

MEMORANDUM

To: ULC Scope and Program Committee

From: William Breetz, Chair, Study Committee to Consider the Need for and Feasibility of Revisions to the Uniform Common Interest Ownership Act

Date: May 30, 2019

Re: REPORT OF THE STUDY COMMITTEE ¹

CONTENTS OF THE STUDY COMMITTEE REPORT

Background of the Study.....2

Activities of the Study Committee

Process.....3

Conclusions.....4

Feasibility/Enactability.....5

Analysis and Recommendations regarding the issues.....7

November 8, 2018 minutes of Study Committee meeting16

January 8, 2019 minutes of Study Committee meeting.....25

February 25, 2019 minutes of Study Committee meeting.....33

**Ex A to 02-25 minutes: Commissioner Cardi analysis
of changing boundaries issues..... 45**

March 27, 2019 Minutes of Study Committee meeting..... 52

¹ **The following Commissioners were members of the Study Committee:** Marion W. Benfield (North Carolina); David D Biklen (Connecticut); William Breetz, Committee Chair (Connecticut); John M. Cannel (New Jersey); Vincent P. Cardi (West Virginia); Martin T. Carr (California); Dennis W. Cooper (Washington); Marc S. Feinstein (South Dakota); Marisa G.Z Lehr (Pennsylvania); Jacqueline T. Lenmark (Montana); Carl Lisman, Chair, ULC Executive Committee (Vermont); J. Cliff McKinney, (Arkansas); Christopher K. Odinet (Louisiana); Anita H. Ramasastry, ULC President (Washington); Daniel Robbins, Chair, ULC Scope & Program Committee (California); Cam Ward, ULC Division Chair (Alabama); Steve Wilborn, ULC Vice President (Kentucky).

The following persons were Observers to the Study Committee: Wilson. Freyermuth, Professor, University of Missouri Law School and the Executive Director of the JEB on Uniform Real Property Acts; Attorney Steven M Prunty of West Virginia; J. David Ramsey, representing the Community Associations Institute; and Andrew Guggenheim of the American Bankers Association.

The American Bar Association Advisor to the Study Committee was Attorney Joseph Lubinski.

Background to the Study The Uniform Common Interest Ownership Act ('UCIOA') deals comprehensively with the many complex issues posed in condominiums, cooperatives and planned communities – the three forms of real estate ownership in which multiple persons each own (or lease for a long term) a separate parcel of real estate and all those persons collectively own or lease other parcels of real estate in common.

The Uniform Laws Conference has devoted substantial attention and resources for more than 50 years to the regulation of these forms of shared real estate ownership. The minutes of the first meeting of this Study Committee describe that history:

In 1968, the NCCUSL began a project ...meant to accomplish for aspects of land law what the Uniform Commercial Code had done for sales of goods and secured transactions. The project expanded to include ...condominiums. In 1975, the entire product was brought before the NCCUSL at its Annual Meeting...(where) the entire project was split....In 1975...the Uniform Land Transactions Act (was approved). [I]n 1976... the Uniform Simplification of Land Transfers Act (USLTA) (was approved).” Both ULTA and USOLTA...were ultimately withdrawn by ULC (Oct. 11, 2018 Study Committee. minutes, *fn 2*).

In 1976, ULC appointed a drafting committee to prepare a free standing Uniform Condominium Act and that Act was promulgated in 1978. Thereafter, ULC promulgated both a Uniform Planned Community Act in 1980 and a Model Real Estate Cooperative Act in 1981. The Uniform Common Interest Ownership Act ('UCIOA') was promulgated in 1982 and applies the concept of a 'common interest community' to all three forms of shared real estate ownership. ULC has subsequently promulgated amendments to UCIOA in 1994 and 2008. (*Id.*, at 1)

That statement of history failed to note that the Conference also adopted an amendment in 2014 to those UCIOA provisions dealing with the Association's so-called 'super lien' in Section 3-116. Finally, in 2017 the Conference approved amendments to the Uniform Condominium Act to conform that Act to the 1994, 2008, and 2014 amendments to UCIOA.

Creation of this Study Committee was proposed by the Joint Editorial Board for Uniform Real Property Acts in a letter dated June 12, 2018 from the JEB's Executive Director, Professor Wilson Freyermuth of the University of Missouri School of Law. Freyermuth wrote, in pertinent part:

UCIOA has been enacted in eight states. Although the ULC continues primarily to promote the adoption of UCIOA (rather than one of its three forebears), at this point, UCA or UCIOA are in effect in 20 states, and the provisions of UCA or UCIOA have also impacted the development of common interest ownership law even in states that have not enacted either UCA or UCIOA. Further, because nearly all modern residential real estate development occurs in the context of common interest ownership developments, the frequency of litigation involving common interest ownership continues to increase. For this reason, if the ULC is to preserve and/or expand the legislative footprint of UCIOA, the ULC has a significant interest in making sure that UCIOA undergoes periodic review and amendment so that any

ambiguities in its language can be identified and clarified, and so that UCIOA will continue to reflect the “state of the art” in common interest ownership.

The Executive Committee thereafter approved the recommendation of Scope and Program and voted as follows: “A motion was made and approved to appoint a study committee to consider the need for and feasibility of revisions to the Uniform Common Interest Ownership Act.”

Activities of the Study Committee

Process The Study Committee met five times by telephone and video conference call, in each instance for 90 minutes; those meetings were in October and November of 2018 and January, February and March of 2019. The Committee members also reviewed and approve this Report in May 2019. The minutes of the four substantive meetings are attached as Exhibits to this Report and are referred to throughout this Report.

From the outset, the Study Committee recognized the limited scope of its work. Our charge was not to consider the desirability or enactability of UCIOA as a whole; rather, we were to consider the desirability of having a Drafting Committee review either

(1) discrete questions regarding provisions of the existing Act that had been raised by various commentators and which the Study Committee concluded might be suitable either for redrafting or for additional commentary; or

(2) new topics that had not been addressed in the existing Act but which, in the view of various commentators, should be addressed with new statutory provisions.

The Study Committee’s first task was to assemble a list of those matters which it might consider. The Issues list that follows in this Report and that comprised the entirety of the Study Committee’s work was compiled primarily from two sources: first, from subjects posed by Professor Freyermuth in his letter of June 12, 1918; and second, from various members of the Study Commission or its Observers. The list was expanded at various times during our deliberations as additional issues arose, and all appear on the enclosed list.

Our second task was an effort to engage representatives of various interest groups as Observers in our deliberations; in this effort, we were only marginally successful. As indicated in Footnote 1, in addition to Professor Freyermuth, we succeeded in attracting only three representatives of affected interest groups: the banking industry, the Community Associations Institute, and an individual lawyer who represents real estate developers but was not an official representative of any interest group. Professor Freyermuth and David Ramsey, the CAI representative, were active participants in our deliberations. A range of other possible interest groups indicated they would likely follow and participate in any drafting efforts, but were not prepared to serve as observers to the Study Committee.

After the initial organizational meeting of the Study Committee in October, 2018, the process of the Study Committee was as follows:

First, before scheduling a meeting, the Chicago office would circulate a survey in customary form, seeking to identify a date and time during which the maximum number of Commissioners could participate in a meeting.

Second, with the date and time set, the Chair would select a number of topics from the list of issues for discussion at the next meeting, and ask one of the participating Commissioners to lead the discussion of that topic. The Chair notes that the members of the Study Committee were, for the most part, very consistent in their attendance during the meetings. He also believes that the process of asking different Commissioners to lead the discussion of each topic proved to be extremely valuable in engaging the discussion leaders in the Committee's work; this was especially helpful to the deliberations since many of the members had limited experience with the subject matter.

Third, at the end of each meeting, the Chair prepared draft minutes of the meeting that were circulated to members before the next meeting. Several Commissioners provided to the Chair the notes they had prepared for their discussion; this was immensely helpful in the preparation of the minutes and those notes have been incorporated into or appear as exhibits to the minutes attached to this Report.

Conclusions - As detailed in the recommendations regarding each of the topics detailed below, the Study Committee concludes that there is a need for the Conference to consider revisions to some, but certainly not all, of the provisions in UCIOA by drafting either substantive statutory provisions or additional comments.

Without diminishing any of the topics that the Committee believes are appropriate for consideration by a Drafting Committee, several topics stand out as being of particular interest.

Lien for Assessments - UCIOA § 3-116. UCIOA § 3-116 creates a statutory lien for a portion of whatever unpaid common expenses may be due from a unit owner to the home owners association; under this section, that lien has limited priority over a lender's first mortgage lien. The minutes of the March 27, 2019 meeting detail the Committee's discussion. While the Conference has dealt with this topic repeatedly in the past, the Joint Editorial Board has continued to pursue discussions with the Federal Housing Finance Agency, which is the federal conservator of both Freddie Mac and Fannie Mae. While this has been a very contentious subject over several years, there is some cautious optimism that a compromise might be reached that would permit the Act to gain support from the lending community.

Adverse Possession of Common Elements This subject is not addressed in the current Act, but appears to be a topic that has arisen with some frequency around the country. 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.

Applicability - UCIOA Article 1, Part 2, §§ 1-201 through 1-210. The Study Committee discussion on February 25, 2019 revealed considerable controversy regarding how UCIOA applies in various contexts, particularly with regard to common interest communities created before adoption of UCIOA. It may be that with the passage of time, potential constitutional constraints that were perceived as significant limitations by the original drafting committee would be less

compelling in today's environment and would permit the Act to apply to all common interest communities regardless of when created, thus eliminating the considerable confusion of deciding which laws apply to various aspects of pre-existing communities.

Feasibility/Enactability – The Study Committee was mindful of the guidance in the Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts, dated January 2014, and particularly paragraphs (c) and (d) of the Criteria:

(c)... [E]very act drafted by the ULC should be guided by the following considerations:

- (1) Whether there [is] a need for an act on the subject.*
- (2) Whether there is a reasonable probability that an act, when approved, either will be accepted and enacted into law by a substantial number of states or, if not, will promote uniformity indirectly. In other words, the act's preparation is likely to be a practical step toward uniformity of state law or at least toward minimizing the diversity of state law.*
- (3) Whether the subject of the act must be such that uniformity of law among states will produce significant benefits to the public through improvements in the law. Such public benefits include (i) facilitating interstate economic, social, or political relations; (ii) responding to a need common to many states as to which uniform legislation may be more effective, more efficient, and more widely and easily understood; and (iii) avoiding significant disadvantages likely to arise from diversity of state law....*

(d) When considering proposals to revise or amend existing acts, the ULC should be guided by the following considerations:

- (1) Whether the act advances the law on a subject that ULC has already addressed;*
- (2) Whether the act addresses matters that have been the subject of successful enactments in the past;*
- (3) Whether the act concerns an area of the law where the ULC has significant presence.*

Analysis of the Guidance Specifically, as regards the proposal to consider drafting a new section of UCIOA addressing the issue of how a State's law of adverse possession should be applied to common elements, the Study Committee was informed that the issue has arisen in several known instances, and guidance on the subject matter, which is not currently addressed in the statute would be helpful.

Beyond the single subject which the Study Committee has recommended as a new subject within UCIOA, we were mindful of the guidance in (d) (i) – (iii) as we considered the full list of proposed matters before us. In several instances, the Study Committee concludes that drafting would not be appropriate. However, with respect to the several other recommended drafting tasks to amend both statutory language and comments, the Study Committee concludes that the clarity or revised approaches of each recommendation is clearly warranted under the guidance. Without detailing that conclusion in each instance, some examples may be useful:

Lien for Assessments – Issue 1. The inability to find common ground between representatives of the home owners association and lending communities on this subject remains one of the most litigated and contentious matters arising under UCIOA. The possibility of reconciling those differences, though not assured, is itself sufficient reason to justify appointment of a drafting committee.

Applicability – Issue 11. The language of the Study Committee’s recommendation below is instructive:

- (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.

The relationship between unit owners and the HOA board – Issues 10 and 17: The Study Committee was struck by the fact that Commissioner Cannel, the retired Reviser of Statutes with the New Jersey Law Revision Commission, and Observer David Ramsey, a practicing lawyer in New Jersey specializing in this field, agree that amendments are needed to UCIOA’s Article 3, which largely governs this relationship and that disagreements over Article 3 have contributed significantly to New Jersey’s failure to adopt UCIOA. Both Cannel and Ramsey feel that this relationship is the source of the largest number of contested matters arising in the field. Several other Commissioners concurred.

The balance of this Report consists of the substantive recommendations of the Study Committee regarding the issues which have been provided for the Committee’s consideration.

**ANALYSIS AND RECOMMENDATIONS REGARDING THE ISSUES FOR
CONSIDERATION BY THE STUDY COMMITTEE**

1. UCIOA Sec. 3-116 creates a 6 month ‘super-priority’ statutory lien on each unit for unpaid common expenses, including these discrete subjects:

- a. Resistance to the super lien from lenders;**
- b. Relative priority of liens from other associations to which unit belongs;**
- c. The validity of a lien foreclosure sale that yields a very low sales price;]**
- d. Whether a home owners association (‘HOA’) can waive its lien priority.**

Study Committee Recommendation (03-27-2019): A Drafting Committee should consider the issues posed in Professor Freyermuth’s presentation and propose such appropriate amendments as determined by that Committee.

2. Whether a unit owner or other person may adversely possess common elements in a common interest community (‘CIC’).

Study Committee Recommendation (11-8-18): UCIOA does not presently address this subject. 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.

3. Under what circumstances may an HOA board of directors assess common expenses to some but not all units in a CIC?

Study Committee Recommendation (11-18-18): A UCIOA drafting committee should consider revisions to Section 3-115 (Assessments) to clarify its meaning.

4. What happens when the boundaries of a unit shift as a result of, for example, a sinking building?

Study Committee Recommendation (02-25-19): As an aid to the Study Committee, Commissioner Cardi prepared an extensive paper analyzing this topic. The Study Committee discussion was wide-ranging but because of time constraints, the Committee did not consider all of the questions and observations contained in Commissioner Cardi's materials. A drafting Committee should review the notes attached as Exhibit A to the Minutes of February 25, 2019 and consider (i) amplifying the existing Comments to UCIOA Section 2-114, and (ii) defining any additional terms that the Drafting Committee concludes are unclear.

5. A variety of issues in connection with termination of a Common Interest Community.

Study Committee Recommendation (11-8-18): A drafting committee should consider whether amendments are needed to UCIOA § 2-118 regarding termination of a common interest community.

6. 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.

Study Committee Recommendation (11-08-2018): A drafting committee should further consider whether revisions to Section 2-120 (Master Associations) or its comments are needed to address the questions discussed in the minutes of November 8, 2018.

7. Whether the Public Offering Statement ('POS') must describe any pending litigation involving the CIC.

Study Committee Recommendation (01-08-2019): In light of the provision in UCIOA § 4-103 (a) (12) that "...a public offering statement must contain or fully and accurately disclose... (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 . . . “the Study Committee concluded that there was no need for further drafting with regard to this issue.

8. Whether a person required to deliver a POS must deliver it to a potential buyer who is an investor rather than a person who intends to occupy her unit.

Study Committee Recommendation (01-08-19): For the reasons described in the discussion of this subject that appear in the minutes of January 8, 2019, the Study Committee concluded that the answer to this question is ‘yes’ and there was no need for further drafting with regard to this issue.

9. What is the meaning of ‘periodic assessments’ in UCIOA?

Study Committee Recommendation (02-25-2019): 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’.

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? Examples include such matters as:

A. The right of a unit owner to bring suit to compel proper board process;

B. Whether the UCIOA standard of care for the board to act the proper standard?

C. To whom does a management company owe its duty? The board? The association? The unit owners?

D. Should UCIOA impose standards on the management company of a common interest community? For example, may the management company act at board direction even if in violation of UCIOA or the documents? If not, what is exposure for a manager and a remedy for a unit owner. What if anything

should UCIOA say when a management company controls electronic messaging to unit owners and abuses that control?

E. Should UCIOA adopt a procedure facilitating amending proposed amendments to the association’s bylaws when the voting process will be by mail vote without a meeting?

F. UCIOA currently “encourage(s)” education of association board members regarding UCIOA matters. Should a stronger word be used?

G. UCIOA currently requires that unit owners be given “a reasonable opportunity” at any meeting to comment regarding any matter affecting the association. Is there utility in clarifying, in a comment, how a time limit might be imposed – bylaw? Rule?

H. A five-minute limit on comment at a board meeting or annual meeting might not be consistent with “a reasonable opportunity at any meeting to comment regarding any matter affecting the association”. There might be 20 items on an meeting agenda. Clarify how a time limit might be imposed – bylaw? Rule?

Study Committee Recommendations (01-08-19): The discussion of Topic 10 was led by Commissioner Carr, while Commissioner Lehr led the discussion of Topic 17, including the examples posed by Commissioner Biklen; both discussions involved matters addressed in Article 3 and were considered during the same session.

A drafting committee should consider whether amendments are needed to various sections of UCIOA Article 3 to address the general relationship of the Executive Board to individual unit owners, as well as the discrete issues posed by Commissioner Biklen. During a Drafting Committee’s consideration of the examples posed in Topic 17, the minutes of the Study Committee’s discussions may be of particular assistance.

11. On its effective date, does UCIOA apply retroactively?

Study Committee Recommendation (02-25-2019): The Study Committee considered this one as one of the more significant issues on their agenda; the discussion as reflected in the minutes of February 25, 2019 was brief but clear. UCIOA presently addresses Applicability in

some detail; see Article 1, Part 2, sections 1-201 through 1-210. However, both Vermont and Connecticut - the first two states to adopt UCIOA (2008) – made significant changes to the applicability provisions, and the retroactive application of the Act to pre-existing common interest communities continues to be a subject of considerable debate.

While constitutional considerations caused the original Drafting Committee to be conservative in determining which provisions of UCIOA might be applied retroactively to pre-existing communities, 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.

In these circumstances, the Study Committee strongly feels a drafting Committee should re-consider the applicability provisions of the Act.

12. Should UCIOA deal with Time shares? Should each time share be fractionalized or treated as a separate unit?

Study Committee Recommendation (02-25-2019): The term ‘time share’ is defined in UCIOA §1-103 (34):

(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 estate or interest in a common interest community or a specified portion thereof.

The minutes of February 25, 2019 contains useful discussion of why UCIOA took a ‘minimalist’ approach to time shares; they quote this language from the comments in UCIOA:

[T]he Act simply defined the term “time share” in Section 1-103 (34) and then required disclosure of any time share provisions in the common interest community; see Section 4-105. Otherwise, this Act did not attempt to regulate time sharing or any of the other forms of interval ownership. That task was left to the Model Real Estate Time Sharing Act.

Experience over the intervening dozen years suggests that this minimalist approach remains appropriate. Without a doubt, the evolving field of interval ownership of both personal and real property poses important issues of public policy. However, this Act does not regulate those substantive issues. Instead, whether or not a particular interval ownership project must comply with this Act depends on whether or not the ownership arrangement meets the definition of a “common interest community.” If it does, then the Act would apply in the same degree as it would to any common interest community.

Discussion by various members of the Study Committee conversant with the field suggested that developments since these comments were first drafted warrant further clarification and amplification of the definitions in UCIOA regarding time shares.

For those reasons, The Study Committee believes a Drafting Committee might consider clarification and amplification of the definitions in UCIOA regarding time shares.

13. When an HOA board announces a special assessment or an adopted budget, what vote of unit owners is needed to reject that assessment or budget?

Study Committee Recommendation (02-25-2019): The process for adopting a proposed budget, and the vote of unit owners needed to reject the proposed budget, is clearly set out in UCIOA §3-123 (a) which reads in pertinent part as follows:

(a) The executive board, at least annually, shall adopt a proposed 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....

In light of this provision, the Study Committee therefore concludes that this is not a subject that requires further review by a Drafting Committee.

14. If there is a legal Judgement against an HOA and the HOA is organized as a non-profit corporation, what is the liability of the unit owner and the liability of the association? What related issues arise in this situation?

Study Committee Recommendation (02-25-19): Attorney Joseph Lubinski, The ABA Advisor to the Study Committee, led the discussion. He and others observed that most home owners associations are organized as non-profit corporations. He also observed that UCIOA addresses this issue in two sections, as described in the minutes of the February 25, 2019 meeting. The minutes describe the Study Committee's detailed analysis of the subject.

Following that discussion, the Study Committee concluded that this subject does not require further consideration by a Drafting Committee.

15. The general issue of Declarant liability and a successor declarant when the successor is 'affiliated'.

Study Committee Recommendation (03-27-19): Regarding declarant and successor declarant liability, including the range of discrete issues identified during the discussion a Drafting Committee should consider the matters posed in Professor Odinet's presentation and propose such appropriate amendments as determined by that Committee.

16. 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?

Study Committee Recommendation (02-25-2019): The minutes of the Study Committee meeting of February 25, 2019 note that UCIOA presently contains a range of provisions bearing on this issue. Nevertheless, the general consensus of the group was that there were circumstances where it seemed appropriate that the board should be empowered to act without a vote of unit owners when that decision would not adversely affect other owners and where the sought-after common element was of no utility to another unit owner.

At the same time, the study committee felt unable to articulate such a standard at the meeting, since any reallocation might have at least an adverse aesthetic impact on other unit owners.

For these reasons, the Study Committee believes a Drafting Committee should consider whether to amend UCIOA to further address the range of circumstances that arise in the fairly common area of a Board's authority to allocate the use of common elements for the benefit of individual owners, either by making a common element a limited common element, by extending an existing limited common element onto the 'general' common elements, or by directly incorporating a common element into the unit itself by adjusting the boundaries of the unit.

18. At the February 25, 2019, Commissioner Biklen noted that some common interest communities allocate votes to unit based on the size or square footage of each unit rather than on the basis of "one person one vote". He asks whether that represented sound public policy.

19. At the February 25, 2019, Commissioner Biklen also noted that some common interest communities allocate common expenses among the units based on the relative unit size alone, rather than on the relative value of those units. The potential effect of this method of allocating common charges is that some similarly sized units might well have significantly different values yet are charged the same common charge. He asks whether the better public policy would be to require that, as with the assessment of real property taxes in most municipalities, common expenses should be allocated based on "value" rather than property size.

Study Committee Recommendation (02-25-2019): After considerable discussion of these two issues, as noted in the minutes of the meeting of February

25, 2019, the Study Committee concluded that a Drafting Committee should not consider amending UCIOA to require either ‘one-person one vote’ or to restrict the permissible methods by which the declaration may allocate common expenses.

20. 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?

21. UCIOA Sec. 3-108(b) (6) currently contains bracketed language that, if adopted, would permit an association board to decline to distribute ‘unapproved’ minutes of a board meeting. Should UCIOA be amended to require that such minutes either be distributed or ‘reasonably available’ to unit owners before they are approved?

Study Committee Recommendation: The Study Committee did not consider Topics 20 and 21 during its deliberations. The Chair of the Committee therefore recommends that if a Drafting Committee is created, the Drafting Committee should itself determine whether UCIOA should be amended to address the concerns raised by these topics and, if so, should draft appropriate language.

**STUDY COMMITTEE TO CONSIDER REVISIONS TO THE
UNIFORM COMMON INTEREST OWNERSHIP ACT**

**MINUTES OF A TELEPHONE CONFERENCE CALL MEETING
OF NOVEMBER 8, 2018**

The conference call began at 12 Noon, Eastern Time and ended at 1:30 pm.

Participants The following members of the Study Committee participated in the call:

William Breetz, Steve Wilborn, (Interim ULC Executive Director), Marion Benfield, David Biklen, John Cannel, Martin Carr, Dennis Cooper, Marc Feinstein, David Scott Jensen, Marisa Lehr, Jacqueline Lenmark, and Christopher Odinet.

Also participating in the call were observers Wilson Freyermuth (Executive director of the JEB on Uniform Real Property Acts) and our most recently appointed observer, Attorney Steven Prunty of Morgantown, West Virginia.

For reasons best known to the Internet Gods, Commissioners Vince Cardi and Cliff McKinney sought valiantly to join the conference but were diverted to their own conference call with ULC staff person Odessa Glaza. Vince was able to join the main call only in its concluding minutes.

The Committee considered these issues identified for discussion in the Memorandum of October 22, 2018 entitled “**Topic Assignments on Proposed Issues Discussion List.**”

I. Termination of a Common Interest Community [UCIOA Section 2-118].

Professor Odinet led this discussion.

1. He first raised a matter he and others discussed in Louisiana when that State was considering adoption of UCIOA:

Suppose that (i) a Declarant still owns units [which may just be unimproved lots] that have been declared in a common interest community project, and (ii) the units she owns comprise at least 80% of all the declared units – that is, the number required to terminate the CIC; and (iii) Declarant has either abandoned the project or has failed

to complete it. Now the Declarant seeks to terminate the project under Section 2-218(a).

In these circumstances, it is obvious that the early buyers who now own their units and may want to sell them, will have marketability issues because of the Declarant's failure to complete the project. Does or should the Act provide a remedy to these buyers in the case of such a termination?

The Committee discussed whether this issue is addressed under the current draft; generally, we seemed to feel the answer would not depend on the current language of Section 2-218 but on whether other sections of UCIOA provide a cause of action for the declarant's failure to complete the project and her subsequent abandonment, either for inadequate disclosure, misrepresentation or other grounds.

[Chair's Note: In thinking about a possible response to this issue as I was preparing these minutes, I noted that a revised section might require that the 80% vote of unit owners for termination might be amended to require that the 80% must include 80% of the units that have been sold to persons who are not the Declarant or her affiliates. There is precedent for such a requirement in UCIOA: *see, e.g.* UCIOA § 2-117 (g), requiring that amendments to the time limits within which development rights may be changed must have the approval of 80% of the unit owners "including 80 percent of the votes allocated to units not owned by the declarant."]

2. The second issue raised under "Termination" was whether UCIOA should include a separate provision that deals with an apartment building that had been converted to a condominium or other form of common interest community and then, when the Declarant finds that she is unable to sell the condominium units, chooses to terminate the condominium and revert to its status as an apartment building – a process known as 'de-conversion.'

[Chair's Note – In Connecticut, Declarants chose to revert to apartment buildings during the Great Recession in order to avoid the increased real estate taxes assessed in many municipalities as a result of the presumably higher values of the apartments following their conversion to the condominium form of ownership.]

Professor Odinet indicated that this process frequently occurred in the 2008-2-15 period and that some states have created special statutory regimes to deal with these types of CIC transformations. For example, Section 15 of the Illinois Condominium Property Act specifically contemplates situations whereby a developer will make an

offer to purchase all of the units within a given condo regime and how voting among unit owners operates to either reject or accept the offer.

In conclusion, Professor Odinet felt that the current rules in UCIOA dealing with termination are likely sufficient to accomplish this same objective through owner voting on termination agreements and the ability of the association's executive board to negotiate for land sale agreements. He suggested, however, that if the Committee so desired, it may be beneficial to explore what a special provision for de-conversions might look like, based on the Illinois statute.

3. Professor Odinet felt that UCIOA § 2-118(e) was a bit confusing as written because it purports to deal with all CICs, but provides that after termination of the CIC, title to the real property comprising the CIC vests in the association. That makes sense for units, but title to the common areas in a planned community and cooperative (as opposed to a condo regime) is already vested in the association. Also, for the transfer of ownership from the unit owners to the association, while this appears to be happening by operation of UCIOA, it may be helpful for the statute to require the termination agreement to state that title to the units has passed, simply for title purposes.

4. Professor Odinet suggested that a Drafting Committee might 'clean-up' several of the comments. For example, UCIOA § 2-118(g) says that after termination any proceeds from the sale of real estate in the former CIC are held by the association as trustee for the owners and any lien holders. But the comment to this section says (g) has to do with co-ops. A little clean-up on this and other comments would be helpful.

5. We then discussed UCIOA § 2-124, dealing with Termination following a catastrophe. In his letter of June 2018, Professor Wilson notes that catastrophic destruction of common interest communities following a disaster has become an important subject. Currently, this section authorizes "the executive board or any other interested person" to commence a court action to terminate the common interest community. The section continues:

"During the pendency of the action, the court may issue whatever orders it considers appropriate, including appointment of a receiver. After a hearing, the court may terminate the common interest community or reduce its size and may issue any other order the court considers to be in the best interest of the unit owners and persons holding an interest in the common interest community."

Some persons have expressed concern that the ‘best interest’ standard may provide inadequate guidance to a court, and as a result, a court might be reluctant to act.

Study Committee Recommendation: A drafting committee should consider whether amendments are needed to UCIOA § 2-118.

II. Adverse possession of units and common elements in a common interest community

Commissioner Jensen led this discussion.

While this subject is not addressed in the current version of UCIOA, the subject arises in various contexts. The question is whether we should recommend that a Drafting Committee address the issue with new provisions.

During the discussion, these points were made:

1. In a condominium, the unit owners ‘own’ – that is, hold title to – an undivided percentage or fractional share of the common element.² A principle of adverse possession law is that a person may not adversely possess property already owned by that person. This principle, however, may not apply in cooperatives or planned communities, where title to the common elements is held by the home owners association.
2. Suppose, however, that a unit in a condominium is designated in the declaration as a unit to be owned by the association and used exclusively for the property’s superintendent. Such a unit would not be a common element and therefore is not partially owned by another unit owner. Does that suggest that either another unit owner or a person who does not own a unit, could adversely possess all or part of that unit?
3. Another member asked whether one unit owner could adversely possess a unit owned by other person? While this might seem unlikely in the context of an apartment inside a building, where the boundaries of the unit were its walls, floors

²UCIOA § 1-103 (10) provides: “Condominium” means a common interest community in which portions of the real estate are designated for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of those portions.” (Emphasis added). Subsection (a) of UCIOA § 2-107 (a) requires that the declaration of a condominium must allocate to each unit:“(i) a fraction or percentage of undivided interests in the common elements...

and ceilings, it would be much easier to conceive of the possibility where the units were each 10 acre lots in a subdivision.

4. More frequently, potential adverse possession issues arise in connection with common element parking spaces or green spaces in a common interest community, where either unit owners or other persons who own land abutting the common interest community may claim ownership by virtue of adverse possession.

Some members of the study committee felt that it would be useful for UCIOA to address some of these situations.

One member asked whether UCIOA might create a procedure short of adverse possession to address some of these situations.

Another question was that if we were to allow adverse possession in these circumstances, how would a successful claim affect the declaration? Would the court order an amendment to the declaration, or would we presume the amendment would be automatic.

Commissioner Cannel noted that he had been a member of the ULC committee studying adverse possession; that Committee concluded that because the laws on the subject were so different among the states, it was unlikely that any State would adopt a uniform act that changed the rules for when and how a person could adversely possess real estate.

Commissioner Feinstein suggested that while each State has substantive law addressing the elements of proving a claim for adverse possession, it may still be helpful to have a statute describing whether the State's law of adverse possession applies in particular circumstances. Other members also thought that such an outcome could be helpful and would not change the local substantive law.

Study Committee Recommendation: A UCIOA drafting committee should consider a statute describing the circumstances when the enacting State's substantive law of adverse possession should apply in a common interest community.

III. Under what circumstances may the Association's Executive Board assess common expenses against some but not all units in a common interest community?

Commissioner Cannel led this discussion.

UCIOA § 3-115 (Assessments) is the applicable provision. Subsection (c) provides in pertinent part:

(c) To the extent required by the declaration:

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

(2) a common expense benefiting fewer than all of the units or their owners may be assessed exclusively against the units or unit owners benefitted; and

1. Commissioner Cannel observed that the section gives little guidance as to what is intended here. The section may be read in different ways; for example,

(i) If the declaration details 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 details 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;

As drafted, this section gives little guidance as to what the Drafters of this language intended.

As an example, in Connecticut, some attorneys representing associations have interpreted this section to allow the Executive Board to allocate the costs of ice damage to the roofs of buildings solely to the units that are affected by the damage, rather than making a claim against the Association’s master insurance policy. Their strategy is that by imposing the repair costs on the affected units, those unit owners will file claims against their individual unit insurance policies; this will allow the association to avoid repeated claims against the master policy, and the resultant risk of cancellation.

While other Connecticut attorneys feel this interpretation of § 3-115 (c) is wrong, there is clearly a problem of statutory interpretation. The question is whether anything useful can be done to clarify what the statute intends.

Professor Odient opined that while it is possible to draft clarifying amendments, it may be more difficult to agree upon the appropriate policy.

Commissioner Cooper observed that after listening to whether UCIOA ought to grant discretion to the board, he felt that granting such discretion to the board would be good, so long as there was a reasonable outcome. This is something that we ought to deal with.

Commissioner Benfield provided a cautionary note: the drafters should be careful here, since homeowners are entitled to know in advance what expenses might be charged to them.

Professor Freyermuth observed that if the drafters of UCIOA are themselves uncertain of the meaning of this section, that is reason enough to recommend redrafting for purposes of clarification.

Study Committee Recommendation: A UCIOA drafting committee should consider revisions to Section 3-115 to clarify its meaning.

IV. To what extent may the Unit Owners Association for a common interest community delegate any of its authority to a Master Association of which that common interest community is a part?

Commissioner Lenmark led the discussion.

1. The principal UCIOA section bearing on this subject is § 2-120 (Master Associations). Sub-sections (a), (b) and (c) are particularly relevant; they provide:

(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 provisions of this [act] applicable to unit owners' associations apply to any such corporation [or unincorporated association], except as modified by this section.

(b) Unless it is acting in the capacity of an 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) If the declaration of any common interest community provides that the executive board may delegate certain powers to a master association, the members of the executive board have no liability for the acts or omissions of the master association with respect to those powers following delegation.

Commissioner Lenmark's reaction to the matter as presented in the Issues memo was that, in general, by virtue of subsection (b), she felt the Executive Board of a common interest community could lawfully delegate to its Master Association nearly any of its statutory powers or other powers that may have been granted to it in its declaration thing unless the declaration, or some statute limits that outcome.

Further, she felt that if the declaration were to specifically provide for delegation, the provision almost certainly would come with guide lines.

Finally, she felt that even in the absence of subsection (b), unless there were a statutory limitation on the Board's delegation power, the Board would have the power to delegate its authority under common law.

2. In his letter of June 2018 on behalf of the JEBURPA, Professor Wilson suggests that a different problem arises under this section. He writes:

UCIOA §2-120 addresses the ability of the board of a common interest community to delegate powers to a master association. Such a delegation should be revocable but, as drafted, UCIOA does not make this explicit.

Commissioner Lenmark, in response, suggested that since the statute grants the Board the discretion to delegate its statutory authority to a master association, then, implicit in the power to delegate is the power to revoke any prior grant of its statutory authority. She also felt that the same result would obtain even if there were no explicit grant of authority in UCIOA. In either case, in her view, it would be unnecessary to provide any revocation authority by statute.

3. Commissioner Benfield raised a different issue, focusing on sub-section (c), which provides:

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

In Commissioner Benfield's view, the statute thus suggests that whether or not the common interest community board members are liable for the acts of the Master Association in exercising powers on behalf of the common interest community depends on the source of the Master Board's authority to so act.

Under (c), if the master association acts pursuant to a delegation outlined in the declaration, then the board members of the common interest community are insulated from liability. However, if the Master Association acts under the last clause of (b) – that is, if they act in the manner “expressly described in the delegations of power from those common interest communities to the master association.” then board members of the common interest community presumably would not be insulated from liability under (c).

Finally, Commissioner Benfield expressed concern that unit owners in a common interest community should be entitled to know in advance that the board members they elect to exercise the powers granted to the association under UCIOA might choose to delegate those powers to another entity that the unit owners do not elect. As drafted, UCIOA does not appear to provide unit owners that protection.

Study Committee Recommendation: A UCIOA drafting committee should further consider whether revisions to Section 2-120 are needed for the matters described above.

**STUDY COMMITTEE TO CONSIDER REVISIONS TO THE
UNIFORM COMMON INTEREST OWNERSHIP ACT**

**MINUTES OF VIDEO AND TELEPHONE CONFERENCE CALL
MEETING OF JANUARY 8, 2019.**

The conference call began at 12 :30 PM, Eastern Time.

Participants The following members of the Study Committee participated in the call:

Commissioners Marlin Appelwick, William Breetz, Steve Wilborn (Interim ULC Executive Director), Tom Hemmendinger [ULC Division Chair], David Biklen, John Cannel, Vince Cardi, Martin Carr, Dennis Cooper, Marc Feinstein, David Scott Jensen, Marisa Lehr, Jacqueline Lenmark, Carl Lisman, Cliff McKinney, and Christopher Odinet.

Also participating in the call were Joseph Lubinski (ABA Advisor), observers David Ramsey, Attorney Steven Prunty and Andy Guggenheim [American Bankers Assn], and ULC staff member / technology guru] Greg Young.

The Committee considered these issues identified for discussion in the Memorandum of December 18, 2018 entitled “**Topic Assignments on Proposed Issues Discussion List.**”

I. Relationship of the Home Owner’s Association’s Board of Directors with Individual Home Owners [Appendix 10]

Commissioner Martin Carr led this discussion.

1. Mr. Carr first noted that he was familiar with California law on this subject – which is similar but not identical to the Uniform Common Interest Ownership Act on this subject. He also noted that in preparing for this matter, he had reviewed Article 3 of UCIOA, which deals with Management of the Common Interest Community.

He also noted that he was not familiar with New Jersey law on this subject, which was relevant because Commissioner Cannel, who posed this issue, had indicated that the issue ‘has been an important issue in New Jersey, and there is

tension between the policy positions of organizations like Community Associations Institute (‘CAI’) and individual unit owners.’

He described the example of the ‘little old lady’ who repeatedly fails to follow a rule adopted by the Association’s Executive Board [for example, failing to take her trash barrel to the curb on collection day], and is then fined \$50 by the Board for each violation. After the unit owner repeatedly fails to pay the fine, the Board commences a foreclosure against the unit, legal fees and court fees are added to the Association’s claim, and the unit owner ultimately loses her unit in foreclosure over what a reasonable person would agree was a minor matter.

2. Commissioner Cannel then commented on the issue. His view was that, unlike the common law, the UCIOA statute confers what he described as ‘one-sided power’ to the Executive Board, and this is not an appropriate balance. He compared the Board’s power to the power of government, which is more constrained. Under UCIOA, there is no independent fact finder, no right of appeal, no right of the unit owner to institute effective claims against the Board’s alleged abuse of its authority. He also focused on the authority of the Board to adopt rules under UCIOA Sec. 3-120, which he felt were overly broad.

3. David Ramsey, an Observer who is also CAI’s appointed representative to the Joint Editorial Board for Uniform Real Property Acts, responded. He said he did not disagree with the general thrust of Commissioner Cannel’s remarks, and felt that the issue deserved further study. At the same time, he noted that no statute can no statute, no matter how carefully drafted, can legislate good conduct on the part either of the Board or of individual unit owners.

4. There followed a discussion of a number of discrete issues, including (i) the importance of a unit owner’s access to records; see Section 3-120; (ii) whether the standard in 3-120(h) that all rules must be ‘reasonable’ is itself a reasonable standard; and (iii) whether the rules regarding arbitration and the imposition of legal fees are too one-sided in favor of the association.

5. **Chair’s Note-** Discussion during the call included a question of who was entitled to act on behalf of the association in exercising the Association’s powers and duties as described in UCIOA §3-102. In fact, UCIOA §3-103(a) explicitly addresses that question; it provides that “[e]xcept 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.”

This language, including those limiting provisions, appears to delineate the Board’s authority with some clarity. The general rule is that the Board ‘acts on behalf of the association’. The exceptions to the general rule are equally clear: first, the declaration or bylaws may limit the Board’s authority; second, subsection (b) of §3-103 contains five objective statements of what the Board may not do; and third, there are several other limitations on the Board’s authority in UCIOA including, for example, how meetings must be conducted [3-108], the use of surplus funds [3-114]; limitations on the Board’s right to foreclose on a unit for unpaid common expenses [3-116(n)]; or how rules must be adopted [3-120].

II Suggestion of Commissioner David Biklen that 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’

Commissioner Marisa Lehr led this discussion focusing in turn on each of the examples presented in Commissioner Biklen’s issue.

In **Example A**, Commissioner Biklen wrote that “the right of a unit owner to bring suit to compel proper board process, even with attorney fees, might be too burdensome and chill efforts to encourage the board to act with proper process.” Commissioner Lehr focused on UCIOA §3-108 and its requirements for meetings; she asked whether the group thought this section provided sufficient ‘openness’ for unit owner participation in meetings.

The Committee discussed the broad discretion provided to the Executive Board in UCIOA §3-102(f) to enforce or not enforce a provision of the declaration, bylaws or rules, and whether this discretion was too broad. There was a general discussion of the Business Judgment Rule.

In **Example B**, Commissioner Biklen asked whether ‘the UCIOA standard of care for the board to act [is] the proper standard. Perhaps it should have a higher standard and should be more clearly set out to whom the duty is owed – the association? A Unit Owner? Both?’

This standard is detailed in UCIOA §3-103(a), which provides in relevant part that “[o]fficers 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” the enacting State’s non-stock corporation statute.

Commissioner Lehr posed the question of whether, in the event of a conflict between a duty owed to the association and a duty owed to one or more individual unit owners, how should that conflict be resolved?

Examples C, D and E focus on various aspects of the duties of a management company. In Example C, Commissioner Biklen asked: “To whom does a management company owe its duty? The Board? The Association? The unit owners? Commissioner Lehr suggested that this matter would normally – or should - be addressed in the management contract between the association and its manager, and the contract standard should govern. Commissioner Biklen suggested there might also be a duty owed to individual unit owners.

Example D asks whether the management company may act, either at the Board’s direction or without such direction, if that act would violate either UCIOA or the declaration or bylaws, and what the remedy for such behavior might be.

Example E deals with a specific management issue: “A management company that controls electronic messaging to unit owners and then attacks, with or without board consent, a named unit owner. Can the management company or board prevent the unit owner from using the same electronic messaging to reply to the attack.” David Ramsey observed that this was another example where it is simply not possible to legislate good conduct.

After discussion, Commissioner Lehr thought this matter and the issues raised in Examples C, D and E might best be addressed in comments.

Example F focuses on a potential issue posed by UCIOA §3-110, which allows voting by electronic ballot or mail; subsection (a) provides, in pertinent part that “[u]nless prohibited or limited by the declaration or bylaws, unit owners may vote ... without a meeting, by electronic or paper ballot pursuant to subsection (d).”

Unlike the outcome in a physical meeting to consider a subject before it is voted on, there is no provision for voting to amend whatever proposal has been submitted for a vote. In addition, there is no procedure in UCIOA allowing a unit owner to change her vote for any reason after her vote is cast. This presents a straight forward policy issue, and Commissioner Biklen proposed a possible solution in Example F.

Commissioner Lehr observed that there were several ways to address this policy issue if the Conference were so inclined. Unlike the constraints in Robert Rules of Order - the default procedure for the conduct of meetings (see UCIOA §3-108 (a)(7))- each unit owners association could by rule or by amendment to the bylaws, provide either for an on-line

comment period before electronic or mail-in balloting began. Alternatively, UCIOA could be amended to require through various means a comment period.

Chair's note: The Chair's notes do not indicate any further discussion of this subject beyond the comments of Commissioner Lehr.

Example G – Commissioner Biklen writes: “Basic education – UCIOA says “encourage” education by board on UCIOA matters. Perhaps a stronger word should be used.” Commissioner Lehr noted that she had searched in vain for a provision in UCIOA addressing this subject, and Commissioner Biklen, the author of this suggestion, had left the call by this point.

Chair's note: Like Commissioner Lehr, The Chair could not recall and, after a search of the statute, was unable to locate any reference in UCIOA to a requirement that the Executive Board encourage unit owners to participate in educational programs. After the meeting, the Chair sought assistance from the ULC's research fellow, who soon located this provision in Connecticut's version of UCIOA:

Sec. 47-261a. Basic education program for association members and management. The executive board of each association of a common interest community, or an officer designated by the executive board, shall encourage each member of such association, including the officers and members of the executive board, and any managing agent of such association or person providing association management services to such association, to attend, when available, a basic education program concerning the purpose and operation of common interest communities and associations, and the rights and responsibilities of unit owners, associations and executive board officers and members.

The Study Committee did not consider whether to recommend to the Conference that a provision similar to Connecticut's statute be incorporated into UCIOA.

Example H – Subsection (a)(5) of UCIOA §3-108 provides that “Unit owners must be given a reasonable opportunity at any meeting to comment regarding any matter affecting the common interest community or the association.”

Commissioner Biklen writes: “A five-minute limit on comment at a board meeting or annual meeting might not be consistent with ‘a reasonable opportunity at any meeting to comment regarding any matter affecting the association. There might be 20 items on a meeting agenda. Clarify how a time limit might be imposed – bylaw? Rule?”

Commissioner Lehr led a discussion by the Study Committee on this subject; she observed that it may be difficult to improve on a ‘reasonableness’ standard to fit every circumstance. The consensus of the group agreed. It may be that expanding the comment on this subject would be helpful to unit owners associations as they consider the various situations that might arise in different settings, and suggest that this could be an appropriate topic for consideration by each community.

Study Committee Recommendation: A drafting committee should consider whether amendments are needed to various sections of UCIOA Article 3 to address the general relationship of the Executive Board to individual unit owners, as well as the discrete issues posed by Commissioner Biklen.

III Must the Public Offering Statement (‘POS’) describe any pending litigation involving the CIC? [Appendix 7]

Commissioner McKinney led this discussion. He noted the requirements of UCIOA §3-4-103(a), set out in Appendix 7:

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) . . .

(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;

Commissioner McKinney pointed out that UCIOA § 4-103 (a)(12) explicitly limits the Declarant’ obligation to disclose information regarding pending actions

‘material to the common interest community’ to matters of which the Declaration has ‘actual knowledge’ ; this limitation does not apply either to an unsatisfied judgment, or a pending action, against the association, presumably based on the fact that since the Declarant typically had control over the Association for some period of time, she should be presumed to have knowledge of actions involving the association, as opposed to other material matters not involving the association that might nonetheless be material to the common interest community.

The disclosure obligation imposed on a Declarant is significantly diminished in the case of a private sale by a unit owner. In that case, the selling unit owner is required by UCIOA § 4-109 to provide a potential buyer with a resale certificate. Subsection (a)(8) of UCIOA § 4-109 requires the resale certificate to include “a statement of any unsatisfied judgments against the association and the status of any pending suits in which the association is a defendant;” The seller, in turn, is entitled to secure this information from the association itself ; UCIOA § 4-109(b) provides that “[t]he 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.”

Study Committee Recommendation: The Study Committee concluded that there was no need for further drafting with regard to this issue.

IV Must a person required to deliver a POS deliver it to a potential buyer who is an investor rather than a person who intends to occupy her unit. [Appendix 8]

Again, Commissioner McKinney led this discussion and concluded that the answer to this question is ‘yes’.

He pointed out that the requirements of Article 4 – which requires preparation and distribution of a Public Offering Statement – apply to all purchasers of a unit unless exempted by specified provisions in the Article. Thus, UCIOA § 4-101(a) states that the entire article applies to ‘all units’ unless exempted in subsection (b) of that section; subsection (b) does not exempt investors considering purchase of a unit. Further, while subsection (b) (5) does exempt the Declarant from delivering a POS to a ‘dealer’, the definition of that term in UCIOA § 1-101(13) would not exempt the declarant from the delivery requirement to a potential investor unless the investor was also “a person in the business of selling units for the person’s own account.”

Study Committee Recommendation: The Study Committee concluded that there was no need for further drafting with regard to this issue.

The meeting concluded at 2 pm, Eastern Standard Time.

**STUDY COMMITTEE TO CONSIDER REVISIONS TO THE
UNIFORM COMMON INTEREST OWNERSHIP ACT**

**MINUTES OF VIDEO AND TELEPHONE CONFERENCE CALL
MEETING OF FEBRUARY 25, 2019.**

The conference call began at 3:30 PM, Eastern Time.

Participants The following members of the Study Committee participated in the call:

Commissioners William Breetz, Steve Wilborn (Interim ULC Executive Director), Tom Hemmendinger [ULC Division Chair], David Biklen, John Cannel, Vince Cardi, Marc Feinstein, David Scott Jensen, Carl Lisman, Joseph Lubinski, Cliff McKinney, and Christopher Odinet.

Also participating in the call were Observers David Ramsey and Steven Prunty and ULC staff members Odessa Glaza and Greg Young.

The Committee considered these issues identified for discussion in Exhibit A to the Memorandum of January 24, 2019 entitled “**Topic Assignments on Proposed Issues Discussion List.**”

1. *What happens when the boundaries of a unit shift as a result of, for example, a sinking building?* [See Appendix 4].

Commissioner Vince Cardi led the discussion and provided very helpful notes regarding the issue; those notes are attached at *Exhibit A* to these minutes.

The Committee considered at length the hypotheticals and analyses presented by Commissioner Cardi. The conversation was wide-ranging but, because of time constraints, the Committee did not consider all of the questions and observations contained in Exhibit A.

Committee Recommendation: A drafting Committee should review the notes contained in Exhibit A and consider (i) amplifying the existing Comments to UCIOA Section 2-114, and (ii) defining any additional terms that the Drafting Committee concludes are unclear.

2. What is the meaning of ‘periodic assessments’ in UCIOA? [See Appendix 9]

Commissioner Cardi again led the discussion. He pointed out that UCIOA uses different and sometimes inconsistent terms in different provisions to mean the same thing – that is, the common expense charges against each unit from time to time in order to fund the association’s activities.

As noted in **Appendix 9**, the term ‘periodic assessment’ appears in UCIOA § 4-109 (Resales of Units):

(a) ... a unit owner shall furnish to a purchaser ... a certificate containing:

(1) . . .

(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; . . .

Commissioner Cardi detailed how these charges are first allocated in accordance with the allocation of common expenses set out in the declaration pursuant to UCIOA §2-107 (Allocation Of Allocated Interests). Subsection (a) of that section requires that “[t]he declaration must allocate to each unit: (i) in a condominium, a fraction or percentage of ...the common expenses of the association...”

The Association, in turn, by virtue of UCIOA § 3-102(a) (Powers and Duties of Unit Owners Association), must deal with the budget of the common interest community. Generally, subsection (a) requires that the Association “... (2) shall adopt and may amend budgets under Section 3-123, [and] may collect assessments for common expenses from unit owners.

The ‘may collect assessments’ language is inconsistent with the mandate contained in UCIOA §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 at least annually, based on a budget adopted at least annually by the association.

(b) Except for assessments under subsections (c), (d), and (e), 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).

As the Comments indicate,

“[t]he text in subsection 4-103(b) ... requires in pertinent part that 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** common expense assessment for each type of unit. (Emphasis added).

Commissioner Cardi concluded by observing that while ‘periodic assessment’ in fact and in most common interest communities meant the monthly common expense assessment made against each unit, UCIOA did not require that the assessment be monthly, but only that it must be made at least ‘annually.’ It might be helpful for a drafting committee to consider whether more clarity was needed in the Act or in the comments in these regards.

Committee Recommendation: 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 ‘periodic common expense assessment.’

On its effective date, does UCIOA apply retroactively? This was an issue in the Washington State legislature. [See Appendix 11]

There was a brief but clear discussion on this subject. UCIOA presently addresses Applicability in some detail; see Article 1, Part 2, sections 1-201 through 1-210. However, both Vermont and Connecticut - the first two states to adopt UCIOA (2008) – made significant changes to the applicability provisions, and the retroactive application of the Act to pre-existing common interest communities continues to be a subject of considerable debate.

While constitutional considerations caused the original Drafting Committee to be conservative in determining which provisions of UCIOA might be applied retroactively to pre-existing communities, 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.

Committee Recommendation: A drafting Committee should re-consider the applicability provisions of the Act.

4. When an HOA board announces a special assessment or an adopted budget, what vote of unit owners is needed to reject that assessment or budget?[See Appendix 13]

The Chair's notes of the meeting do not indicate that the Study Committee discussed this issue. However, the process for adopting a proposed budget, and the vote of unit owners needed to reject the proposed budget, is clearly set out in UCIOA §3-123 (a) which reads in pertinent part as follows:

(a) The executive board, at least annually, shall adopt a proposed budget for the common interest community for consideration by the unit owners. ...[T]he executive board shall ...provide to all the unit owners a summary of the budget....Simultaneously, the board shall set a date...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.
(Emphasis added)

Committee Recommendation: Absent objection from the Study Committee, the Chair believes this is not a subject that requires further review by a Drafting Committee.

5. Should UCIOA deal with Time shares? Should each time share be fractionalized or treated as a separate unit? [See Appendix 12]

Marc Fineststein led the discussion. He observed that the term ‘time share’ is defined in UCIOA §1-103 (34):

(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 estate or interest in a common interest community or a specified portion thereof.

Marc also pointed to Comment 26 of UCIOA §1-103, which reads in its entirety as follows:

25. Definition (34), “Time share,” is based on Section 1-102(14) and (18) of the Model Real Estate Time-Share Act.

When this Act was first promulgated in 1982, such concepts as “time share” and “interval ownership” were relatively new; they were neither fully developed nor generally accepted in the marketplace. Moreover, the nature of the relationship between the various forms of common interest ownership and time fractionalization of real estate was not at all clearly understood.

In these circumstances, the Conference adopted a “minimalist” approach in dealing with the concept of time sharing. To that end, the Act simply defined the term “time share” in Section 1-103 (34) and then required disclosure of any time share provisions in the common interest community; see Section 4-105. Otherwise, this Act did not attempt to regulate time sharing or any of the other forms of interval ownership. That task was left to the Model Real Estate Time Sharing Act.

Experience over the intervening dozen years suggests that this minimalist approach remains appropriate. Without a doubt, the evolving field of interval ownership of both personal and real property poses important issues of public policy. However, this Act does not regulate those substantive issues. Instead, whether or not a particular interval ownership project must comply with this Act depends on whether or not the ownership arrangement meets the definition of a

“common interest community.” If it does, then the Act would apply in the same degree as it would to any common interest community.

Finally, UCIOA §4-105 requires the public offering statement for a common interest community that may contain time shares must disclose:

(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.

Discussion by various commissioners conversant with the field suggested that developments since these sections were first drafted warrant further clarification and amplification of the definitions in UCIOA regarding time shares.

Committee Recommendation: The Study Committee believes a Drafting Committee might consider clarification and amplification of the definitions in UCIOA regarding time shares.

6. If there is a legal Judgment against an HOA and the HOA is organized as a non-profit corporation, what is the liability of the unit owner and the liability of the association? What related issues arise in this situation? [See Appendix 14]

Joseph Lubinski led the discussion. He believes there is no need for further consideration of this subject by a Drafting Committee.

Commissioner Lubinski and others observed that most home owners associations are organized as non-profit corporations. He also observed that UCIOA addresses this issue in two sections.

The most relevant provision is Section 3-117, entitled Other Liens. Subsection (a) provides in pertinent part as follows:

(a) In a condominium or planned community:

(1) Except as otherwise provided in paragraph (2), a judgment for money against the association ... is a lien in favor of the judgment lien holder against ... all of the units in the common interest community at

the time the judgment was entered. No other property of a unit owner is subject to the claims of creditors of the association. (Emphasis added)

(3) ...[I]f a...judgment lien ...becomes effective against two or more units, the unit owner of an affected unit may pay to the lien holder the amount of the lien attributable to the unit, and the lien holder, upon receipt of payment, promptly shall deliver a release of the lien covering that unit. The amount of the payment must be proportionate to the ratio that the unit owner's common expense liability bears to the common expense liabilities of all unit owners the units of which are subject to the lien. After payment, the association may not assess or have a lien against that unit owner's unit for any portion of the common expenses incurred in connection with that lien.

UCIOA also contemplates that the association may wish to avoid the need for a lien to be placed against each unit, by paying the judgment creditor the amount due. To raise those sums, the association could borrow that sum, in which case the sums needed to amortize the debt would become a common expense, or the association could directly assess the unit owners for their proportionate share of that cost. Section 3-115 (d) contemplates that possibility and recognizes that the judgment should only be paid, in an expandable common interest community, but the units that had been

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.

The Study Committee also discussed the possibility that the association might be organized as an unincorporated association, as contemplated by UCIOA §3-101(a). The Committee concluded that even if State law generally held that the members of an unincorporated association were jointly and severally liable for the obligations of their association, a court would likely hold that the limited liability granted to all unit owners under UCIOA, was more specific and would likely prevail.

Committee Recommendation: The Study Committee believes that this subject does not require further consideration by a Drafting Committee.

7. The general issue of Declarant liability and a successor declarant when the successor is ‘affiliated’ [See Appendix 15]

Commissioner Chris Odinet had previously circulated a memorandum on the subject and began to lead the discussion. Unfortunately, the Chair failed to accommodate a request made by Commissioner Odinet before the day of the Conference that this subject be considered earlier in the agenda because of a conflict in Commissioner Odinet’s schedule. As a consequence, the Study Committee tabled this discussion until our next meeting.

8. 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?

David Biklen led the discussion. As the Agenda notes, this issue had been previously posed by Observer David Ramsey. Mr. Ramsey writes:

“....The issue commonly arises in the following context. A board wants to permit an owner to expand a patio or deck or adopt a resolution that allows all unit owners to expand their patios or decks by some specific amount. But in order to do so, common elements are necessarily being converted from common elements to limited common elements. Several courts (I don’t know if such a case exists in a Uniform Property state) have held that an owner cannot be permitted to expand the limited common elements without the vote of 100% of the other unit owners since such an approval takes away the other owners’ property rights in common elements. I don’t know of any opinions to the contrary.

It’s debatable in those scenarios whether the law should simply allow a board to grant such authority since it might be subject to abuse. But there are some situations where there is no practical impact on any one in permitting such a request. Say, by way of example, that a unit adjoins a stairwell with enclosed space below it that is unused. The adjoining owner would like to convert this otherwise unused space into storage space that is accessible from her unit. Should this require a 100% vote of other owners?

California has a statute that partially deals with this issue to some extent – though I hasten to add that I’m not proposing the adoption of the

language from the California law.... But it does highlight those scenarios where it may be practical to allow some room for a board to permit the conversion of a common element to other than that. At the very least the California statute reduces the 100% vote requirement to a 67% vote. 100% votes are virtual impossibilities in CICs.

Several commissioners as well as Mr. Ramsey participated in a vigorous discussion regarding the policy issues embedded in the issue; all speakers concurred that the issue arose in a variety of contexts.

Mr. Ramsey described one case in New Jersey had been litigated over 18 months where a condominium unit owner sought to relocate a window in his unit from one wall to another; the issue was whether the board could, without a unit owner vote, permit a common element – here, the exterior wall in which a new window would be located – to be demolished in favor of that one unit owner.

UCIOA already contains some provisions bearing on the question. First, subsection (a) of Section 2-105 (Contents of Declaration) provides in pertinent part as follows.

(a) The declaration must contain:

(7) a description of any real estate ...that may be allocated subsequently as limited common elements ...together with a statement that they may be so allocated;

Second, subsection (c) of Section 2-108. (Limited Common Elements) provides:

(a) A common element not previously allocated as a limited common element may be so allocated only pursuant to...Section 2-105(a)(7).
The allocations must be made by amendments to the declaration.

Further, there are provisions in UCIOA granting the Board authority to grant rights over the common elements, but that authority may be subject to different interpretations. Subsection (a) of UCIOA § 3-102 (Powers and Duties of Unit Owners Association) provides in part as follows:

(a) Except as otherwise provided in subsection (b) and other provisions of this [act], the association [CHAIR NOTE: which acts through the board]

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

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

[CHAIR NOTE: The provision in UCIOA most directly bearing on this subject is Section 2-112(b) (Relocation of Unit Boundaries); this section was not addressed during our meeting, although it does not deal directly with the subject of converting common elements to limited common elements.

Subsection (b) reads as follows:

(b)... [B]oundaries 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 owner 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 applicable comments are also relevant:

4. Experience under the original Act indicates that it does not adequately address the frequently occurring issue of new additions to existing units, which commonly encroach on the common elements. While the use of limited common elements is a possible device to address this question – and while this new subsection does not prohibit use of that device – the drafters believe that new subsection (b), added in the 1994 amendment, offers a more direct means to address this situation.

While this section sets the default rule for such additions, local zoning and other rules would continue to limit its applicability.

This revision provides a mechanism to alter the boundary between a unit and the common elements and sets out a default rule with respect

to association action to accomplish that result. In the absence of this rule, Section 2-117(d) mandates that a change in a unit boundary requires unanimous consent of all owners. With this amendment, unanimity is no longer required. (Emphasis added)

Thus, UCIOA already contains a range of provisions bearing on the issues presented by David Ramsey. Nevertheless, the general consensus of the group was that there were circumstances where it seemed appropriate that the board should be empowered to act without a vote of unit owners when that decision would not adversely affect other owners and where the sought-after common element was of no utility to another unit owner. At the same time, the group felt unable to articulate such a standard at the meeting, since any reallocation might have at least an adverse aesthetic impact on other unit owners.

Committee Recommendation: The Study Committee believes a Drafting Committee should consider whether to amend UCIOA to further address the range of circumstances that arise in the fairly common area of a Board's authority to allocate the use of common elements for the benefit of individual owners, either by making a common element a limited common element, but extending a limited common element onto the 'general' common elements, or by directly incorporating a common element into the unit itself by adjusting the boundaries of the unit.

ADDITIONAL ISSUES DISCUSSED AT THE END OF THE MEETING

In response to the Chair's invitation for further comment or questions, Commissioner Biklen asked whether the study committee thought it worth looking at the following practices, which are currently authorized by UCIOA:

First, some Common Interest Communities, including two in which Commissioner Biklen holds an interest, allocate votes to unit based on the size or square footage of each unit rather than on the basis of "one person one vote".

Second, some Common Interest Communities allocate common expenses among the units based on the relative unit size alone, rather than on the relative value of those units. The potential effect of this method of allocating common charges is that some similarly sized units might well have significantly different values yet are charged the same common charge.

Further, in both these instances, the CIC practices, although authorized by existing provisions of UCIOA, are inconsistent with the principles of 'one person,

one vote’ and of property taxation based on “value” rather than property size which are usually applied by municipalities.

The Chair asked each committee member their opinion regarding these matters.

Two committee members observed that the more contemporary voting practice – although certainly not universal - is to allocate one person, one vote. It was also noted that many CICs already follow the voting practice described by Commissioner Biklen; as David Ramsey observed, the count votes with the benefit of an Excel spread sheet.

Regarding the allocation of common expenses, one committee member suggested that the analogy to municipal governance practices may not always be relevant in the CIC context, since the services provided to equally sized units – common area maintenance, management services, etc. - presumably had the same value to those unit owners, regardless of the fact that one of the units might have a greater market value than the other as a result of its location within the building or property or the enhanced amenities inside the unit.

Of course, if the declaration so provided, common expenses could be allocated among the units based on their relative market values, either as established at the outset of the complex or, presumably, based on periodic appraisals.

CHAIR NOTE: It is also true that regardless of how common expenses are allocated among the units, the property taxes levied by the municipality in which the complex is located will be based on relative market values, rather than sizes, of the units.

Committee Recommendation: The Study Committee does not believe that a Drafting Committee should consider amending UCIOA to require either ‘one-person one vote’ or the permissible methods by which the declaration should allocate common expenses.

**STUDY COMMITTEE TO CONSIDER REVISIONS TO THE
UNIFORM COMMON INTEREST OWNERSHIP ACT**

EXHIBIT A TO MINUTES OF FEBRUARY 25

**WHAT HAPPENS WHEN A UNIT BOUNDARY MOVES AND
ENCROACHES ON ANOTHER UNIT OR COMMON ELEMENT?**

- Vince Cardi

Introduction:

Problems arise when the physical objects that define boundaries of units and common elements shift or are moved.

I. **Hypotheticals.** The following hypos illustrate two situations in which boundary disputes within a CIC might arise.

Hypothetical 1 – CONDOMINIUM

Two separate unit owners in a condominium share a wall between unit 1 bedroom and closet and unit 2 living room. An electrical fire in unit 1 damaged the wall between the units. Unit 1's insurer contracted to have the wall rebuilt and bedroom and closet remodeled. During the remodel, the contractor tore down the remaining commonly shared wall in order to start renovation. The wall was rebuilt 4 inches into unit 2's living room. Unit 2 then remodeled on the unit 2 interior side of the wall. Six months after both remodels were completed, unit 2 owner noticed the misplacement of the wall. What are the rights of the parties?

Hypothetical 2 – PLANNED COMMUNITY

The declaration describes unit 1 in a planned community as “. . . and running 300 feet directly east to the corner of the stone wall and then bounded on the east by the stone wall, runs 500 feet along the wall. . . .” Five years later severe weather caused the ground and the stone wall upon it to shift 3 feet farther east, encroaching 3 feet onto adjacent unit 2. What are the rights of the parties?

Section 2-114 of UCIOA addresses both hypotheticals, providing two alternatives of 2-114, Alternative A and Alternative B.

II. The Hypotheticals Under Alternative A - creating an easement

Alternative A gives the encroaching unit (dominant property) an easement over the encroached-upon unit (subordinate property) for any encroachment of a unit or common element on any other unit or common element. As of last year, Alaska, Colorado, and Vermont follow Alternative A.

Analysis of Condo Hypo under Alternative A

Since units in condominiums are generally defined in the original declaration by the exterior walls of each unit, the 4-inch encroachment is an encroachment of one unit (unit 1) onto another unit (unit 2). This is expressly covered by alternative A and a valid easement is created for the encroachment.

This easement does not, however, relieve Unit 1 owner of liability for any willful misconduct, or failure to adhere to the original plans. Although an easement is now created by statute, the liability and damages for the encroachment are to be determined in accordance with other state law since they are not provided for in the UCIOA. See Section 1-108.

Analysis of Planned Community Hypo under Alternative A

Q1. Is there an encroachment? Because units in this hypo are defined in the original declaration using a physical boundary (the stone wall), the three-foot encroachment is an encroachment of one unit (unit 1) onto another unit (unit 2). This is expressly covered by alternative A and Alt A provides that a valid easement is created for unit 1's encroachment onto unit 2. It is likely unusual and maybe rare for a planned community to define inter-unit boundaries by reference to physical monuments, except maybe roads, but the assigned hypothetical question assumes such.

Q2. Who now has the right to use the 3 foot strip?

Alternative A provides that unit 1 has "a valid easement for encroachment," but does not address the rights of Unit 2.

Q3. What rights do the owners of unit 1 and unit 2 have to use the 3 feet strip?

- UCIOA does not address this issue.

As provided by § 1-108, the rights and liabilities of the parties are found in other state rules of law and equity including "the law of real estate."

Q4. What remedies are available to unit 2 owner?

- Remedies for the encroachment are not covered under Alternative A and are therefore, provided by other state law. See § 1-108.

Section 2-112 provides a mechanism for the parties to formally relocate unit boundaries by agreement among the parties and review by the CIC executive board.

III. The Hypotheticals Under Alternative B - the new physical boundaries are the legal boundaries

Alternative B provides that a unit's existing physical boundaries, or its physical boundaries reconstructed in substantial accordance with the original declaration's description, are its legal boundaries. This replaces the boundary in the original declaration description "regardless of vertical or lateral movement of the building or minor variance between those boundaries and the boundaries derived from description contained in the original declaration." As of last year, Connecticut, Minnesota, Nevada, and West Virginia follow Alternative B.

Analysis of Condo Hypo under Alternative B

If the newly constructed wall with its 4-inch variation from the original wall location is found to have been "reconstructed in substantial accordance with" the original plans, then the boundaries of both units are defined by the new wall. The Unit 1 owner would still be liable for any willful altering of the boundary. If, however, the 4-inch shift in the wall is deemed not to be "in substantial accordance with" the plans, the situation is not covered by Alternative B and state law would provide the remedy. See § 1-108.

Analysis of Planned Community Hypo under Alternative B

Alternative B provides the "existing physical boundaries of a unit are its legal boundaries." Therefore, the boundary to unit 1 is the stone wall as it is located after the movement and encroachment onto unit 2. The legal boundary derived by reading the full description in the declaration might be different and is no longer the boundary.

General Questions and Issues for Alternative B:

A. UCIOA does not define the term "Physical Boundary".

(1) The term can logically be read to mean any physical part of property used as part of the property description, but is not made clear.

(2) Does “Physical Boundary” include a property boundary reliant on a monument or other physical marker, but which marker is not located exactly on the boundary? (i.e. a property description that states a property boundary is “10 ft. west of High St.”?)

(3) A definition could be helpful.

B. What happens when physical boundaries are reconstructed in a manner not in substantial accordance with original declaration?

(1) An example is: 2 units in a condominium are damaged by fire. Contractors are hired to replace the wall between unit 1 and unit 2. Contractor places the new wall two-feet from its original location (and the location on the original declaration).

(2) “Substantial Accordance” and “minor variance” are not defined by UCIOA, and are questions of fact.

(3) This situation seemingly falls outside of UCIOA and is controlled by state law per § 1-108.

(4) Maybe comments should address this situation and desired intent.

C. Are physical boundaries which are constructed after the original declaration was made considered “existing physical boundaries?”

(1) Potential situations could arise when physical boundaries are later constructed not in accordance with the original declaration.

(2) This could be addressed in comments.

D. It may be appropriate to change the term “building,” in the phrase “regardless of vertical or lateral movement of the building,” to “physical boundary,” “monument,” or “physical marker.”

(1) The term “building” potentially excludes other physical boundaries like roads, walls, streams, etc.

IV. General Questions and Issues in Section 2-114

1. Does 2-114 apply to an encroachment where the declaration, plat, etc. describes the unit by metes and bounds, with no reference to a physical feature or monument. (And does a surveyor's pin constitute a monument?)

Hypo – A unit's boundaries are described by metes and bounds. Over time, the unit's driveway slips 4 feet laterally, 4 feet over onto unit 2's property, as described by metes and bounds. Unit 1's owner also builds a garden fence 4 feet over onto unit 3's property as described by metes and bounds.

Question: Does 2-114 apply so that under say, Alt A, unit 1 now has an easement 4 feet onto unit 2 for the driveway and 4 feet onto unit 3 for the garden fence?

Answer: Probably no to both, but UCIOA does not make this clear.

2. UCIOA does not define the term "encroachment". The term can logically be read to mean "the encroachment of a physical object or marker used in the original declaration, plat or plan to describe the boundaries of a unit or common element."

Observation - A definition in the comments could be helpful.

3. UCIOA does not address remedies available to the encroached-upon unit owner, so, apparently, their state law applies. See 1-108. Specifically, UCIOA does not address the nature of liability or remedies for negligent or intentional shifting or movement of monuments that produces the encroachment.

Observation – Again, since section 2-114 is silent, state law controls. § 1-108. This Could be addressed in comments to clarify that other state law controls if that is the intent.

4. UCIOA does not address whether the benefit accruing to the dominant estate from the easement entitles the subordinate estate to compensation.

Observation - Because this is not addressed by Alternative A, the question is probably controlled by other applicable state law. § 1-108. Again, should comments clarify?

5. Potential issues could arise as a statutorily valid easement could be created by willful misconduct. Although a misfeisor cannot escape liability under Alternative A, the statute as draft does appear to create an easement.

Observation - Comments could address what the intended consequences of this scenario.

6. UCIOA does not address any possible encroachment of a unit or common element on any property outside of the CIC.

Observation - This section states that an easement is created for the encroachment of any unit or common element on any other unit or common element; but does not mention the encroachment of any unit or common element on any property outside of the CIC. Because an encroachment on a property outside of the CIC is not explicitly addressed here, that encroachment presumably would be controlled by applicable state law. § 1-108. This issue could be addressed in comments to clarify that other state law controls if that is the intent.

7. General Comment: No state that has enacted UCIOA has had litigation regarding shifting of unit boundaries or the individually adopted Alternatives A or B.

V. § 1-108 SUPPLEMENTAL PRINCIPLES OF LAW

1. General principles of law and equity supplement this Act to the extent consistent with provisions of this Act.

2. So, provisions of state common law or statutes relating to moving of boundaries apply only where UCIOA does not directly apply or provide an answer.

VI. § 2-112 RELOCATION OF UNIT BOUNDARIES

This section may not be directly relevant to the problem, but it is relevant to providing a solution to the problem. This section allows unit owners and CIC administrators to adjust boundaries between units (with or without a boundary shift having occurred) when all affected parties agree. The agreement would also be subject to applicable state laws.

Specifically, § 2-112(a) provides that boundaries between a unit and another unit may be reallocated by affected unit owners and the association taking these steps:

1. The owners must submit an application to the executive board.
2. The board must consider the proposal and not find it unreasonable within 30 days.

3. The association prepares an amendment to the declaration stating the reallocation.

4. The affected unit owners sign the amendment.

5. The amendment contains conveyance language between the affected parties.

6. The amendment must be recorded and indexed.

7. Pursuant to subsection (c), the association would have to record new plans or plats.

§ 2-112(b) states that boundaries between units and common elements may be relocated to incorporate common elements within the unit. Reallocating from common elements to a unit may be accomplished by:

1. Submitting an application to the executive board.

2. The affected unit owners sign the amendment.

3. The association must sign the agreement.

4. The amendment must contain conveyance language between the affected parties.

5. The amendment must be recorded and indexed.

6. Again, pursuant to subsection (c), the association would have to record new plans or plats.

7. Sixty Seven percent (67%) of the votes in the association must approve the amendment as a condition to its effectiveness.

8. The association may charge fees to the unit owner in connection with any reallocation application.

**STUDY COMMITTEE TO CONSIDER REVISIONS TO THE
UNIFORM COMMON INTEREST OWNERSHIP ACT**

**MINUTES OF VIDEO AND TELEPHONE CONFERENCE CALL
MEETING OF MARCH 27, 2019.**

The conference call began at 3:00 PM, Eastern Daylight Savings Time.

Participants The following members of the Study Committee participated in the call: Commissioners David Biklen, William Breetz, John Cannel, Vince Cardi, Martin Carr, Dennis Cooper, Marc Feinstein, David Scott Jensen, Jacqueline Lenmark, Carl Lisman, Joseph Lubinski, Cliff McKinney and Christopher Odinet.

Also participating in the call were Observers Andrew Guggenheim, Steven Prunty, David Ramsey and Wilson Freyermuth and ULC staff members Odessa Glaza and Greg Young.

The Committee considered the following two issues identified for discussion in the Chair’s Memorandum of March 22 entitled “**MATERIALS ON UCIOA’S ‘SUPER PRIORITY’ LIEN FOR COMMON EXPENSES**”:

1. The liability of Declarants and successor Declarants
2. UCIOA’s ‘super priority’ lien for common expenses

1. THE LIABILITY OF DECLARANTS AND SUCCESSOR DECLARANTS

The discussion was led by Professor Chris Odinet at the University of Oklahoma Law School. Prof. Odinet is a member of the Study Committee and a member of the Joint Editorial Board for the Uniform Real Property Acts. Much of the text that follows is drawn from Prof. Odinet’s notes, which he kindly forwarded to the Chair.

Prof. Odinet first noted that most of the following issues arose during deliberations of a Law Reform committee in Louisiana that was considering UCIOA; Prof. Odinet participated in those deliberations.

The term “**Declarant**” is defined in UCIOA § 1-103 (14) as

“any person or group of persons acting in concert that:

- (A) as part of a common promotional plan, offers to dispose of the interest of the person or group of persons in a unit not previously disposed of; or
- (B) reserves or succeeds to any special declarant right.

Thus, UCIOA does not define a “declarant” as being the first or ‘original’ declarant and then the successor to such a person. Indeed, the term ‘**successor declarant**’ is not defined in UCIOA. Instead, the core concept in UCIOA is whether a person holds “**special declarant rights**”, regardless of whether or not that person actually offers units for sale – the alternate basis for defining a declarant.

Therefore, by definition, the first person to hold any special declarant right in a particular common interest community is “the declarant”, but anyone to whom those rights are later transferred is also a declarant.

The term “special declarant right” is defined in UCIOA §1-103 (33) as any of the rights enumerated in that section that are reserved for the benefit of a declarant.

With that background, the following six issues deal with Special Declarant Rights and with the rights and obligations of the Transferor of Special Declarant Rights.

ISSUE ONE. Should UCIOA §1-103 (33) be amended to permit the Declarant to reserve additional ‘Special Declarant Rights’, beyond those already enumerated in the Act?

During the Louisiana deliberations, a committee member who represented developers provided two examples of SDRs that are common practice in Louisiana but appear to be barred practices under UCIOA.

First, it is common practice in Louisiana that the declaration – prepared by the declarant - exempts the declarant from paying assessments on the units she owns.

Second, declarants might choose to reserve the right to grant themselves easements for certain limited purposes on lots even when those lots have been conveyed to buyers.

David Ramsey stated that from the CAI perspective, neither practice should be permitted because they are inconsistent with consumer protection.

Commissioner Lisman stated that in his view, a declarant could legitimately reserve the right to grant future easements across property previously sold.

Commissioner Biklen concluded that these were appropriate matters for study.

TRANSFEROR LIABILITY UNDER UCIOA §1-104

ISSUE TWO: UCIOA § 3-104(a) addresses the **transfer** of special declarant rights. Specifically, these right can “be transferred only by an instrument evidencing the transfer recorded in every [county] in which any portion of the common interest community is located”, and the instrument is not effective unless executed by the transferee.

Members of the Louisiana committee questioned whether the transfer should be effective at least between the transferor and transferee once executed or if the transfer can have no effect until it is recorded.

ISSUE THREE: As for the transferor’s liability after transferring special declarant rights, UCIOA § 3-104(b) states that:

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

The Louisiana committee was uncertain as to the meaning of the separation of obligations and liabilities arising before the transfer and liabilities imposed by the Act’s warranty obligations; these include the express warranties in 4-113 [dealing

with specific promises] and the implied warranties in 4-114 [dealing with freedom from defects]. Specifically, the committee was uncertain regarding the relationship between the transferor declarant and the transferee declarant as to warranty obligations (such as completing certain amenities) once the transferor no longer has access to the property.

One Commissioner questioned whether a unit owner would have only a claim for damages for breach of warranty, as opposed to a claim for specific performance.

ISSUE FOUR: UCIOA § 3-104(b) (3) provides that

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.

While this provision answers the question as to the liability between non-affiliated transferees and the transferor, the Louisiana committee asked whether it would be preferable to adopt an ‘all or nothing’ approach to transferred SDRs, in contrast to the current policy allowing a declarant to assign to different parties different powers enumerated under the special declarant right umbrella. In Louisiana, the consensus was that UCIOA should make clear that the allocation of SDRs should be more absolute, thus making a party either a declarant for all purposes, or not at all.

ISSUE FIVE: UCIOA § 3-104(c) provides that

[i]n case of foreclosure of a security interest, . . . 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.

The Louisiana committee questioned this policy; it is not clear that in all cases, the special declarant rights are or should be connected to ownership of a unit. Members of the committee reported working on planned community projects where the declarant did not own any real estate in the community at all; instead, the real estate subject to development rights was owned by a family trust that was serving as a development partner but wanted to keep the undeveloped real estate titled in the name of the trust.

ISSUE SIX: The last sentence of Comment 3 to UCIOA §3-104 provides that

(3) *** 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.*

The Louisiana committee questioned whether this result clearly followed from the text of the statute. Suppose, for example, that there is a foreclosure of all of a declarant's units but the foreclosing party *does not* request to acquire the special declarant rights; what provision of UCIOA §3-104 yields the result suggested by Comment 3?

The Study Committee members discussed the ramifications of the question, but did not resolve it.

TRANSFEEE LIABILITY UNDER UCIOA §1-104

Prof. Odinet next discussed a range of issues surrounding the **Transferee's** liability under UCIOA §3-104 (e) and (f). As a general observation, the Louisiana committee found these provisions required a very close reading and were nearly incomprehensible to his committee; he also observed that the entire section might benefit from re-organization.

First, regarding UCIOA §3-104 (e) (1), the Committee felt the following provision is clear and not controversial:

A successor to any special declarant right who is an **affiliate** of a declarant is subject to **all obligations and liabilities** imposed on the transferor by this [act] or by the declaration.

Second , UCIOA §3-104 (e) (2) reads as follows:

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 non-exercise of special declarant rights; or **on his transferor**, other than:

(a) misrepresentations by any previous declarant;

(b) warranty obligations on improvements made by any previous declarant, or made before the common interest community was created;

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

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

The Committee discussed whether or not, under (e) (2), general civil wrongs committed by the transferor in his capacity as the declarant, such as a violation of some state consumer protection law, would become a liability of the successor.

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

(4) A successor to all special declarant rights held by 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), **may declare 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 other than any right held by his 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 exercise of those rights is void. So long as a successor declarant may not exercise special declarant rights under this subsection, the successor declarant is not subject to any liability or obligation as a declarant other than liability for his acts and omissions under Section 3-103(d).”

Committee Recommendation: A Drafting Committee should consider the issues posed in Professor Odinet’s presentation and propose such appropriate amendments as determined by that Committee.

2. UCIOA LIEN PRIORITY

This discussion was led by Wilson Freyermuth, an Observer to our study; he is a Professor at the University Missouri Law School (Columbia) and the Executive Director of the Joint Editorial Board for the Uniform Real Property Acts. These minutes closely track the notes that Prof. Freyermuth kindly forwarded to the Chair.

Prof. Freyermuth began by breaking down some of the key components of the current version of UCIOA § 3-116, highlighting some of the more controversial issues associated with this Section.

Subsections (a), (b) and (c) are the most important sections of Section 3-116.

Subsection (a) creates a lien in favor of the association for any assessment attributable to a unit within the development; the lien secures the payment of those assessments along with attorney fees, late charges, fines, and interest. This lien thus permits the association to take action to foreclose on the unit if payment is not forthcoming.

Subsection (b) establishes the priority of the association's lien vis-à-vis competing liens. It gives the association priority over conflicting liens, with four basic exceptions:

- First, liens that were of record before the community's declaration was recorded will generally have priority over the association.
- Second, liens for real estate taxes and governmental assessments will have priority over the association.
- Third, mechanics' liens will have priority over the association if state law other than UCIOA gives them that priority.
- And fourth, and most significantly for our purposes, recorded first mortgage liens on the unit are to have priority over the association, but with a significant caveat articulated in subsection (c).

Under subsection (c), the association's lien also has priority over the first mortgage lien, but only to the extent of six months of unpaid assessments, during any one year, based on the association's periodic budget, plus the association's reasonable attorney fees and costs in enforcing its lien.

If a unit owner is more than six months in arrears in payment of assessments, subsections (a) through (c) effectively gives the association's lien a "split" priority. The association has first priority to the extent of six months of assessments per budget year. The otherwise first mortgage lender is next in priority, and then the association's lien is subordinate to the mortgage lender to the extent of the non-priority portion of the association's assessment bill.

There are a few points regarding other sections of Section 3-116.

Subsection (d) provides that competing association liens have equal priority. This issue would typically arise in master planned communities comprised of various sub-associations each covering portions of the overall development, where a unit might be subject to a master association and a sub-association.

There's been some confusion in the case law as to what "equal priority" means when one association starts a foreclosure. If it has equal priority, would that foreclosure extinguish the other association's lien or not? One of Nevada's members of ACREL

has suggested to the JEB that a clarification of this section, or some type of interpretive commentary, would be useful to clarify this question.

Subsection (e) makes clear that recording of the declaration is sufficient to give notice of the association's potential lien and to perfect that lien, without any further need for the association to record an additional notice at the time a unit owner goes into default or when the association begins a foreclosure.

Subsection (f) creates a statute of repose for the association's lien that extinguishes that lien unless the association brings action to enforce its lien within three years, although the Act brackets the period.

Subsection (g) makes clear that the association can bring an action to recover a judgment against the unit owner for unpaid assessments, and can take a deed in lieu of foreclosure from the unit or lot owner.

Subsection (i) effectively requires the association to give a payoff statement to the unit owner within 10 business days, and which statement is binding on the association.

Subsection (j) is a provision that was added in 2014, and is based on Illinois's condominium act, which allows the association to bring a summary eviction against a defaulting unit owner, and to take possession of the unit and rent the unit to another occupant in order to collect rents and apply them against the unpaid assessment bill. The threat of summary proceedings to dispossess a unit owner has proven in Illinois to encourage unit owners to pay their assessments on time except in cases of extreme default where the unit owner is also in default on their mortgage as well.

Subsection (k) is meant to preserve to each state the choice as to how an association lien foreclosure would proceed. In judicial foreclosure states, that has to be a judicial process. In a state that allows nonjudicial foreclosure, then a state could include subparagraph (4), which would permit the association to foreclose its lien nonjudicially. Subsection (m) also allows the association to seek a receiver for a unit in the context of its foreclosure.

Subsections (n), (o), (p), and (q) were included in UCIOA in the 2008 amendments and derived from the UCIOA Homeowners Bill of Rights project.

Subsection (n) basically prevents the association from foreclosing or evicting a unit owner until there are at least certain threshold amount in arrears, and until the unit

owner has been offered and rejected or failed to comply with a payment plan, and also requires a board resolution to proceed to foreclosure.

Subsection (o) provides a waterfall provision for how foreclosure proceeds would be applied that requires them to be applied to assessments first before late charges, attorney fees, fines, and interest.

Subsection (p) prohibits a foreclosure if the only sums due are fines against a unit rather than unpaid dues. And subsection (q) requires that the association's foreclosure sale has to be commercially reasonable in all respects.

Finally, subsection (r), which was also added in 2014, is designed to clarify that in nonjudicial foreclosure states, an association's foreclosure would not extinguish the otherwise-first mortgage lien unless the association gave effective notice of that foreclosure to the lender. That provision isn't necessary in judicial foreclosure states, because the lender would be a necessary party to the foreclosure and thus its interest couldn't be affected unless it was joined as a party.

There are several ways in which a drafting committee might consider revisions to Section 3-116.

Those revisions need not revisit the basic question of whether the association's lien is a true lien priority, and thus whether an association's foreclosure sale could have the effect of extinguishing an otherwise-first mortgage lien.

During the real estate downturn, post-2007, enormous numbers of lots and units that were "underwater" or in a negative equity position. In these circumstances, many first mortgage lenders decided to delayed foreclosure of their mortgages, both because they didn't want to take title to the units in a down market and because they didn't want the liability for association assessments.

If the association's lien doesn't have a true priority in that situation, the association's lien is practically valueless, and the first mortgage lender has no incentive to act even though the association's continued maintenance of the community helps to preserve the value of the unit.

However, a Drafting Committee might focus on the way in which an association lien foreclosure takes place to minimize the risk that an association foreclosure would extinguish the position of the first mortgage lender.

Obviously, the Section should reaffirm the idea that no lien can be extinguished unless the lienholder receives notice of the association's foreclosure proceeding. The Committee might go further in terms of the content of that notice, what information it contains, and some type of disclaimer or warning to bring home to the recipient the potential extinguishment of the recipient's interest.

The Committee might also consider amending subsection (i) to require more specificity and greater itemization with regard to the "payoff letter" from the association. As currently drafted, this section envisions only one statement, while in fact, the statement has at least two different recipients --- the unit owner and the otherwise-first mortgage lender.

The statement to the unit owner should state what the FULL amount secured by the lien is: all assessments, all fines, all late charges, all interest, all attorney fees, etc. – since that is what the unit owner must pay to avoid a foreclosure.

By contrast, the statement to the first mortgage lender should state what the PRIORITY PORTION of the unpaid amount is because that's the amount that the lender or its servicer has to tender to satisfy the priority portion of the association's lien and thus to redeem the mortgagee's first priority.

The existing subsection (i) is unclear, and in many cases, the association sent a payoff that didn't adequately notify the lender as to what it had to pay to satisfy the priority portion of the lien.

The Committee might also consider whether the association could legitimately expect to have its priority vis-à-vis the lender extend to attorney fees without the association first giving the lender effective notice and a cure period.

The Committee might also consider whether subsection (q) is sufficient. It was intended to incorporate Article 9's "commercial reasonableness" standard, but it has proven inadequate in one key respect.

Many of the association foreclosure sales have resulted in sale prices where the winning bid was equal to the total unpaid assessment balance, or perhaps a few dollars more. This means that homes worth perhaps hundreds of thousands of dollars sold for a few thousand. And the difficulty there is that real estate law has customarily said that a foreclosure sale can't be set aside purely for a low price unless it was so low as to "shock the conscience," and the judicial threshold for that is pretty low.

The drafting committee might consider either creating some type of objective threshold for the sale price, or consider the possibility of incorporating some kind of statutory right of redemption for a limited period for the lender to match the sale price and thus redeem its mortgage lien. The association presumably should not care as long as the association got the priority portion of its unpaid assessments paid out of the sale proceeds.

Committee Recommendation: A Drafting Committee should consider the issues posed in Professor Freyermuth's presentation and propose such appropriate amendments as determined by that Committee.