mortgage lender who opts to bid in and obtain the project at the foreclosure sale solely for the purpose of subsequent resale. It permits such a foreclosing lender to undertake such a transaction without incurring the full burden of declarant obligations and liabilities. At the same time, the provision recognizes the need for continuing operation of the association and, to that end, permits a foreclosing lender to assume control of the association for the purpose of ensuring a smooth transition.

Third, paragraph (3) of subsection (e) provides that a successor who has only the right to maintain model units, sales offices, and signs does not thereby become subject to any obligations or liabilities as a declarant except for the obligation to provide a public offering statement and any liability resulting therefrom. This provision also is designed to protect mortgage lenders and contemplates the situation where a lender takes over a condominium project and desires to sell out existing units without making any additional improvements to the project. This provision facilitates such a transaction by relieving the mortgage lender, in that instance, from the full burden of obligations and liabilities ordinarily imposed upon a declarant under the Act.

Under Section 2-110, a declarant may reserve the right to create additional units in portions of the condominium which were originally designated as common elements. The declarant becomes the owner of any units created, but, prior to creation of units, the title to those portions of the condominium is in the unit owners. The right to create the units is an interest in land in which a security interest might be granted. If the mortgagee of that interest forecloses, the purchaser at the foreclosure sale has the choices concerning development rights

and resulting liability which are described in the preceding paragraph. That is, under subsections (c) and (d), the purchaser may limit his liability by agreeing to hold the developments only for the purpose of transfer as provided by paragraph (e)(4) or may buy the rights under paragraph (c).

§ 3-105. [Termination of Contracts and Leases of Declarant]

If entered into before the executive board elected by the unit owners pursuant to Section 3-103(f) takes offices, (i) any management contract, employment contract, or lease of recreational or parking areas or facilities, (ii) any other contract or lease between the association and a declarant or an affiliate of a declarant, or (iii) any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the circumstances then prevailing, may be terminated without penalty by the association at any time after the executive board elected by the unit owners pursuant to Section 3-103(f) takes office upon not less than (90) days' notice to the other party. This section does not apply to any lease the termination of which would terminate the condominium or reduce its size, unless the real estate subject to that lease was included in the condominium for the purpose of avoiding the right of the association to terminate a lease under this section.

COMMENT

1. This section deals with a common problem in the development of condominium projects: the temptation on the part of the developer, while in control of the association, to enter into, on behalf of the association, long-term contracts and leases with himself or with an affiliated entity.

The Act deals with this problem in two ways. First, Section 3-103(a) imposes upon all executive board members appointed by the declarant liability as fiduciaries of the unit owners for all of their acts or omissions as members of the board. Second, Section 3-105 provides for the termination of certain contracts and leases made during a period of declarant control.

2. In addition to contracts or leases made by a declarant with himself or with an affiliated entity, there are also certain contracts and leases so critical to the operation of the condominium and to the unit owners' full enjoyment of their rights of ownership that they too should be voidable by the unit owners upon the expiration of any period of declarant control. At the same time, a statutorily-sanctioned right of cancellation should not be applicable to all contracts or leases which a declarant may enter into in the course of developing a condominium project. For example, a commercial tenant would not be willing to invest substantial amounts in equipment and other improvements for the operation of his business if the lease could unilaterally be cancelled by the association. Accordingly, this section provides that (subject to the exception set forth in the last sentence thereof), upon the expiration of any period of declarant control, the association may terminate without penalty, any "critical" contract (i.e., any management contract, employment contract, or lease of recreational or parking areas or facilities) entered into during a period of declarant control, any contract or lease to which the declarant or an affiliate of the declarant is a party, or any contract or lease previously entered into by the declarant which is not bona fide or which was unconscionable to the unit owners at the time entered into under the circumstances then prevailing.

3. The last sentence of the section addresses the usual leasehold condominium situation where the

underlying real estate is subject to a long-term ground lease which is then submitted to the Act. Because termination of the ground lease would terminate the condominium, this sentence prevents cancellation. However, in order to avoid the possibility that recreation and other leases otherwise cancellable under subsection (a) will be restructured to come within the exception, a subjective test of "intent" is imposed. Under the test, if a declarant's principal purpose in subjecting the leased real estate to the condominium was to prevent termination of the lease, the lease may nevertheless be terminated.

§ 3-106. [Bylaws]

(a) The bylaws of the association must provide for:

(1) the number of members of the executive board and the titles of the officers of the association;

(2) election by the executive board of a president, treasurer, secretary, and any other officers of the association the bylaws specify;

(3) the qualifications, powers and duties, terms of office, and manner of electing and removing executive board members and officers and filling vacancies;

(4) which, if any, of its powers the executive board or officers may delegate to other persons or to a managing agent;

(5) which of its officers may prepare, execute, certify, and record amendments to the declaration on behalf of the association; and

(6) the method of amending the bylaws.

(b) Subject to the provisions of the declaration, the bylaws may provide for any other matters the association deems necessary and appropriate.

COMMENT

1. Because the Act does not require the recordation of bylaws, it is contemplated that unrecorded bylaws will set forth only matters relating to the internal operations of the association and various "housekeeping" matters with respect to the condominium. The Act requires specific matters to be set forth in the recorded declaration and not in the bylaws, unless the bylaws are to be recorded as an exhibit to the declaration.

2. The requirement, set forth in subsection (a)(5), that the bylaws designate which of the officers of the association has the responsibility to prepare, execute, certify, and record amendments to the declaration reflects the obligation imposed upon the association by several provisions of this Act to record such amendments in certain circumstances. These provisions include Section 1-107 (Eminent Domain), Section 2-106 (expiration of certain leases), Section 2-112 (Relocation of Boundaries Between Adjoining Units), and Section 2-113

(subdivision or conversion of units). Section 2-117(e) provides that, if no officer is designated for this purpose, it shall be the duty of the president.

§ 3-107. [Upkeep of Condominium]

(a) Except to the extent provided by the declaration, subsection (b), or Section 3-113(h), the association is responsible for maintenance, repair, and replacement of the common elements, and each unit owner is responsible for maintenance, repair, and replacement of his unit. Each unit owner shall afford to the association and the other unit owners, and to their agents or employees, access through his unit reasonably necessary for those purposes. If damage is inflicted on the common elements, or on any unit through which access is taken, the unit owner responsible for the damage, or the association if it is responsible, is liable for the prompt repair thereof.

(b) In addition to the liability that a declarant as a unit owner has under this Act, the declarant alone is liable for all expenses in connection with real estate subject to development rights. No other unit owner and no other portion of the condominium is subject to a claim for payment of those expenses. Unless the declaration provides otherwise, any income or proceeds from real estate subject to development rights inures to the declarant.

COMMENT

1. The Act permits the declaration to separate maintenance responsibility from ownership. This is commonly done in practice. In the absence of any provision in the declaration, maintenance responsibility follows ownership of the unit or rests with the association in the case of common elements. Under this Act, limited common elements (which might include, for example, patios, balconies, and parking spaces) are common elements. See Section 1-103(16). As a result, under subsection (a), unless the declaration requires that unit owners are responsible for the upkeep of such limited common elements, the association will be responsible for their maintenance. Under Section 3-115(c), the cost of maintenance, repair, and replacement for such limited common elements is assessed against all the units in the condominium, unless the declaration provides for such expenses to be paid only by the units benefited. See Comment 1 to Section 2-108.

2. Under Section 2-110, a declarant may reserve the right to create units in portions of the condominium originally designated as common elements. Prior to creation of the units, title to those portions of the condominium is in the unit owners. However, under Section 3-107(b), the developer is obligated to pay all of the expenses of (including real estate taxes properly apportionable to) that real estate. As to real estate taxes, see Section 1-105(c).

§ 3-108. [Meetings]

A meeting of the association must be held at least one each year. Special meetings of the association may be called by the president, a majority of the executive board or by unit owners having 20 percent, or any lower percentage specified in the bylaws, of the votes in the association. Not less than (10) nor more than [60] days in advance of any meeting, the secretary or other officer specified in the bylaws shall cause notice to be hand-delivered or sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner. The notice of any meeting must state the time and place of the

meeting and the items on the agenda, including the general nature of any proposed amendment to the declaration or bylaws, any budget changes, and any proposal to remove a director or officer.

§ 3-109. [Quorums]

(a) Unless the bylaws provide otherwise, a quorum is present throughout any meeting of the association if persons entitled to cast [20] percent of the votes which may be cast for election of the executive board are present in person or by proxy at the beginning of the meeting.

(b) Unless the bylaws specify a larger percentage, a quorum is deemed present throughout any meeting of the executive board if persons entitled to cast [50] percent of the votes on that board are present at the beginning of the meeting.

COMMENT

Mandatory quorum requirements lower than 50 percent for meetings of the association are often justified because of the common difficulty of inducing unit owners to attend meetings. The problem is particularly acute in the case of resort condominiums where many owners may reside elsewhere, often at considerable distances, for most of the year.

§ 3-110. [Voting; Proxies]

(a) If only one of the multiple owners of a unit is present at a meeting of the association, he is entitled to cast all the votes allocated to that unit. If more than one of the multiple owners are present, the votes allocated to that unit may be cast only in accordance with the agreement of a majority in interest of the multiple owners, unless the declaration expressly provides otherwise. There is majority agreement if any one of the multiple owners casts the votes allocated to that unit without protest being made promptly to the person presiding over the meeting by any of the other owners of the unit.

(b) Votes allocated to a unit may be cast pursuant to proxy duly executed by a unit owner. If a unit is owned by more than one person, each owner of the unit may vote or register protest to the casting of votes by the other owners of the unit through a duly executed proxy. A unit owner may not revoke a proxy given pursuant to this section except by actual notice of revocation to the person presiding over a meeting of the association. A proxy is void if it is not dated or purports to be revocable without notice. A proxy terminates one year after its date, unless it specifies a shorter term.

(c) If the declaration requires that votes on specified matters affecting the condominium be cast by lessees rather than unit owners of leased units; (i) the provisions of subsection (a) and (b) apply to lessees as if they were unit owners; (ii) unit owners who have leased their units to other persons may not cast votes on those specified matters; and (iii) lessees are entitled to notice of meetings, access to records, and other rights respecting those matters as if they were unit owners. Unit owners must also be given notice, in the manner provided in Section 3-108, of all meetings at which lessees may be entitled to vote.



(d) No votes allocated to a unit owned by the association may be cast.

#### COMMENT

Subsection (c) addresses an increasingly important matter in the governance of condominiums: the role of tenants occupying units owned by investors or other persons. Most present statutes require voting by owners in the association. However, it may be desirable to give lessees, rather than lessors, of units the right to vote on issues involving day-to-day operation both because the lessees may have a greater interest than the lessors and because it is desirable to have lessees feel they are an integral part of the condominium community.

#### § 3-111. [Tort and Contract Liability]

Neither the association nor any unit owner except the declarant is liable for that declarant's torts in connection with any part of the condominium which that declarant has the responsibility to maintain. Otherwise, an action alleging a wrong done by the association must be brought against the association and not against any unit owner. If the wrong occurred during any period of declarant control and the association gives the declarant reasonable notice of and an opportunity to defend against the action, the declarant who then controlled the association is liable to the association or to any unit owner: (i) for all tort losses not covered by insurance suffered by the association or that unit owner, and (ii) for all costs which the association would not have incurred but for a breach of contract or other wrongful act or omission. Whenever the declarant is liable to the association under this section, the declarant is also liable for all litigation expenses, including reasonable attorneys fees, incurred by the association. Any statute of limitation affecting the association's right of action under this section is tolled until the period of declarant control terminates. A unit owner is not precluded from bringing an action contemplated by this section because he is a unit owner or a member or officer of the association. Liens resulting from judgments against the association are governed by Section 3-117 (Other Liens Affecting the Condominium).

#### COMMENT

1. This section provides that any action in tort or contract arising out of acts or omissions of the association shall be brought against the association and not against the individual unit owners. This changes the law in states where plaintiffs are forced to name individual unit owners as the real parties in interest to any action brought against the association. The subsection also provides that a unit owner is not precluded from bringing an action in tort or contract against the association solely because he is a unit owner or a member or officer of the association.

2. In recognition of the practical control that can (and in most cases will) be exercised by a declarant over the affairs of the association during any period of declarant control permitted pursuant to Section 3-103, subsection (a) provides that the association or any unit owner shall have a right of action against the declarant for any losses (including both payment of damages and attorneys' fees) suffered by the association or any unit owner as a result of an action based upon a tort or breach of contract arising during any period of declarant control. To assure that the decision to bring such an action can be made by an executive board free from the influence of the declarant, the subsection also provides that any statute of limitations affecting such a right of action by the association shall be tolled until the expiration of any period of declarant control.

3. If a suit based on a claim which accrued during the period of developer control is brought against the association after control of the association has passed from the developer, reasonable notice to, and grant of an opportunity to the developer to defend, are conditions to developer liability. If, however, suit is brought against the association while the developer is still in control, obviously the developer cannot later resist a suit by the association for reimbursement on the grounds of failure to notify.

§ 3-112. [Conveyance or Encumbrance of Common Elements]

(a) Portions of the common elements may be conveyed or subjected to a security interest by the association if persons entitled to cast at least [80] percent of the votes in the association, including [80] percent of the votes allocated to units not owned by a declarant, or any larger percentage the declaration specifies, agree to that action; but all the owners of units to which any limited common element is allocated must agree in order to convey that limited common element or subject it to a security interest. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to non-residential uses. Proceeds of the sale are an asset of the association.

(b) An agreement to convey common elements or subject them to a security interest must be evidenced by the execution of an agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of unit owners. The agreement must specify a date after which the agreement will be void unless recorded before that date. The agreement and all ratifications thereof must be recorded in every [county] in which a portion of the condominium is situated, and is effective only upon recordation.

(c) The association, on behalf of the unit owners, may contract to convey common elements, or subject them to a security interest, but the contract is not enforceable against the association until approved pursuant to subsections (a) and (b). Thereafter, the association has all powers necessary and appropriate to effect the conveyance or encumbrance, including the power to execute deeds or other instruments.

(d) Any purported conveyance, encumbrance, judicial sale or other voluntary transfer of common elements, unless made pursuant to this section, is void.

(e) A conveyance or encumbrance of common elements pursuant to this section does not deprive any unit of its rights of access and support.

(f) [Unless the declaration otherwise provides,] a conveyance or encumbrance of common elements pursuant to this section does not affect the priority or validity of pre-existing encumbrances.

COMMENT

1. Subsection (a) provides that, on agreement of unit owners holding 80% of the votes in the association, parts of the common elements may be sold or encumbered. (80% is the percentage required for termination of the condominium under Section 2-118.) This power may be exercised during the period of declarant control, but, in order to be effective, 80% of non-declarant unit owners must approve the action.

The ability to sell a portion of the common elements without termination of the condominium gives the condominium regime desirable flexibility. For example, the unit owners, some years after the initial creation of the condominium, may decide to convey away a portion of the open space which has been reserved as a part of the common elements because they no longer find the area useful or because they wish to use sale proceeds to make other improvements. Similarly, the ability to encumber common elements gives the association power to raise money for improvements through the device of mortgaging the improvements themselves. Of course, recreational improvements will frequently not be sufficient security for a loan for their construction. Nevertheless, the ability to take a security interest in such improvements may lead lenders to be more favorably disposed toward making a loan in larger amounts and at lower interest rates.

2. Subsection (b) requires that the agreement for sale or encumbrance be evidenced by the execution of an agreement in the same manner as a deed by the requisite majority of the unit owners. The agreement then must be recorded in the land records. The recorded agreement signed by the unit owners is not the conveyance itself, but is rather a supporting document which shows that the association has full power to execute a deed or mortgage. Under subsection (c), it is contemplated that the association will execute the actual instrument of conveyance. Under subsection (e), a conveyance or encumbrance of common elements may not deprive a unit owner of rights of access and support.

3. Under the condominium form of ownership, each unit owner owns a share of the common elements as an appurtenant interest to his unit and, when the unit owner mortgages his unit, he also mortgages his appurtenant interest. The unit owner himself cannot convey his unit separately from its interest in the common elements nor can he convey his common element interest separately from the unit. Therefore, if there is a mortgage or other lien against any unit, the problem arises as to whether the association under this section can convey a part of the common elements free from the mortgage interest of the unit mortgagee. Subsection (f) answers that question no. Therefore, a sale or encumbrance of common elements under this section would be subject to the superior priority of any prior mortgagee on the unit unless the mortgagee releases his interest therein.

The bracketed introductory language to subsection (f) is intended to permit an enacting state to choose whether or not the declaration could vary the rule of subsection (f). If the bracketed language is included, the declaration might provide, for example, that any subsequent conveyance of specified portions of the common elements would be free of prior security interests. In that case, the security interest in the common elements held by unit mortgagees would be cut off. Since the loss of the security interest in the common elements could significantly affect mortgagees, states considering inclusion of the bracketed language probably should consult mortgagee groups. If limited to particular common element real estate such as portions of recreational area land, and if protections are provided for lender interests, the ability to convey free of prior security interests could contribute significantly to the continued economic viability of a project. Therefore, lenders may be favorable to inclusion of the bracketed language.

The declaration could protect lender interests in connection with a conveyance free of the security interests in a number of ways. For example, the declaration might provide for payment of a specified percentage of the sales price to unit mortgagees or it might provide that a specified percentage of the mortgage debt be paid to them. Also, the declaration might provide that no sale or encumbrance of common elements would be

effective without the approval of a specified percentage of lenders. There are, no doubt, other devices which could afford substantial protection to lenders.

§ 3-113. [Insurance]

(a) Commencing not later than the time of the first conveyance of a unit to a person other than a declarant, the association shall maintain, to the extent reasonably available:

(1) property insurance on the common elements insuring against all risks of direct physical loss commonly insured against or, in the case of a conversion building, against fire and extended coverage perils. The total amount of insurance after application of any deductibles shall be not less than 80 percent of the actual cash value of the insured property at the time the insurance is purchased and at each renewal date, exclusive of land, excavations, foundations and other items normally excluded from property policies; and

(2) liability insurance, including medical payments insurance, in an amount determined by the executive board but not less than any amount specified in the declaration, covering all occurrences commonly insured against for death, bodily injury, and property damage arising out of or in connection with the use, ownership, or maintenance of the common elements.

(b) In the case of a building containing units having horizontal boundaries described in the declaration, the insurance maintained under subsection (a)(1), to the extent reasonably available, shall include the units, but need not include improvements and betterments installed by unit owners.

(c) If the insurance described in subsections (a) and (b) is not reasonably available, the association promptly shall cause notice of that fact to be hand-delivered or sent prepaid by United States mail to all unit owners. The declaration may require the association to carry any other insurance, and the association in any event may carry any other insurance it deems appropriate to protect the association or the unit owners.

(d) Insurance policies carried pursuant to subsection (a) must provide that:

(1) each unit owner is an insured person under the policy with respect to liability arising out of his interest in the common elements or membership in the association;

(2) the insurer waives its right to subrogation under the policy against any unit owner or member of his household;

(3) no act or omission by any unit owner, unless acting within the scope of his authority on behalf of the association, will void the policy or be a condition to recovery under the policy; and

(4) if, at the time of a loss under the policy, there is other insurance in the name of a unit owner covering the same risk covered by the policy, the association's policy provides primary

insurance.

(e) Any loss covered by the property policy under subsections (a)(1) and (b) must be adjusted with the association, but the insurance proceeds for that loss are payable to any insurance trustee designated for that purpose, or otherwise to the association, and not to any mortgagee or beneficiary under a deed of trust. The insurance trustee or the association shall hold any insurance proceeds in trust for unit owners and lien holders as their interests may appear. Subject to the provisions of subsection (h), the proceeds must be disbursed first for the repair or restoration of the damaged property, and unit owners and lien holders are not entitled to receive payment of any portion of the proceeds unless there is a surplus of proceeds after the property has been completely repaired or restored, or the condominium is terminated.

(f) An insurance policy issued to the association does not prevent a unit owner from obtaining insurance for his own benefit.

(g) An insurer that has issued an insurance policy under this section shall issue certificates or memoranda of insurance to the association and, upon written request, to any unit owner, mortgagee, or beneficiary under a deed of trust. The insurer issuing the policy may not cancel or refuse to renew it until [30] days after notice of the proposed cancellation or non-renewal has been mailed to the association, each unit owner and each mortgagee or beneficiary under a deed of trust to whom a certificate or memorandum of insurance has been issued at their respective last known addresses.

(h) Any portion of the condominium for which insurance is required under this section which is damaged or destroyed shall be repaired or replaced promptly by the association unless (i) the condominium is terminated, (ii) repair or replacement would be illegal under any state or local health or safety statute or ordinance, or (iii) [80] percent of the unit owners, including every owner of a unit or assigned limited common element which will not be rebuilt, vote not to rebuild. The cost of repair or replacement in excess of insurance proceeds and reserves is a common expense. If the entire condominium is not repaired or replaced, (i) the insurance proceeds attributable to the damaged common elements must be used to restore the damaged area to a condition compatible with the remainder of the condominium, (ii) the insurance proceeds attributable to units and limited common elements which are not rebuilt must be distributed to the owners of those units and the owners of the units to which those limited common elements were allocated, or to lienholders, as their interests may appear, and (iii) the remainder of the proceeds must be distributed to all the unit owners or lienholders, as their interests may appear, in proportion to the common element interests of all the units. If the unit owners vote not to rebuild any unit, that unit's allocated interests are automatically reallocated upon the vote as if the unit had been condemned under Section 1-107(a), and the association promptly shall prepare, execute, and record an amendment to the declaration reflecting the reallocations. Notwithstanding the provisions of this subsection, Section 2-118 (Termination of Condominium) governs the distribution of insurance proceeds if the condominium is terminated.

(i) The provisions of this section may be varied or waived in the case of a condominium all of whose units are restricted to non-residential use.

COMMENT

1. Subsections (a) and (b) provide that the required insurance must be maintained only to the extent reasonably available. This permits the association to comply with the insurance requirements even if certain coverages are unavailable or unreasonably expensive.

2. Subsection (b) represents a significant departure from the present law in virtually all states by requiring that the association obtain and maintain property insurance on both the common elements and the units within buildings with "stacked" units. See Comment 3. While it has been common practice in many parts of the country (either by custom or as mandated by statute) for associations to maintain property insurance on the common elements, it has generally not been the practice for the property insurance policy to cover individual units as well. However, given the great interdependence of the unit owners in the stacked unit condominium situation, mandating property insurance for the entire building is the preferable approach. Moreover, such an approach will greatly simplify claims procedures, particularly where both common elements and portions of a unit have been destroyed. If common elements and units are insured separately, the insurers could be involved in disputes as to the coverage provided by each policy.

The Act does not mandate association insurance on units in town house or other arrangements in which there are no stacked units. However, if the developer wishes, the declaration may require association insurance as to units having shared walls or as to all units in the development. Many developments will have some units with horizontal boundaries and other units with no horizontal boundaries. In that case, association insurance as to the units having horizontal boundaries is required, but it is not necessary as to other units.

3. The distinction between what is a common element and what is a unit with respect to the insurance coverage required by this section is complex. The definitions of common elements and a unit in Section 1-103(4) and (25) are not sufficient for this purpose. To determine the distinction between the common elements and units, one must refer first to the declaration's section on unit boundaries. That section will define the unit boundaries. If the declaration fails to do so, the provisions of Section 2-102 apply.

In summary, Section 2-102 provides that, if the declaration is silent, all non-loadbearing and non-structural portions of the walls, floors and ceilings are part of the unit, while all loadbearing and structural portions of the walls, floors and ceilings are common elements. Further, with respect to any structure partially within and partially outside of the boundaries of a unit, any portion thereof serving only that unit is a limited common element (see definition in Section 1-103(16) ), and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements. This treats and defines ownership of all portions of the electrical, plumbing and mechanical systems serving the building not entirely within the boundaries of a unit.

All spaces, interior partitions, electrical, plumbing and mechanical systems, and all other items within the boundaries of the unit which are attached to the unit boundaries, whether or not deemed fixtures under state law, are part of the unit.

Put simply, if any item is installed, constructed, repaired or replaced by the declarant or his successor in connection with the original sale of a stacked unit, the item is insured by the association. Clearly, this does not include items of personal property easily movable within the unit or easily removable from the unit (whether or

not deemed a fixture under state law), such as a vase, table or other furnishings. If installed by the unit owner, the item should be insured by the unit owner. Those items, installed by the unit owner and not covered by the association policy, are called "improvements and betterments".

4. Although "all risk" coverage is not required as to conversion buildings, but merely fire and extended coverage, this is not intended to imply that such coverage is unnecessary. "All risk" coverage is not required because it may not be appropriate in the case of an unrenovated conversion where cost is a critical factor.

5. The minimum requirement as to the amount of insurance, which is 80% of the actual cash value, should not be viewed as a recommendation; rather, the 80% is a floor. Typically, many condominium documents require insurance in an amount equal to 100% of the replacement cost of the insured property. The Act permits greater flexibility, however, inasmuch as different types of construction and varieties of projects may not require such total coverage with its attendant higher premium cost.

6. Subsection (a)(2) covers only the liability of the association, and unit owners as members, but does not cover the unit owner's individual liability for his acts or omissions or liability for occurrences within his unit.

7. Clause (i) of the third sentence of subsection (h) would operate as follows: (1) if the condominium consists of campsites, restoration after fire damage might consist of merely resodding the area damaged; (2) if the condominium consists of separate gardentype buildings, restoration after fire damage might consist of demolishing the remaining structure and paving or landscaping the area; and (3) if the condominium consists of a single highrise building, restoration may not be required (if the building is substantially destroyed) inasmuch as "a condition compatible with the remainder of the condominium" would be damaged and unrestored.

8. The scheme of this section, as set forth in subsection (h), is that any damage or destruction to any portion of the condominium must be repaired (if repairs can be made consistent with applicable safety and health laws) absent a decision to terminate the condominium or a decision by 80% of the unit owners (including the owners of any damaged units) not to rebuild. Unless a decision is made not to rebuild, any available insurance proceeds must be used to effectuate such repairs. For this reason, subsection (e) provides that any loss covered by the association's property insurance policy shall be adjusted with the association and that the proceeds for any loss shall be payable to the association or to any insurance trustee that may be designated for such purpose. Significantly, such insurance proceeds may not be paid to any mortgagee or other outside party. This provision is necessary to insure that insurance proceeds are available to effectuate any repairs or restoration to the condominium that may be required.

9. In the case of commercial or industrial condominiums, unit owners may prefer to act as self-insurers or make other arrangements with respect to property insurance. Accordingly, subsection (i) provides that the insurance requirements of this section may be varied or waived in the case of a condominium all of the units of which are reserved exclusively for non-residential use. Such waiver or modification is not possible in the case of a mixed-use condominium, some of the units of which are used for residential purposes.

§ 3-114. [Surplus Funds]

Unless otherwise provided in the declaration, any surplus funds of the association remaining after payment of or provision for common expenses and any prepayment of reserves must be paid to the unit owners in proportion to their common expense liabilities or credited to them to reduce their future common expense assessments.

#### COMMENT

Surplus funds of the association are generally used first for the pre-payment of reserves, and remaining funds are thereafter credited to the account of unit owners or paid to them. In some cases, however, unit owners might prefer that surplus funds be used for other purposes (e.g., the purchase of recreational equipment). Accordingly, this section permits the declaration to specify any other use of surplus funds.

#### § 3-115. [Assessments for Common Expenses]

(a) Until the association makes a common expense assessment, the declarant shall pay all common expenses. After any assessment has been made by the association, assessments must be made at least annually, based on a budget adopted at least annually by the association.

(b) Except for assessments under subsections (c), (d), and (e), all common expenses must be assessed against all the units in accordance with the allocations set forth in the declaration pursuant to Section 2-107(a). Any past due common expense assessment or instalment thereof bears interest at the rate established by the association not exceeding [18] percent per year.

(c) To the extent required by the declaration:

(1) any common expense associated with the maintenance, repair, or replacement of a limited common element must be assessed against the units to which that limited common element is assigned, equally, or in any other proportion that the declaration provides;

(2) any common expense or portion thereof benefiting fewer than all of the units must be assessed exclusively against the units benefited; and

(3) the costs of insurance must be assessed in proportion to risk and the costs of utilities must be assessed in proportion to usage.

(d) Assessments to pay a judgment against the association (Section 3-117(a) ) may be made only against the units in the condominium at the time the judgment was entered, in proportion to their common expense liabilities.

(e) If any common expense is caused by the misconduct of any unit owner, the association may assess that expense exclusively against his unit.

(f) If common expense liabilities are reallocated, common expense assessments and any instalment thereof



not yet due shall be recalculated in accordance with the reallocated common expense liabilities.

#### COMMENT

1. This section contemplates that a declarant might find it advantageous, particularly in the early stages of condominium development, to pay all of the expenses of the condominium himself rather than assessing each unit individually. Such a situation might arise, for example, where a declarant owns most of the units in the condominium and wishes to avoid building the costs of each unit separately and crediting payment to each unit. It might also arise in the case of a declarant who, although willing to assume all expenses of the condominium, is unwilling to make payments for replacement reserves or for other expenses which he expects will ultimately be part of the association's budget. Subsection (a) grants the declarant such flexibility while at the same time providing that once an assessment is made against any unit, all units, including those owned by the declarant, must be assessed for their full portion of the common expense liability.

2. Under subsection (c), the declaration may provide for assessment on a basis other than the allocation made in Section 2-107 as to limited common elements, other expenses benefiting less than all units, insurance costs, and utility costs.

3. If additional units are added to a condominium after a judgment has been entered against the association, the new units are not assessed any part of the judgment debt. Since unit owners will know the assessment, and since such unpaid judgment assessments would affect the price paid by purchasers of units, it would be complicated and unnecessary to fairness to reallocate judgment assessments when new units are added.

4. Subsection (f) refers to those instances in which various provisions of this Act require that common expense liabilities be reallocated among the units of a condominium by amendment to the declaration. These provisions include Section 1-107 (Eminent Domain), Section 2-106(d) (expiration of certain leases), Section 2-110 (Exercise of Development Rights) and Section 2-113(b) (subdivision or conversion of units).

#### § 3-116. [Lien for Assessments]

(a) The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. The association's lien may be foreclosed in like manner as a mortgage on real estate [or a power of sale under (insert appropriate state statute) ] [but the association shall give reasonable notice of its action to all lienholders of the unit whose interest would be affected]. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11) and (12) are enforceable as assessments under this section. If an assessment is payable in instalments, the full amount of the assessment is a lien from the time the first instalment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the recordation of the declaration, (ii) a first mortgage or deed of trust on the unit recorded before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for real estate taxes and other governmental assessments or charges against the unit. The lien is also prior to the

mortgages and deeds of trust described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. [The lien under this section is not subject to the provisions of (insert appropriate reference to state homestead, dower and curtesy, or other exemptions).]

(c) Unless the declaration otherwise provides, if 2 or more associations have liens for assessments created at any time on the same real estate, those liens have equal priority.

(d) Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

(e) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within [3] years after the full amount of the assessments becomes due.

(f) This section does not prohibit actions to recover sums for which subsection (a) creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

(g) A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

(h) The association upon written request shall furnish to a unit owner a recordable statement setting forth the amount of unpaid assessments against his unit. The statement must be furnished within (10) business days after receipt of the request and is binding on the association, the executive board, and every unit owner.

#### COMMENT

1. Subsection (a) provides that the association's lien on a unit for unpaid assessments shall be enforceable in the same manner as mortgage liens. In addition, if the use of a power of sale pursuant to a mortgage is permitted in a particular state, the bracketed language (with an appropriate statutory citation inserted) may be used to ensure that the association's lien for unpaid assessments may also be enforced through the power of sale device. The bracketed language requiring notice of foreclosure should be adopted only in states in which the power of sale statute does not require notice to junior lienholders.

2. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (a) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first mortgages recorded before the date the assessment became delinquent. However, as to prior first mortgages, the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting

the priority of the security interests of mortgage lenders. As a practical matter, mortgage lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit. If the mortgage lender wishes, an escrow for assessments can be required. Since this provision may conflict with the provisions of some state statutes which forbid some lending institutions from making loans not secured by first priority liens, the law of each state should be reviewed and amended when necessary.

3. Subsection (e) makes clear that the association may have remedies short of foreclosure of its lien that can be used to collect unpaid assessments. The association, for example, might bring an action in debt or breach of contract against a recalcitrant unit owner rather than resorting to foreclosure.

4. In view of the association's powers to enforce its lien for unpaid assessments, subsection (f) provides unit owners with a method to determine the amount presently due and owing. A unit owner may obtain a statement of any unpaid assessment, including fines and other charges enforceable as assessments under subsection (a), currently levied against his unit. The statement is binding on the association, the executive board, and every unit owner in any subsequent action to collect such unpaid assessments.

5. Units may be part of a condominium and of a larger real estate regime (see the Uniform Planned Community Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 1980, which would govern most associations with assessment powers). For example, a large real estate development may consist of a larger planned community which contains detached single family dwellings and town houses which are not part of any condominium and a highrise building which is organized as a condominium within the planned community. In that case, the planned community association might assess the condominium units for the general maintenance expenses of the planned community and the condominium association would assess for the direct maintenance expenses of the building itself. In such a situation, subsection (c) provides that unpaid liens of the two associations have equal priority regardless of the relative time of creation of the two regimes and regardless of the time the assessments were made or become delinquent.

#### § 3-117. [Other Liens Affecting the Condominium]

(a) Except as provided in subsection (b), a judgment for money against the association [if recorded] [if docketed] [if (insert other procedures required under state law to perfect a lien on real property as a result of a judgment) ], is not a lien on the common elements, but is a lien in favor of the judgment lienholder against all of the units in the condominium at the time the judgment was entered. No other property of a unit owner is subject to the claims of creditors of the association.

(b) If the association has granted a security interest in the common elements to a creditor of the association pursuant to Section 3-112, the holder of that security interest shall exercise its right against the common elements before its judgment lien on any unit may be enforced.

(c) Whether perfected before or after the creation of the condominium, if a lien other than a deed of trust or mortgage, including a judgment lien or lien attributable to work performed or materials supplied before creation of the condominium, becomes effective against two or more units, the unit owner of an affected unit may pay to the lienholder the amount of the lien attributable to his unit, and the lienholder, upon receipt of payment,

promptly shall deliver a release of the lien covering that unit. The amount of the payment must be proportionate to the ratio which that unit owner's common expense liability bears to the common expense liabilities of all unit owners whose units are subject to the lien. After payment, the association may not assess or have a lien against that unit owner's unit for any portion of the common expenses incurred in connection with that lien.

(d) A judgment against the association must be indexed in the name of the condominium and the association and, when so indexed, is notice of the lien against the units.

#### COMMENT

1. This section deals with the effect on unit owners of judgments against the association. The issue is not free from difficulty. Presently, in most states, if the association is organized as a corporation, the unit owners are likely to receive the insulation from liability given shareholders of a corporation, so that the judgment lienholder can satisfy his judgment only against the property of the association. On the other hand, if the association is organized as an unincorporated association, under the law of most states each unit owner would have joint and several liability on the judgment. This Act strikes a balance between the two extremes, making the judgment lien a direct lien against each individual unit, but allowing the individual unit owner to discharge the lien by payment of his pro-rata share of the judgment. The judgment would also be a lien against any property owned by the association.

2. It should be noted that, while the judgment lien runs directly against unit owners, the actual liability of the unit owner is almost identical with what it would be if the ordinary corporation rule insulating the unit owner from direct liability were applied. If the incorporated association only is liable for a judgment, it will, of course, have no assets to satisfy the judgment except whatever personal property and real estate not a part of the common elements it owns. If a checking account or other cash funds of the association are attached or garnished by the creditor, the association, in order to maintain its operations and fulfill its other obligations, will be obliged to make an additional assessment against the unit owners to cover the judgment. The same result follows if the association is to prevent the sale of other assets at an execution sale. That additional assessment would be in precisely the amount for which this Act gives a direct lien against the individual unit owners. Further, if an association which is without sufficient assets to satisfy a judgment refuses to make assessments from which the creditor can have his claim satisfied, it is very likely that a court, in a supplemental proceeding on the judgment, would direct the association to make the necessary assessments against the unit owners. Unpaid assessment made by the association constitute liens against units just as do judgments.

Therefore, whether the lien of the judgment creditor runs against the units directly, or whether the lien is only against the association which finds it necessary to make additional assessments to satisfy the judgment, the unit owner who does not pay his proportionate share will end up with a lien against his unit.

The differences, therefore, between the lien system established by Section 3-117 and the system which would be applicable if ordinary corporation rules were applied are these:

(1) The unit owner can discharge his unit from the lien and free it from the possibility of being subsequently assessed by the association for the judgment by making a payment directly to the lien holder. This

ability may be valuable to a unit owner who is in the process of selling or securing a mortgage on his unit during the period between the time the judgment is entered and the time the association makes a formal assessment against individual unit owners for the amount of the judgment lien.

(2) The judgment creditor through his ability to threaten to foreclose the lien on an individual unit if the judgment is not paid is given some leverage over individual unit owners to encourage them to see that the association pays the judgment. Procuring an assessment through pressure on individual unit owners may be quicker and cheaper for the judgment creditor than using supplemental proceedings and having a judge order that the board of directors make the necessary assessment.

In the rare case where, under corporation law an association could avoid payment of a judgment by dissolution of the association and vesting of title to the units in the unit owners as tenants-in-common or otherwise, the National Conference of Commissioners on Uniform State Laws believes that that result is inappropriate, and that the unit in the condominium itself should be viewed as equity property of the association capable of being reached by judgment creditors in satisfaction of the judgment. As a matter of social policy the condominium association is in quite a different position than the ordinary corporation. The corporation statutes provide shareholders immunity from liability for debts of the corporation to encourage investment in corporations whose entrepreneurial activities in the marketplace contribute to the general wealth and well-being of society. The condominium association, in managing the affairs of the homeowners, does not serve the same entrepreneurial function. It seems reasonable, as a matter of social policy, that an individual homeowner who would be fully liable for debts incurred in the renovation and maintenance of his home or for torts caused by his failure to adequately maintain the premises should not be able to entirely avoid that liability through the device of organizing with other homeowners into a condominium association. On the other hand, it is perhaps not fair to a unit owner in a condominium regime to have all of his assets at risk based on the contracts of the association over which he has little control and as to which he has only a fractional interest or benefit.

It should be noted that, except for situations in which the association has given a mortgage or deed of trust on common elements, the judgment creditor cannot assert a lien against common elements, but is rather left to a lien against the units. That is, the judgment creditor has no power to levy on the golf course or on the swimming pool or other open spaces and sell them independently of the units to satisfy the judgment.

#### § 3-118. [Association Records]

The association shall keep financial records sufficiently detailed to enable the association to comply with Section 4-109. All financial and other records shall be made reasonable available for examination by any unit owner and his authorized agents.

#### § 3-119. [Association as Trustee]

With respect to a third person dealing with the association in the association's capacity as a trustee, the existence of trust powers and their proper exercise by the association may be assumed without inquiry. A third person is not bound to inquire whether the association has power to act as trustee or is properly exercising trust powers. A third person, without actual knowledge that the association is exceeding or improperly exercising its

powers, is fully protected in dealing with the association as if it possessed and properly exercised the powers it purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the association in its capacity as trustee.

#### COMMENT

Based on Section 7 of the Uniform Trustees' Powers Act, this section is intended to protect an innocent third party in its dealings with the association only when the association is acting as a trustee for the unit owners, either under Section 3-113 for insurance proceeds, or Section 2-118 following termination.

## ARTICLE 4

### PROTECTION OF CONDOMINIUM PURCHASERS

#### § 4-101. [Applicability; Waiver]

(a) This Article applies to all units subject to this Act, except as provided in subsection (b) or as modified or waived by agreement of purchasers of units in a condominium in which all units are restricted to non-residential use.

(b) Neither a public offering statement nor a resale certificate need be prepared or delivered in the case of:

(1) a gratuitous disposition of a unit;

(2) a disposition pursuant to court order;

(3) a disposition by a government or governmental agency;

(4) a disposition by foreclosure or deed in lieu of foreclosure;

(5) a disposition to a person in the business of selling real estate who intends to offer those units to purchasers; or

(6) a disposition that may be canceled at any time and for any reason by the purchaser without penalty.

#### COMMENT

In the case of commercial and industrial condominiums, the purchaser is often more sophisticated than the purchaser of residential units and thus better able to bargain for the protections he believes necessary. While this may not always be true, no objective test can be developed which easily distinguishes those commercial purchasers who are able to protect themselves from those who, in the ordinary course of business, have not developed such sophistication. At the same time, the cost of protection imposed by Article 4 may be substantial. Accordingly, subsection (a) permits waiver or modification of Article 4 protection in condominiums where all units are restricted to non-residential use, e.g., in the case of most commercial and industrial condominiums. However, except for certain waivers of implied warranties of quality (see Section 4-115) and certain exemptions from public offering statement and resale certificate requirements (see subsection (b) ), no express waiver of the protections of this Article with respect to the purchasers of residential units is permitted by this subsection. Accordingly, by operation of Section 1-104, the rights provided by this Article may not be waived in the case of residential purchasers. Moreover, because of the interrelated rights of residential and commercial owners in mixed-use condominiums, waiver or modification of rights conferred by this Article is restricted to purchasers in wholly non-residential condominiums.

§ 4-102. [Liability for Public Offering Statement Requirements]

(a) Except as provided in subsection (b), a declarant, prior to the offering of any interest in a unit to the public, shall prepare a public offering statement conforming to the requirements of Sections 4-103, 4-104, 4-105 and 4-106.

(b) A declarant may transfer responsibility for preparation of all or a part of the public offering statement to a successor declarant (Section 3-104) or to a person in the business of selling real estate who intends to offer units in the condominium for his own account. In the event of any such transfer, the transferor shall provide the transferee with any information necessary to enable the transferee to fulfill the requirements of subsection (a).

(c) Any declarant or other person in the business of selling real estate who offers a unit for his own account to a purchaser shall deliver a public offering statement in the manner prescribed in subsection 4-108(a). The person who prepared all or a part of the public offering statement is liable under Sections 4-108 [and] [,] 4-117 [, 5-105, and 5-106] for any false or misleading statement set forth therein or for any omission of material fact therefrom with respect to that portion of the public offering statement which he prepared. If a declarant did not prepare any part of a public offering statement that he delivers, he is not liable for any false or misleading statement set forth therein or for any omission of material fact therefrom unless he had actual knowledge of the statement or omission or, in the exercise of reasonable care, should have known of the statement or omission.

(d) If a unit is part of a condominium and is part of any other real estate regime in connection with the sale of which the delivery of a public offering statement is required under the laws of this State, a single public offering statement conforming to the requirements of Sections 4-103, 4-104, 4-105, and 4-106 as those requirements relate to all real estate regimes in which the unit is located, and to any other requirements imposed under the laws of this State, may be prepared and delivered in lieu of providing 2 or more public offering statements.

COMMENT

This section permits declarants to transfer responsibility for preparation of a public offering statement to successor declarants or dealers, provided the declarant furnishes the information needed by the successor or dealer to complete the statement. The person who prepares the public offering statement is liable for his own misrepresentations and material omissions. A person who delivers a public offering statement prepared by others is responsible for any such deficiencies only to the extent he knows or reasonably should have known of them.

§ 4-103. [Public Offering Statement; General Provisions]

(a) Except as provided in subsection (b), a public offering statement must contain or fully and accurately disclose;

- (1) the name and principal address of the declarant and of the condominium;
- (2) a general description of the condominium, including to the extent possible, the types,



number, and declarant's schedule of commencement and completion of construction of buildings, and amenities that declarant anticipates including in the condominium;

(3) the number of units in the condominium;

(4) copies and a brief narrative description of the significant features of the declaration (other than the plats and plans) and any other recorded covenants, conditions, restrictions and reservations affecting the condominium; the bylaws, and any rules or regulations of the association; copies of any contracts and leases to be signed by purchasers at closing, and a brief narrative description of any contracts or leases that will or may be subject to cancellation by the association under Section 3-105;

(5) any current balance sheet and a projected budget for the association, either within or as an exhibit to the public offering statement, for [one] year after the date of the first conveyance to a purchaser, and thereafter the current budget of the association, a statement of who prepared the budget, and a statement of the budget's assumptions concerning occupancy and inflation factors. The budget must include, without limitation:

(i) a statement of the amount, or a statement that there is no amount, included in the budget as a reserve for repairs and replacement;

(ii) a statement of any other reserves;

(iii) the projected common expense assessment by category of expenditures for the association; and

(iv) the projected monthly common expense assessment for each type of unit;

(6) any services not reflected in the budget that the declarant provides, or expenses that he pays, and that he expects may become at any subsequent time a common expense of the association and the projected common expense assessment attributable to each of those services or expenses for the association and for each type of unit;

(7) any initial or special fee due from the purchase at closing, together with a description of the purpose and method of calculating the fee;

(8) a description of any liens, defects, or encumbrances on or affecting the title to the condominium;

(9) a description of any financing offered or arranged by the declarant;

(10) the terms and significant limitations of any warranties provided by the declarant, including statutory warranties and limitations on the enforcement thereof or on damages;

(11) a statement that:

(i) within 15 days after receipt of a public offering statement a purchaser, before conveyance, may cancel any contract for purchase of a unit from a declarant,

(ii) if a declarant fails to provide a public offering statement to a purchaser before conveying a unit, that purchaser may recover from the declarant (10) percent of the sales price of the unit, and

(iii) if a purchaser receives the public offering statement more than 15 days before signing a contract, he cannot cancel the contract;

(12) a statement of any unsatisfied judgments or pending suits against the association, and the status of any pending suits material to the condominium of which a declarant has actual knowledge;

(13) a statement that any deposit made in connection with the purchase of a unit will be held in an escrow account until closing and will be returned to the purchaser if the purchaser cancels the contract pursuant to Section 4-108, together with the name and address of the escrow agent;

(14) any restraints on alienation of any portion of the condominium;

(15) a description of the insurance coverage provided for the benefit of unit owners;

(16) any current or expected fees or charges to be paid by unit owners for the use of the common elements and other facilities related to the condominium;

(17) the extent to which financial arrangements have been provided for completion of all improvements labeled "MUST BE BUILT" pursuant to Section 4-119 (Declarant's Obligation to Complete and Restore); and

(18) a brief narrative description of any zoning and other land use requirements affecting the condominium; and

(19) all unusual and material circumstances, features, and characteristics of the condominium and the units.

(b) If a condominium composed of not more than 12 units is not subject to any development rights, and no power is reserved to a declarant to make the condominium part of a larger condominium, group of condominiums, or other real estate, a public offering statement may but need not include the information otherwise required by paragraphs (9), (10), (15), (16), (17), (18), and (19) of subsection (a) and the narrative descriptions of documents required by paragraph (a)(4).

(c) A declarant promptly shall amend the public offering statement to report any material change in the information required by this section.

## COMMENT

1. The best "consumer protection" that the law can provide to any purchaser is to insure that he has an opportunity to acquire an understanding of the nature of the products which he is purchasing. Such a result is difficult to achieve, however, in the case of the condominium purchaser because of the complex nature of the bundle of rights and obligations which each unit owner obtains. For this reason, the Act, adopting the approach of many so-called "second generation" condominium statutes, sets forth a lengthy list of information which must be provided to each purchaser before he contracts for a unit. This list includes a number of important matters not typically required in public offering statements under existing law. The requirement for providing the public offering statement appears in Section 4-102(c), and Section 4-108 provides purchasers with cancellation rights and imposes civil penalties upon declarants not complying with the public offering statement requirements of the Act.

2. Paragraph (a)(2) requires a general description of the condominium and, to the extent possible, the declarant's schedule for commencement and completion of construction for all building amenities that will comprise portions of the condominium. Under Section 2-109, the declarant is obligated to label all improvements which may be made in the condominium as either "MUST BE BUILT" or "NEED NOT BE BUILT." Under Section 4-119, the declarant is obligated to complete all improvements labeled "MUST BE BUILT." The estimated schedule of commencement and completion of construction dates provides a standard for judging whether a declarant has complied with the requirements of Section 4-119.

3. Paragraph (4) requires the public offering statement to include copies of the declaration, bylaws, and any rules and regulations of the condominium, as well as copies of any contracts or leases to be executed by the purchaser. In addition, the paragraph requires the public offering statement to include a brief narrative description of the significant features of those documents, as well as of any management contract, leases of recreational facilities, and other sorts of contracts which may be subject to cancellation by the association after the period of declarant control expires, as provided in Section 3-105. This latter requirement is intended to encourage the preparation of brief summaries of all condominium documents in laymen's terms, *i.e.*, the "brief narrative description" should be more than a simple explanation of what a declaration (or other document) is, but less than an extended legal analysis duplicating the contents of the documents themselves. The summary requirement is intended to alleviate the common problem of public offering statements being drafted in lawyers' terms and being no more comprehensible to laymen than the documents themselves.

4. The disclosure requirement of paragraph (6) is intended to eliminate the common deceptive sales practice known as "lowballing," a practice by which a declarant intentionally underestimates the budget for the association by providing many of the services himself during the initial sales period. In such a circumstance, the declarant commonly intends that, after a certain time, these services (which might include lawn maintenance, painting, security, bookkeeping, or other services) will become expenses of the association, thereby substantially increasing the periodic common expense assessments which association members must ultimately bear. By requiring the disclosure of these services (including the projected common expense assessment attributable to

each) in paragraph (6), the Act seeks to minimize "lowballing". In order to comply fully with the provisions of paragraph (5), the declarant must calculate the budget on the basis of his best estimate of the number of units which will be part of the condominium during that budget year. This requirement as well operates to negate the effects of any attempted "lowballing."

5. Paragraph (9) requires disclosure of any financing "offered" by the declarant. The paragraph contemplates that a declarant disclose any arrangements for financing that may have been made, including arrangements with any unaffiliated lender to provide mortgages to qualified purchasers.

6. Under paragraph (10), the declarant is required to disclose the terms of all warranties provided by the declarant (including the statutory warranties set forth in Section 4-114) and to describe any significant limitations on such warranties, the enforcement thereof, or damages which may be collectible as a result of a breach thereof. This latter requirement would necessitate a description by the declarant of any exclusions or modifications of statutory warranties undertaken pursuant to Section 4-115. The statute of limitations for warranties set forth in Section 4-116, together with any separate written agreement (as required by Section 4-116) providing for reduction of the period of such statute of limitations, must also be disclosed.

7. Paragraph (14) requires that the declarant disclose the existence of any right of first refusal or other restrictions on the uses for which or classes of persons to whom units may be sold.

8. Paragraph (15) corrects a defect common to many condominium statutes by requiring the declarant to describe the insurance coverage provided for the benefit of unit owners. See Section 3-113.

9. Under paragraph (16), the declarant is obligated to disclose any current or expected fees or charges which unit owners may be required to pay for the use of the common elements and other facilities related to the condominium. Such fees or charges might include swimming pool fees, golf course fees, or required membership fees for recreation associations. Such fees are often not disclosed to condominium purchasers and can represent a substantial addition to their monthly assessments.

10. The "financial arrangements" required to be disclosed pursuant to paragraph (17) may vary substantially from one condominium development to another. It is the intent of the paragraph to give purchasers as much information as possible with which to assess the declarant's ability to carry out his obligations to complete the improvements. For example, if a declarant has a commitment from a bank to provide construction financing for a swimming pool when 50% of the units in the condominium are completed, that fact should be disclosed to potential purchasers.

11. In addition to the information required to be disclosed by paragraphs (1) through (18), paragraph (19) requires that the declarant disclose all other "unusual and material circumstances, features, and characteristics" of the condominium and all units therein. This requires only information which is both "unusual and material." Thus, the provision does not require the disclosure of "material" factors which are commonly understood to be part of the condominium, e.g., the fact that a condominium has a roof, walls, doors, and windows. Similarly, the provision does not require the disclosure of "unusual" information about the condominium which is not also "material," e.g., the fact that a condominium is the first condominium in a particular community. Information

which would normally be required to be disclosed pursuant to paragraph (19) might include, to the extent that they are unusual and material, environmental conditions affecting the use or enjoyment of the condominium, features of the location of the condominium, e.g., near the end of an airport runway or a planned rendering plant, and the like.

12. The cost of preparing a public offering statement can be substantial and may, particularly in the case of small condominiums, represent a significant portion of the cost of a unit. For that reason, subsection (b) permits a declarant to exclude from a public offering statement certain information in the case of a small condominium (i.e., less than 12 units) which is not subject to development rights and which is not potentially part of a larger condominium or group of condominiums. Essentially, subsection (b) permits a declarant to exclude from a public offering statement those materials which, as a practical matter, require extended preparation effort by an attorney or engineer in addition to the normal effort which must be exerted to provide the declaration, bylaws, plats and plans, or other documents required by the Act.

§ 4-104. [Same; Condominiums Subject To Development Rights]

If the declaration provides that a condominium is subject to any development rights, the public offering statement must disclose, in addition to the information required by Section 4-103:

(1) the maximum number of units, and the maximum number of units per acre, that may be created;

(2) a statement of how many or what percentage of the units which may be created will be restricted exclusively to residential use, or a statement that no representations are made regarding use restrictions;

(3) if any of the units that may be built within real estate subject to development rights are not to be restricted exclusively to residential use, a statement, with respect to each portion of that real estate, of the maximum percentage of the real estate areas, and the maximum percentage of the floor areas of all units that may be created therein, that are not restricted exclusively to residential use;

(4) a brief narrative description of any development rights reserved by a declarant and of any conditions relating to or limitations upon the exercise of development rights;

(5) a statement of the maximum extent to which each unit's allocated interests may be changed by the exercise of any development right described in paragraph (3);

(6) a statement of the extent to which any buildings or other improvements that may be erected pursuant to any development right in any part of the condominium will be compatible with existing buildings and improvements in the condominium in terms of architectural style, quality of construction, and size, or a statement that no assurances are made in those regards;

(7) general descriptions of all other improvements that may be made and limited common elements that may be created within any part of the condominium pursuant to any development right reserved by the declarant, or a statement that no assurances are made in that regard;

(8) a statement of any limitations as to the locations of any building or other improvement that may be made within any part of the condominium pursuant to any development right reserved by the declarant, or a statement that no assurances are made in that regard;

(9) a statement that any limited common elements created pursuant to any development right reserved by the declarant will be of the same general types and sizes as the limited common elements within other parts of the condominium, or a statement of the types and sizes planned, or a statement that no assurances are made in that regard;

(10) a statement that the proportion of limited common elements to units created pursuant to any development right reserved by the declarant will be approximately equal to the proportion existing within other parts of the condominium, or a statement of any other assurances in that regard, or a statement that no assurances are made in that regard;

(11) a statement that all restrictions in the declaration affecting use, occupancy, and alienation of units will apply to any units created pursuant to any development right reserved by the declarant, or a statement of any differentiations that may be made as to those units, or a statement that no assurances are made in that regard; and

(12) a statement of the extent to which any assurances made pursuant to this section apply or do not apply in the event that any development right is not exercised by the declarant.

#### COMMENT

This section requires disclosure in the public offering statement of the manner in which the declarant's exercise of development rights may affect purchasers who acquire units before those rights have been fully exercised. The purpose is to put the purchaser on notice of the extent to which the exercise of those rights may alter, sometimes quite dramatically, both the physical and the legal aspects of the project. For example, the prospective purchaser may be contemplating the acquisition of a particular unit because it enjoys a view of open, undeveloped land over which the declarant has, however, reserved development rights. It may be that the boundary of the parcel as to which development rights have been reserved actually coincides with, or runs quite close to, the outer wall of the unit in question. The disclosures or statements made pursuant to paragraphs (8) and (12) of this section will indicate to the prospective purchaser the extent (if any) to which he can rely on the declarant not to do anything which would radically alter the view from the unit which he now finds so appealing.

§ 4-105. [Same; Time Shares]

If the declaration provides that ownership or occupancy of any units is or may be in time shares, the public offering statement shall disclose, in addition to the information required by Section 4-103:

- (1) the number and identity of units in which time shares may be created;
- (2) the total number of time shares that may be created;
- (3) the minimum duration of any time shares that may be created; and
- (4) the extent to which the creation of time shares will or may affect the enforceability of the association's lien for assessments provided in Section 3-116.

#### COMMENT

1. Time sharing has become increasingly important in recent years, particularly with respect to resort condominiums. In recognition of this fact, this section requires the disclosure of certain information with respect to time sharing.

2. Virtually all existing state condominium statutes are silent with respect to time-share ownership. The inclusion of disclosure provisions for certain forms of time sharing in this Act, however, does not imply that other law regulating time sharing is affected in any way in a state merely because that state enacts this Act.

The Uniform Law Commissioners' Model Real Estate Time-Share Act specifies more extensive disclosures for time-share properties. A "time-share property" may include part or all of the condominium, and Section 1-109 of the Model Act governs conflicts between this Act and time-share legislation.

#### § 4-106. [Same; Condominiums Containing Conversion Buildings]

(a) The public offering statement of a condominium containing any conversion building must contain, in addition to the information required by Section 4-103:

(1) a statement by the declarant, based on a report prepared by an independent (registered) architect or engineer, describing the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the building;

(2) a statement by the declarant of the expected useful life of each item reported on in paragraph (1) or a statement that no representations are made in that regard; and

(3) a list of any outstanding notices of uncured violations of building code or other municipal regulations, together with the estimated cost of curing those violations.

(b) This section applies only to buildings containing units that may be occupied for residential use.

#### COMMENT

1. In the case of a condominium containing one or more conversion buildings, the disclosure of additional

information relating to the condition of those buildings is required in the public offering statement because of the difficulty inherent in a single purchaser attempting to determine the condition of what is likely to be an older building being renovated for the purpose of condominium sales.

2. Paragraph (a)(1) requires the person who gives the public offering statement to retain an independent architect or engineer to report on the present condition of all structural components and fixed mechanical and electrical installations in the conversion building. Such information is as useful to declarant as to the purchaser since, under the implied warranty provisions of Section 4-114, a declarant impliedly warrants all improvements made by any person to the building "before creation of the condominium" unless such improvements are specifically excluded from the implied warranty of quality pursuant to Section 4-115(b).

3. See Comment 6 to Section 2-101 concerning the meaning of "structural components" as used in paragraph (a)(1). Any material changes in the "present condition" of these systems must be reported by an amendment to the public offering statement.

4. Under paragraph (a)(3), the person required to give the public offering statement is required to provide purchasers with a list of all outstanding notices of uncured violations of building codes or other municipal regulations. The literal wording of this provision does not require disclosure of known violations of such building codes or municipal regulations (at least violations having no effect upon the structural components or fixed mechanical and electrical installations of the condominium) unless actual "notices" of such violations have been received. To the extent that outstanding notices of uncured violations do exist, the cost of curing such violations would become a liability of the unit owners or the association following transfer of the unit to a purchaser. For that reason, the estimated cost of curing any outstanding violations must also be disclosed.

5. For the same reasons set forth in the Comment to Section 4-101(a), this section does not apply to units which are restricted exclusively to non-residential use.

§ 4-107. [Same; Condominium Securities]

If an interest in a condominium is currently registered with the Securities and Exchange Commission of the United States, a declarant satisfies all requirements relating to the preparation of a public offering statement of this Act if he delivers to the purchaser [and files with the Agency] a copy of the public offering statement filed with the Securities and Exchange Commission. [An interest in a condominium is not a security under the provisions of (insert appropriate state securities regulation statutes.) ]

#### COMMENT

1. Some condominiums are regarded as "investment contracts" or other "securities" under federal law because they exhibit certain investment features such as mandatory rental pools. See SEC Securities Act Release No. 5347 (January 1973). The purpose of this section is to permit the declarant to file or deliver, in lieu of a public offering statement specifically prepared to comply with the provisions of this Act, the prospectus filed with and distributed pursuant to the regulations of the United States Securities and Exchange Commission. Absent this provision, prospective purchasers of condominiums classified by the SEC as "securities" would have to be



given two public offering statements, one prepared pursuant to this Act and the other prepared pursuant to the Securities Act of 1933. Not only would this result increase the declarant's costs (and thus the price) of units, it might also reduce the likelihood of either public offering statement actually being read by prospective purchasers.

2. The bracketed language in the first sentence of this section should be inserted by states which choose to adopt the agency provisions of Article 5 of the Act. The second sentence should also be inserted by states opting to incorporate Article 5 of the Act to avoid duplicative regulation of condominiums by the agency administering the State's securities regulation statutes.

#### § 4-108. [Purchaser's Right to Cancel]

(a) A person required to deliver a public offering statement pursuant to Section 4-102(c) shall provide a purchaser of a unit with a copy of the public offering statement and all amendments thereto before conveyance of that unit, and not later than the date of any contract of sale. Unless a purchaser is given the public offering statement more than 15 days before execution of a contract for the purchase of a unit, the purchaser, before conveyance, may cancel the contract within 15 days after first receiving the public offering statement.

(b) If a purchaser elects to cancel a contract pursuant to subsection (a), he may do so by hand-delivering notice thereof to the offeror or by mailing notice thereof by prepaid United States mail to the offeror or to his agent for service of process. Cancellation is without penalty, and all payments made by the purchaser before cancellation shall be refunded promptly.

(c) If a person required to deliver a public offering statement pursuant to Section 4-102(c) fails to provide a purchaser to whom a unit is conveyed with that public offering statement and all amendments thereto as required by subsection (a), the purchaser, in addition to any rights to damages or other relief, is entitled to receive from that person an amount equal to [10] percent of the sales price of the unit.

#### COMMENT

1. The "cooling off" period provided to a purchaser in this section is similar to provisions in many current state condominium statutes.

2. Subsection (a) requires that each purchaser be provided with both the public offering statement and all amendments thereto prior to the time that the unit is conveyed. If there is a contract for the sale of the unit, these documents must be provided not later than the date of the contract. The section makes clear that any amendments to the public offering statement prepared between the date of any contract and the date of conveyance must also be provided to the purchaser.

3. This section does not require the delivery of a public offering statement prior to the execution by the purchaser of an agreement pursuant to which the purchaser reserves the right to buy a unit but is not contractually bound to do so. Because such agreements (frequently referred to as "non-binding reservation agreements") may be unilaterally cancelled at any time by a prospective purchaser without penalty, they do not constitute "contract[s] of sale" within the meaning of the section.

4. The requirement set forth in subsection (a) that a purchaser be provided with subsequent amendments to the public offering statement during the period between execution of the contract for purchase and conveyance of the unit does not, in itself, extend the "cooling off" period. Indeed, the delivery of such amendments is required even if the "cooling off" period has expired. The purpose of this requirement is to assure that purchasers of units are advised of any material change in the condominium which may affect their sales contracts under general law. While many such amendments will be merely technical and will not affect the bargain that the purchaser and declarant entered into, each purchaser should be permitted to judge for himself the materiality of any change in the nature of the condominium.

5. Under the scheme set forth in this section, it is at least theoretically possible that there will be a contract for sale of the unit, and that a public offering statement will be given to the purchaser at closing just prior to conveyance. However, the available evidence suggests that such practice would be rare, and that the provision of a public offering statement moments prior to conveyance would, in itself, tend to dampen the enthusiasm of the purchaser for immediate closing. In such circumstances, under subsection (a), the purchaser would, as a matter of right, be able to extend the date of closing for 15 days from the time the public offering statement was provided. This fact, together with the generally unsatisfactory experience with mandatory "cooling off" periods such as that imposed under the federal Real Estate Settlement Procedures Act, supports the conclusion that it is inappropriate to require a minimum period of delay between delivery of a public offering statement and conveyance.

6. Under subsection (a), the failure to deliver a public offering statement before conveyance does not result in a statutory right by the purchaser to cancel the conveyance or to reconvey the unit once conveyance has occurred. Any such cancellation or reconveyance right following an actual conveyance could create serious mechanical and title problems that could not be easily resolved. The failure of the Act to provide for such cancellation or reconveyance is not, however, intended to diminish any right which a purchaser may otherwise have under general state law. For example, where it appears that a seller, by deliberately failing to disclose certain material information with respect to a transaction, substantially changed the bargain which he and the purchaser entered into, it is possible under the common law in some states that reconveyance would be an available remedy.

Even absent such resort to general law, however, the penalty provisions of subsection (c) are designed to provide a sufficient incentive to the seller to insure that the public offering statement is provided in the timely fashion required by the Act. The penalty so specified in the subsection is in addition to any right a prevailing purchaser may have under Section 4-117 to collect punitive damages and attorney's fees in connection with his action against the declarant.

#### § 4-109. [Resales of Units]

(a) Except in the case of a sale where delivery of a public offering statement is required, or unless exempt under Section 4-101(b), a unit owner shall furnish to a purchaser before execution of any contract for sale of a unit, or otherwise before conveyance, a copy of the declaration (other than the plats and plans), the bylaws, the rules or regulations of the association, and a certificate containing:

(1) a statement disclosing the effect on the proposed disposition of any right of first refusal or other restraint on the free alienability of the unit;

(2) a statement setting forth the amount of the monthly common expense assessment and any unpaid common expense or special assessment currently due and payable from the selling unit owner;

(3) a statement of any other fees payable by unit owners;

(4) a statement of any capital expenditures anticipated by the association for the current and 2 next succeeding fiscal years;

(5) a statement of the amount of any reserves for capital expenditures and of any portions of those reserves designated by the association for any specified projects;

(6) the most recent regularly prepared balance sheet and income and expense statement, if any, of the association;

(7) the current operating budget of the association;

(8) a statement of any unsatisfied judgments against the association and the status of any pending suits in which the association is a defendant;

(9) a statement describing any insurance coverage provided for the benefit of unit owners;

(10) a statement as to whether the executive board has knowledge that any alterations or improvements to the unit or to the limited common elements assigned thereto violate any provision of the declaration;

(11) a statement as to whether the executive board has knowledge of any violations of the health or building codes with respect to the unit, the limited common elements assigned thereto, or any other portion of the condominium; and

(12) a statement of the remaining term of any leasehold estate affecting the condominium and the provisions governing any extension or renewal thereof.

(b) The association, within 10 days after a request by a unit owner, shall furnish a certificate containing the information necessary to enable the unit owner to comply with this section. A unit owner providing a certificate pursuant to subsection (a) is not liable to the purchaser for any erroneous information provided by the association and included in the certificate.

(c) A purchaser is not liable for any unpaid assessment or fee greater than the amount set forth in the certificate prepared by the association. A unit owner is not liable to a purchaser for the failure or delay of the

association to provide the certificate in a timely manner, but the purchaser contract is voidable by the purchaser until the certificate has been provided and for (5) days thereafter or until conveyance, whichever first occurs.

#### COMMENT

1. In the case of the resale of a unit by a private unit owner who is not a declarant or a person in the business of selling real estate for his own account, a public offering statement need not be provided. See Section 4-102(c). Nevertheless, there are important facts which a purchaser should have in order to make a rational judgment about the advisability of purchasing the particular condominium unit. Accordingly, each unit owner not required to furnish a public offering statement under Section 4-102(c) and not exempt under Section 4-101(b) is required to furnish to a resale purchaser, before the execution of any contract of sale, a copy of the declaration, bylaws, and rules and regulations of the association and a variety of fiscal, insurance, and other information concerning the condominium and the unit.

2. While the obligation to provide the information required by this section rests upon each unit owner (since the purchaser is in privity only with that unit owner), the association has an obligation to provide the information to the unit owner within 10 days after a request for such information. Under Section 3-102(a)(12), the association is entitled to charge the unit owner a reasonable fee for the preparation of the certificate. Should the association fail to provide the certificate as required, the unit owner would have a right to action against the association pursuant to Section 4-117.

3. Under subsection (c), if a purchaser receives a resale certificate which fails to state the proper amount of the unpaid assessments due from the purchased unit, the purchaser is not liable for any amount greater than that disclosed in the resale certificate. Because a resale purchaser is dependent upon the association for information with respect to the outstanding assessments against the unit which he contemplates buying, it is altogether appropriate that the association should be prohibited from later collecting greater assessments than those disclosed prior to the time of the resale purchase.

#### § 4-110. [Escrow of Deposits]

Any deposit made in connection with the purchase or reservation of a unit from a person required to deliver a public offering statement pursuant to Section 4-102(c) shall be placed in escrow and held either in this State or in the state where the unit is located in an account designated solely for that purpose by [a licensed title insurance company] [an attorney] [a licensed real estate broker] [an independent bonded escrow company or] an institution whose accounts are insured by a governmental agency or instrumentality until (i) delivered to the declarant at closing; (ii) delivered to the declarant because of purchaser's default under a contract to purchase the unit; or (iii) refunded to the purchaser.

#### COMMENT

1. This section applies to the sale by persons required to furnish public offering statements of residential units and of non-residential units unless waived pursuant to the provisions of Section 4-101. It does not apply, however, to resales of units between private parties. Escrow provisions are not part of the law in several

jurisdictions.

2. This section provides declarant a number of choices as to the appropriate escrow agent. Whether the escrow agent must deposit the funds in an insured institutional depository, or in a particular type of account, depends on state law, or the agreement of the parties. To minimize record keeping, of course, the institutional depository could itself be the escrow agent. The section does not require a separate account for each unit, so that mingling of funds in a single escrow account would be permitted. The account may be held whether in the state where the unit is located, or in the enacting state, in recognition that buyers are often from outside the state where the unit is located.

3. The escrow requirements of this section apply in connection with any deposit made by a purchaser, whether such deposit is made pursuant to a binding contract or pursuant to a nonbinding reservation agreement (with respect to which no public offering statement is required under Section 4-101(b)(6) ).

4. In some states current practice permits escrows to be held by certain title insurance or escrow companies, attorneys, or real estate brokers. Accordingly, the bracketed language should be included or deleted in accordance with local practice.

5. Under this section, any interest earned on an escrow deposit may, but need not, be credited to the purchaser at closing, added to any deposit forfeited to the seller, or added to any deposit refunded to the purchaser. In short, disposition of any interest is left to agreement of the parties.

6. In some states, such as New York, the substitution of a bond in place of a deposit escrow is permitted. The evidence indicates, however, that in many instances the use of the bonding device has forced purchasers to incur substantial costs and delay prior to obtaining refunds to which they are entitled. For this reason, this Act does not include bonding as an alternative to the required escrow of deposits.

#### § 4-111. [Release of Liens]

(a) In the case of a sale of a unit where delivery of a public offering statement is required pursuant to Section 4-102(c), a seller shall, before conveying a unit, record or furnish to the purchaser, releases of all liens affecting that unit and its common element interest which the purchaser does not expressly agree to take subject to or assume [, or shall provide a surety bond or substitute collateral for or insurance against the lien as provided for liens on real estate in (insert appropriate references to general state law or Sections 5-211 and 5-212 of the State Uniform Simplification of Land Transfers Act).] This subsection does not apply to any real estate which a declarant has the right to withdraw.

(b) Before conveying real estate to the association the declarant shall have that real estate released from: (1) all liens the foreclosure of which would deprive unit owners of any right of access to or easement of support of their units, and (2) all other liens on that real estate unless the public offering statement describes certain real estate which may be conveyed subject to liens in specified amounts.

#### COMMENT

The exemption for withdrawable real estate set forth in subsection (a) is designed to preserve flexibility for the declarant in terms of financing arrangements. Theoretically, a developer might partially avoid the lien release requirement of subsection (a) by placing part of the common element improvements such as a swimming pool or tennis court on withdrawable real estate. By doing so, it could separately mortgage that part of the common elements without being obligated to discharge the mortgage or secure partial releases when individual units are sold. (However, even if there were no withdrawable real estate exemption from the release of lien requirement, developers could still separately mortgage such improvements as pools and tennis courts without having to discharge the mortgage on sale of units. All they would have to do is leave the particular real estate out of the condominium and then convey it directly to the association subject to the mortgage.)

If a mortgage or other lien created by or arising against the developer attaches to withdrawable real estate after the declaration has been recorded, a lapse of the developer's right to withdraw the real estate would also terminate the rights of the lienor, since the lien would attach only to the developer's interest (the right to withdraw). However, an alert lienor would not permit the right to withdraw to lapse without taking steps to see that the right to withdraw is exercised. If the mortgage or other lien attached to the real estate and was perfected before the condominium declaration was recorded, lapse of the right to withdraw would not affect the lienor's rights and it could foreclose on the real estate whether or not the developer had lost the right to withdraw. As a practical matter, whether the mortgage or other lien against withdrawable real estate arises before or after the declaration is recorded, unit owners may find that, if the association does not release liens on withdrawable real estate containing common elements, the lienor will be able to withdraw the land and deprive the unit owners of its use. Therefore, unit purchasers and their counsel should be alert to that possibility.

If units are created in withdrawable real estate, the units, when sold, are subject to the release-of-lien rule of subsection (b)(1) and after a unit in a particular withdrawable parcel is sold, that parcel can no longer be withdrawn. In that case, any lien created by or arising against the developer which attached to the real estate and is subordinate to the condominium declaration would automatically expire.

#### § 4-112. [Conversion Buildings]

(a) A declarant of a condominium containing conversion buildings, and any person in the business of selling real estate for his own account who intends to offer units in such a condominium shall give each of the residential tenants and any residential subtenant in possession of a portion of a conversion building notice of the conversion and provide those persons with the public offering statement no later than 120 days before the tenants and any subtenant in possession are required to vacate. The notice must set forth generally the rights of tenants and subtenants under this section and shall be hand-delivered to the unit or mailed by prepaid United States mail to the tenant and subtenant at the address of the unit or any other mailing address provided by a tenant. No tenant or subtenant may be required to vacate upon less than 120 days' notice, except by reason of nonpayment of rent, waste, or conduct that disturbs other tenants' peaceful enjoyment of the premises, and the terms of the tenancy may not be altered during that period. Failure to give notice as required by this section is a defense to an action for possession.

(b) For [60] days after delivery or mailing of the notice described in subsection (a), the person required to give the notice shall offer to convey each unit or proposed unit occupied for residential use to the tenant who

leases that unit. If a tenant fails to purchase the unit during that [60]-day period, the offeror may not offer to dispose of an interest in that unit during the following [180] days at a price or on terms more favorable to the offeree than the price or terms offered to the tenant. This subsection does not apply to any unit in a conversion building if that unit will be restricted exclusively to non-residential use or the boundaries of the converted unit do not substantially conform to the dimensions of the residential unit before conversion.

(c) If a seller, in violation of subsection (b), conveys a unit to a purchaser for value who has no knowledge of the violation, recordation of the deed conveying the unit extinguishes any right a tenant may have under subsection (b) to purchase that unit if the deed states that the seller has complied with subsection (b), but does not affect the right of a tenant to recover damages from the seller for a violation of subsection (b).

(d) If a notice of conversion specifies a date by which a unit or proposed unit must be vacated, and otherwise complies with the provisions of (insert appropriate state summary process statute), the notice also constitutes a notice to vacate specified by that statute.

(e) Nothing in this section permits termination of a lease by a declarant in violation of its terms.

#### COMMENT

1. One of the most controversial issues in the field of condominium development relates to conversion of rental buildings to condominiums. Opponents of conversions point out that the frequent result of conversions, which occur principally in large urban areas, is to displace low- and moderate-income tenants and provide homes for more affluent persons able to afford the higher prices which the converted apartments command. Indeed, studies indicate that the burden of conversion displacement falls most frequently on low- and moderate-income and elderly persons. At the same time, the conversion of a building to condominium ownership can lead to a substantial increase in property value, a result which proponents believe can be an important factor in curtailing the problem of declining urban tax bases. Proponents also point out that the conversion of rental units in inner-city areas to individual ownership frequently results in the stabilization of the buildings concerned, thus providing an important technique for use in neighborhood preservation and revitalization. This section, which seeks to balance these competing interests, is based principally on similar provisions set forth in the condominium statutes of Virginia and the District of Columbia.

2. In an attempt to strike a fair balance between the competing interests of rental tenants and prospective owners, subsection (b) provides the tenant a right for 60 days to purchase the unit which he leases at a price and on terms offered by the declarant. The subsection discourages unreasonable offers by declarants by providing that, if the tenant fails to accept the terms offered, the declarant may not thereafter sell the unit at a lower price or upon more favorable terms to a third person for at least 180 days. However, the declarant is not required to offer residential tenants the right to purchase commercial units or to offer to sell to tenants if the dimensions of their previous apartments have been substantially altered. The reason for this exception is that, if an apartment is subdivided or if two apartments are merged into a single condominium unit, compliance with the requirements of subsection (b) would be impossible.

3. Jurisdictions with rent control statutes should consider whether amendments to this section are

necessary to conform to the procedures or substantive requirements set out in the rent control laws or whether modifications to the rent control laws may be required as a result of the enactment of this section.

4. Except for the restrictions on permissible evictions stated in subsection (a), this Act does not change the law of summary process in a state. As a result, if a tenant refuses to vacate the premises following the 120-day notice, the usual provisions of the state's summary process statutes would apply, while any defenses available to a tenant would also be available.

#### § 4-113. [Express Warranties of Quality]

(a) Express warranties made by any seller to a purchaser of a unit, if relied upon by the purchaser, are created as follows:

(1) any affirmation of fact or promise which relates to the unit, its use, or rights appurtenant thereto, area improvements to the condominium that would directly benefit the unit, or the right to use or have the benefit of facilities not located in the condominium, creates an express warranty that the unit and related rights and uses will conform to the affirmation or promise;

(2) any model or description of the physical characteristics of the condominium, including plans and specifications of or for improvements, creates an express warranty that the condominium will conform to the model or description;

(3) any description of the quantity or extent of the real estate comprising the condominium, including plats or surveys, creates an express warranty that the condominium will conform to the description, subject to customary tolerances; and

(4) a provision that a buyer may put a unit only to a specified use is an express warranty that the specified use is lawful.

(b) Neither formal words, such as "warranty" or "guarantee", nor a specific intention to make a warranty, are necessary to create an express warranty of quality, but a statement purporting to be merely an opinion or commendation of the real estate or its value does not create a warranty.

(c) Any conveyance of a unit transfers to the purchaser all express warranties of quality made by previous sellers.

#### COMMENT

1. This section, together with Sections 4-114, 4-115, and 4-116, are adapted from the real estate warranty provisions contained in the Uniform Land Transactions Act (ULTA).

2. This section, which parallels Section 2-308 of ULTA, deals with express warranties, that is, with the



expectations of the purchaser created by particular conduct of the declarant in connection with inducement of the sale. It is based on the principle that, once it is established that the declarant has acted so as to create particular expectations in the purchaser, warranty should be found unless it is clear that, prior to the time of final agreement, the declarant has negated the conduct which created the expectation.

3. Subsection (b) makes it clear that no specific intention to make a warranty is necessary if any of the factors mentioned in subsection (a) are made part of the basis of the bargain between the parties. In actual practice, representations made by a declarant concerning condominium property during the bargaining process are typically regarded as a part of the description. Therefore, no particular reliance on the representations need be shown in order to weave them into the fabric of the agreement. Rather, the burden is on the declarant to show that representations made in the bargaining process were not relied upon by the purchaser at the time of contracting.

4. Subsection (a)(1) provides that representations as to improvements and facilities not located in the condominium may create express warranties. Declarants often assert that recreational facilities, such as swimming pools, golf courses, tennis courts, etc., will be constructed in the future and that unit owners will have the right to utilize such facilities once constructed. Such assertions are intended to be included within the language "have the benefit of facilities not located in the condominium." If, under the circumstances, such improvements would benefit the unit being sold, then the declarant may be liable for breach of express warranty if they are not completed. Such liability is distinct from the declarant's obligations, under Section 4-119, to complete all improvements labeled "MUST BE BUILT" on plats and plans.

5. Under subsection (a)(4), a contract provision permitting the purchaser to use a condominium unit only for a specified use or uses creates an express warranty that the unit may lawfully be used for that purpose. Therefore, if there is a limitation on use, the resulting express warranty could not be disclaimed by a disclaimer of implied warranties under Section 4-115.

6. The precise time when representations set forth in subsection (a) are made is not material. The sole question is whether the language or other representations of the declarant are fairly to be regarded as part of the contract between the parties.

7. Subsection (b) makes clear that it is not necessary to the existence of a warranty that the declarant have intended to assume a warranty obligation. On the other hand, mere statements of opinion or commendations by the declarant do not necessarily create warranties. Whether a particular statement purports to be merely opinion or commendation is basically a question of whether the purchaser could reasonably rely upon the statement as a meaningful representation or promise with respect to the condominium. That determination depends, in turn, not merely upon the words used but also upon the relative characteristics and skills of the parties. Thus a representation by a declarant to a novice purchaser that a particular condominium unit is in "good condition" may be more than mere opinion or commendation, while the same statement by a novice seller to a professional buyer would likely be only opinion or commendation, and thus not a warranty.

8. The provision of subsection (c) that the conveyance of a unit transfers to the purchaser all express warranties made by prior declarants is intended, in part, to avoid the possibility that a declarant could negate his

warranty obligations through the device of transferring a unit through a shell entity to the ultimate purchaser.

§ 4-114. [Implied Warranties of Quality]

(a) A declarant and any person in the business of selling real estate for his own account warrants that 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 excepted.

(b) A declarant and any person in the business of selling real estate for his own account impliedly warrants that a unit and the common elements in the condominium are suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by him, or made by any person before the creation of the condominium, will be:

(1) free from defective materials; and

(2) constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner.

(c) In addition, a declarant and any person in the business of selling real estate for his own account warrants to a purchaser of a unit that may be used for residential use that an existing use, continuation of which is contemplated by the parties, does not violate applicable law at the earlier of the time of conveyance or delivery of possession.

(d) Warranties imposed by this section may be excluded or modified as specified in Section 4-115.

(e) For purposes of this section, improvements made or contracted for by an affiliate of a declarant (Section 1-103(1) ) are made or contracted for by the declarant.

(f) Any conveyance of a unit transfers to the purchaser all of the declarant's implied warranties of quality.

COMMENT

1. This section, which is based upon Section 2-309 of ULTA, overturns the rule still applied in many states that a professional seller of real estate makes no implied warranties of quality (the rule of "caveat emptor"). In recent years, that rule has been increasingly recognized as a relic of an earlier age whose continued existence defeats reasonable expectations of purchasers. Since the 1930's, more and more courts have completely or partially abolished the caveat emptor rule, and it is clear that the judicial tide is now running in favor of seller liability.

2. The principal warranty imposed under this section is that of suitability of both the unit and common elements for ordinary uses of real estate of similar type, and of quality of construction. Both of these warranties, which arise under subsection (b), are imposed only against declarants and not against unit owners selling their units to others.

3. Many recent cases have held that a seller of new housing impliedly warrants that the houses sold are habitable. The warranty of suitability under this Act is similar to the warranty of habitability. However, under the Act, the warranty of suitability applies to both units and common elements in both commercial and residential condominiums. If, for example, a commercial unit is sold for commercial use although it is not suitable for the ordinary uses of condominium units of that type, the warranty of suitability has been breached. Moreover, this warranty of suitability arises in the case of used, as well as new, buildings or other improvements in the condominium.

4. The warranty of suitability and of quality of construction arises only against a declarant and persons in the business of selling real estate for their own account. As in the case of sales of goods, a non-professional seller is liable, if at all, only for any express warranties made by him. However, if a non-professional seller fails to disclose defects of which he is aware, he may be liable to the purchaser for fraud or misrepresentation under the common law of the state where the transaction occurred. Also, the warranties imposed by this section may be used to give content to a general "guarantee" by a non-professional seller.

5. The warranty as to quality of construction for improvements made or contracted for by the declarant or made by any person before the creation of the condominium is broader than the warranty of suitability. Particularly, it imposes liability for defects which may not be so serious as to render the condominium unsuitable for ordinary purposes of real estate of similar type. Moreover, subsection (e) prevents a declarant from avoiding liability with respect to the quality of construction warranty by having an affiliated entity make the desired improvements.

6. Under subsection (c), a declarant also warrants to a residential purchaser that an existing use contemplated by the parties does not violate applicable law. The declarant, therefore, is liable for any violation of housing codes or other laws which renders any existing use of the condominium unlawful.

7. The issue of declarant liability for warranties is an important one in cases where a transfer of the declarant's rights occurs, either as an arm's length transaction, as a transfer to an affiliate, or as a transfer by foreclosure or a deed in lieu of foreclosure. Subsection (f) makes clear that a conveyance of a unit transfers to the purchaser all warranties of quality made by any declarant, and Section 3-104(b)(1) makes clear that the original declarant remains liable for all warranties of quality with respect to improvements made by him, even after he transfers all declarant rights, regardless of whether the unit is purchased from the declarant who made the improvements. If the successor declarant is an affiliate of the original declarant, it is clear, under both Sections 3-104(b)(2) and 4-114(f), that the original declarant remains liable for warranties of quality or improvements made by his successor even after the declarant himself ceases to have any special declarant rights.

8. As to the liabilities of successor declarants for warranties of quality, a successor who is an affiliate of a declarant is liable, pursuant to Section 3-104(e)(1), for warranties or improvements made by his predecessor. However, any non-affiliated successor of the original declarant is liable only for warranties of quality for improvements made or contracted for by him, and is not liable for warranties which may lie against the original declarant even if the successor sells units completed by the original declarant to a purchaser. See Section 3-104(e)(2). In the case of a foreclosing lender, this is the same result as that reached under Section 2-309(f) of ULTA. The same result is also reached under ULTA in the case of a successor who, under ULTA Section

3-309(b), would be a seller in the business of selling real estate since under that subsection the seller is liable only for warranties or improvements made or contracted for by him.

§ 4-115. [Exclusion or Modification of Implied Warranties of Quality]

(a) Except as limited by subsection (b) with respect to a purchaser of a unit that may be used for residential use, implied warranties of quality:

(1) may be excluded or modified by agreement of the parties; and

(2) are excluded by expression of disclaimer, such as "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties.

(b) With respect to a purchaser of a unit that may be occupied for residential use, no general disclaimer of implied warranties of quality is effective, but a declarant and any person in the business of selling real estate for his own account may disclaim liability in an instrument signed by the purchaser for a specified defect or specified failure to comply with applicable law, if the defect or failure entered into and became a part of the basis of the bargain.

COMMENT

1. This section parallels Section 2-311(b) and (c) of ULTA.

2. Under this section, implied warranties of quality may be disclaimed. However, a warranty disclaimer clause, like any other contract clause, is subject to a possible court holding of unconscionability. Although the section imposes no requirement that a disclaimer be in writing, except in the case of residential units, an oral disclaimer might be ineffective under the law of parole and extrinsic evidence.

3. Except as against purchasers of residential units, there are no formal standards for the effectiveness of a disclaimer clause. All that is necessary under this section is that the disclaimer be calculated to effectively notify the purchaser of the nature of the disclaimer.

4. Under subsection (b), general disclaimers of implied warranties are not permitted with respect to purchasers of residential units. However, a declarant may disclaim liability for a specified defect or a specified failure to comply with applicable law in an instrument signed by such a purchaser. The requirement that the disclaimer as to each defect or failure be in a signed instrument is designed to insure that the declarant sufficiently calls each defect or failure to the purchaser's attention and that the purchaser has the opportunity to consider the effect of the particular defect or failure upon the bargain of the parties. Consequently, this section imposes a special burden upon the declarant who desires to make a "laundry list" of defects or failures by requiring him to emphasize each item on such a list and make its import clear to prospective purchasers. For example, the declarant of a conversion condominium might, consistent with this subsection, disclaim certain warranties for "all electrical wiring and fixtures in the building, the furnace, all materials comprising or supporting the roof, and

all components of the air conditioning system."

5. This section is not intended to be inconsistent with, or to prevent, the use of insured warranty programs offered by some home builders. However, under the Act, the implied warranty that a new condominium unit will be suitable for ordinary uses (i.e., habitable) and will be constructed in a sound, workmanlike manner, and free of defective materials, cannot be disclaimed by general language.

§ 4-116. [Statute of Limitations for Warranties]

(a) A judicial proceeding for breach of any obligation arising under Section 4-113 or 4-114 must be commenced within 6 years after the [claim for relief] [cause of action] accrues, but the parties may agree to reduce the period of limitation to not less than 2 years. With respect to a unit that may be occupied for residential use, an agreement to reduce the period of limitation must be evidenced by a separate instrument executed by the purchaser.

(b) Subject to subsection (c), a [claim for relief] [cause of action] for breach of warranty of quality, regardless of the purchaser's lack of knowledge of the breach, accrues:

(1) as to a unit, at the time the purchaser to whom the warranty is first made enters into possession if a possessory interest was conveyed or at the time of acceptance of the instrument of conveyance if a nonpossessory interest was conveyed; and

(2) as to each common element, at the time the common element is completed or: if later, (i) as to a common element that may be added to the condominium or portion thereof, at the time the first unit therein is conveyed to a bona fide purchaser, or (ii) as to a common element within any other portion of the condominium, at the time the first unit in the condominium is conveyed to a bona fide purchaser.

(c) If a warranty of quality explicitly extends to future performance or duration of any improvement or component of the condominium, the [claim for relief] [cause of action] accrues at the time the breach is discovered or at the end of the period for which the warranty explicitly extends, whichever is earlier.

COMMENT

1. Under subsection (a), the parties may agree that the statute of limitations be reduced to as little as 2 years. However, such a contract provision (which, in the case of residential units, must be reflected in a separate written instrument executed by the purchaser) could, like other contract provisions, be subject to attack on grounds of unconscionability in particular cases.

2. Except for warranties of quality which explicitly refer to future performance or duration, a cause of action for breach of a warranty of quality would normally arise when the purchaser to whom it is first made enters into possession. Suit on such a warranty would thus have to be brought within 6 years thereafter. Even an inability to discover the breach would not delay the running of the statute of limitations in this regard.

3. Real estate sales frequently include warranties that certain components (e.g., furnaces, hot water heaters, air conditioning systems, and roofs) will last for a particular period of time. In the case of such warranties, the statute of limitations would not start running until the breach is discovered, or, if not discovered before the end of the warranty term, until the end of the term.

§ 4-117. [Effect of Violations on Rights of Action; Attorney's Fees]

If a declarant or any other person subject to this Act fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. Punitive damages may be awarded for a willful failure to comply with this Act. The court, in an appropriate case, may award reasonable attorney's fees.

COMMENT

This section provides a general clause of action or claim for relief for failure to comply with the Act by either a declarant or any other person subject to the Act's provisions. Such persons might include unit owners, persons exercising a declarant's rights of appointment pursuant to Section 3-103(d), or the association itself. A claim for appropriate relief might include damages, injunctive relief, specific performance, rescission or reconveyance if appropriate under the law of the state, or any other remedy normally available under state law. The section specifically refers to "any person or class of persons" to indicate that any relief available under the state class action statute would be available in circumstances where a failure to comply with this Act has occurred. This section specifically permits punitive damages to be awarded in the case of willful failure to comply with the Act and also permits attorney's fees to be awarded in the discretion of the court to any party that prevails in an action.

§ 4-118. [Labeling of Promotional Material]

If any improvement contemplated in a condominium is labeled "NEED NOT BE BUILT" on a plat or plan, or is to be located within a portion of the condominium with respect to which the declarant has reserved a development right, no promotional material may be displayed or delivered to prospective purchasers which describes or portrays that improvement unless the description or portrayal of the improvement in the promotional material is conspicuously labeled or identified as "NEED NOT BE BUILT."

COMMENT

1. Section 2-109(c) requires that the plats and plans for every condominium indicate whether or not any improvement that might be built in the condominium must be built. However, Section 4-103 does not require that copies of the plats and plans be provided to purchasers as part of the public offering statement. Consequently, this section requiring the labeling of improvements depicted on promotional material is necessary to assure that purchasers are not deceived with respect to which improvements the declarant is obligated to make in a particular condominium project.

2. Since no contemplated improvements on real estate subject to development rights need be shown on

plats and plans, additional labeling is required by this section to insure that, if the declarant shows any contemplated improvements in his promotional material which are not shown on the plats and plans, those improvements must also be appropriately labeled.

§ 4-119. [Declarant's Obligation to Complete and Restore]

(a) The declarant shall complete all improvements labeled "MUST BE BUILT" on plats or plans prepared pursuant to Section 2-109.

(b) The declarant is subject to liability for the prompt repair and restoration, to a condition compatible with the remainder of the condominium, of any portion of the condominium affected by the exercise of rights reserved pursuant to or created by Sections 2-110, 2-111, 2-112, 2-113, 2-115, and 2-116.

COMMENT

1. Subsection (a) requires the declarant to complete any improvement which the plats or plans indicate, pursuant to the requirements of Section 2-109(c), "MUST BE BUILT." This is a fundamental obligation of the declarant and is one with which a successor declarant is obligated to comply under Section 3-104.

2. Under subsection (b), in the event that a declarant exercises the right to use an easement which is created by Section 2-116, or in the event the declarant maintains model units or signs on the condominium, the declarant is obligated to restore the portions of the condominiums used to a condition compatible with the remainder of the condominium.

§ 4-120. [Substantial Completion of Units]

In the case of a sale of a unit where delivery of a public offering statement is required, a contract of sale may be executed, but no interest in that unit may be conveyed, [except pursuant to Section 5-103(b) ], until the declaration is recorded and the unit is substantially completed, as evidenced by a recorded certificate of substantial completion executed by an independent [registered] architect, surveyor or engineer, or by issuance of a certificate of occupancy authorized by law.

COMMENT

The purpose of this section, complemented by Section 4-110, is to assure that the declarant is not able to obtain use of the purchaser's money until the purchaser is able to get a completed unit.

[OPTIONAL]

ARTICLE 5

**ADMINISTRATION AND REGISTRATION OF CONDOMINIUMS**

PREFATORY COMMENT TO ARTICLE 5

Administrative agencies have become an essential and accepted part of state government. Accordingly, the procedures by which those agencies adopt their rules and reach their decisions, as well as the powers of those agencies, have assumed great importance.

The existence of government regulation reflects the common belief that adequate enforcement of a particular field of law requires both public oversight of private compliance with law, and an ability in government to promulgate new regulations to meet new circumstances. Often, regulation also reflects the regulated industry's desires for certainty and for an administrative agency knowledgeable of, and perhaps sympathetic to, the needs of the industry.

At the same time, in some states the public's response to administrative regulation has become increasingly negative. The adoption of so-called "sunshine" and "sunset" laws, consolidation or merger of many agencies, and abolition of some outmoded boards and commissions, reflect a growing public perception that administrative enforcement may at times be neither efficient nor effective.

The debate on the general desirability of state agency regulation is reflected in the question of regulation of condominium development. While many states with widespread condominium activity, such as California, Florida, Virginia, and New York, have created agencies to regulate condominiums or have placed the regulation of condominiums in an existing governmental body, other states with substantial condominium activity, such as Illinois and Maryland, have chosen not to regulate condominiums, relying instead on the private market and lenders for consumer protection.

State administrative law does not demand uniformity between the States. For example, the Revised Model State Administrative Procedure Act (1961), noted that there was a demand for an act covering that subject, but that administrative procedure was a subject upon which uniformity between the states was neither necessary nor desirable. "Every student of administrative law recognizes that many of the procedural details involved in administrative action must necessarily vary more or less from state to state and even from agency to agency within the same state." Comment, Content of the Model State Administrative Procedure Act, Uniform Laws Annotated, Master Edition (see U.L.A. Directory of Acts for location).

The same reasoning applies to the law of condominiums. While uniform substantive law regarding condominiums and the protection to be provided to consumers is important, the means by which the substantive law is enforced does not require uniformity. Nevertheless, it appears desirable to provide the states the option of choosing agency regulation of condominiums, as many states have already chosen to do, by providing an optional article on agency administration which is closely integrated with the Uniform Condominium Act.



Accordingly, Article 5 may or may not be adopted, depending on whether or not a state chooses to have agency regulation. The article has been drafted in such a way as to minimize the number of changes necessary in the body of the first four articles of the Act. However, in order to provide for close integration of Article 5 with the remainder of the Act, there are a number of sections in the Act where bracketed references to the agency or to Article 5 now exist. These sections are Sections 1-102(c), 1-103(10)(b), 2-101(b), 2-101(c), 3-103(f), 3-104(e)(3), and 4-105. In the event that a state determines not to adopt Article 5, the bracketed clauses or provisions in each of the above sections which refer to Article 5 should be deleted. In the event a state adopts Article 5, the brackets should be removed and the clauses or provisions retained.

§ 5-101. [Administrative Agency]

As used in this Act, "agency" means (insert appropriate administrative agency), which is an agency within the meaning of (insert appropriate reference to state administrative procedure act). (Insert any related provisions on creation, selection, and remuneration of personnel, budget, annual reports, fees, and other administrative provisions appropriate to the particular state).

COMMENT

1. Each state should insert in lieu of the bracketed language in the first sentence that agency, whether it be the Real Estate Commission, the Attorney General's Office, or any other existing or new agency, which the state deems appropriate for regulation of condominiums.

2. The Revised Model State Administrative Procedure Act (the "Model Act") had been adopted in 26 states and the District of Columbia by 1976. The appropriate reference in those states to the definition of "Agency" would be the statute adopting Section 1(1) of the Model Act. In those states which have not adopted the Model Act, reference to a similar statute should be made to insure that the procedures of the agency regulating condominiums are undertaken in accordance with the principles of procedural due process which underlie the Model Act. In those states which do not have an administrative procedure act, appropriate administrative procedures should be included, either in this section or elsewhere in this article, to provide for hearings, appellate review, regulations, and other administrative matters.

3. As indicated, Article 5 was not designed to solve all procedural matters which are appropriate for an agency. Rather, the Act relies on the cross reference to a state administrative procedure act. Even in such states, however, it may be appropriate to include other provisions, either in Section 5-101 or elsewhere in this article, which are necessary under state practice to insure the proper functioning of a state agency. This might include budget authority, salary levels, civil service requirements, and the like. This may be particularly important when a new state agency is created.

§ 5-102. [Registration Required]

A declarant may not offer or dispose of a unit intended for residential use unless the condominium and the unit are registered with the agency, but a condominium consisting of no more than 12 units and which is not subject to development rights is exempt from the requirements of this section and Section 5-103(a).

## COMMENT

1. Registration of a condominium is only required in the case of a condominium or unit intended for residential use. Commercial and industrial condominiums, accordingly, are exempt from registration under this Act. Also exempt from the requirement of registration is a small condominium containing 12 or fewer units, so long as the condominium is not subject to development rights. However, the small condominium and the industrial or commercial condominium are still subject to scrutiny by the agency under its general powers, despite the fact that registration is not required.

2. If Article 5 were adopted in a particular state, a declarant could not offer or dispose of a residential unit unless that unit were registered with the agency. However, he could offer and dispose of the unit after registration was approved but before the condominium was created, subject to the requirements of Sections 2-101 and 5-103.

### § 5-103. [Application for Registration; Approval of Uncompleted Units]

(a) An application for registration must contain the information and be accompanied by any reasonable fees required by the agency's [rules] [regulations.] A declarant promptly shall file amendments to report any factual or expected material change in any document or information contained in his application.

(b) If a declarant files with the agency a declaration or proposed declaration, or an amendment or proposed amendment to a declaration, creating units which he proposes to convey before they are substantially completed in the manner required by Sections 2-101(b) and 4-120, the declarant shall also file with the agency:

(1) a verified statement showing all costs involved in completing the buildings containing those units;

(2) a verified estimate of the time of completion of construction of the buildings containing those units;

(3) satisfactory evidence of sufficient funds to cover all costs to complete the buildings containing those units;

(4) a copy of the executed construction contract and any other contracts for the completion of the buildings containing those units;

(5) a 100 percent payment and performance bond covering the entire cost of construction of the buildings containing those units;

(6) plans for the units conforming to the requirements of Section 2-109(c);

(7) if purchasers' funds are to be utilized for the construction of the condominium, an executed copy of the escrow agreement with an escrow company or financial institution authorized to do business within the state which provides that:

(i) disbursements of purchasers' funds may be made from time to time to pay for construction of the condominium, architectural, engineering finance, and legal fees, and other costs for the completion of the condominium in proportion to the value of the work completed by the contractor as certified by an independent (registered) architect or engineer, or bills submitted and approved by the lender of construction funds or the escrow agent;

(ii) disbursement of the balance of purchasers' funds remaining after completion of the condominium shall be made only when the escrow agent or lender receives satisfactory evidence that the period for filing mechanic's and materialman's liens has expired, or that the right to claim those liens has expired, or that the right to claim those liens has been waived, or that adequate provision has been made for satisfaction of any claimed mechanic's or materialman's lien; and

(iii) any other restriction relative to the retention and disbursement of purchasers' funds required by the agency; and

(8) any other materials or information the agency may require by its [rules] [regulations.]

The agency may not register the units described in the declaration or the amendment unless the agency determines, on the basis of the material submitted by declarant and any other information available to the agency, that there is a reasonable basis to expect that the units to be conveyed will be completed by the declarant following conveyance.

#### COMMENT

1. Subsection (a) is a general provision empowering the agency by regulation to develop requirements for information to be submitted to the agency, and for the imposition of reasonable fees by the agency. Such rules or regulations, under the Model Act, could be adopted only after providing notice to interested persons and an opportunity to be heard. See Section 3 of the Model Act. The article encourages, but does not require, development of uniform regulations between states adopting Article 5. See Section 5-107(e).

2. Subsection (b) departs from the provisions contained in Section 2-101 and Section 4-120 regarding conveyance of units. Under Section 2-101(b), neither a declaration nor an amendment to a declaration adding units to a condominium, may be recorded (and thus no condominium may be created) unless the structural components of the buildings in which those units are located are substantially completed. Under Section 4-120, no unit in a condominium may be conveyed unless the unit itself is substantially completed. In addition, under Section 4-110, any deposit made in connection with the purchase or reservation of a unit must be held in escrow until closing. The combined effect of Sections 2-101, 4-120 and 4-110 is to insure that any funds of a purchaser are held in escrow until his unit is substantially completed, and the purchaser has title.

The need for consumer protection suggests that substantial completion of a residential unit should be a prerequisite for adding that unit to the condominium or conveying the unit to a purchaser, in the absence of an agency to control and review condominium projects. Under subsection (b), however, a declarant may file a declaration or proposed declaration, or an amendment to a declaration, for the purpose of creating a condominium

in which the buildings are not structurally completed. Subsection (b) contemplates that the agency might nevertheless register the units described in the declaration or amendment, if the agency were satisfied that the units would be completed. Registration would then permit the declarant to offer to sell and convey units which had not yet been built and to record the declaration.

In addition, paragraph (7) of Section 5-103(b) contemplates that purchaser's funds might be used, despite the language of Section 4-110 for construction of the condominium. Controls are imposed, however, to insure that disbursements are made in accordance with the value of work completed and approved by an escrow agent.

Note that the common elements in the condominium under the Act need not be completed at the time of the sale, even in the absence of an agency. Completion of common elements, however, is governed by Section 4-119 (Obligation to Complete and Restore).

3. The agency, by regulation, should determine the parties whom the payment and performance bond required under paragraph (b)(5) indemnifies.

#### § 5-104. [Receipt of Application; Order or Registration]

(a) The agency shall acknowledge receipt of an application for registration within [5] business days after receiving it. Within [60] days after receiving the application, the agency shall determine whether:

(1) the application and the proposed public offering statement satisfy the requirements of this Act and the agency's rules;

(2) the declaration and bylaws comply with this Act; and

(3) it is likely that the improvements the declarant has undertaken to make can be completed as represented.

(b) If the agency makes a favorable determination, it shall issue promptly an order registering the condominium. Otherwise, unless the declarant has consented in writing to a delay, the agency shall issue promptly an order rejecting registration.

#### COMMENT

1. This section provides reasonable deadlines for agency review of an application for registration, and describes the standards by which the application should be measured. The agency is directed to review the documents provided to the purchaser, and is given a great deal of discretion in mandating the form and content of the public offering statement; see Section 5-110.

2. The agency is also charged with reviewing those common element improvements which a declarant has promised to make, and which would be labeled under Section 4-118 as "MUST BE BUILT," to determine whether the declarant has the financial capacity to build them.

3. In the event the agency were to issue an order rejecting registration under subsection (b), an important issue concerning judicial review of that order may arise in some states.

The order would appear to be a rejection of an application for a license, as defined in Section 1(3) of the Model Act; it would be a "contested case", however, within the meaning of Section 1(2) of the Model Act, only if "an opportunity for hearing" is provided. No right to a hearing, or right of appeal, is provided in the Act.

The order rejecting registration thus might not be appealable under Section 15 of the Model Act, because judicial review is provided under Section 15 only for "contested cases". While that section does not limit utilization of, or the scope of judicial review available under, other means of review, some courts have held that, in the absence of specific statutory authority to hear an appeal from an administrative decision, courts have no jurisdiction to entertain such an appeal. See, e.g., Rybinski v. State Employees' Retirement Comm., 173 Conn. 462 (1977).

Accordingly, the law of each state should be carefully reviewed. In cases where the state administrative procedure act provides for appeals from decision on licensing matters made by state agencies regardless of the availability of a hearing, no amendment would be required.

#### § 5-105. [Cease and Desist Orders]

If the agency determines, after notice and hearing, that any person has disseminated or caused to be disseminated orally or in writing any false or misleading promotional materials in connection with a condominium, or that any person has otherwise violated any provision of this Act or the agency's [rules] [regulations] or orders, the agency may issue an order to cease and desist from that conduct, to comply with the provisions of this Act and the agency's [rules] [regulations] and orders, or to take affirmative action to correct conditions resulting from that conduct or failure to comply.

#### § 5-106. [Revocation of Registration]

(a) The agency, after notice and hearing, may issue an order revoking the registration of a condominium upon determination that a declarant or any officer or principal of a declarant has:

(1) failed to comply with a cease and desist order issued by the agency affecting that condominium;

(2) concealed, diverted, or disposed of any funds or assets of any person in a manner impairing rights of purchasers of units in that condominium;

(3) failed to perform any stipulation or agreement made to induce the agency to issue an order relating to that condominium;

(4) misrepresented or failed to disclose a material fact in the application for registration;

or

(5) failed to meet any of the conditions described in Sections 5-103 and 5-104 necessary to qualify for registration.

(b) A declarant shall not convey, cause to be conveyed, or contract for the conveyance of any interest in a unit while an order revoking the registration of the condominium is in effect, without the consent of the agency.

(c) In appropriate cases the agency, in its discretion, may issue a cease and desist order in lieu of an order of revocation.

#### COMMENT

1. This section permits the agency, after notice and hearing, to revoke a prior registration of a condominium. Under Section 15 of the Model Act, the revocation would not be effective until the last day for seeking review of the agency order. While the filing of the appeal would not stay the agency's decision, the agency or reviewing court could grant a stay of the revocation. Naturally, this result may vary in a particular state.

2. A declarant is prohibited from disposing of any interest in a unit when registration has been revoked, without consent of the agency.

#### § 5-107. [General Powers and Duties of Agency]

(a) The agency may adopt, amend, and repeal [rules] [regulations] and issue orders consistent with and in furtherance of the objectives of this Act, but the agency may not intervene in the internal activities of an association except to the extent necessary to prevent or cure violations of this Act. The agency may prescribe forms and procedures for submitting information to the agency.

(b) If it appears that any person has engaged, is engaging, or is about to engage in any act or practice in violation of this Act or any of the agency's rules or orders, the agency without prior administrative proceedings may bring suit in the [appropriate court] to enjoin that act or practice or for other appropriate relief. The agency is not required to post a bond or prove that no adequate remedy at law exists.

(c) The agency may intervene in any action or suit involving the powers or responsibilities of a declarant in connection with any condominium for which an application for registration is on file.

(d) The agency may accept grants in aid from any governmental source and may contract with agencies charged with similar functions in this or other jurisdictions, in furtherance of the objectives of this Act.

(e) The agency may cooperate with agencies performing similar functions in this and other jurisdictions to develop uniform filing procedures and forms, uniform disclosure standards, and uniform administrative practices, and may develop information that may be useful in the discharge of the agency's duties.

(f) In issuing any cease and desist order or order rejecting or revoking registration of a condominium, the

agency shall state the basis for the adverse determination and the underlying facts.

(g) The agency, in its sound discretion, may require bonding, escrow of portions of sales proceeds, or other safeguards it may prescribe by its [rules] [regulations] to guarantee completion of all improvements labeled "MUST BE BUILT" pursuant to Section 4-119 (Declarant's Obligation to Complete and Restore).

#### COMMENT

1. Under subsection (a), the agency is empowered to adopt regulations and issue orders in furtherance of the objectives of this Act. Those objectives are the same as the underlying purposes of the Act. The agency, however, is prohibited from intervening in the internal activities of the association except to the extent necessary to prevent or cure violations of this Act. The principal purpose of the agency is to regulate the behavior of the declarant, not the behavior of individual unit owners. If, however, the declarant is misusing the association by virtue of his power to control its activities, and thereby violating the Act, the agency may act to prevent the violation.

2. Subsection (g) empowers the agency to require bonding, escrow, or other safeguards to guarantee completion of improvements labeled "MUST BE BUILT" (Sections 2-109, 4-118).

A substantive requirement for bonding is not included under Article 4 for all condominiums, in all circumstances. While some states have adopted bonding and escrow requirements for completion of the common elements (see, e.g., Section 47-74d, Conn.Gen.Stat.), the available economic evidence indicates that a universal bonding requirement would increase the cost of condominiums, and that the cost of such provisions may not always be justified. The principal concern for consumer protection in this regard has been resolved in the Act by requiring substantial completion of all units prior to conveyance (Section 4-120) and by requiring labeling of common elements as either "MUST BE BUILT" or "NEED NOT BE BUILT."

At the same time, particularly in the case of condominiums registered under Section 5-103(b), there may be individual cases where the agency, in its discretion, may find escrowing or bonding to be in the public interest. For that reason, this power is included only as a permissible power for the agency under Article 5.

#### § 5-108. [Investigative Powers of Agency]

(a) The agency may initiate public or private investigations within or outside this State to determine whether any representation in any document or information filed with the agency is false or misleading or whether any person has engaged, is engaging, or is about to engage in any unlawful act or practice.

(b) In the course of any investigation or hearing, the agency may subpoena witnesses and documents, administer oaths and affirmations, and adduce evidence. If a person fails to comply with a subpoena or to answer questions propounded during the investigation or hearing, the agency may apply to the [appropriate court] for a contempt order or injunctive or other appropriate relief to secure compliance.

#### COMMENT

The powers enumerated in Sections 5-107 and 5-108 are specifically granted to the agency because of judicial determinations in various states that, in the absence of such statutory powers, agencies have no authority to act.

§ 5-109. [Annual Report and Amendments]

(a) A declarant, within 30 days after the anniversary date of the order of registration, annually shall file a report to bring up-to-date the material contained in the application for registration and the public offering statement. This provision does not relieve the declarant of the obligation to file amendments pursuant to subsection (b).

(b) A declarant promptly shall file amendments to the public offering statement with the agency.

(c) If an annual report reveals that a declarant owns or controls units representing less than (25) percent of the voting power in the association and that a declarant has no power to increase the number of units in the condominium, or to cause a merger or confederation of the condominium with other condominiums, the agency shall issue an order relieving the declarant of any further obligation to file annual reports. Thereafter, so long as the declarant is offering any units for sale, the agency has jurisdiction over the declarant's activities, but has no other authority to regulate the condominium.

COMMENT

1. This section requires annual reports from a declarant to the agency in order to keep the information filed with the agency current. This requirement parallels the declarant's obligation to provide a current public offering statement to unit owners. See Section 4-103(c).

2. Under subsection (c), if the period of declaration control has passed, the declarant is relieved of the obligation to continue to file an annual report. However, the obligation to continue to provide public offering statements is imposed on a declarant under Section 4-103 so long as he is offering any unit for sale. The agency would thus continue to have jurisdiction over the declarant's activities, but would have no other authority to regulate the condominium.

§ 5-110. [Agency Regulation of Public Offering Statement]

(a) The agency at any time may require a declarant to alter or supplement the form or substance of a public offering statement to assure adequate and accurate disclosure to prospective purchasers.

(b) The public offering statement may not be used for any promotional purpose before registration and afterwards only if it is used in its entirety. No person may advertise or represent that the agency has approved or recommended the condominium, the disclosure statement, or any of the documents contained in the application for registration.

(c) In the case of a condominium situated wholly outside of this State, no application for registration or



proposed public offering statement filed with the agency which has been approved by an agency in the State where the condominium is located and substantially complies with the requirements of this Act may be rejected by the agency on the grounds of non-compliance with any different or additional requirements imposed by this Act or by the agency's [rules] [regulations.] However, the agency may require additional documents or information in particular cases to assure adequate and accurate disclosure to prospective purchasers.

#### COMMENT

1. Subsection (c) attempts to facilitate interstate sales of units by requiring the agency in the enacting state to accept an agency-approved public offering statement from the state where the condominium is located. This avoids the need for a different public offering statement in several states for the same project. If no agency exists in the state where the condominium is located, however, a public offering statement must be prepared and approved before offering an out-of-state unit in an enacting state.

2. Because of the bracketed language contained in Section 1-102(c), which should be inserted in the Act if Article 5 is enacted, a foreign condominium must only be registered under this Article in an enacting state if a declarant is "offering" the condominium in the enacting state. Thus, general advertising which did not meet the definition of "offering" could be circulated in the enacting state without registration. If an "offering" is once made, however, then all of Article 5 applies to the foreign condominium. Any "disposition" of a foreign residential condominium in an enacting state, of course, would require delivery of a public offering statement even in the absence of an agency; see Section 1-102(c). If an agency exists in the enacting state, any disposition in that state would be illegal if the condominium were not registered in the enacting state; see Section 5-102.