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FOR DISCUSSION ONLY

AMEND OR REVISE THE UNIFORM COMMON INTEREST OWNERSHIP ACT AND THE UNIFORM CONDOMINIUM ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

November 13–14, 2020 Committee Video Meeting

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October 30, 2020

AMEND OR REVISE THE UNIFORM COMMON INTEREST OWNERSHIP ACT AND THE UNIFORM CONDOMINIUM ACT

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AMEND OR REVISE THE UNIFORM COMMON INTEREST OWNERSHIP ACT AND THE UNIFORM CONDOMINIUM ACT

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AMEND OR REVISE THE UNIFORM COMMON INTEREST OWNERSHIP ACT AND THE UNIFORM CONDOMINIUM ACT

[ARTICLE] 1

GENERAL PROVISIONS

[PART] 1

SECTION 1-103. DEFINITIONS. In this [act]:

* * *

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

means:

(A) an organization that holds a power pursuant to a delegation described in Section 2-120(a) and is not a unit owners association; or

(B) a unit owners association that serves more than one common interest community or has entered into an arrangement described in Section 1-209(b).

Reporter's Note (10/23)

Jack Burton writes:

Again, this is a great draft. These are minor points in the scheme of the larger picture, but worth fixing.

1-103(22). Reverse paragraphs (A) and (B) and reletter them.

Reason: to avoid "not" in Paragraph A being read to modify paragraph (B) along with the end of paragraph (A). I realize that if the reader stops and reads the text through again and pays close attention to the punctuation, the reader will arrive at the correct meaning. But we can draft the statute to make it absolutely clear for the reader the first time simply by reversing the order of paragraphs (A) and (B).

Reporter's Notes

1. The proposed new definition of "Master Association" moves some of the language from existing Section 2-120(a) (below) and is designed to achieve

consistency of usage throughout section 2-120. The proposed definition also seeks to draw a sharper definitional line between the unit owners association and a master association.

2. Existing Section 2-120(a) defines a master association as the recipient of "powers described in Section 3-102 . . . or other powers." The proposed new definition deletes the "other powers" prong because it is not necessary. Section 3-102 defines "powers" to include all possible powers. See 3-102(a)(15)-(17) ("any other powers conferred by the declaration or bylaws . . . all other powers that may be exercised in this state by organizations of the same type as the association . . . any other powers necessary and proper for the governance and operation of the association").

3. Existing Section 2-120(a) requires a master association to be "a profit or nonprofit corporation [or unincorporated association]." Yet UCIOA allows a unit owners association to be any type of organization authorized by state law. Section 3-101 provides: "The association must be organized as a profit or nonprofit corporation, trust, limited liability company, partnership, [unincorporated association,] or any other form of organization authorized by the law of this state." There does not appear to be a reason to impose greater limits to a master association's choice of entity. The proposed new definition matches the substance of Section 3-101 simply by referring to "an organization." The bracketed term in existing Section 2-120(a) and in Section 3-101− [or unincorporated association] – is not included. It is unnecessary because all states authorize unincorporated associations ("any other form of organization authorized by the law of this state"). ***Question: This act does not presently define "organization." Should we add a definition?***

4. The existing definition of "master association" by its reference to Section 3-101 allows a master association also to serve as a unit owners association. Part (B) of the proposed new definition preserves this ability. A master association may be a unit owners association when a common interest community is linked to a geographical area larger than its boundaries. For example, (1) a master association may serve two neighboring common interest communities, neither of which has a separate unit owners association of its own; or (2) a master association for a large retail center may serve as the only association for a neighboring common interest community. The Part (B) reference to Section 1-209(b) includes this latter type of arrangement. Section 1-209(b) refers to an "arrangement between an association and the owner of real estate that is not part of a common interest community to share the costs of real estate taxes, insurance premiums, services, maintenance or improvements of real estate, or other activities . . . ."

* * *

(34) "Time share" means a right to occupy a unit or any of several units during [five] or

more separated time periods over a period of at least [five] years, including renewal options, whether or not coupled with ~~an~~ a freehold or leasehold estate ~~or interest in a common interest community or a specified portion thereof~~.

Reporter's Note (10/23)

Jack Burton writes:

1-103(43). The act defines time share by borrowing a definition of "time share estate" from a the Model Real Estate Time-Share Act. This act was last revised almost 40 years ago, in 1982. According to the ULC Reference Book the model act has been adopted by only 5 states, Louisiana, Massachusetts, Michigan, Rhode Island, Wisconsin, and Wisconsin. According to the ULC website, the last enactments occurred in 1988. As far as I am aware the ULC does not keep track of how many of those states have retained the borrowed definition. The question is whether we can't find a more widely accepted, and more modern definition of time share to borrow for our act.

Reporter's Notes

1. The Study Committee Report (topic # 12) asks:" Should UCIOA deal with Time shares? Should each time share be fractionalized or treated as a separate unit?" In addition, the Study Committee recommends that the Drafting Committee "consider clarification and amplification of the definitions in UCIOA regarding time shares." See also Study Committee Report pp. 37-38 for discussion of time-share issues. The Drafting Committee at its January 2020 meeting discussed various time-share issues and asked the Reporter to draft language for consideration.

2. The proposed amendment to the definition of "Time share" conforms this definition to the substance of the definition of "time share" in the ULC's Model Real Estate Time-Share Act Section 1-102(14), which reads "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, coupled with a freehold estate or an estate for years in a time-share property or a specified portion thereof." The proposed amendment uses the term "leasehold" instead of "estate for years" because this act generally uses "leasehold" (they mean the same thing).

3. The proposed amendment avoids use of the word "interest," which may create ambiguity – every time-share right, even if only a license, contract right, or membership right, might be an "interest" in a common interest community. The proposed amendment omits the final words of the existing definition "interest in a common interest community or a specified portion thereof" as redundant; the

act's definition of "unit" shows a unit is always a portion of a common interest community.

* * *

Comment

* * *

26. Definition (35), "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~~ the sale of a unit to 5 persons as tenants in common does not create ~~12~~ 5 new units – there are, rather, ~~12~~ 5 owners of the unit. (Under the section on voting (Section ~~2-110~~ 3-110), a majority of the ~~time-share owners of a unit~~ tenants in common are entitled to cast the vote assigned to that unit.)

* * *

27. Definition (36), "Unit owner," 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 must 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 a declarant, so long as he owns units in a common interest community, is the unit owner of any unit created by the declaration, and is therefore subject to all of the obligations imposed on other unit owners, including the obligation to pay common expense assessments. This provision is designed to resolve ambiguities on this point which have arisen under several existing state statutes.

In the special case of a cooperative, the declarant is treated as the owner of a unit or "potential unit" to which allocated interests have been allocated, until that unit is conveyed to another.

The definition includes the buyers of time shares only if they directly hold an estate or long-term leasehold in the unit. Then they own the unit as real property and are treated the same as other multiple owners of a single unit under the [act]. Time-share unit owners may exist in a condominium, a planned community, or in a cooperative.

Example 1: A fee simple owner of a condominium unit records a time-share declaration for her unit and conveys fee simple time-share estates to 12 different persons, each receiving the right to occupy the unit for one month each year. The deeds of conveyance are recorded. The 12 owners have time shares "coupled with an estate" as defined in Section 1-103(34) and they are "unit owners" under Section 1-103(36). Collectively the 12 owners hold the single allocation of votes allocated to their unit.

Section 2-107(a). A majority in interest of the 12 owners determines how to cast their unit's vote unless the declaration for the condominium community or the time-share declaration expressly provides otherwise. Section 3-110(b)(2).

Example 2: A cooperative has 10 members, each holding the right to possess one unit under a proprietary lease. The member of the association who owns Unit 6 records a time-share declaration for her unit. The member agrees to sell time-share leaseholds to 6 different persons, each of whom will receive the right to occupy the unit for two months each year. The sales close, with the member turning in her proprietary lease to the association. The association then cancels this proprietary lease and issues 6 new proprietary leases to the time-share buyers. The 6 buyers have time shares coupled with a leasehold as defined in Section 1-103(34) and they are "unit owners" under Section 1-103(36).

When a unit is devoted to time shares that are classified as personal property (e.g., a license, a membership, or contract rights), then the time-share owners are not unit owners. In this situation, someone else necessarily holds title to the unit. It may be the developer, a trustee, a corporation, an association, or another entity. That person is the unit owner, holding title for the benefit of the time-share owners, and its obligations and rights, including voting rights, are the same as an entity who owns a regular unit for the benefit of shareholders, members, or other individuals.

Reporter's Notes

1. The proposed amendment to Comment 26 replaces the hypothetical of 12 time-share owners in the explanation of the definition of "Unit" with a hypothetical of 5 tenants in common. The amendment moves the time-share hypothetical to the explanation of the definition of "Unit owner" in Comment 27, where it is a better fit. The proposed amendment to Comment 27 also explains that time-share owners are unit owners when they hold title to an estate or leasehold in the unit, but not when their time-share ownership is classified as personal property.

2. In Example 1, the default rule is that a majority of the12 time-share owners decide how to cast their single vote for their unit. This rule may be changed either by the time-share declaration or by the condominium declaration. The time-share unit should be considered a common interest community of its own within the condominium community. Thus, Section 3-110(b)(2) authorizes either declaration to change the "majority rules" default rule.

[PART] 2

APPLICABILITY

SECTION 1-201. APPLICABILITY TO NEW COMMON INTEREST COMMUNITIES.

COMMUNITIES. Except as otherwise provided in this [part], this [act] applies to all common interest communities created within this state after [the effective date of this ~~act]~~ [act]]. The provisions of [insert reference to all present statutes expressly applicable to planned communities, condominiums, cooperatives, or horizontal property regimes] do not apply to common interest communities created after [the effective date of this ~~act]~~ [act]]. Amendments to this [act] apply to all common interest communities created after [the effective date of this ~~act]~~ [act]] or made subject to this [act] by amendment of the declaration of the common interest community**,** regardless of when the amendment to this [act] becomes effective.

Reporter's Note (10/23)

At the September 2020 Zoom annual meeting first reading of the act, a concern from the floor was raised that the last sentence of this sentence may result in an old common interest community inadvertently becoming subject to UCIOA when it makes an amendment to its declaration.

Reporter's Notes

The Study Committee Report (topic #11) identifies the question of retroactive application of UCIOA "as one of the more significant issues on their agenda." The Study Committee observed "there is increasing sentiment that:

> (1) the lack of uniformity within a state regarding which laws apply and which do not has become a complex issue for the legal community;
> (2) it would be a considerable improvement in the administration of law and practice within a state if all communities were, to the maximum extent feasible, subject to the same law; and
> (3) the Study Committee members thought that courts would likely look more favorably on the topic today than once might have been the case."

For possible revisions to sections 1-201 and the other scope provisions contained in article 1, part 2 dealing with "applicability," see reporter's *Memorandum on the Scope of the Uniform Common Interest Ownership Act* (aug. 4, 2020, provided separately).

[ARTICLE] 2

CREATION, ALTERATION, AND

TERMINATION OF COMMON INTEREST COMMUNITIES

* * *

SECTION 2-108. LIMITED COMMON ELEMENTS.

(a) Except for the limited common elements described in Section 2-102(2) and (4), the declaration must specify to which unit or units each limited common element is allocated. An allocation may not be altered without the consent of the unit owners whose units are affected.

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

(c) ~~A~~ All or part of a common element not previously allocated as a limited common element may be so allocated only ~~pursuant to provisions in the declaration made in accordance with Section 2-105(a)(7). The allocations must be made~~ by an ~~amendments~~ amendment to the declaration. A unit owner may request that the executive board amend the declaration to allocate, as a limited common element for the exclusive use of the owner's unit, part of a common element that is immediately adjacent to the owner's unit. The executive board may prescribe in the amendment fees or charges payable by the unit owner to the association in connection with the new allocation. Unless the declaration provides otherwise, the executive board may in its discretion approve the amendment without a vote of the unit owners if the

proposed limited common element does not exceed 50 square feet in area, is generally inaccessible, and is not of practical use to a unit owner other than the unit owner requesting the allocation. Unless the declaration provides otherwise, the executive board may approve any other amendment only if the unit owners vote under Section 3-110, whether or not a quorum is present, to approve the amendment by a vote of at least [67] percent of the votes cast, including [67] percent of the votes cast and allocated to units not owned by the declarant. On approval of the amendment, the association and the owner of the benefitted unit shall execute the amendment.

Question and Possible Alternative for subsection (c): The reason for not requiring a quorum is that associations often find it hard to get a quorum of members to vote, and this may be especially difficult for a matter like this, which usually affects few members. A possible alternative for subsection (c) is to dispense with the regular quorum, but require a minimum number of votes required to be cast.

(d) The association shall record an amendment to the declaration made under this section. The amendment must be indexed in the names of the parties and the association as grantor or grantee, as appropriate. If an amendment changes any information in a plat or plan concerning a limited common element described in Section 2-109(b)(10) other than a common wall between units, the association shall prepare and record a revised plat or plan.

Reporter's Note (10/23)

Observations from our August 2020 informal Zoom session on the act included:

(1) Consider removing the size limitation. Is it necessary? If the space is not useful to anyone other than the requesting unit owner, why require a vote, whether or not the area exceeds 50 feet?
(2) The proposed amendment to this section borrows language from a similar provision, Section 2-112, which requires that the amendment to the declaration include "words of conveyance between the parties." This requirement is not included in Section 2-108. Should it be?
(3) All unit owners affected by conversions of space should get copies of an amendment to the declaration and other documents.

(4) In some states (e.g., Arizona, Colorado) associations commonly transfer rights to outside spaces, including yards, to individual unit owners who agree to undertake responsibility for maintenance, and watering. This saves the association money. Should the Drafting Committee permit such transfers?

At the September 2020 Zoom annual meeting first reading of the act, a concern was raised as to the 50-foot size limit – whether it was too small, and whether a size limit is necessary.

Reporter's Notes

1. The Study Committee Report (topic # 16) asks: "Should the HOA's Board of Directors be allowed to convert common elements into limited common elements benefitting fewer than all the unit owners without a vote of some or all of the unit owners?" Existing subsection (c) allows conversion "only pursuant to provisions in the declaration made in accordance with Section 2-105(a)(7)."

Revised subsection (c) addresses topic # 16. The new language of subsection (c) borrows from the existing text of Section 2-112(b), added to UCOIA as part of the 1994 amendments, which allows a unit owner to incorporate a common element into the owner's unit with a vote of the membership. Under revised subsection (c), a vote of the unit owners is required for the reallocation of a common element as a limited common element unless the area of the common element to be reallocated is small and not generally accessible to other owners. Examples are (1) extending an upstairs balcony of a unit, (2) opening up the attic space over a unit, and (3) creating a storage closet from the airspace under a stairway that adjoins only the unit of the requesting owner.

Subsection (c) preserves a reallocation made pursuant to provisions in the declaration because its procedure calling for a unit owner's request and a vote in some circumstances applies "[u]nless the declaration otherwise provides." The description of real estate in the declaration pursuant to Section 2-105(a)(7) by itself does not displace the approval mechanism in subsection (c). Only a provision in the declaration that provides a different approval mechanism, such as approval by the declarant or a different vote, replaces the procedure of subsection (c).

2. Section 3-102(a)(9) allows the executive board to "grant easements, leases, licenses, and concessions through or over the common elements." A board might avoid the procedures of Section 2-108 and Section 2-112 by granting an easement, lease, or license to a unit owner in lieu of redesignation as a limited common element or the relocation of the boundary. Accordingly, an amendment to Section 3-102(a)(9) is proposed to prohibit this avenue (see Section 3-102 below).

3. The Drafting Committee at its April 2020 meeting made several decisions concerning revised subsection (c), including (i) adding an explicit requirement that executive board's approval of the unit owner's application is necessary to remove possible ambiguity and (ii) changing the vote required to convert a common element to a limited common element from 67% of all votes to 67% of the votes cast. Revised subsection (c) allows a vote by any of the procedures authorized under Section 3-110. The board may schedule the vote at the next regular unit owners' meeting, call a special meeting, or call for a vote without a meeting.

SECTION 2-112. RELOCATION OF UNIT BOUNDARIES.

(a) ~~Subject to the provisions of the declaration and other provisions of law, the~~ The boundaries between adjoining units may be relocated only by an amendment to the declaration ~~up~~on application to the ~~association~~ executive board 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 reallocation~~s~~. Unless ~~the executive board determines, within 30 days, that the reallocations are unreasonable,~~ the declaration provides otherwise, the association shall prepare an amendment that identifies the units involved and states the reallocation~~s~~. unless the executive board determines, not later than 30 days after receipt of the application, that the reallocation is unreasonable. The amendment must be executed by those unit owners~~, contain words of conveyance between them, and, on recordation, be indexed in the name of the grantor and the grantee, and [in the grantee's index] in the name of the association~~.

~~(b) Subject to the provisions of the declaration and other provisions of law, boundaries between units and common elements may be relocated to incorporate common elements within a unit by an amendment to the declaration upon application to the association by the owner of the unit who proposes to relocate a boundary. Unless the declaration provides otherwise, the amendment may be approved only if persons entitled to cast at least [67] percent of the votes in the association, including [67] percent of the votes allocated to units not owned by the declarant,~~

~~agree to the action. The amendment may describe any fees or charges payable by the owner of the affected unit in connection with the boundary relocation and the fees and charges are assets of the association. The amendment must be executed by the unit owner of the unit whose boundary is being relocated and by the association, contain words of conveyance between them, and on recordation be indexed in the name of the unit owner and the association as grantor or grantee, as appropriate.~~

(b) The boundary of a unit may be relocated to incorporate all or part of a common element within the unit only by an amendment to the declaration on application to the executive board by the owner of the unit. The executive board may prescribe in the amendment fees or charges payable by the unit owner to the association in connection with the relocation. Unless the declaration provides otherwise, the executive board may approve the amendment only if the unit owners vote to approve the amendment by a vote under Section 3-110, whether or not a quorum is present, of at least [67] percent of the votes cast, including [67] percent of the votes cast and allocated to units not owned by the declarant. On approval of the amendment, the association and the owner of the benefitted unit shall execute the amendment.

(c) An amendment to the declaration under this section must contain words of conveyance between the parties. The association shall record an amendment made under this section. The amendment must be indexed in the name of the parties and the association as grantor or grantee, as appropriate. ~~The association (i) in~~ In a condominium or planned community, the association shall prepare and record plats or plans necessary to show the altered boundaries of affected units, and their dimensions and identifying numbers.~~, and (ii) in~~ In a cooperative, the association shall prepare and record amendments to the declaration, including any plans necessary to show or describe the altered boundaries of affected units, and their

dimensions and identifying numbers.

Reporter's Notes

1. The proposed revisions to this section are prompted by the Drafting Committee's work on a related provision, Section 2-108, dealing with allocations and reallocations of limited common elements (see Section 2-108 above). The Drafting Committee at its April 2020 meeting discussed the proposed addition to Section 2-108 above and its source, Section 2-112(b), and discerned possible ambiguity as to whether the executive board's approval of the unit owner's application is necessary. This proposed amendment resolves the ambiguity by requiring the executive board's approval, regardless of a vote of the unit owners. Other proposed amendments conform all subsections of this Section to the style and organization of Section 2-108.

2. Existing subsections (a) and (b) of Section 2-112 both qualify the procedures for relocating boundaries with the introductory phrase "Subject to the provisions of the declaration and other provisions of law". The phrase raises several questions. (1) It seems odd to say that provisions of the declaration may prevent amending the declaration. But this is apparently the intent, according to existing Comment 1 (quoted below). Why shouldn't unit owners always be allowed to amend the declaration to get rid of any content they don't like? Suppose the declaration simply says, "Boundaries between units cannot be relocated." Why can't the unit owners just vote to amend the declaration under section 2-117 both to delete this sentence and simultaneously to relocate certain boundaries? (2) What "other provisions of law" limit use of these relocation procedures? Why shouldn't this section override other provisions of state law?

The proposed revisions to this section replace the phrase "Subject to the provisions of the declaration and other provisions of law" with the phrase "Unless the declaration provides otherwise" (a phrase used more frequently in this act), inserted in places to indicate which of this section's rules are default rules capable of overriding in the declaration.

Comment

1. This section changes the effect of most current declarations, 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~~ the relocation of boundaries is allowed notwithstanding restrictions in the declaration. The declaration, however, may specify different procedures for the association's approval of boundary relocations.

* * *

~~**Alternative A**~~

~~**[SECTION 2-114. 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 any plats and plans or, in a cooperative, to any representation in the public offering statement.]~~

~~**Alternative B**~~

~~**[SECTION 2-114. MONUMENTS AS BOUNDARIES.** The existing physical boundaries of a unit or the physical boundaries of a unit reconstructed in substantial accordance with the description contained in the original declaration are its legal boundaries, rather than the boundaries derived from the description contained in the original declaration, regardless of vertical or lateral movement of the building or minor variance between those boundaries and the boundaries derived from the description contained in the original declaration. This section does not relieve a unit owner of liability in case of his willful misconduct or relieve a declarant or any other person of liability for failure to adhere to any plats and plans or, in a cooperative, to any representation in the public offering statement.]~~

~~**End of Alternatives**~~

SECTION 2-114. BUILDING ENCROACHMENTS.

Alternative A

(a) Except as otherwise provided in subsection (b) or (c), if the construction, reconstruction, or alteration of a building or the vertical or lateral movement of a building results in an encroachment due to the divergence between the existing physical boundaries of a unit and the boundaries described in the declaration pursuant to Section 2-105(a)(5), an easement for the

encroachment exists between adjacent units and between units and adjacent common areas.

Alternative B

(a) Except as otherwise provided in subsection (b) or (c), if the construction, reconstruction, or alteration of a building or the vertical or lateral movement of a building results in an encroachment due to the divergence between the existing physical boundaries of a unit and the boundaries described in the declaration pursuant to Section 2-105(a)(5), the existing physical boundaries of the unit are its legal boundaries, rather than the boundaries described in the declaration.

End of Alternatives

(b) Subsection (a) does not apply if the encroachment:

(1) extends beyond [five] feet as measured from any point on the common boundary along a line perpendicular to the boundary; or

(2) results from willful misconduct of the unit owner that claims a benefit under subsection (a).

(c) This section does not relieve a declarant of liability for failure to adhere to any plat or plan or, in a cooperative, to any representation in the public offering statement.

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.

Reporter's Notes

1. The Study Committee Report (topic #4) calls for a consideration of the topic of shifting unit boundaries addressed by Section 2-114. Commissioner Cardi prepared an extensive analysis of the topic, identifying potential problems and raising a number of questions. His analysis is reproduced in the Study Committee Report, beginning at p. 45. The Drafting Committee at its January 2020 meeting briefly discussed this topic and asked the Reporter to study the matter further and report back at our April 2020 meeting.

The Reporter believes that Commissioner Cardi has identified substantial problems and recommends that the committee consider amendments to the statutory text and the comments, guided by a discussion of Commissioner Cardi's materials. Both Section 2-114 Alternatives leave a number of points open and unsettled and leave much to the imagination. The basic idea of Section 2-114 is clear and simple: Most encroachments ought to be cleared up by the creation of an easement (Alternative A) or by an adjustment of the legal boundary to conform to the space occupied by the encroachment (Alternative B). The problems and questions arise at the next level and include:

- What does "most" mean? Which encroachments should not be tolerated, leaving the encroached-upon owner to pursue the normal equitable and legal remedies available for trespass?
- When a unit owner acquires an easement for encroachment or more space due to a boundary adjustment, should the unit owner ever have to pay compensation to the "victim"?
- What does "willful misconduct" mean? Is this the same as proof that a unit owner knowingly trespassed when making the encroachment?
- What is the relevance of deviations from plats and plans contained in the declaration? Who are the "other persons" described in both Alternatives who must comply with plats and plans? Is the unit owner an "other person"?
- What is "substantial accordance" with the original boundaries or a "minor variance" from the original boundaries? Why does this matter for Alternative B but not for Alternative A?
- Is there a difference between encroachments arising from the declarant's original construction of improvements and subsequent changes? (See Commissioner Cardi's condominium hypothetical and stone wall hypothetical.)
- Is there a difference between encroachments on units and encroachments on common areas?

The Comment asserts that "the practical effect of both [Alternatives] is the same." This may be true in the general sense that awarding an easement for encroaching improvements versus transferring fee title to the airspace occupied by encroaching improvements does not make a significant difference for either party. But if the Comment's assertion means that actual cases should be resolved the same way

under both Alternatives, the Reporter doubts this is accurate (see bullet points above and Commissioner Cardi's extensive analysis).

2. The proposed revisions to Section 2-114 address many of the concerns raised by Commissioner Cardi while preserving the two primary alternatives of the existing text. New proposed subsection (a) limits the scope of this section to encroachments between units and between units and common elements stemming from the construction and subsequent changes to buildings and their component parts. It does not address other encroachments and boundary problems, such as misplaced fences and misplaced monuments.

SECTION 2-118. TERMINATION OF COMMON INTEREST COMMUNITY.

(a) Except for a taking of all the units by eminent domain, foreclosure against an entire cooperative of a security interest that has priority over the declaration, or in the circumstances described in Section 2-124, a common interest community may be terminated only ~~by agreement of unit owners of units to which~~ if the unit owners vote under Section 3-110 to approve the termination by a vote of at least 80 percent of the votes in the association, ~~are allocated, or any larger percentage the declaration specifies, and with any other approvals required by the declaration~~ including 80 percent of the votes allocated to units not owned by the declarant. The declaration may require a larger percentage of total votes in the association for approval, but termination still requires approval by at least 80 percent of the votes allocated to units not owned by the declarant. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential uses. The declaration may require other approvals for termination.

Question: Do we need the last sentence of the proposed revision to subsection (a), which restates deleted text from the previous sentence and allows the declaration to require other approvals for termination? For example, if the declaration requires the approval of mortgage lenders, this section (below) adequately protects their interests by granting them priority claims on the proceeds of sale after termination. If the declaration gives the declarant a veto power, why shouldn't the owners' vote under this section override the veto? A declarant owning more than 20% of the units will still have a veto due to voting rules of this section.

Reporter's Note (10/23)

At our August 2020 informal Zoom session on the act, the comment was made that if we retain this sentence, we mean approvals by persons other than unit owners and changes to the required vote percentages are not allowed.

(b) An agreement to terminate must be evidenced by the execution of a termination agreement, or ~~ratifications thereof~~ ratification of the agreement, 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 is void unless it is recorded before that date. ~~A~~ The termination agreement and ~~all ratifications thereof~~ any ratification of the agreement must be recorded in every [county] in which a portion of the common interest community is situated and is effective only ~~upon~~ on recordation.

Reporter's Note (10/23)

At the September 2020 Zoom annual meeting first reading of the act, a concern was raised that this subsection requires recording in county offices, but Rhode Island and several other states have municipal recording offices. This is why "county" is in brackets.

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

Reporter's Note (10/23)

At the September 2020 Zoom annual meeting first reading of the act, Howard Swibel suggested changing "must be sold" to "is to be sold" in the first sentence of this subsection.

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

Note: The proposed amendment to subsection (c) and the deletion of subsection (d) raise an important issue of policy. The existing text allows termination and sale by an 80% vote only for communities having only multi-story buildings (i.e., stacked units with "horizontal boundaries"). Other communities, including a subdivision with detached single-family homes, may have a termination with sale of all the real estate (including units) only by unanimous vote. The proposed amendment would alter this, allowing termination and sale by 80% vote for all communities, regardless of building type.

~~(c)~~ (d) The association, on behalf of the unit owners, may contract for the sale of real estate in a common interest community, but the contract is not binding on the unit owners until approved pursuant to subsections (a) and (b). If any real estate is to be sold following termination~~,~~:

(1) title to ~~that~~ the real estate~~, upon termination, vests in the association~~ to be sold and not already owned by the association vests on termination in the association as trustee for the holders of all interests in the units~~.~~; and

(2) the termination agreement must state that title to the units is conveyed to the association as trustee at the time of termination.

Question: Do we need paragraph (2)? The purpose is to make the transfer of real estate from the unit owners to the association as trustee appear in a document recorded in the public records. Subsection (b) above requires recordation of the termination statement. The transfer, however, happens automatically under this subsection (d), with no need for a deed or recording. Adding the requirement raises the problem of what happens if the termination agreement omits the required statement. Perhaps paragraph (2) is only useful if we determine that title insurance companies and title attorneys perceive a need for this.

Reporter's Note (10/23)

Barry Hawkins writes:

> I think paragraph 2 is not needed as the result follows clearly from what is now paragraph 1 which ought to be consolidated with the last sentence of (d). To state it twice is both redundant and may lead to unintended confusion as readers try to think out why it had to be stated again in 2 having already been dealt with in paragraph 1.

(e) ~~Thereafter, the~~ The association has all powers necessary and appropriate to effect ~~the~~ a sale approved under subsections (a) and (b). Until the sale ~~has been~~ is 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 accordance with subsections (h), (i), and (j). Unless otherwise specified in the termination agreement, as long as the association holds title to the real estate, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit. During the period of ~~that~~ occupancy, each unit owner and the unit owner's successors in interest remain liable for all assessments and other obligations imposed on unit owners by this [act] or the declaration.

(f) In a condominium or planned community, if the real estate constituting the common interest community is not to be sold following termination, title to the common elements ~~and, in a common interest community containing only units having horizontal boundaries described in the declaration, title to all the real estate in the common interest community,~~ vests in the unit owners ~~upon~~ on termination, as tenants in common in proportion to their respective interests ~~as provided in~~ under subsection (j)~~, and liens on the units shift accordingly~~. Unit owners continue to hold individual titles to their respective units. ~~While the tenancy in common exists, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the~~

~~portion of the real estate that formerly constituted the unit~~.

Reporter's Note (10/23)

At the September 2020 Zoom annual meeting first reading of the act, Howard Swibel suggested changing "is not to be sold" to "is sold" in the first sentence of this subsection.

Note: The proposed amendments to subsection (c) and subsection (d), in the context of sale after termination, eliminate the different treatment for communities with units having horizontal boundaries and communities with units with non-horizontal boundaries. Should we change this subsection (f) dealing with title to real estate not being sold? Possibilities include: (1) The above edit to this subsection converts only common elements to a tenancy in common for a planned community, leaving all units titled in the unit owners. (In a condominium the unit owners generally already own the common elements as tenants in common.) (2) Make no change. (3) Convert all common elements and units to a tenancy in common. (4) Defer to the termination agreement; make no change to title to real estate that is not to be sold unless the termination agreement has a provision changing title.

(g) Following termination of the common interest community, the proceeds of 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.

(h) Following termination of a condominium or planned community, 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.

(i) In a cooperative, the declaration may provide that all creditors of the association have priority over any interests of unit owners and creditors of unit owners. In that event, following termination, creditors of the association holding liens on the cooperative 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 their liens in the same manner as any lien holder~~,~~. ~~and any other creditor~~ All other creditors of the association ~~is~~ are to be treated as if ~~the creditor~~ they had perfected ~~a lien against the cooperative~~ liens on the cooperative immediately before termination. Unless the declaration provides that all creditors of the association have that priority:

(1) the lien of each creditor of the association which was perfected against the association before termination becomes, upon termination, a lien against each unit owner's interest in the unit as of the date the lien was perfected;

(2) any other creditor of the association is to be treated upon termination as if the creditor had perfected a lien against each unit owner's interest immediately before termination;

(3) the amount of the lien of an association's creditor described in paragraphs (1) and (2) against each of the unit owners' interest must be proportionate to the ratio which each unit's common expense liability bears to the common expense liability of all of the units;

(4) the lien of each creditor of each unit owner which was perfected before termination continues as a lien against that unit owner's unit as of the date the lien was perfected;

(5) the assets of the association must be distributed to all unit owners and all lien holders as their interests may appear in the order described above; and

(6) creditors of the association are not entitled to payment from any unit owner in excess of the amount of the creditor's lien against that unit owner's interest.

(j) The ~~respective interests of unit owners referred to in~~ following rules apply to subsections (e), (f), (g), (h), and (i)~~ are as follows~~:

(1) Except as otherwise provided in paragraph (2), the respective interests of unit owners are the fair market values of their units, allocated interests, and any limited common

elements immediately before the termination, as determined by ~~one or more independent appraisers selected by the association. The decision of the independent appraisers must be distributed to the unit owners and becomes~~ appraisal. The association shall select one or more independent appraisers and send the appraisal to the unit owners. The appraisal is final unless

(i) disapproved within 30 days after distribution by unit owners of units to which 25 percent of the votes in the association are allocated~~.~~ or (ii) one or more unit owners file written objection to the appraisal not later than 20 days after receipt of the appraisal. A unit owner that objects may designate an appraiser to represent the owner and make an appraisal of the owner's unit. If the association's appraisal and the unit owner's appraisal differ as to the fair market value of the owner's interest, the appraisers mutually shall designate a third appraiser. A panel consisting of an appraiser selected by the association, the unit owner's appraiser, and the designated third appraiser shall determine, by majority vote, the value of the unit owner's interest. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the appraised fair market value of that unit owner's ~~unit and its allocated interests~~ interest by the total appraised fair market values of all ~~the units and their allocated~~ unit owners' interests.

Note: The proposed amendment to paragraph (1), conferring a right to unit owners to obtain their own appraisal if they believe that the association's appraiser has undervalued their unit, is a significant change in policy. The text is based on an Illinois statute (see Reporter's Note 2 below), which Illinois practitioners report has worked well, without imposing significant impediments to the negotiation of sales of condominium projects upon termination.

(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:

(A) in a condominium, their respective common element interests

immediately before the termination;

(B) in a cooperative, their respective ownership interests immediately before the termination; and

(C) in a planned community, their respective common expense liabilities immediately before the termination.

(k) In a condominium or planned community, except as otherwise provided in subsection (l), foreclosure or enforcement of a lien or encumbrance against the entire common interest community does not terminate, of itself, the common interest community, and foreclosure or enforcement of a lien or encumbrance against a portion of the common interest community, other than withdrawable real estate, does not withdraw that portion from the common interest community. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate, or against common elements that have been subjected to a security interest by the association under Section 3-112, does not withdraw, of itself, that real estate from the common interest community, but the person taking title thereto may require from the association, upon request, an amendment excluding the real estate from the common interest community.

(*l*) In a condominium or planned community, if a lien or encumbrance against a portion of the real estate comprising the common interest community has priority over the declaration and the lien or encumbrance has not been partially released, the parties foreclosing the lien or encumbrance, upon foreclosure, may record an instrument excluding the real estate subject to that lien or encumbrance from the common interest community.

Reporter's Note (10/23)

1. At our August 2020 informal Zoom session on the act, the suggestion was made that the Drafting Committee might consider adding language to

authorize partial terminations of communities and that Florida's condominium act might provide a useful starting point. Fla. Stat. § 718.117. After this Note are provisions based on the Florida act, modified to take account of the scope and terminology of UCIOA. If we add a partial termination provision, some of the existing subsections (a)-(*l*) above may require modification; but for the sake of our initial discussion, none are included in this draft.

2. Section 718.117 of the Florida condominium act, like UCIOA § 2-118, originally addressed only total (regular) terminations. In 2011, the Florida legislature amended § 718.117 to add partial termination provisions, which were further amended in 2015. Florida applies the same voting and approval rules to total and partial terminations; unit owners have the same voting rights whether their unit is designated for termination or continuation. For useful background, see Peter M. Dunbar, et al., *Partial Termination, Good Things Can Happen to Bad Projects*, 87 Fla. B.J. 47 (2013).

(m) A common interest community may be terminated pursuant to subsection (a) for a portion of the real estate in a common interest community. Any partial termination is subject to the following requirements:

(1) The termination agreement described in subsection (b) must identify the units and common elements that survive the partial termination and provide that such units and common elements remain in the common interest community.

(2) Title to the surviving units and common elements that remain part of the common interest community specified in the termination agreement remain vested in the ownership shown in the public records and do not vest in the association.

(3) The termination agreement may require separate appraisal for the common elements. In the absence of separate appraisal, it is presumed that the common elements have no independent value but rather that their value is incorporated into the appraisal of the units, including their allocated interests. In a partial termination, the aggregate values of the units and common elements that are being terminated must be separately determined, and the termination agreement must specify the allocation of the proceeds of sale for the units and common elements being terminated.

(4) Liens on surviving units and surviving common elements continue, and liens on units being terminated no longer extend to any surviving common elements.

(5) The unit owners association may continue as the association for the units that remain subject to the declaration.

(6) An amendment to the declaration or an amended and restated declaration must be recorded simultaneously with the recordation of the termination agreement under subsection (b). Approval of the amendment under Section 2-117 is not required if the ownership share of the common elements of each surviving unit in the common interest community remains in the same proportion to the surviving units as it was before the partial termination.

Reporter's Note (10/23)

1. At our August 2020 informal Zoom session on the act, a question from the floor asked whether any of this section applies or should apply to a governmental condemnation of a common interest community.

2. UCIOA § 1-107, *Eminent Domain*, provides some rules, but appears to focus only on the taking of a single unit or part of a unit. Possibly § 1-107 does not apply to a taking of all or substantially all of a community.

Reporter's Notes

1. The Study Committee Report (topic # 5) recommends: "A drafting committee should consider whether amendments are needed to UCIOA § 2-118 regarding termination of a common interest community." A variety of issues are identified. The first issue concerns the existing text in Section 2-118(a), which allows termination with a vote of at least 80 percent of the declared units. See Study Committee Report pp. 16-17. Section 2-118(a) allows a declarant who has sold less than 20 percent of the units to terminate the project without the approval of any of the buyers of units. This may create substantial hardships for buyers. One problem is that termination results in a tenancy in common, which may lead to partition by sale at a price that does not fully compensate the buyers who are forced to sell their units.

The Drafting Committee discussed this issue at its January 2020 meeting, with the consensus that the Reporter prepare language adding a requirement of approval by the owners of 80 percent of the sold units. The amendment to subsection (a) modifies the voting procedure by requiring the approval of 80

percent of the sold units in addition to 80 percent of all units. This adopts an existing voting procedure used in Section 2-117(g) for creating new development rights or extending the time limit for the exercise of development rights. At Its April 2020 meeting the Drafting Committee discussed what should happen if the declaration specifies a supermajority vote higher than 80%. The Committee decided to apply the 80% floor for votes from non-declarant units

2. The second issue identified by the Study Committee is whether separate provisions are advisable to deal with condominium "deconversions" that have taken place frequently in recent years. See Study Committee Report pp. 17-18. The present approval requirement for a termination and a sale of all of the common interest community turns on whether all of the units have horizontal boundaries (the typical condominium with stacked units). If there are only units with horizontal boundaries, Section 2-118(c) authorizes a sale with an 80-percent supermajority vote of unit owners. But if the community consists of units without horizontal boundaries (or is a hybrid with both stacked and non-stacked units), a unanimous vote of the unit owners is required under Section 2-118(d). This section might be simplified by requiring the same vote for all condominiums (or planned communities) regardless of unit configuration. The Illinois Condominium Property Act takes this approach for condominiums. 765 ILCS 605/15 makes a 75-percent supermajority vote binding on all condominium unit owners.

At its April 2020 meeting the Drafting Committee discussed this issue and by a vote decided to eliminate subsection (d) and allow termination with the sale of units by the same 80-percent supermajority vote, regardless of the presence of horizontal, stacked, or non-stacked units. The public offering statement must disclose this possibility because it is a major change from the expectations of purchasers in typical single-family subdivisions with detached homes. The declaration may change this default rule; for example, the declaration may provide that no unit shall be sold without the consent of its owner.

Another issue stemming from condominium deconversions is the proper division of sales proceeds among unit owners. Presumably, few problems should result when all unit owners have approved a sale, but when the vote for sale is not unanimous, an objecting unit owner might not receive adequate compensation. After the payment of liens, unit owners are to receive proportions of sales proceeds based on "the fair market values of their units . . . immediately before termination." Section 2-118(j)(1). The executive board is in control of the process. Section 2-118(j)(1) requires the association to obtain one or more independent appraisals, which become final unless disapproved by a vote of at least 25 percent of the unit owners. The Illinois act, like several other condominium statutes, affords greater rights to dissident unit owners. 765 ILCS 605/15 guarantees a unit owner not voting in favor of sale a share of the proceeds equal to the greater of (i) the owner's mortgage debt secured by the unit or (ii) a "fair appraisal," determined in the case of disagreement by a panel of three expert appraisers (one appointed by the unit owner, one by the prospective purchaser, and one by the

first two appraisers).

At its April 2020 meeting the Drafting Committee discussed this issue and asked the Reporter to draft language allowing an objecting unit owner to obtain an appraisal with a mechanism similar to the one provided by the Illinois legislation. The proposed revision to paragraph (1) of Section 2-118(i) [renumbered from existing Section 2-118(j)] is based on the Illinois statute. Unlike the Illinois statute, (1) the revision does not increase the valuation of the objecting unit owner to the amount of bona fide mortgage debt on the unit when that debt exceeds the unit's appraised value and (2) the revision does not limit the right to object to unit owners who voted against approval of the termination agreement.

3. The third issue identified by the Study Committee concerns what happens to title to real property at the time of termination. See Study Committee Report p. 18. If termination is to result in a sale, the existing text provides that title to the real estate vests in the association as trustee. Section 2-118(e) But the association already has title to the real estate in a cooperative and title to common areas in a planned community. The amendment to subsection (e) (renumbered as (d)) clarifies the meaning by stating that title vests only for the real estate not already owned by the association. In addition, the amendment requires that the termination agreement recite the fact that title to the units passes to the association. This makes the transfer of record because the termination agreement is recorded in the public land records. Section 2-118(b).

Comment

* * *

8. Subsection (f) contemplates the possibility that a planned community or condominium might be terminated but the real estate not sold.

~~Subsections (b) and (g), the parallel provisions to Section 2-117(b) and (d) of MRECA, contemplate the same possibility in the case of cooperatives.~~ Termination without sale is not likely to be the usual case, but might occur if the unit owners plan ~~conversion~~ to ~~another~~ form ~~of~~ a new common interest community.~~, for example, conversion from a cooperative to a condominium. In the case of a cooperative, title to the real estate upon termination would remain in the name of the association as trustee for the unit owners; *see* subsection (g).~~ In a condominium or planned community, title to the common elements following termination vests in the unit owners as tenants in common if that real estate is not to be sold.~~, *see* subsection (f), but until a sale occurs vests in the association if the real estate is to be sold; *see* subsection (e). In the case of a condominium or planned community which contains only units with horizontal boundaries, these title rules also apply to all the units. (*See* subsection (f).) In the remaining case, *i.e.*, the case where there are some units with horizontal boundaries and some without horizontal boundaries, the Act provides, in subsection (f), that unit owners become tenants in common of the common elements, but~~ The unit owners continue to hold individual titles to their units. Therefore, in a condominium or planned community with units located in ~~both a high rise~~ in a

high-rise building, ~~and in single story structures, the unit owners in the high rise building will hold individual title to their unit upon termination, and~~ either the declaration or the termination agreement should address the needs for easements of support and access for the ~~high rise~~ high-rise units over the real estate which all the unit owners will own as tenants in common. Undoubtedly, the unit owners will immediately reconstitute themselves as some form of common interest community.

9. Subsection (f) does not cover the possibility that a cooperative might be terminated but the real estate not sold. While this is not likely to be the usual case, termination without sale might occur if the cooperative unit owners plan conversion to another form of common interest community, such as a condominium. Since, after termination of a cooperative title to the real estate remains in the association, it could record a new declaration corresponding to the new form of common interest community adopted, convey the units to the former unit holders, and then itself continue as the new common interest community's association.

* * *

[RENUMBER SUBSEQUENT COMMENTS]

Reporter's Notes

1. The Study Committee Report (topic #5) recommends a review of the Section 2-118 Comments. Above are proposed amendments to existing Comment 8, which splits the content into two Comments, a revised Comment 8 and a new Comment 9. The amendments are intended to clean up two points in existing Comment 8. First, existing Comment focuses on subsection (f), which addresses only the termination without sale of condominiums and planned communities; yet the Comment discusses the termination of cooperatives. Second, language in the Comment discusses sales and includes a cross-reference to sales proceeds in subsection (g). The amendments limit Comment 8 to discussion of the operation of subsection (f) and add a new Comment 9 to address the termination of cooperatives without a sale of the real estate.

2. As indicated following the text of subsection (f), the Drafting Committee will consider whether the scope of subsection (f) should be condominiums and planned communities (as in existing subsection (f)) or only the latter. If the committee selects the latter, further edits to this Comment are needed.

SECTION 2-120. MASTER ASSOCIATIONS.

(a) ~~If the declaration 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] that exercises those or other powers on behalf of one or more common interest~~

~~communities or for the benefit of the unit owners of one or more common interest communities,~~ ~~all~~ The declaration may delegate any power described in Section 3-102 to a master association. Unless the declaration provides otherwise, the executive board of a unit owners association may delegate any additional power described in Section 3-102 to a master association. A delegation of the board is subject to approval by the unit owners. The executive board shall make approval of the delegation an item on the agenda at the first meeting of the unit owners association after the delegation. A delegation of powers to a master association is not effective before acceptance by the master association. All provisions of this [act] applicable to a unit owners~~'~~ associations~~s~~ apply to ~~any such corporation [or unincorporated~~ a master association~~]~~, except as modified by this section.

Reporter's Note (10/23)

David Ramsey writes to suggest that in addition to the declaration, the bylaws may delegate powers to a master association, and that the bylaws may restrict a board delegation.

(b) The unit owners at any meeting may approve or disapprove any delegation of powers to a master association by a majority of the votes cast at the meeting. Other law determines the effect of disapproval on the rights and obligations of parties under an existing contract between a unit owners association and a master association.

Reporter's Note (10/23)

David Ramsey writes:

Do we mean any meeting of the members? Do we mean any meeting of the board? I assume the former and, if so, perhaps we need to say that. Further, it shouldn't be subject to a vote if a motion is made at the meeting, but without prior notice that the matter will be on the agenda. Otherwise, a meeting with a bare quorum could vote to revoke a delegation, when the majority of the members would be opposed to revoking the delegation.

Note: The proposed amendment to subsection (a) and new subsection (b) allow

the board to delegate powers to a master association, subject to the right of unit owners to terminate or revoke the delegation by majority vote. See Reporter's Note 1 below. Discussion at the Drafting Committee's April 2020 meeting revealed complex issues stemming from the Committee's tentative decision to allow a board-approved delegation to become effective immediately, subject to termination [revocation] by the unit owners. Before the unit owners meet, the board and the master association may have entered into a long-term agreement that does not allow prompt termination by the association. An alternative approach is to make the delegation could become effective only when and if approved by the unit owners. Also, note that subsection (b) as drafted allows termination for any delegation to a master termination, not only for board-approved delegations reviewed at the first unit owners' meeting after the delegation. We may want to consider whether to add more express limitations on power to terminate.

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

~~(c)~~ (d) ~~If the declaration of any common interest community provides that the executive board may delegate certain powers to a master association, the~~ The members of the executive board of a unit owners association have no liability for the acts or omissions of ~~the~~ a master association with respect to ~~those powers following delegation~~ a power delegated to the master association.

~~(d)~~ (e) 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 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)~~ (f) Even if a master association is also ~~an~~ a unit owners association ~~described in Section 3-101~~, the certificate of incorporation or other instrument creating the master association

and the declaration of each common interest community, 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 common interest communities subject to the master association may elect all members of the master association's executive board.

(2) All members of the executive boards of all common interest communities subject to the master association may elect all members of the master association's executive board.

Reporter's Note (10/23)

David Ramsey writes:

The potential problem with this is that a crafty developer could create a number of common interest communities, but if it wanted to control the master board for an extended period of time, it could have a board made up, say, of 50 members, while other CIC boards are 3 to 5 members each, and thereby control the master association longer than it should.

(3) All unit owners of each common interest community subject to the master association may elect specified members of the master association's executive board.

Reporter's Note (10/23)

David Ramsey writes:

This can and will be subject to abuse by developers. A developer could set up a master association with a 9-member board, where three members are electable by the unit owners in the first 5 CICs and 6 members are electable by the unit owners in the last CIC. There has to be some proportionality and at some point (e.g. after 75% of the units in the full project have been conveyed) only non-developer unit owners can vote for master association board members.

(4) All members of the executive board of each common interest community subject to the master association may elect specified members of the master association's executive board.

Reporter's Notes

1. The Study Committee Report (topic # 6) asks: "To what extent may the unit owners association in a common interest community delegate any of its statutory authority to a Master Association for a larger planned community of which that HOA is a part?" The Drafting Committee at its January 2020 meeting voted in favor of an amendment to allow the executive board to delegate powers to a master association, subject to the right of unit owners to disapprove of the delegation by majority vote.

The proposed amendment to subsection (a) clearly differentiates between provisions in the declaration that establish and assign powers to a master association and a subsequent decision of the executive board of the common interest community to delegate powers to a master association.

Revised subsection (a) and new subsection (b) reflect a compromise. A subsequent decision to delegate powers to a master association often has a substantial impact on unit owners. The act might allow a delegation only if authorized in the declaration or by a subsequent vote of the unit owners. Instead, subsection (a) allows the executive board to delegate powers to a master association on its own initiative, subject to the ability of the unit owners to revoke the delegation at the next unit owners meeting, whether a regular or special meeting.

2. At its January 2020 meeting the consensus of the Drafting Committee was to add a provision stating that an assignment to a master association is effective only if accepted by the master association. The new sentence added to subsection (a) makes it clear what was implicit: A transfer or delegation of powers to a master association becomes effective only if accepted by the master association. In most cases, the master association's agreement is manifested in writing.

3. The amendment to original subsection (c) [renumbered subsection (d)] makes it clear that the board members of the common interest community are insulated from liability for the acts and omissions of the master association after the transfer of powers, regardless of how the master association acquired the powers.

SECTION 2-125. ADVERSE POSSESSION AND PRESCRIPTIVE EASEMENTS. A unit owner or a person claiming through a unit owner may not acquire title by adverse possession or an easement by prescription to a common element in derogation of the title of any other unit owner or the association.

Reporter's Note (10/23)

At the August 2020 informal Zoom session and the September 2020 Zoom annual meeting first reading of the act, questions were raised as to whether we need the "in derogation of the title of any other unit owner or the association" qualification; and if so, whether other language might be better? At the August meeting, an observation was made that this section may propose a good rule, but it is not highly important because unit owners who raise adverse possession claims to common elements rarely win their cases.

Reporter's Notes

1. The Study Committee Report (topic # 2) recommends: "A drafting committee should consider drafting a statute describing the circumstances when the enacting State's substantive law of adverse possession should apply in a common interest community. The Drafting Committee at its January 2020 meeting discussed the issues and considered the Reporter's Memorandum on Adverse Possession, dated January 24, 2020, which includes four possible statutory approaches to deal with adverse possession. The Drafting Committee voted in favor of Approach 2, which immunizes common elements from loss by adverse possession by claims of unit owners. The Committee also agreed that the immunity should extend to prescriptive easements.

The Drafting Committee at its April 2020 meeting discussed this new section and decided to add the phrase "or a person claiming through a unit owner" to protect common elements from claims made by tenants of unit owners or similar persons.

2. The proposed new Section 2-125 protects all the common elements from loss of title by claims of adverse possession or prescription by a limited immunity. This immunity is limited to real estate defined as "common elements" in UCOIA. This Section precludes only a claim made by a unit owner. When the unit owners own the common elements in tenancy in common, this provision modifies existing law by not allowing a unit owner to acquire adverse possession by proving an "ouster" of the other cotenants. When the association owns the common elements, this provision modifies existing law, which in most states lacks reported law clearly delineating the requirements for a person to acquire adverse possession title to property owned by an association of which the person is a member.

This section adopts Approach 2 described in the Reporter's Memorandum on Adverse Possession (Jan. 24, 2020). This section provides a more limited immunity than Approach 1 described in the Reporter's Memorandum, which would have provided immunity from claims against the common elements made by any person, including unit owners and neighboring property owners.

3. The new section leaves intact the enacting State's substantive law of adverse possession to govern claims made by the association or the unit owners collectively as tenants in common. Claims of this type may be asserted when the common elements are subject to a title defect: a person other than association or the unit owners owns or has a potential claim to a common element. An adverse possession claim of this type protects the unit owners' interest in the common elements, rather than jeopardizing the unit owners' expectations of ownership and use of the common elements.

4. The language in this section is based on Minn. Stat. § 508.02, which provides: "No title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession, but the common law doctrine of practical location of boundaries applies to registered land whenever registered." Like the Minnesota statute, this section refers to both "adverse possession" and "prescription." A Minnesota court has interpreted the statutory reference to "prescription" to preclude the creation of a prescriptive easement against registered land. Moore v. Henricksen, 165 N.W.2d 209 (Minn. 1968). Accordingly, this provision is drafted to immunize the common elements from claims of prescriptive easements made by unit owners.

5. The last phrase in this section, "in derogation of the title of the other unit owners or the association," limits the scope of immunity to claims that impair the community's title to and use of the common elements. The state's normal rules of adverse possession determine when the unit owners may use the doctrine of adverse possession to obtain or perfect title to a common element.

Example 1: A condominium community has a recreational field (a common element) situated between a building with units and the northern boundary of the community's real estate. A unit owner on the ground floor extends her patio by eight feet into the recreational field. The state has a ten-year statute of limitations for the recovery of possession of real property. Even if the unit owner maintains her extended patio in place for more than 10 years and satisfies all the other elements of adverse possession (actual possession that is open, notorious, continuous, and exclusive), this section prevents her from acquiring title by adverse possession to the area occupied by the patio encroachment. Her acquisition would be "in derogation of the title of the other unit owners," who (along with her) own the area as tenants in common.

Example 2: A condominium community has a recreational field (a common element) situated between a building with units and the northern boundary of the community's real estate. Due to a surveying error, the description of the northern boundary contained in the original declaration pursuant to section 2-105(a)(3) lies 10 feet too far to the north. The entire recreational field, including the 10-foot strip, is a common element. The neighbor who owns the adjacent parcel to the north has paramount title to the 10-foot strip. The state has a ten-year statute of limitations for the recovery of possession of real property. More than ten years after installation of the recreational field, the neighbor brings a cause of action against the association to recover possession of the

10-foot strip. The answer to the litigation filed by the association raises the affirmative defense that the unit owners (and the association as their agent) have acquired title to the strip by adverse possession. This section does not apply because their claim is not "in derogation of the title of the other unit owners or the association." It is in derogation of the neighbor's title. Thus, the state's normal rules of adverse possession will determine whether the neighbor or the unit owners prevail.

[ARTICLE] 3

MANAGEMENT OF THE COMMON INTEREST COMMUNITY

* * *

SECTION 3-102. POWERS AND DUTIES OF UNIT OWNERS ASSOCIATION.

(a) Except as otherwise provided in subsection (b) and other provisions of this [act], the association:

(1) shall adopt and may amend bylaws and may adopt and amend rules;

(2) shall adopt and may amend budgets under Section 3-123, may collect assessments for common expenses from unit owners, and may invest funds of the association;

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

(4) may institute, defend, or intervene in litigation or in arbitration, mediation, or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community, subject to Section 3-124;

(5) may make contracts and incur liabilities;

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

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

(8) may acquire, hold, encumber, and convey in its own name any right, title, or

interest to real estate or personal property, but:

(A) common elements in a condominium or planned community may be conveyed or subjected to a security interest only pursuant to Section 3-112; and

(B) part of a cooperative may be conveyed, or all or part of a cooperative may be subjected to a security interest, only pursuant to Section 3-112;

(9) may grant ~~easements, leases, licenses, and concessions~~ an easement, lease, license, or concession through or over the common elements, unless the grant is to a unit owner for the benefit of the owner's unit;

Reporter's Note (10/23)

Style rewrote this section, which previously stated: "(9) may grant easements, leases, licenses, and concessions through or over the common elements; *provided, the association shall not grant an easement, lease, license, or concession to a unit owner for the benefit of the unit owner's unit;*".

Concerning this paragraph as revised by Style, David Biklen writes:

New 3-102(a)(9)
"(9) may grant an easement, lease, license, or concession through or over the common elements, [unless the grant is to a unit owner for the benefit of the owner's unit] **except that the board may not make a grant under this paragraph to a unit owner that benefits only the unit of the owner.**

It seems to me the proposed rewrite by the drafting committee - in brackets - might not clearly say that the board cannot do this. "unless" what then? Why not simply prohibit it? How about something like the new [bold] language above?

(10) may impose and receive any payments, fees, or charges for:

(A) the use, rental, or operation of the common elements, other than limited common elements described in Section 2-102(2) and (4); and

(B) services provided to unit owners;

(11) may impose charges for late payment of assessments and, after notice and an opportunity to be heard, may impose reasonable fines for violations of the declaration,

bylaws, and rules of the association;

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

(14) except to the extent limited by the declaration, may assign its right to future income, including the right to receive assessments;

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

(16) may exercise all other powers that may be exercised in this state by organizations of the same type as the association;

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

(18) may require that disputes between the association and unit owners or between two or more unit owners regarding the common interest community be submitted to nonbinding alternative dispute resolution as a prerequisite to commencement of a judicial proceeding; and

(19) may suspend any right or privilege of a unit owner that fails to pay an assessment, but may not:

(A) deny a unit owner or other occupant access to the owner's unit;

(B) suspend a unit owner's right to vote;

(C) prevent a unit owner from seeking election as a director or officer of the association; or

(D) withhold services provided to a unit or a unit owner by the association if the effect of withholding the service would be to endanger the health, safety, or property of any person.

(b) The declaration may not limit the power of the association beyond the limit authorized in subsection (a)(18) to:

(1) deal with the declarant if the limit is more restrictive than the limit imposed on the power of the association to deal with other persons; or

(2) institute litigation or an arbitration, mediation, or administrative proceeding against any person, subject to the following:

(A) the association shall comply with Section 3-124, if applicable, before instituting any proceeding described in Section 3-124 (a) in connection with construction defects; and

(B) the executive board promptly shall provide notice to the unit owners of any legal proceeding in which the association is a party other than proceedings involving enforcement of rules or to recover unpaid assessments or other sums due the association.

(c) If a tenant of a unit owner violates the declaration, bylaws, or rules of the association, in addition to exercising any of its powers against the unit owner, the association may:

(1) exercise directly against the tenant the powers described in subsection (a)(11);

(2) after giving notice to the tenant and the unit owner and an opportunity to be heard, levy reasonable fines against the tenant for the violation; and

(3) enforce any other rights against the tenant for the violation which the unit

owner as landlord could lawfully have exercised under the lease or which the association could lawfully have exercised directly against the unit owner, or both.

(d) The rights referred to in subsection (c)(3) may be exercised only if the tenant or unit owner fails to cure the violation within 10 days after the association notifies the tenant and unit owner of that violation.

(e) Unless a lease otherwise provides, this section does not:

(1) affect rights that the unit owner has to enforce the lease or that the association has under other law; or

(2) permit the association to enforce a lease to which it is not a party in the absence of a violation of the declaration, bylaws, or rules.

(f) The executive board may determine whether to take enforcement action by exercising the association's power to impose sanctions or commencing an action for a violation of the declaration, bylaws, and rules, including whether to compromise any claim for unpaid assessments or other claim made by or against it. The executive board does not have a duty to take enforcement action if it determines that, under the facts and circumstances presented:

(1) the association's legal position does not justify taking any or further enforcement action;

(2) the covenant, restriction, or rule being enforced is, or is likely to be construed as, inconsistent with law;

(3) although a violation may exist or may have occurred, it is not so material as to be objectionable to a reasonable person or to justify expending the association's resources; or

(4) it is not in the association's best interests to pursue an enforcement action.

(g) The executive board's decision under subsection (f) not to pursue enforcement under

one set of circumstances does not prevent the executive board from taking enforcement action under another set of circumstances, but the executive board may not be arbitrary or capricious in taking enforcement action.

(h) The executive board shall establish a reasonable method for unit owners to communicate among themselves and with the executive board on matters concerning the association.

Reporter's Note (10/23)

Observations from our August 2020 informal Zoom session on the act included:

(1) Does the restriction of grants to unit owners in 3-102(a)(9) extend (and should it extend) to temporary construction easements?
(2) Should this restriction prevent the existing practice in some states to transfer outside spaces to unit owners who agree to undertake maintenance of the areas, described in the Reporter's Note to 2-108?

Reporter's Notes

This proposed amendment to Section 3-102(a)(9) is a companion to the proposed amendment to Section 2-108 discussed above, dealing with the ability of the executive board to convert common elements into limited common elements. The amendment to Section 3-102(a)(9) is designed to make this section compatible with the procedures of Section 2-108 and Section 2-112, which generally require a vote of the membership for the executive board to allocate a common element for the exclusive use of a unit owner by redesignation as a limited common element or relocation of the boundary between the unit and the common element. A board might avoid these procedures by granting an easement or a long-term lease or license to a unit owner. Section 3-102(6) allows the board to "regulate the use" of common elements, but this should not be interpreted to allow the board to assign the exclusive use to one or less than all of the unit owners.

Example: A ground-level unit has a 150-foot wooden deck, which is a limited common element allocated for the exclusive use of the owner of the adjoining unit. The deck is in terrible shape, and the unit owner hires a contractor to demolish the deck completely and install a new deck. The contractor orders new materials and builds a new deck. The new deck occupies 180 square feet and encroaches on a 30-square-foot area of the lawn (a common element). The mistake is discovered, and the unit owner asks for help from the executive board. Existing Section 3-102(a)(9) may be interpreted to allow the board to forgive the encroachment by granting the unit owner an easement, lease, or license to

maintain the deck over the 30 square feet of the lawn. Because the deck is an improvement that is likely to remain in place for a long time, instead of granting an easement, lease, or license, the board should require that the unit owner apply for a reallocation of the lawn area from a common element to a limited common element under Section 2-108(c). This will require a vote of the unit owners and the preparation and recordation of an amendment to the declaration.

Comment

* * *

4. Paragraph (8) refers to the power granted by Section 3-112, upon a vote of the requisite number of unit owners, to sell or encumber common elements in a condominium or planned community or to sell part or encumber all or part of a cooperative without a termination of the common interest community. 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. Paragraph (9) allows the executive board to grant rights to use common elements only for transactions that do not have a significant impact on the unit owners' rights to use and enjoy the common elements. Examples include a license for a non-profit organization to use a lawn or clubhouse for one or several days, a one-year lease of building space to an entity that provides services expected to be of value to residents, and a non-exclusive revocable easement allowing a neighboring community to use a roadway or trail. Most grants under Paragraph (9) are temporary or revocable by the association, do not grant exclusive rights to the holder, and are donative in nature or granted for a small fee paid by the holder. The board may not use Paragraph (9) as an alternative to a conveyance of common elements, which requires a vote of the unit owners under Paragraph (8) and Section 3-112. Examples of transactions not authorized under Paragraph (9) include the grant of a ten-year lease of a significant part of the common elements or a long-term parking easement that allows the holder to install and use parking spaces.

Reporter's Notes

The Drafting Committee at its April 2020 meeting discussed Section 3-102(a)(9) and the possibility that the executive boards might grant leases, easements, or leases in common elements that have long durations, including sales of such interests, and thereby avoid the act's restrictions on the conveyance of common elements stated in Section 3-102(a)(9) and Section 3-112, which requires a vote of 80% of the unit owners. The Committee asked the Reporter to draft Comment language to provide guidance.

SECTION 3-103. EXECUTIVE BOARD MEMBERS AND OFFICERS.

(a) Except as otherwise provided in the declaration, the bylaws, subsection (b), or other provisions of this [act], the executive board acts on behalf of the association. In the performance of their duties, officers and members of the executive board appointed by the

declarant shall exercise the degree of care and loyalty to the association required of a trustee. Officers and members of the executive board not appointed by the declarant shall exercise the degree of care and loyalty to the association required of an officer or director of a corporation organized, and are subject to the conflict of interest rules governing directors and officers, under [insert reference to state nonprofit corporation law]. The standards of care and loyalty described in this section apply regardless of the form in which the association is organized.

(b) The executive board may not:

(1) amend the declaration except as provided in Section 2-117;

(2) amend the bylaws;

(3) terminate the common interest community;

(4) elect members of the executive board but may fill vacancies in its membership for the unexpired portion of any term or, if earlier, until the next regularly scheduled election of executive board members; or

(5) determine the qualifications, powers, duties, or terms of office of executive board members.

(c) The executive board shall adopt budgets as provided in Section 3-123.

(d) Subject to subsection (e), the declaration may provide for a period of declarant control of the association, during which a declarant, or persons designated by the declarant, may appoint and remove the officers and members of the executive board. A declarant may voluntarily surrender the right to appoint and remove officers and members of the executive board before the period ends. In that event, the declarant may require during the remainder of the period 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.

Regardless of the period provided in the declaration, and except as provided in Section 2-123(g), a period of declarant control terminates no later than the earliest of:

(1) [60] days after conveyance of [three-fourths] of the units that may be created to unit owners other than a declarant;

(2) two years after all declarants have ceased to offer units for sale in the ordinary course of business;

(3) two years after any right to add new units was last exercised; or

(4) the day the declarant, after giving notice in a record to unit owners, records an instrument voluntarily surrendering all rights to control activities of the association.

(e) Not later than 60 days after conveyance of [one-fourth] of the units that 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 [one-half] of the units that may be created to unit owners other than a declarant, not less than [one-third] of the members of the executive board must be elected by unit owners other than the declarant.

(f) Except as otherwise provided in Section 2-120(e), not later than the termination of any period of declarant control, the unit owners shall elect an executive board of at least three members, at least a majority of whom must be unit owners. Unless the declaration provides for the election of officers by the unit owners, the executive board shall elect the officers. The executive board members and officers shall take office upon election or appointment.

(g) A declaration may provide for the appointment of specified positions on the executive board by persons other than the declarant during or after the period of declarant control. It also may provide a method for filling vacancies in those positions, other than by

election by the unit owners. However, after the period of declarant control, appointed members:

(1) may not comprise more than [one third] of the board; and

(2) have no greater authority than any other member of the board.

Reporter's Notes

The Study Committee Report (topics # 10 and 17) recommends two issues for consideration by the Drafting Committee:

> 10. The relationship of the HOA's board of directors with individual unit owners.
> 17. Should the Study Committee revisit the balance between the right of a unit owner to have information and comment and the need of the board to act in an efficient manner?

The Drafting Committee at its January 2020 meeting discussed the model of representative governance generally used in UCOIA Article 3 and the possibility of augmenting owner participation. One question is whether to allow unit owners to rescind a new rule or regulation passed by the board. Presently the avenue for relief is voting in a new board or recalling board members. The Drafting Committee agreed to defer consideration of this question for its April 2020 meeting. [At its April meeting the Committee did not revisit this issue.]

Comment

1. Subsection (a) makes officers and members of the executive board appointed by the declarant liable as trustees 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. The 1994 amendment to subsection (a) added precision by changing the standard of care for declarant-appointed officers and members from "fiduciary" to "trustee." The law contemplates many forms of fiduciary relationships; among them, the trustee's duty is the highest.

Originally subsection (a) specified that officers and members elected by the unit owners have a duty of "ordinary and reasonable care." The 1994 amendment conforms the Act to expectations of owners, officers, members of executive boards, and courts. The duties owed by an elected officer or board member ought to parallel the standards imposed on persons holding equivalent positions in non-profit corporations in the state where the common interest community is located.

For both declarant-appointed and elected officers and members, subsection (a) looks to other state law to measure the standard of care and the basis of liability. For declarant-appointed persons, the law of trusts determines the precise content of the fiduciary duties, as well as other

duties including conflict-of-interest rules, owed to the unit owners. For elected officers and members, the standards of conduct and the standards of liability are determined by the content of the state nonprofit corporation statute. This applies regardless of the organizational type of the association. Thus, if an association is a limited liability company (LLC), the standards for its officers and board members are not affected by the content to of the state LLC statute.

A majority of states have adopted a version of the ABA's Model Nonprofit Corporation Act (MNCA) (3d ed. 1987; the ABA is presently working on a 4th edition). MNCA Section 8.30 sets forth standards of conduct, and section 8.31 sets forth standards of liability for directors. Executive board members are treated as "directors" whether or not they have the formal title of "director" as a member of the association's governing board. MNCA Section 8.42 prescribes standards of conduct for officers; they include a duty to act with the care of "an ordinarily prudent person." States without the model act may apply different rules for director conduct, such as a trust rule or the rules applicable to directors of standard, for-profit corporations, as well as different rules for officers.

2. Executive board members frequently will obtain the benefits of the business judgment rule under subsection (a). The business judgment rule is a standard of liability, not a standard of conduct. The rule curtails judicial review of board decisions by creating a presumption of sound business judgment. As long as the board decision might serve a rational business purpose, courts do not interfere by substituting their own ideas of what is or is not a correct or reasonable decision. The rule also presumes that the directors act in good faith, on an informed basis, and with the honest belief that their action furthers the best interests of the corporation. The business judgment rule began as common-law rule for evaluating the conduct of directors of for-profit corporations. Now many courts apply the rule in the non-profit context generally and as the basis for evaluating the activities of boards of unit owners associations. See, e.g., Reiner v. Ehrlich, 66 A.3d 1132 (Md. Ct. Spec. App. 2013); Committee for a Better Twin Rivers v. Twin Rivers Homeowners Association, 929 A.2d 1060 (N.J. 2007); 40 West 67th Street v. Pullman, 790 N.WE.2d 1174 (N.Y. 2003).

Subsection (a) does not codify the business judgment rule. Its application to executive boards depends on judicial adoption and on other state statutes. Nor does MNCA Section 8.31 codify the business judgment rule, but it has several components, one of which reflects some of the principal elements of the common-law business judgment rule.

[RENUMBER SUBSEQUENT COMMENTS 3 and 4]

* * *

~~5. The 1994 amendment to subsection (a) is intended to conform the Act to expectations of owners, members of executive boards, and courts. The duty owed by an elected member of an executive board ought to parallel the standard imposed on directors of non-profit corporations. The original text set out a lesser standard. By making reference to the non-profit corporate model, members will also obtain the benefits of the business judgment rule, now commonly applied by courts in the non-profit context; see, for example, Levandusky v. One Fifth Avenue Apartment Corp., 75 N.Y.2d 530 (1990).~~

~~Comment 5 was expanded in 2008, because of the importance of this issue. The Act continues to rely on the Business Judgment Rule as the basis for evaluating the actions of the Board. "As long as directors of a corporation decide matters rationally, honestly, and without a disabling conflict of interest, the decision will not be reviewed by the courts." Atkins v. Hibernia Corp., 182 F3d 320, 324, (5 th cir. 1999) quoted in Block, Barton & Radin, The Business Judgment Rule, (5th ed. 1998) in 2002 Supp. Page 6.~~

~~The business judgment rule is a tool of judicial review, not a standard of conduct. The rule (1) shields directors from liability and protects decisions made by directors when The rule's elements a business decision, disinterestedness, and independence, due care, good faith and no abuse of discretion are present and a challenged decision does not constitute fraud, illegality, ultra-vires conduct or waste, and (2) creates a presumption that directors have acted in accordance with each of the elements of the rule.~~

~~[Block et al at page 110.] In its 2007 decision, the Supreme Court of New Jersey confirmed the continuing vitality of the business judgment rule as the basis for evaluating the activities of the executive board of a unit owners association. See Committee for a Better Twin Rivers v. Twin Rivers Homeowners Association, 192 N.J. 344; 929 A.2d 1060 (2007); the decision is expected to be widely followed.~~

~~The change from "fiduciary" to "trustee" as the standard of care for declarant-appointed directors makes the standard of care more precise. The law contemplates many forms of fiduciary relationships; among them, the trustee's duty is the highest.~~

* * *

Reporter's Notes

The Study Committee Report (topic # 17) asks: "Should the Study Committee revisit the balance between the right of a unit owner to have information and comment and the need of the board to act in an efficient manner?" The Study Committee identifies one subissue: "B. Whether the UCIOA standard of care for the board to act [is] the proper standard?" The Drafting Committee at its January 2020 meeting discussed the issue and asked the Reporter to draft a Comment explaining various types of standards of care and when UCOIA provides standards and when it points to other state law to provide standards.

The proposed amendment to Comment 1 of Section 3-103 explains that UCOIA now looks outside the act to other state law to determine the standard of care and standard of liability for association officers and members of the executive board. The proposed amendment deletes Comment 5, which covers the same topic, and incorporates some of the deleted material into the additions to Comment 1 and in new proposed Comment 2, which explains application of the business judgment rule to executive board members.

SECTION 3-104. TRANSFER OF SPECIAL DECLARANT RIGHTS.

Note: In the process of preparing proposed amendments to this section, the discussions of the Drafting Committee have revealed a fundamental and practical issue regarding the nature of special declarant rights. There are 10 types of special declarant rights, defined in Section 1-103(33), which exist only if reserved by the declarant in the declaration recorded to create the common interest community. The first view considers special declarant rights to be contract rights that allow the declarant to alter the legal status of real estate and to exercise rights concerning governance of the common interest community. This means that the rights are personal property and generally freely alienable, whether or not conveyed with real estate to which they apply. The second view considers special declarant rights to be appurtenant to particular parcels of real estate. This means that their ownership may not be severed from those particular parcels. This draft contains two alternatives for further consideration (Alternative 1 and Alternative 2), which try to implement the two competing views, respectively. THESE ALTERNATIVES ARE NOT PROPOSED AS ALTERNATIVES TO BE RECOMMENDED TO THE STATES IN THE FINAL ACT; rather they are intended to assist in further discussion, with the thought that the final act will pick one of these alternatives or some variation thereof.

Alternative 1

(a) A declarant may transfer a special declarant right ~~(Section 1-103(29)) created or~~ reserved under this [act] ~~may be transferred~~ only by an instrument evidencing the transfer ~~recorded in every [county] in which any portion of the common interest community is located. The instrument is not effective unless executed by the transferee.~~ executed by both parties.

(b) Except as otherwise provided in Section 3-104B(c), a declarant that transfers fewer than all its special declarant rights retains the special declarant rights that are not transferred.

Alternative 2

(a) A declarant may transfer a special declarant right ~~(Section 1-103(29)) created or~~ reserved under this [act] ~~may be transferred only by an instrument evidencing the transfer recorded in every [county] in which any portion of the common interest community is located. The instrument is not effective unless executed by the transferee.~~ only to a person that owns real

estate to which the special declarant right applies, as described in the declaration under Section 2-105(a)(8). The transfer must be evidenced by an instrument executed by both parties.

(b) If a declarant transfers fewer than all its special declarant rights, the declarant retains only its special declarant rights that are appurtenant to real estate the declarant continues to own as described in the declaration under Section 2-105(a)(8). Other special declarant rights automatically terminate.

End of Alternatives

(c) An instrument that transfers a special declarant right must be recorded in every [county] in which any portion of the common interest community is located. The instrument is not effective until recorded.

Reporter's Note (10/23)

Observations from our August 2020 informal Zoom session on the act included:

(1) We should provide clear rules for the transfer, financing, and encumbering of special declarant rights.
(2) Development rights are often especially valuable, and their transfers are common.
(3) Under the act as it stands now, title insurance companies are not willing to issue insurance on transfers of special declarant rights.

Reporter's Notes

1. The Study Committee Report (topic # 15) calls for consideration of issues concerning declarant liability and the liability of successor declarants, both those who are affiliates and not affiliates of the original declarant. See Study Committee Report pp. 51-58.

The Drafting Committee at its January 2020 meeting discussed many of the issues and asked the committee Chair and the Reporter to attempt to rewrite and reorganize the set of rules contained in existing Section 3-104. Their effort included the division of content from existing Section 3-104 into a series of six new sections in the April 2020 meeting draft and the addition of a new definition of "Non-affiliate successor," now in Section 3-104A below, which serves as a companion to the existing definition of "Affiliate of a declarant" in Section 1-103(1). Discussion by the Drafting Committee at its April 2020 meeting resulted in the Reporter's consolidation of the material into three sections: Section 3-104

(above) and Sections 3-104A and 3-104B (below).

2. The Drafting Committee at its April 2020 meeting discussed whether special declarant rights are real property or personal property. UCOIA as presently drafted may assume that special declarant rights are real property, but it does not say so directly. Some cases hold that development rights are real property in some contexts. E.g., Village at Treehouse, Inc. v. Property Tax Adm'r, 2014 COA 6, 321 P.3d 624 (Colo. Ct. App. 2014) (condominium development rights are "interests in real property" subject to ad valorem taxation); Layden v. City of Rutland, 737 A.2d 894 (Vt. 1999) (development rights acquired with undeveloped land in condominium project are subject to ad valorem taxation). But some of the special declarant rights, perhaps most of them, may be intangible personal property (contract rights). If so, in financing transactions they are general intangibles under UCC Article 9. The Committee did not reach a consensus at its April 2020 meeting on how to handle the issue of classification. It requested that the Reporter consider two approaches: deferring to other law to make the determination or adding provisions making all special declarant rights real property interests or treating them as if they are real property. The two Alternatives in this section and in Section 3-104B below attempt to implement these two approaches.

3. Alternative 1 in subsections (a) and (b) addresses to a concern raised by the Study Committee based on a sentence in existing Comment 3 to Section 3-104: "The transfer by a declarant of all of his interest in a 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." See Study Committee Report p. 56 (Issue Six). The Drafting Committee at its January 2020 meeting discussed this issue, with the consensus that special declarant rights that are not transferred remain with the declarant. The Comment does not have support in the existing statutory language. Alternative 1 calls for the opposite outcome, and if adopted, Comment 3 should be deleted (see Comment 3 below).

4. Alternative 1 also responds to a question raised by the Study Committee. The Study Committee asks whether there should be limits on how many persons may receive and hold special declarant rights at one point in time, asking whether it would be preferable to identify a single declarant who is in control and responsible. See Study Committee Report p. 55 (Issue Four). The Drafting Committee at its January 2020 meeting discussed the issue, with the consensus that the intent of existing Section 3-104 is not to limit transfers and the fragmentation of special declarant rights. Alternative 1 in subsections (a) and (b) makes it clearer that the act imposes no limits. Usually a developer will not find it advantageous to divide special declarant rights among more than a few persons. Fragmentation when it occurs may sometimes make it harder for third parties, including unit owners, to determine who holds what special declarant rights and who is responsible for certain obligations and liabilities. The recording rule

discussed above (Note 3) and the reorganization of the rules addressing obligations and liabilities (see new sections below) should allow third parties to find this information.

5. Alternative 2 reflects the practical reality that special declarant rights have value only when connected to real estate within the common interest community or that may be added to the community interest community pursuant to a development right reserved in the declaration. In addition to describing all special declarant rights reserved by the declarant, the declaration must identify the real estate that is subject to special declarant rights. Section 2-105(a)(8) requires that the declaration contain "a description of any development right and other special declarant rights 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." This requirement may imply a legal linkage between special declarant rights and parcels of real estate. If the rights are real property, they do not qualify as servitudes (a real covenant or equitable servitude running with the land) because a person cannot own a servitude in his own property. If other words, if the declarant has a development right to create units on undeveloped real estate owned by the declarant, that right is not a servitude. *Restatement (Third) of Property (Servitudes)* § 7.5 comment a (2000) ("A servitude benefit is the right to use the land of another"); Woodling v. Polk, 473 S.W.3d 233 (Mo. Ct. App. 2015) (deed purporting to grant driveway easement to developer over one of its lots does not create easement). But the rights may still be real property if they are viewed as appurtenant to the ownership of land.

6. A transfer of a special declarant right does not have to consist of the entire special declarant right. For example, a declarant may own an undeveloped 50-acre parcel within a 300-acre common interest community. The declarant decides to sell the 50-acre parcel to another developer, and along with the conveyance of the parcel, the declarant transfers development rights and the right to maintain a sales office with respect to the 50-acre parcel. The declarant retains development rights and sales-office rights for his remaining 250 acres. The buyer becomes a successor declarant.

7. The Study Committee questions whether a transfer of special declarant rights should be effective between the transferor and transferee before recordation. See Study Committee Report p. 54 (Issue Two). The language of existing Section 3-104(a) appears to indicate the transfer is effective only upon recordation. The Drafting Committee at its January 2020 meeting discussed the issue, with the consensus that recording is necessary. New subsection (c) makes this explicit, tracking the language used in Section 2-118(b) for the effectiveness of termination agreements. This is an exception to the normal rule that agreements and conveyances are effective between the parties when executed, prior to recordation. The purpose of delaying effectiveness, even between the parties, is to perform a notice function. Recording allows all third parties, including unit

owners, to ascertain who holds and may exercise special declarant rights at all times, and thus who has obligations and liabilities stemming from special declarant rights.

At its April 2020 meeting the Drafting Committee discussed new subsection (c) and whether to require the sending of notice of the transfer of special declarant rights to all unit owners. New Jersey requires that when a declarant amends its public offering statement, the declarant must notify prior buyers of units. After discussion, the consensus was not to make a change to require notice.

Comment

* * *

3. ~~Subsection (a)~~ This section 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 does not mean that special declarant rights are real property. Recording 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 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.~~

Other state law determines whether special declarant rights are real property or personal property. Some are almost certainly intangible personal property; for example, the declarant's right to appoint or remove association officers and board members and the declarant's right to make a common interest community subject to a master association. Some are sufficiently connected to real estate that they may be servitudes; for example, a declarant's right to use easements to make improvements and a declarant's development right over land owned by another person. If a special declarant right is a servitude, it is a servitude in gross. See *Restatement (Third) of Property (Servitudes)* § 2.6 (2000): "The benefit of a servitude may be created to be held in gross, or as an appurtenance to another interest in property . . . ." Special declarant rights, if servitudes, are not appurtenant servitudes because this section makes all special declarant rights freely alienable to any person, regardless of whether that person acquires or owns units or other real estate.

* * *

Reporter's Notes

1. The above proposed revisions to Comment 3 reflect Alternative 1. If Alternative 2 is adopted, different revisions to the Comment will be needed. The Comment revisions delete the last sentence of the first paragraph of Comment 3 because it is inconsistent with the existing statutory text of Section 3-104 and with

Alternative 1. See Reporter's Note 3 to Section 3-104 (above).

2. Alternative 1 makes special declarant rights freely transferable, but it is agnostic as to whether they are personal or real property. The Comment revisions clarify that the recording requirement does not imply that special declarant rights are real property. The new proposed second paragraph to Comment 3offers brief guidance on the issue of classification.

3. Alternative 2 in subsection (b) incorporates the substance of the last sentence of the first paragraph of Comment 3. See Reporter's Note 5 to Section 3-104 (above).

4. The proposed new language at the end of the first paragraph of Comment 3 clarifies that the recording requirement does not imply that special declarant rights are real property.

SECTION 3-104A. LIABILITY AFTER TRANSFER OF SPECIAL DECLARANT RIGHTS.

(a) In this section, "non-affiliate successor" means a person that succeeds to a special declarant right and is not an affiliate of the declarant that transferred the special declarant right to the person.

(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~~ If a transferor declarant transfers a special declarant right to an affiliate of the declarant, the transferor and the successor are jointly and severally liable for all obligations and liabilities imposed upon either party by this [act] or the declaration. Lack of privity does not deprive ~~any~~ a unit owner of standing to maintain an action to enforce ~~any~~ an obligation or liability of the transferor or transferee.

~~(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 common interest community.~~

~~(3) If a transferor retains any special declarant rights, 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) If a declarant transfers a special declarant right to a non-affiliate successor, the transferor remains liable for any obligation or liability arising before the transfer, including a warranty obligation imposed on the transferor by this [act]. The transferor is not liable for any obligation or liability arising after the transfer which is imposed on the successor by this [act] or the declaration relating to the transferred special declarant right.

~~(c) Unless otherwise provided in a mortgage instrument, deed of trust, or other agreement creating a security interest, in case of foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under Bankruptcy Code or receivership proceedings, of any units owned by a declarant or real estate in a common interest community subject to development rights, a person acquiring title to all the property being foreclosed or sold, but only upon his request, succeeds to all special declarant rights related to that property 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 must provide for transfer of only the special declarant rights requested.~~

~~(d) Upon foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under Bankruptcy Code or receivership proceedings, of all interests in a common interest community 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)~~ (d) ~~The liabilities and obligations of a person who succeeds to special declarant rights are as follows:~~

~~(1) A~~ Except as otherwise provided in this section, a successor to ~~any~~ a 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.

(e) A non-affiliate successor that acquires fewer than all special declarant rights held by the transferor is not subject to an obligation or liability that relates to special declarant rights not transferred to the successor.

~~(2) A successor to any special declarant right, other than a successor described in paragraph (3) or (4) or a successor who is an affiliate of a declarant, is subject to the obligations and liabilities imposed by this [act] or the declaration:~~

~~(i) on a declarant which relate to the successor's exercise or nonexercise of special declarant rights; or~~

~~(ii) on his transferor, other than:~~

(f) A non-affiliate successor is not subject to an obligation or liability that relates to:

~~(A)~~ (1) a misrepresentation~~s~~ by ~~any~~ a previous declarant;

~~(B)~~ (2) a warranty obligation~~s~~ on an improvement~~s~~ made by ~~any~~ a previous declarant~~,~~ or made before the common interest community was created;

~~(C)~~ (3) breach of ~~any~~ a fiduciary obligation by ~~any~~ a previous declarant or ~~his~~ the previous declarant's appointees to the executive board; or

~~(D)~~ (4) ~~any liability or obligation~~ an obligation or liability imposed on the transferor as a result of the transferor's act~~s~~ or omission~~s~~ after the transfer.

~~(3)~~ (g) ~~A successor to only a right reserved in the declaration to maintain models, sales offices, and signs (Section 2-115),~~ A non-affiliate successor to which only a special declarant right to maintain an office, sign, or model is transferred may not exercise any other special declarant right~~,~~ and is not subject to any obligation or liability ~~or obligation~~ as a declarant, except ~~the~~ an obligation ~~to provide~~ or liability related to a public offering statement ~~[,]~~ ~~and any liability arising as a result thereof [,~~ and an obligation~~s~~ under [Article] 5].

(h) A successor that acquires a special declarant right after foreclosure of a security interest, tax sale, judicial sale, or sale in a bankruptcy or receivership proceeding and complies with the requirements of Section 3-104B is not subject to an obligation or liability as a declarant other than liability under Section 3-103(d) for the successor's act or omission.

Reporter's Notes

One concern raised by the Study Committee is whether the existing language of Section 3-104(b) is sufficiently clear with respect to the allocation of liability for warranties between the transferor declarant and the transferee declarant. The proposed amendments clarify the issue. When the transferee is an affiliate, the joint and several liability of both parties under Section 3-104A(b) "for all obligations and liabilities" includes all warranty obligations, regardless of when improvements are made and when a breach occurs.

When a transferor declarant transfers a special declarant right to a non-affiliate successor, under Section 3-104A(c) the transferor remains liable for "a warranty obligation imposed on the transferor." A transferee declarant who is not an affiliate of the transferor becomes liable for all warranty obligations except for

"a warranty obligation on an improvement made by a previous declarant or made before the common interest community was created" under Section 3-104B(f)(2). In other words, the transferee declarant is liable for warranties on improvements made after its acquisition of special declarant rights.

SECTION 3-104B. FORECLOSURE OF SPECIAL DECLARANT RIGHTS.

(a) In this section, "foreclosure sale" means a sale of property owned by a declarant pursuant to a foreclosure of a security interest, deed in lieu of foreclosure, tax sale, judicial sale, or sale in a bankruptcy or receivership proceeding.

Note: Below are two alternatives following the choices indicated in Section 3-104 (above). Alternative 1 treats special declarant rights are free-standing rights that are usually personal property. Alternative 2 treats special declarant rights as appurtenant to real estate.

Alternative 1

(b) If a foreclosure sale of real estate includes a special declarant right, the purchaser may elect to acquire or reject the special declarant right. The judgment or instrument conveying title must provide for transfer of only the special declarant rights acquired.

Alternative 2

(b) Unless an instrument creating the security interest being foreclosed provides otherwise, a person acquiring title to all property being foreclosed may request to acquire all special declarant rights related to the property held by the declarant or only to a special declarant right to maintain an office, sign, or model pursuant to Section 2-115. The judgment or instrument conveying title must provide for transfer of only the special declarant rights acquired.

End of Alternatives

(c) If, after a foreclosure sale, the declarant no longer owns real estate in a common interest community:

(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 the declarant to a successor declarant.

~~(4)~~ (d) ~~A successor to all special declarant rights held by a transferor who succeeded to those rights pursuant to a deed or other instrument of conveyance in lieu of foreclosure or a judgment or instrument conveying title under subsection (c),~~ A purchaser of a special declarant right at a foreclosure sale is a successor declarant that may declare its intention in a recorded instrument ~~the intention~~ 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 or real estate subject to development rights owned by the successor, or until recording an instrument permitting exercise of all those rights, that successor may not exercise any of those rights~~ After recording the instrument, the successor declarant may not exercise a special declarant right, other than ~~any~~ a right held by ~~his~~ the transferor to control the executive board in accordance with Section 3-103(d) ~~for the duration of any period of declarant control~~, and any ~~attempted~~ attempt to exercise ~~of those rights~~ a special declarant right in violation of this section is void.

Alternative 1

The successor declarant, before the period for exercising a special declarant right expires pursuant to Section 2-105(a)(8), may transfer some or all its special declarant rights to any person.

Alternative 2

The successor declarant, before the period for exercising a special declarant right expires pursuant to Section 2-105(a)(8), may transfer some or all its special declarant rights to a person acquiring title to real estate to which the special declarant right applies, as described in the

declaration.

End of Alternatives

(e) ~~So~~ As long as a successor declarant ~~may not exercise special declarant rights under this subsection~~ described in subsection (d) complies with this section, the successor declarant is not subject to any obligation or liability ~~or obligation~~ as a declarant other than liability for ~~his~~ its 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.~~

Reporter's Notes

1. This proposed new section is a reorganization of the parts of existing Section 3-104 that address foreclosure sales with the transfer of special declarant rights from the defaulting declarant to a foreclosure purchaser. In the draft for the April 2020 Drafting Committee meeting, the Chair and Reporter reorganized without attempting to make changes of substance to the existing statutory text.

The Reporter, however, recommends that the Drafting Committee review the substance and consider whether changes are advisable, either to make changes of substance or to clarify how the provisions are intended to operate. Points to discuss include the following:

- The scope of the provision is the foreclosure of real estate when the declarant owns development rights. Development rights are defined in Section 1-201(16) and they are one of the ten types of special declarant rights. See Section 1-201(33)(B). What if the declarant does not have development rights at the time of the foreclosure but owns other special declarants rights? Should the scope be expanded to cover transfer of special declarant rights in this situation?

- The provision may mean that the foreclosure purchaser has three choices: take all of the declarant's special declarant rights, take none of them, or take only the special declarant right under Section 1-201(33)(C) to maintain offices, signs, and models. Should the purchaser have the right to "pick and choose," the same as in a voluntary transfer under Section 3-104 above?

- The Reporter believes that most of the special declarant rights defined in Section 1-201(33) are intangible personal property; specifically, general intangibles under UCC Article 9. The existing provision appears to treat special declarant rights as if they are real property. Although the statute does not say this directly, Section 3-104 Comment 7 states that a declarant's "right to create additional units . . . is an interest in land which may be sold or in which a security interest may be granted." UCOIA defines "security interest" as "an interest in real estate or personal property, created by contract or conveyance, which secures payment or performance of an obligation." We should consider how our Section 3-104C, D, and E provisions fit with Article 9.

- Which involuntary transfers should the provision cover? Section 3-104 Comment 7 refers to "a conveyance in lieu of foreclosure" but this is not in the statutory text.

- The provision appears to contemplate that a foreclosure sale will transfer all of the declarant's units and real estate in the community. What if a foreclosure or other involuntary sale transfers only some of the declarant's units or property? Is that within the scope of the provision, and if so, what happens?

At its April 2020 meeting the Drafting Committee discussed these questions and other issues, with the consensus that further redrafting including changes in substance is desirable.

2. New subsection (a) serves as a scope provision for this section with a new definition of "foreclosure sale." The scope is expanded to cover any foreclosure of special declarant rights. The new definition also expressly includes a deed in lieu of foreclosure. Although almost always the creditor's foreclosure will consist of the sale of both real estate and special declarant rights, subsection (a) does not require the sale of real estate; the definition refers to "a sale of property owned by declarant." In principle, a creditor may foreclose only on special declarant rights, presumably in order to transfer them to a person who already owns real estate or has a stake in the common interest community.

Like existing Section 3-104(c), subsection (a) uses the term "security interest," which is broadly defined in the Act to include interests created by mortgages, deeds of trust, and UCC Article 9 security agreements. Section103(32). Therefore, the defined term "foreclosure sale" includes a foreclosure of personal property under UCC Article 9.

3. Alternative 1 in subsections (b) and (d) reflects the principles that special declarant rights are freely transferable as a general matter and in the context of foreclosures. Existing section 3-104(c) appears to give the foreclosure

purchaser the right to obtain special declarant rights, whether or not the mortgage lender's security agreement includes special declarant rights as part of the collateral. Those rights appear to be automatically tied to the real estate. Instead, this new section transfers special declarant rights to a purchaser only if "a foreclosure sale of real estate includes a special declarant right" under Alternative 1 subsection (b). As explained in the proposed Alternative 1 revision to Section 3-104 Comment 3 (above), the special declarant rights may be real property (appurtenant rights or servitudes in gross) or intangible personal property, subject to UCC Article 9. This new section applies only if (1) the mortgage lender's collateral includes special declarant rights and (2) the mortgage lender has organized its foreclosure sale to include the sale of special declarant rights. This Act does not tell a mortgage lender how to obtain a security interest in special declarant rights.

If the special declarant rights are personal property, the mortgage lender has mixed collateral. It may foreclose using the foreclosure procedures of Article 9. If the mortgage lender is selling units or other real estate at the same time, the mortgage lender may choose to sell both types of collateral at a real estate foreclosure. See UCC § 9-604 (*Procedure if Security Agreement Covers Real Property or Fixtures*.)

Similar issues arise with respect to the other types of involuntary sales within the scope of this section. In bankruptcy, the declarant's bankruptcy estate consists of all of the declarant's property, so a bankruptcy sale may include the declarant's special declarant rights. Tax sales and judicial sales are within the scope only if the subject of those sales includes the declarant's special declarant rights, whether they are real or personal property.

4. Alternative 1 in subsections (b) deletes the provision in existing section 3-104(c) allowing the foreclosure purchaser to request only the right to maintain model units, sales offices, and signs. According to section 3-104 Comment 7, this provision "is designed to protect mortgage lenders and contemplates the situation where a lender takes over a project and desires to sell out existing units without making any additional improvements to the project." Instead of this special choice, new subsection (b) broadens the purchaser's choice by allowing the purchaser to pick and choose among any of the special declarant rights that are advertised as part of the collateral being sold at foreclosure.

5. Alternative 2 in subsections (b) and (d) preserves the substance of existing Section 3-104(c) with respect to the foreclosure purchaser's rights to obtain special declarant rights. The foreclosure purchaser always has three choices: take all the rights, none of the rights, or only the rights to maintain offices, signs, and models. It does not matter whether the mortgage lender has a security interest in the special declarant rights. They transfer automatically if the purchaser requests them. Under subsection (d) the purchaser may transfer special declarant rights only to a person who acquires the relevant real estate to which the

rights are attached.

SECTION 3-108. MEETINGS.

(a) The following requirements apply to unit owner meetings:

(1) An association shall hold a meeting of unit owners annually at a time, date, and place stated in or fixed in accordance with the bylaws.

(2) An association shall hold a special meeting of unit owners to address any matter affecting the common interest community or the association if its president, a majority of the executive board, or unit owners having at least 20 percent, or any lower percentage specified in the bylaws, of the votes in the association request that the secretary call the meeting. If the association does not notify unit owners of a special meeting within 30 days after the requisite number or percentage of unit owners request the secretary to do so, the requesting members may directly notify all the unit owners of the meeting. Only matters described in the meeting notice required by paragraph (3) may be considered at a special meeting.

(3) An association shall notify unit owners of the time, date, and place of each annual and special unit owners meeting not less than 10 days or more than 60 days before the meeting date. Notice may be by any means described in Section 3-121. The notice of any meeting must state the time, date and place of the meeting and the items on the agenda, including:

(A) a statement of the general nature of any proposed amendment to the declaration or bylaws;

(B) any budget changes; and

(C) any proposal to remove an officer or member of the executive board.

(4) The minimum time to give notice required by paragraph (3) may be reduced

or waived for a meeting called to deal with an emergency.

(5) Unit owners must be given a reasonable opportunity at any meeting to comment regarding any matter affecting the common interest community or the association.

(6) The declaration or bylaws may ~~allow for meetings~~ provide that a meeting of unit owners ~~to be conducted by telephonic, video, or other conferencing process, if the alternative process is consistent with subsection (b)(7)~~ is not required to be held at a geographic location if the meeting is conducted by a means of communication that enables the owners to read or hear the proceedings substantially concurrently with their occurrence, vote on matters submitted to the owners, pose questions, and make comments.

(7) The executive board may allow unit owners to participate remotely in a meeting held at a geographic location by a means of communication that is consistent with paragraph (6).

~~(7)~~ (8) Except as otherwise provided in the bylaws, meetings of the association must be conducted in accordance with the most recent edition of Roberts' Rules of Order Newly Revised.

(b) The following requirements apply to meetings of the executive board and committees of the association authorized to act for the association:

(1) Meetings must be open to the unit owners except during executive sessions. The executive board and those committees may hold an executive session only during a regular or special meeting of the board or a committee. No final vote or action may be taken during an executive session. An executive session may be held only to:

(A) consult with the association's attorney concerning legal matters;

(B) discuss existing or potential litigation or mediation, arbitration, or

administrative proceedings;

(C) discuss labor or personnel matters;

(D) discuss contracts, leases, and other commercial transactions to purchase or provide goods or services currently being negotiated, including the review of bids or proposals, if premature general knowledge of those matters would place the association at a disadvantage; or

(E) prevent public knowledge of the matter to be discussed if the executive board or committee determines that public knowledge would violate the privacy of any person.

(2) For purposes of this section, a gathering of board members at which the board members do not conduct association business is not a meeting of the executive board. The executive board and its members may not use incidental or social gatherings of board members or any other method to evade the open meeting requirements of this section.

(3) During the period of declarant control, the executive board shall meet at least four times a year. At least one of those meetings must be held at the common interest community or at a place convenient to the community. After termination of the period of declarant control, all executive board meetings must be at the common interest community or at a place convenient to the community unless the unit owners amend the bylaws to vary the location of those meetings.

(4) At each executive board meeting, the executive board shall provide a reasonable opportunity for unit owners to comment regarding any matter affecting the common interest community and the association.

(5) Unless the meeting is included in a schedule given to the unit owners or the

meeting is called to deal with an emergency, the secretary or other officer specified in the bylaws shall give notice of each executive board meeting to each board member and to the unit owners. The notice must be given at least 10 days before the meeting and must state the time, date, place, and agenda of the meeting.

(6) If any materials are distributed to the executive board before the meeting, the executive board at the same time shall make copies of those materials reasonably available to unit owners, except that the board need not make available copies of unapproved minutes or materials that are to be considered in executive session.

(7) Unless the declaration or bylaws otherwise provide, the executive board may meet by telephonic, video, or other conferencing process if:

(A) the meeting notice states the conferencing process to be used and provides information explaining how unit owners may participate in the conference directly or by meeting at a central location or conference connection; and

(B) the process provides all unit owners the opportunity to hear or perceive the discussion and to comment as provided in paragraph (4).

(8) After termination of the period of declarant control, unit owners may amend the bylaws to vary the procedures for meetings described in paragraph (7).

(9) Instead of meeting, the executive board may act by unanimous consent as documented in a record authenticated by all its members. The secretary promptly shall give notice to all unit owners of any action taken by unanimous consent. After termination of the period of declarant control, the executive board may act by unanimous consent only to undertake ministerial actions or to implement actions previously taken at a meeting of the executive board.

Reporter's Note (10/23)

David Biklen writes:

I believe this says that the board may take any action it wishes without notice and an open meeting so long as the board decision is unanimous. Do we really mean that? And if so, how is that good policy? It completely guts the open meeting rules of the act.

(10) Even if an action by the executive board is not in compliance with this section, it is valid unless set aside by a court. A challenge to the validity of an action of the executive board for failure to comply with this section may not be brought more than [60] days after the minutes of the executive board of the meeting at which the action was taken are approved or the record of that action is distributed to unit owners**,** whichever is later.

Reporter's Note (10/23)

1. Observations from our August 2020 informal Zoom session on the act included:

(1) The section should use the defined term "record" in appropriate places so as to include electronic documents and electronic communications.
(2) We should make sure that the statutory language works correctly for hybrid meetings, when some owners are present in person and some participate remotely.
(3) Consider expanding Section 3-108(a)(6) to allow remote attendees to make motions and amend motions.
(4) Consider changing Section 3-108(b)(6), which allows the executive board to withhold "unapproved minutes" from the unit owners. Discussion included the following points:

(i) unapproved minutes frequently contain inaccuracies;
(ii) owners should be informed about actions taken at board meetings within a reasonable period of time after the meeting;
(iii) board actions are effective when taken, regardless of whether or when minutes are prepared and approved; and
(iv) the Act has no express time limit on how long the board may take before approving minutes from a prior meeting.

2. At the September 2020 Zoom annual meeting first reading of the act, a floor comment suggested that we make sure that the rules in this section on how many days before meetings notices must be sent work with electronic communications and with the voting procedures in § 3-110: Note: § 3-121 provides rules for notices and authorizes e-mail notices, but does not indicate whether notices are

effective when sent or when received for any of the types of notices (i.e., does a mailbox rule apply?).

3. David Biklen has concerns about Unit Owner Communication with Other Unit Owners, which relates to meetings and voting but extends further. David writes:

My condo board says they can communicate with other unit owners by email, but I must deliver by hand or by US mail. The board will not share email addresses. It seems to me the proper rule ought to be that a unit owner may communicate with other unit owners in the same means as does the board or management company.

The situation. My condo complex has three brick towers with 20 units in each. Two years ago, a nighttime fire in the unit below mine destroyed the unit and drove most residents of the other 19 units from the building - some actually never woke up or left the building. My unit was too dangerous to return to until firefighters removed the dangerous levels of carbon monoxide.

The board and management company did not notify all 60 association members of the fire (many had slept thru it or were away) and, despite my request, did not call an emergency board meeting - even tho the fire had started in an electric baseboard unit common to all units. (Why scare residents was the statement - much like T's recent statement re covid.)

I then hand delivered a memo to all unit owners describing the fire and asking for an emergency board meeting- which was then held - to address the fire damage and find and remediate the cause.

The board then emailed a memo to all unit owners criticizing my "alarmist" memo and calling into question its accuracy. I prepared a brief response to the board memo because my veracity had been called into question. I asked the board to distribute my memo in the same manner that the board distributed its memo - by email. The board refused to distribute my memo by email even tho it related to the board's email that criticized me.

That ought not be the case. It would be great if the drafting committee could devise a way to avoid this result.

Reporter's Notes

1. The proposed amendments to this section are designed to make this section compatible with the proposed revisions to Section 3-110 (below) dealing with electronic voting.

2. The proposed amendment to subsection (a)(6) closely follows language from the proposed 4th edition to the ABA's Model Nonprofit Corporation Act

(MNCA) (exposure draft Dec. 13, 2019) § 701(e), which provides: "The articles of incorporation or bylaws may provide that an annual or regular meeting of members does not need to be held at a geographic location if the meeting is held by any means of communication by which the members have the opportunity to read or hear the proceedings substantially concurrently with their occurrence, vote on matters submitted to the members, pose questions, and make comments."

The proposed language allows all types of communications technology that allow owners to participate in the ways described in the subsection, without attempting to identify particular types of technology that qualify. This is broader than the existing language: "telephonic, video, or other conferencing process." Any type of technology that meets the substantive requirements of this subsection is permitted. Also, the proposed language stating the meeting does not require "a geographic location" makes it clear that a meeting under this subsection does not require a stated "place" for the meeting under subsection (a)(1).

3. Section 3-108 does not presently allow a live meeting at a geographic place with some unit owners attending remotely by communications technology. New proposed subsection (a)(7) allows remote attendance and participation at live meetings. This subsection is based a proposed new section for the fourth edition of the ABA nonprofit act. MNCA § 710(a) (*Remote participation in member meeting*), which provides: "Members of any class may participate in any meeting of members by means of remote communication to the extent the board of directors authorizes such participation for that class. Participation as a member by means of remote communication is subject to any guidelines and procedures the board of directors adopts that conform to Section 708(c)."

SECTION 3-110. VOTING; PROXIES; BALLOTS.

(a) ~~Unless~~ At a meeting, unit owners may vote in person or, unless prohibited or limited by the declaration or bylaws, ~~unit owners may vote at a meeting in person, by absentee ballot pursuant to subsection (b)(4),~~ by ~~a~~ proxy pursuant to subsection (c) or~~, when a vote is conducted without a meeting, by electronic or paper~~ absentee ballot pursuant to subsection ~~(d)~~ (e).

(b) At a meeting of unit owners the following requirements apply:

(1) Unit owners ~~who~~ that are present in person may vote by voice vote, show of hands, standing, or any other method for determining the votes of unit owners, as designated by the person presiding at the meeting.

(2) A unit owner that participates by means of communications under Section 3-

108(a)(6) or (7) is deemed present in person and may vote ***[by electronic ballot?]*** at the meeting if the association has implemented reasonable measures to verify the identity of each person participating remotely as a unit owner.

~~(2)~~ (3) If only one of several owners of a unit is present, that owner is entitled to cast all the votes allocated to that unit. If more than one of the 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 owners, unless the declaration expressly provides otherwise. There is majority agreement if any one of the owners casts the votes allocated to the unit without protest being made promptly to the person presiding over the meeting by any of the other owners of the unit.

Reporter's Note (10/23)

At the September 2020 Zoom annual meeting first reading of the act, a floor comment suggested that this subsection may not work when owners are voting by electronic ballots.

~~(3)~~ (4) Unless a greater number or fraction of the votes in the association is required by this [act] or the declaration, a majority of the votes cast determines the outcome of any action of the association.

~~(4) Subject to subsection (a), a unit owner may vote by absentee ballot without being present at the meeting. The association promptly shall deliver an absentee ballot to an owner that requests it if the request is made at least [three] days before the scheduled meeting. Votes cast by absentee ballot must be included in the tally of a vote taken at that meeting.~~

~~(5) When a unit owner votes by absentee ballot, the association must be able to verify that the ballot is cast by the unit owner having the right to do so.~~

(c) Except as otherwise provided in the declaration or bylaws**,** the following requirements apply with respect to proxy voting:

(1) Votes allocated to a unit may be cast pursuant to a directed or undirected proxy duly executed by a unit owner.

(2) 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.

(3) A unit owner may revoke a proxy given pursuant to this section only by actual notice of revocation to the person presiding over a meeting of the association.

(4) A proxy is void if it is not dated or purports to be revocable without notice.

(5) A proxy is valid only for the meeting at which it is cast and any recessed session of that meeting.

(6) A person may not cast undirected proxies representing more than [15] percent of the votes in the association.

(d) Unless prohibited or limited by the declaration or bylaws, an association may conduct a vote by ballot without a meeting. Approval by ballot is valid only if the number of votes cast equals or exceeds the quorum required to be present at a meeting authorizing the action.

(e) ~~In that event,~~ A ballot under this section must comply with the following requirements ~~apply~~:

(1) The ~~association shall~~ association's notice of a meeting or notice of a vote without a meeting must notify the unit owners ~~that the~~ of their right to vote ~~will be taken~~ by ballot and how to vote by ballot.

~~(2) The association shall deliver a paper or electronic ballot to every unit owner entitled to vote on the matter.~~

(2) A unit owner may vote by:

(A) paper ballot; or

(B) if the association allows electronic voting and a unit owner consents in a record to electronic voting, by electronic ballot.

Note: We should clarify in this subsection or in subsection (b)(2) whether all remote voting using communications technology requires the unit owner to cast an electronic ballot. For example, in a live meeting held under Section 3-108(a)(6), is a voice vote or roll-call vote allowed?

(3) The ballot must set forth each proposed action, ~~and~~ provide an opportunity to vote for or against the action~~.~~, and:

~~(4) When the association delivers the ballots, it shall also:~~

(A) indicate the number of responses needed to meet the quorum requirements;

(B) state the percent of votes necessary to approve each matter other than election of directors;

(C) specify the time and date by which a ballot must be delivered to the association to be counted, which time and date may not be fewer than [three] days after the date the association delivers the ballot; and

(D) describe the time, date, and manner by which unit owners wishing to deliver information to all unit owners regarding the subject of the vote may do so.

(4) A ballot for a vote at a meeting may be cast only at the scheduled meeting and any recessed session of the meeting. A ballot for a vote without a meeting must state an expiration date after which the ballot may not be cast.

(5) A unit owner may revoke a ballot before a deadline established by the association, which for a meeting may not be more than five days before the scheduled date for

the meeting. Except as otherwise provided in the declaration or bylaws, a ballot is not revoked by death or disability after delivery to the association ~~by death or disability or attempted revocation by the person that cast that vote~~.

~~(6) Approval by ballot pursuant to this subsection is valid only if the number of votes cast by ballot equals or exceeds the quorum required to be present at a meeting authorizing the action.~~

(6) The association shall verify that each paper and electronic ballot is cast by the unit owner having the right to do so.

(7) For electronic ballots, the association shall create a record of electronic votes that is capable of retention, retrieval, and review.

~~(e)~~ (f) If the declaration requires that votes on specified matters affecting the common interest community be cast by lessees rather than unit owners of leased units:

(1) this section applies to lessees as if they were unit owners;

(2) unit owners that have leased their units to other persons may not cast votes on those specified matters; and

(3) lessees are entitled to notice of meetings, access to records, and other rights respecting those matters as if they were unit owners.

~~(f)~~ (g) Unit owners must also be given notice of all meetings at which lessees are entitled to vote.

~~(g)~~ (h) Votes allocated to a unit owned by the association must be cast in any vote of the unit owners in the same proportion as the votes cast on the matter by unit owners other than the association.

Reporter's Note (10/23)

Observations from the August 2020 informal Zoom session on the act included:

(1) The section should use the defined term "record" in appropriate places so as to include electronic documents and electronic communications.
(2) We should consider authorizing or facilitating secret ballots for electronic voting and for remote attendees at meetings. There appears to be technology currently being used that allows secret ballots to be cast electronically and securely, with the recipients who count votes not able to identify the voters.

Reporter's Notes

1. The Study Committee Report (topic # 20) asks: "Under UCIOA Sec. 3-110(d), an association is permitted to vote by electronic ballot. Should unit owners be allowed to change an electronic vote after viewing comments from others?" The Drafting Committee at its January 2020 meeting discussed various issues concerning electronic ballots, including whether they should remain valid for postponed meetings. The consensus was that an owner should be able to revoke or amend a ballot before the meeting when votes are cast.

2. This draft reorganizes material in several of the subsections. Subsection (a) presently discusses all types of votes; the revised language treats only voting at meetings. Subsection (b) still covers requirements for meetings, with a new subsection (b)(2) addressing electronic voting and the subsections dealing with absentee ballots moved to new proposed subsection (e), which has rules for all types of ballots (absentee, paper, and electronic). Voting without a meeting is now addressed only in subsection (d) and new proposed subsection (e).

3. A proposed new subsection (b)(2) deals with voting at two types of meetings – all-electronic meetings where there is no geographic meeting place, and live meetings where some unit owners attend remotely using communications technology. These meetings are authorized by proposed amendments to section 3-108(a)(6) and (7), respectively. Subsection (b)(2) allows remote voting if the association uses a reasonable method of authentication. The language is closely based on language from the proposed 4th edition to the ABA's Model Nonprofit Corporation Act (MNCA) (exposure draft Dec. 13, 2019) § 710(b) (*Remote participation in member meeting*), which provides: "Members participating by means of remote communication are deemed present and may vote at the meeting if the membership corporation has implemented reasonable measures: (1) to verify that each person participating remotely as a member is a member; and (2) to provide the members a reasonable opportunity to participate in the meeting and to vote on matters submitted to the members, including an opportunity to communicate, and to read or hear the proceedings of the meeting, substantially concurrently with the proceedings."

4. The existing language of Section 3-110 expressly authorizes electronic ballots, but only when a vote is conducted without a meeting. Section 3-110(a) and (d). The existing provisions for absentee ballots and proxy votes (subsections (c) and (d)) do not say whether electronic absentee ballots or electronic proxies are allowed.

New proposed subsection (e)(2) allows electronic ballots for all voting if allowed by the association and with the unit owner's consent. The unit owner who prefers a paper ballot is always allowed to use one. This draft does not address electronic proxies.

5. The April 2020 Drafting Committee draft of this section contained a proposed new subsection (h) to authorize electronic ballots for votes taken at live meetings and to set forth minimum requirements for an electronic voting system selected by the association. The new subsection (h) was based on Fla. Stat. § 718.128, adopted in 2015 as a new section in the Florida condominium act to regulate electronic voting. The Florida statute has more detail and additional requirements than subsection (h). The Drafting Committee at its April 2020 meeting discussed new proposed subsection (h) and issues concerning other subsections of 3-110. The consensus was that subsection (h) provided too much detail and might be too restrictive. One issue is whether voting by email is reliable and subject to proper authentication of the voter's identity and the vote.

This draft eliminates proposed subsection (h) from the April 2020 draft on electronic voting and replaces it with briefer requirements in new proposed subsection (e), which states requirements for all ballots (paper and electronic).

SECTION 3-115. ASSESSMENTS.

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

(b) Except for assessments under subsections (c)~~, (d), and (e)~~ through (g)**,** or as otherwise provided in this [act], 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) and (b). The association may charge interest on any past due assessment or portion thereof at the rate established by the association, not exceeding [18] percent per year.

(c) ~~To the extent required by the~~ The declaration may provide for~~:~~

~~(1) a~~ the assessment of common expenses associated with the maintenance, repair, or replacement of a limited common element ~~must be assessed~~ against the units to which ~~that~~ the limited common element is assigned~~;~~. The declaration may provide that the assessment be made equally~~,~~ against the units or in any other proportion ~~the declaration provides;~~.

~~(2)~~ (d) ~~a~~ The declaration may provide that common expenses benefiting fewer than all of the units ~~or their owners may~~ must be assessed exclusively against the units ~~or unit owners~~ benefitted~~; and~~, but only if the declaration specifies which common expense is to be assessed exclusively and which units are subject to the assessment. If the declaration so provides, the assessment must be made in accordance with the allocation specified in the declaration.

Reporter's Note (10/23)

Barry Hawkins writes:

> After considerable thought and re-reading of subsection (d) I have come to like it better and better and do not think it needs any major surgery. As I now read it it would appear to apply primarily to ongoing maintenance and repairs or replacements. As long as there are no big surprises for the unit owner I think it makes sense to allocate financial responsibility to those unit owners whose units include features different in kind from that of other owners. Everybody would be on an even playing field since the features triggering different allocations from the standard (whether based upon value, square footage or any other measuring tool) would be disclosed specifically and the buyer could choose to buy or not buy depending upon that factor among others. I think that works well in on going maintenance and perhaps less well in the event of allocating cost of repairing or replacing features harmed by some loss event because of the interplay of insurance and causation and the difficulty of advance disclosure of the many unexpected events which could have been allocated differently with perfect foresight. None the less and subject to my subsequent comments on subsection (g) I think it works and is an elegant solution to a difficult problem.

~~(3)~~ (e) To the extent required by the declaration, the costs of insurance must be assessed in proportion to risk, and the costs of utilities must be assessed in proportion to usage.

~~(d)~~ (f) Assessments to pay a judgment against the association may be made only against the units in the common interest community at the time the judgment was entered, in proportion to their common expense liabilities.

~~(e)~~ (g) If damage to a unit or other part of the common interest community, or if any other common expense is caused by the willful misconduct or gross negligence of any unit owner or a guest or invitee of a unit owner, the association may assess that expense exclusively against that owner's unit, even if the association maintains insurance with respect to that damage or common expense.

Reporter's Note (10/23)

Barry Hawkins writes:

> Now I turn to subsection (g) and that is a horse of different color. I think we got it wrong in 2008 and now it needs to be corrected. As I will elaborate on later I think we saw the problem in our 2010 deliberations in Connecticut and modified what was then 3-115(e) to its present format in Conn. Gen Statutes Section 47-257. I propose that (g) be discussed as part of your committees agenda and have concluded that it be substantially re-written to more closely track 47-257. In hindsight I think we came closer to the solution in 2010 and now regret that we did not then tackle amending CIOA to implement that fix.
>
> Subsection (e) as it was identified in 1982 CIOA was maintained in the original formulation from 1982 through the substantial amendments in 1994. It was apparently modified in 2008 and that is where I think we went wrong. The original formula allowed the association to directly surcharge the unit owner for misconduct resulting in a loss. The language did not deal with the issue of whether or not there was insurance coverage for the loss and the formula has no explanatory commentary.
>
> I submit that the formulation and absence of commentary result from the fact that almost all property insurance policies exclude from coverage damages resulting from the intentional bad acts of the insured. This limitation of liability is identical between master policies covering multiple units and standalone single homes. It would not be a surprise or unfair for a unit owner to find that their policy would not pay for intentional bad acts (read "misconduct").
>
> In a common interest community of course there is a need to reconcile the fact that unit owners are insured but they are also not individually responsible for

purchasing and paying for the policy premium. To avoid an unfair result in such a community we also provided for mandatory insurance Waiver of subrogation rights to make sure that a unit owners misconduct would not defeat the claims of other unit owners for damages To their units and the association on behalf of all owners to achieve the same result for damages to common elements resulting from misconduct of a unit owner. Section 3-113 sets forth the provisions needed to reflect the unique needs of unit owners in a multi-family ownership situation and it did it quite nicely in a manner which was consistent with 3-115. These two subsections worked reasonably well from 1983-2008 when I think we left the tracks inadvertently but with good intentions.

In 2008 section 3-115(e) was amended to add the word willful as a modifier to misconduct (a change of no substance I think since willful is inherently an implied feature of misconduct and this changes the standard not at all) and much more importantly added the troubling standard of gross negligence to the conduct that would allow the association to visit the entire cost of repairing damages upon the errant unit owner and even worse added the concept that this would be done whether or not there was any insurance coverage for the conduct and the resulting damages.

The origin of these unfortunate changes was probably based upon the factors discussed in the commentary to section 3-113 of the 2008 CIOA text. The changes made to 3-115(e) are described in the accompanying commentary as being made at least in part to resolve the issues described in the 2008 commentary to 3-113 as needing solution. Unfortunately they do not directly nor adequately address the very real problems of high deductibles, lack of incentives for unit owners to act carefully with respect to maintaining common elements, and lack of incentives for unit owners not to file numerous small claims against the master policy thus raising the costs of premiums for all as well as leading to higher deductible amounts resulting in associations effectively having to self insure many such smaller claims. The raising of insurance premium cost and higher deductibles results of course in all unit owners paying the resulting cost of such lack of incentives.

Although the 2008 commentary acknowledges the difficulty of selecting fair and adequate alternatives it appears to have been mesmerized by the prospect of passing on the costs of many tort claims by expanding upon the concept of assigning fault to unit owners having tort claims and blithely passing it on to the unit owners individual property owners insurance carriers to pay for the repair or replacement of damages which had formerly been the responsibility of the master policy Carrier.

Accordingly 3-115(e) was modified to allow the association to decide whether the damages resulted from ordinary or gross negligence and if the latter, to allocate the total cost of repair or replacement to the unit owner. Presumably the association would not receive much resistance since that owner could then submit

the claim to his unit insurance carrier paying only the much more modest deductible charged by that unit carrier. In effect and despite the existence of provisions in 3-113 making it clear that the master policy was to provide primary insurance and the unit policy only secondary, this flim flam game depended upon the unit policy carrier accepting the decision of the association that the tort was one of gross negligence and therefor the tort was not an insured event under the master policy.

It did not take unit policy insurers long to realize that this was actually a three card Monte scheme with unit owner responsibility for negligence being cleverly passed on to the unit carrier. The unit carriers have of course pushed back with higher premium costs, larger deductibles and sometimes complex litigation claims. Many association lawyers, including me, have advised their clients to encourage unit owners to obtain unit property damage insurance coverage from the same carrier that writes the master policy, making the carrier agnostic as to the characterization of the tort as gross or simple negligence. Either way the carrier must pay and there is in reality no change in the incentives to be given to change unit owner conduct. I would submit that a scheme of coverage based upon an absence of incentives and a pull the wool over the carriers eyes is not a sound policy to be promoted by the ULC.

Even in the absence of a “hiding the ball “scheme of passing liability for payment on to the unit policy insuror there are a number of sound policy reasons not to add “fault” to decide whether a unit owner should pay for the cost of repair or replacement resulting from an accident. First, ordinary insurance policies on single family homes cover accident damage claims so that is the ordinary expectation of the property owner. In order to vary that expected and normal result there should be a sound rationale based upon some unique circumstance of common ownership that justifies a difference in result.

There are some differences of course such as the association pays the premium based upon mandatory payments from all owners and the policy prohibits any subrogation claims against the unit owners based upon their status as owners. This payment difference does lessen the incentive of an owner not to file meritless or numerous small claims since that conduct would raise the cost of premiums for all owners and no individual owner is likely to risk having their coverage threatened by non renewal or premium surcharge levied only against them. If the conduct of claims is poorly managed by one or more unit owners all owners will bear that risk jointly.

Secondly the distinctions between simple and gross negligence have been perplexing and difficult for jurists and juries alike for many decades. Saddling this distinction on multi family structures only as opposed to single family homes is a real step backwards and likely to be favored only by litigators who are paid to explore the often subtle differences.

Third , since the initial decision about whether to submit a claim to the master insurance policy or not to do so will fall to the associations board (which has a strong incentive to avoid raising the expenses of all owners either because of high deductible or future premium increases or both) the unhappy owner may or may not be able to rely upon a unit policy carrier (and least have to pay that deductible alone) or to sue the Board for using gross negligence as a reason for non submission. If the latter the unit owner would then have the burden of proving that he or she was not grossly negligent as difficult and expensive as that may be.

Finally the incentives arguably justifying this unfair choice of not seeking payment under already available insurance coverage paid for by all owners are not the least expensive and most efficient way to provide proper incentives.

The problem of multiple small or frivolous claims can be met by applying a de minimus standard to all claims below a reasonable minimum at which if meritorious the association would self insure by paying to repair the damage with funds of all owners through the common charges. Claims could be denied as not being meritorious by the Board But only after notice and opportunity for the unit owner to be heard.

In addition to misconduct as a trigger for unit owner liability the same high standard could also be applied to a unit owner who has violated a duly publicized written standard of maintenance such as maintaining heat in temporarily unoccupied units to prevent frozen pipe damage, not exchanging water heaters or laundry hoses beyond x years. Again after notice and hearing such conduct would be deemed equal to misconduct triggering individual liability.

Finally the desirable standard should probably articulate whether the Prohibited conduct of a unit owner warrants individual responsibility for all damages including deductibles or whether the standard should be all such expenditure (including deductible) after payment of all insurance proceeds. That decision may have to be made also in contemplation of the fact that damages to other units or common areas resulting from such conduct may be beyond the resources of a single unit owner and you may not want to deprive the association from access to the insuror's presumably deeper pockets.

As noted above the choices made in 2010 by the Connecticut council reviewing the 2008 act, as reflected in Section 47-257 of the Conn Gen Statutes would serve as a useful starting point in improving the policy decisions still reflected in what is now Section 3-115(g) of the Act being drafted. It is now time to correct our earlier error.

(h) The association may adopt a policy that allows all unit owners to prepay assessments at a reasonable discount specified in the policy.

~~(f)~~ (i) If common expense liabilities are reallocated pursuant to Section 1-107, 2-106(d), 2-110, or 2-113(b), common expense assessments and any ~~instalment thereof~~ installment of the assessment not yet due must be recalculated in accordance with the reallocated common expense liabilities.

Reporter's Notes

1. The Study Committee Report (topic # 3) asks: "Under what circumstances may the Association's Executive Board assess common expenses against some but not all units in a common interest community?" The Drafting Committee at its January 2020 meeting discussed the issue. The consensus was that sharing common expenses among all unit owners should be a strong norm, that the "who is benefitted standard" is vague, and that owners are entitled to sufficient notice of the circumstances in which they must pay all or a higher share of certain common expenses.

2. The amendments are intended to clarify the circumstances in which assessments of common expenses to less than all of the units are appropriate. When the Study Committee considered the issue, Commissioner Cannel stated that three different interpretations of the statutory language are possible:

> (i) If the declaration . . . specifies certain common expenses that "must" be assessed against fewer than all units, then those, and only those, common expenses must be so allocated;
> (ii) If the declaration . . . specifies certain common expenses that "may" be assessed against fewer than all units, then those, and only those, common expenses may be so allocated if the Board chooses to do so, but the Board has discretion in that regard; or
> (iii) The section simply allows the declaration generally to empower the Executive Board of the Association to decide from time to time whether any common expenses shall be assessed against fewer than all units, but until such a decision is made by the Board, no such variable assessments should be made"

Study Committee Report p. 21. The proposed amendments adopt the first approach. There is a strong norm that common expenses ought to be allocated to all the units. A departure from this norm is appropriate only when the declaration specifically describes certain common expenses that are to be assessed to fewer than all units. The specification of common expenses may be by category; for example, decks, windows, or roofs. The declaration must indicate which units must pay the common expenses, but a list of units is not required if the declaration reasonably identifies the units. For example, it suffices if the declaration states: (1) "Common expenses for all skylight repairs and replacements shall be assessed

to the individual unit benefitted by the skylight" or (2) "Common expenses for repairs and replacements for damage caused by flooding shall be assessed to affected units within an official flood zone."

Example 1: A community has two buildings, a ten-story tower and a long two-story townhome building. Maintenance, repair, and replacement of the roofs are common expenses. The declaration states the common expenses must be assessed in accordance with their allocated interests in the common elements, but it allows the association "to assess a common expense benefiting fewer than all of the units exclusively against the units benefitted." The Board replaces the roof on the ten-story tower. Under subsection (d), the Board must assess the common expenses for the roof replacement to all units in both buildings. The Board has no discretion to assess the common expenses only to the units in the tower. The general reference in the declaration to assessing those units that are benefitted does not satisfy the requirement in subsection (d) that the declaration specify "which common expense is to be assessed exclusively and which units are subject to the assessment." Under the existing language of Section 3-115, the Board arguably has discretion to assess the common expenses for the tower roof replacement only against the tower units.

Example 2: A community has two buildings, a ten-story tower and a long two-story townhome building. Maintenance, repair, and replacement of the roofs are common expenses. The declaration states the costs for maintenance, repair, and replacement of a building's roof shall be assessed to the units in the building." The Board replaces the roof on the ten-story tower. Under subsection (d), the Board must assess common expenses for the roof on the ten-story tower to the units in the tower. The reference in the declaration satisfies the requirement in subsection (d) that the declaration specify "which common expense is to be assessed exclusively and which units are subject to the assessment." The Board has no discretion to assess the common expenses to the units in both buildings.

3. The proposed new subsection (h) allows the board to adopt a policy allowing unit owners to prepay assessments at a reasonable discount. One situation in which this is appropriate involves an association that has borrowed a substantial amount of money for capital improvements, to be repaid through future assessments. A policy may allow a unit owner to prepay the unit owner's share of the loan in exchange for a discount equivalent to the savings in loan interest.

Comment

1. This section contemplates that a declarant might find it advantageous, particularly in the early stages of project development, to pay all of the expenses of the common interest community himself rather than assessing each unit individually. Such a situation might arise, for example, where a declarant owns most of the units in the project and wishes to avoid ~~building~~ billing 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 common interest community, 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. Common expenses are by their nature recurring, and the association must collect what the act calls the "periodic common expense assessment." Subsection (a) requires assessment "at least annually" and allows any shorter period. Monthly assessments are most commonly used. The association may choose to change its periodic common expense assessment if it determines a shorter or longer period is appropriate.

Reporter's Notes

1. The Study Committee Report (topic # 9) asks "What is the meaning of 'periodic assessments' in UCIOA?" and recommends: "A drafting Committee might consider the extent to which amendments might be made either to the text of the Act or the comments to clarify what was meant by the term 'periodic common expense assessment.'" The Drafting Committee at its January 2020 meeting discussed the issue. The consensus was that any period not to exceed one year is acceptable, and the comments should be revised to reflect this.

2. This addition to the comment makes it clear that the association has the discretion to select any period for assessment and payment of common expenses, provided that the period does not exceed one year. The contrary might be inferred from two references, one in the existing text (Section 4-103(b)) and one in the comments (Section 3-123 Comment 3), both referring to "monthly" assessments. Amendments are proposed to delete both references (see Section 3-123 Comment below).

SECTION 3-123. ADOPTION OF BUDGETS; SPECIAL ASSESSMENTS.

(a) The executive board, at least annually, shall adopt a proposed budget for the common interest community for consideration by the unit owners. Not later than [30] days after adoption of a~~n~~ proposed budget, the executive board shall provide to all the unit owners a summary of the budget, including any reserves, and a statement of the basis on which any reserves are calculated and funded. Simultaneously, the board shall set a date not less than 10 days or more than 60 days after providing the summary for a meeting of the unit owners to consider ratification of the budget. Unless at that meeting a majority of all unit owners or any larger number specified in the declaration reject the budget, the budget is ratified, whether or not

a quorum is present. If a proposed budget is rejected, the budget last ratified by the unit owners continues until unit owners ratify a subsequent budget.

(b) The executive board, at any time, may propose a special assessment. Except as otherwise provided in subsection (c), the assessment is effective only if the executive board follows the procedures for ratification of a budget described in subsection (a) and the unit owners do not reject the proposed assessment.

(c) If the executive board determines by a two-thirds vote that a special assessment is necessary to respond to an emergency:

(1) the special assessment becomes effective immediately in accordance with the terms of the vote;

(2) notice of the emergency assessment must be provided promptly to all unit owners; and

(3) the executive board may spend the funds paid on account of the emergency assessment only for the purposes described in the vote.

Comment

* * *

3. . . .

(b) The public offering statement must contain any current balance sheet and a projected budget for the association, **** The budget must include:

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

(B) a statement of any other reserves;

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

(D) the projected ~~monthly~~ periodic common expense assessment for each type of unit.

[ARTICLE] 4

PROTECTION OF PURCHASERS

* * *

SECTION 4-103. PUBLIC OFFERING STATEMENT; GENERAL PROVISIONS.

(a) Except as otherwise 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 common interest community, and a statement that the common interest community is a condominium, cooperative, or planned community;

(2) a general description of the common interest community, including to the extent possible, the types, number, and declarant's schedule of commencement and completion of construction of buildings, and amenities that the declarant anticipates including in the common interest community;

(3) the number of units in the common interest community;

(4) copies and a brief narrative description of the significant features of the declaration, other than any plats and plans, and any other recorded covenants, conditions, restrictions, and reservations affecting the common interest community; the bylaws and any rules 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) the financial information required by subsection (b);

(6) any services not reflected in the budget that the declarant provides, or

expenses that the declarant pays and which the declarant 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 purchaser or seller at the time of sale, 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 common interest community;

(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:

(A) 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;

(B) 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 plus [10] percent of the share, proportionate to the purchaser's common expense liability, of any indebtedness of the association secured by security interests encumbering the common interest community; and

(C) if a purchaser receives the public offering statement more than 15 days before signing a contract, the purchaser may not cancel the contract;

(12) a statement of any unsatisfied judgment or pending action against the association, and the status of any pending action material to the common interest community 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 common interest community and any restrictions:

(A) on use, occupancy, and alienation of the units; and

(B) on the amount for which a unit may be sold or on the amount that may be received by a unit owner on sale, condemnation, or casualty loss to the unit or to the common interest community, or on termination of the common interest community;

(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 common interest community;

(17) the extent to which financial arrangements have been provided for completion of all improvements that the declarant is obligated to build pursuant to Section 4-119;

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

(19) any other unusual and material circumstances, features, and characteristics of the common interest community and the units;

(20) in a cooperative, a statement whether the unit owners will be entitled, for federal, state, and local income tax purposes, to a pass-through of deductions for payments made

by the association for real estate taxes and interest paid the holder of a security interest encumbering the cooperative and a statement as to the effect on every unit owner if the association fails to pay real estate taxes or payments due the holder of a security interest encumbering the cooperative; ~~and~~

(21) a description of any arrangement described in Section 1-209 binding the association~~.~~; and

(22) in a condominium or planned community containing a unit not having horizontal boundaries described in the declaration, a statement whether the unit may be sold following termination of the common interest community under Section 2-118 without the consent of all the unit owners.

(b) The public offering statement must contain 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:

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

(B) a statement of any other reserves;

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

(D) the projected ~~monthly~~ periodic common expense assessment for each type of unit.

(c) If a common interest community composed of not more than 12 units is not subject

to any development right and no power is reserved to a declarant to make the common interest community part of a larger common interest community, group of common interest communities, or other real estate, a public offering statement may include the information otherwise required by subsection (a) (9), (10), (15), (16), (17), (18), and (19) and the narrative descriptions of documents required by subsection (a)(4).

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

Reporter's Notes

1. Section 4-103(b) requires that the public offering statement contain a projected budget, including "the projected monthly common expense assessment for each type of unit." Although monthly assessments are the common practice, UCOIA allows any period up to annual assessments. See Section 3-115(a) ("assessments must be made at least annually"). The amendment corrects this subsection by replacing "monthly common expense assessment" with "periodic common expense assessment," the term presently used in Section 4-109(a)(2) to describe content in the certificate to be provided to the purchaser of a resale unit.

2. The proposed addition to the public offering statement in Section 4-103(a)(22) is a companion to the revision to Section 2-118(c) and (d), which allows termination of a common interest community and the sale of all real estate, including all units, with a supermajority vote of 80%, regardless of whether the units have horizontal boundaries.

Comment

* * *

7. Paragraph (14) requires that the declarant disclose the existence of any ~~right~~ restrictions on the use and occupancy of units, including restrictions on rentals or the creation of time-share arrangements. The declarant must disclose any rights of first refusal or other restrictions on the ~~uses for which or~~ classes of persons to whom units may be sold. It also requires disclosure of any provisions limiting the amount for which units may be sold or on the part of the sales price which may be retained by the selling unit owner. In some existing housing cooperatives for low income families the unit owner is required to sell at no more than a fixed sum; sometimes the amount which the unit owner paid; sometimes that plus a fixed appreciation. In addition to that practice, the section contemplates other possible limitations on the owner's right to receive sales proceeds such as a provision under which the developer shares in any appreciation in value.

* * *

10. 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 common interest community 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 common interest community, *e.g.*, the fact that buildings have a roof, walls, doors, and windows. Similarly, the provision does not require the disclosure of "unusual" information about the common interest community which is not also "material~~,~~" (*e.g.*, the fact that a common interest community is the first development of its type in a particular locality). 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 common interest community, features of the location of the common interest community~~,~~ (*e.g.*, near the end of an airport runway or a planned rendering plant), a plan to convert any units to time-share ownership, and the like.

Reporter's Notes

1. The proposed amendment to Comment 7 makes explicit what was already implicit: requiring the disclosure of restrictions on sale means a provision in the declaration that prohibits the creation of time-share arrangements should be disclosed. The amendment also cleans up the language and includes restrictions on rentals, including restrictions on short-term rentals.

2. The proposed amendment to Comment 10 requires the disclosure of any plan to allow some or all of the units to be devoted to time-share arrangements. Such a provision would be unusual in many communities. If the plan is set forth in the declaration, Section 4-105 also requires inclusion in the public offering statement.

SECTION 4-105. ~~SAME~~ PUBLIC OFFERING STATEMENT; 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 frequent since the 1960s, particularly ~~with respect~~ to in resort common interest communities. In recognition of this fact, this section requires the disclosure of certain information with respect to time sharing. This section does not apply to the sale of time-share units that are subject to another state statute requiring the declarant to file a public offering statement with a state agency. See Section 4-107.

2. ~~Virtually all~~ Some existing state statutes dealing with condominiums, planned communities, or cooperatives 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 common interest community, and Section 1-109 of the Model Act governs conflicts between this Act and time-share legislation.

Reporter's Notes

The amendment updates the language of the Comment and refers to Section 4-107, which contains a proposed amendment for an exemption from this act's requirement of a public offering statement when the declarant has prepared a time-share public offering statement.

SECTION 4-107. ~~SAME~~ PUBLIC OFFERING STATEMENT; COMMON INTEREST COMMUNITY ~~SECURITIES~~ REGISTERED WITH GOVERNMENT AGENCY. If an interest in a common interest community is currently registered with the Securities and Exchange Commission of the United States [or with the state pursuant to [cite to appropriate state time-share statute]], a declarant satisfies all requirements of this [act] relating to the preparation of a public offering statement ~~of this [act]~~ if the declarant delivers to the purchaser ~~[and files with the agency]~~ a copy of the public offering statement filed with the Securities and Exchange Commission [or [the appropriate state agency]]. [An interest in a common interest community is not a security under ~~the provisions of~~ [~~insert~~ cite to appropriate

state securities regulation statutes].]

Reporter's Notes

The proposed amendment provides optional language for an exemption from the public offering statement provisions of this article when the state has enacted a time-share statute that requires the developer or seller of time shares to prepare a public offering statement to be filed with a state agency and given to purchasers. The amendment follows the language of Nev. Rev. Stat. § 116.4107, which provides an exemption for a common interest community registered to sell time-shares with the Real Estate Division of the Department of Business and Industry.

SECTION 4-109. ~~RESALES OF UNITS~~ RESALE OF UNIT.

(a) Except in the case of a sale in which 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 the earlier of conveyance or transfer of the right to possession of a unit, a copy of the declaration, other than any plats and plans, the bylaws, the rules or regulations of the association, and a certificate containing:

Reporter's Note (10/23)

At the September 2020 Zoom annual meeting first reading of the act, Howard Swibel suggested an edit to the preceding clause to make it clear that "other than" applies only to "any plats and plans" and not to the following terms beginning with "the bylaws".

(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 held by the association;

(2) a statement setting forth the amount of the periodic 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 the owner of the unit being sold;

(4) a statement of any capital expenditures approved by the association for the

current and 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 given or received notice in a record that any existing uses, occupancies, alterations, or improvements in or 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 received notice in a record from a governmental agency of any violation of environmental, health, or building codes with respect to the unit, the limited common elements assigned thereto, or any other portion of the common interest community which has not been cured;

(12) a statement of the remaining term of any leasehold estate affecting the common interest community and the provisions governing any extension or renewal thereof;

(13) a statement of any restrictions in the declaration affecting the amount that may be received by a unit owner upon sale, condemnation, casualty loss to the unit or the common interest community, or termination of the common interest community;

(14) in a cooperative, an accountant's statement, if any was prepared, as to the deductibility for federal income tax purposes by the unit owner of real estate taxes and interest paid by the association;

(15) a statement describing any pending sale or encumbrance of common elements; and

(16) a statement disclosing the effect on the unit to be conveyed of any restrictions on the ~~owner's~~ right to use or occupy the unit ~~or to~~, including a restriction on a lease or other rental of the unit ~~to another person~~.

(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 purchase contract is voidable by the purchaser until the certificate has been provided and for [five] days thereafter or until conveyance, whichever first occurs.

Reporter's Notes

The proposed amendment expands the scope of the disclosure in Section 9-106(a)(16) to include not only standard leases, but also time-share arrangements. short-term rentals, and sharing platforms that sell licenses to guests, such as Airbnb. The proposed amendment matches the scope of what the declaration must and may disclose in Section 2-105(a)(12) and (b). Recently many common interest communities have placed restrictions on short-term rentals in declarations and rules, and this information is important for many buyers.