# UNIFORM CONDOMINIUM ACT (1980)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONRS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS EIGHTY-NINTH YEAR
ON KAUAI, HAWAII
JULY 26-AUGUST 1, 1960

*WITH COMMENTS*



August 16, 2021

The Executive Committee approved technical and conforming amendments to the act at its July 13, 2017 meeting.

## ABOUT ULC

The **Uniform Law Commission** (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 126th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.

- ULC statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.

- ULC keeps state law up-to-date by addressing important and timely legal issues.

- ULC's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.

- ULC's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.

- Uniform Law Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service, and receive no salary or compensation for their work.

- ULC's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.

- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

# UNIFORM CONDOMINIUM ACT (1980)

The Committee which acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Condominium Act was as follows:

WILLIS E. SULLIVAN. P.O. Box 2527, Boise, ID 83701, *Chairman*
WILLIAM H. ADAMS, III, P.O. Box 4099, Jacksonville, FL 32201
MARION W. BENFIELD, JR., University of Illinois, College of Law, Champaign, IL 61820
ALBERTO FERRER, Inter American University of Puerto Rico, School of Law, P.O. Box 8897, Santurce, PR 00910
BENNY L. KASS, 1528 Eighteenth Street, N.W., Washington, DC 20036
A. PRATT KESLER. Apt. 404, 875 Donner Way, Salt Lake City, UT 84108
CARL H. LISMAN, 191 College Street, Burlington, VT 05401
HIROSHI SAKAI, Suite 602, 810 Richards Street, Honolulu, HI 96813
WILLIAM G. THOMAS, P.O. Box 820, Alexandria, VA 22313
WILLIAM R. BREETZ, JR., One Constitution Plaza, Hartford, CT 06103, *Reporter*
ROBERT M. DIAMOND. P.O. Box 820, Alexandria, VA 22313, *Reporter*
STEPHEN G. JOHNAKIN, P.O. Bai 14515, Richmond, VA 23221, *Reporter*
JAMES W. JONES, 1229 Nineteenth Street, N.W., Washington, DC 20036, *Reporter*
JAMES M. BUSH, 363 North First Avenue, Phoenix, AZ 85003, *President, Ex Officio, (1975-77)*
JOHN C. DEACON. P.O. Box 1245, Jonesboro, AR 72401, *President, Ex Officio, (1979-1981)*
GEORGE C. KEELY, 1600 Colorado National Building, 950 Seventeenth Street, Denver, CO 80202, President, Ex Officio, (1977-79)
M. KING HILL, JR, 6th Floor, 100 Light Street, Baltimore, MD 21202, *Chairman, Executive Committee, Ex Officio*
WILLIAM J. PIERCE, University of Michigan, School of Law, Ann Arbor, Ml 48109, *Executive Director, Ex Officio*

## Review Committee

MAURICE A. HARTNETT. III, Chambers, Court of Chancery, 45 The Green, Dover, DE 19901, *Chairman*
EDWARD I. CUTLER, P.O. Box 3239, Tampa, FL 33601
DAVID M. MADWAY, Suite 300, 2150 Shattuck Avenue, Berkeley, CA 94704
ROBERT A. STEIN, University of Minnesota, School of Law, Minneapolis, MN, 55455

## Advisors to Special Committee on Uniform Condominium Act

GUS BAUMAN. National Association of Home Builders
ROBERT C. COON, Loan Guaranty Service, Veterans Administration
WILLIAM E. CUMBERLAND, Mortgage Bankers Association of America

# UNIFORM CONDOMINIUM ACT (1980)

## TABLE OF CONTENTS

## ARTICLE 1

## GENERAL PROVISIONS

## PART 1



## ARTICLE 1

## PART 2

## ARTICLE 2

## CREATION, ALTERATION, AND TERMINATION OF CONDOMINIUMS



## ARTICLE 3

## MANAGEMENT OF CONDOMINIUM

**ARTICLE 4**

**PROTECTION OF CONDOMINIM PURCHASERS**

## ARTICLE 5

## ADMINISTRATION AND REGISTRATION OF CONDOMINIUMS

# UNIFORM CONDOMINIUM ACT (1980)

## ARTICLE 1

## GENERAL PROVISIONS

### PART 1

**SECTION 1-101. SHORT TITLE.** This [act] may be cited as the Uniform Condominium Act.

**SECTION 1-102. APPLICABILITY.** Applicability of this [act] is governed by [Part] 2 of this [article].

**SECTION 1-103. DEFINITIONS.** In this Act:

(1) "Affiliate of a declarant" means any person who controls, is controlled by, or is under common control with a declarant. For purposes of this definition:

(A) a person controls a declarant if the person:

(i) is a general partner, officer, director, or employer of the declarant;

(ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than 20 percent of the voting interest in the declarant;

(iii) controls in any manner the election of a majority of the directors of the declarant; or

(iv) has contributed more than 20 percent of the capital of the declarant.

(B) a person is controlled by a declarant if the declarant:

(i) is a general partner, officer, director, or employer of the person;

(ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds

proxies representing, more than 20 percent of the voting interest in the person;

(iii) controls in any manner the election of a majority of the directors of the person; or

(iv) has contributed more than 20 percent of the capital of the person; and

(C) control does not exist if the powers described in this paragraph are held solely as security for an obligation and are not exercised.

(2) "Allocated Interests" means the following interests allocated to each unit:

(A) the undivided interest in the common elements;

(B) the common expense liability; and

(C) votes in the association.

(3) "Assessment" means the sum attributable to each unit and due to the association pursuant to Section 3-115.

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

(5) "Bylaws" means the instruments, however denominated, that contain the procedures for conduct of the affairs of the association regardless of the form in which the association is organized, including any amendments to the instruments.

(6) "Common elements" means all portions of a condominium other than the units and any other interests in real estate for the benefit of unit owners which are subject to the declaration.

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

(8) "Common expense liability" means the liability for common expenses allocated to

each unit pursuant to Section 2-107.

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

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

(11) "Dealer" means a person in the business of selling units for the person's own account.

(12) "Declarant" means 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 [; or

(C) applies for registration of a condominium under [Article] 5.]

(13) "Declaration" means the instrument, however denominated, that creates a condominium, and any amendments to the instrument.

(14) "Development rights" means any right or combination of rights reserved by a declarant in the declaration to:

(A) add real estate to a condominium;

(B) create units, common elements, or limited common elements within a condominium;

(C) subdivide units or convert units into common elements; or

(D) withdraw real estate from a condominium.

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

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

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

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

(19) "Limited common element" means a portion of the common elements allocated by the declaration or by operation of Section 2-102(2) or (4) for the exclusive use of one or more but fewer than all of the units.

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

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

(22) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or

governmental subdivision, agency, or instrumentality, or any other legal or commercial entity. [In the case of a land trust the term means the beneficiary of the trust rather than the trust or the trustee.]

(23) "Purchaser" means any person, other than a declarant or a dealer, that by means of a voluntary transfer acquires a legal or equitable interest in a unit other than:

(A) a leasehold interest, including renewal options, of less than 20 years, or

(B) as security for an obligation.

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

(25) "Record", used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

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

(27) "Special declarant rights" means rights reserved for the benefit of a declarant to:

(A) complete improvements indicated on plats and plans filed with the declaration;

(B) exercise any development right;

(C) maintain sales offices, management offices, signs advertising the condominium, and models;

(D) use easements through the common elements for the purpose of making improvements within the condominium or within real estate which may be added to the

condominium;

(E) make the condominium subject to a master association;

(F) merge or consolidate a condominium with another condominium;

(G) appoint or remove any officer of the association or any master association or any executive board member during any period of declarant control

(H) control any construction, design review, or aesthetic standards committee or process;

(I) attend meetings of the unit owners and, except during an executive session, the executive board; and

(J) have access to the records of the association to the same extent as a unit owner.

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

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

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

**Comment**

1. Regardless of how terms are used or defined in the declaration or bylaws, terms have an unvarying meaning in the Act, and any restricted practice which depends on the definition of a

term is not affected by a changed term in the documents. For example, a declarant might vary the definition of "unit owner" in the declaration to exclude itself in an attempt to avoid assessments for units which the declarant owns. The attempt would be futile, because the Act defines a declarant who owns a unit as a unit owner and defines the liabilities of a unit owner.
2. The definition of "affiliate of a declarant" (Section 1-103(1)) is similar to the definitions in 12 U.S.C. § 1730(a), which prescribes the authority of the Federal Savings and Loan Insurance Corporation to regulate the activities of savings and loan holding companies, and in 15 U.S.C. § 78(c)(18), which defines persons deemed to be associated with a broker or dealer for purposes of the federal securities laws. The objective standards of the definition permit a ready determination of the existence of affiliate status to be made. Unlike 12 U.S.C. § 1730(a)(2)(B), no power is vested in an agency to subjectively determine the existence of "control" necessary to establish affiliate status. Thus, affiliate status does not exist under the Act unless these objective criteria are met.

As a result of this definition, the association may, in some instances, be a declarant. Under the definition of "Affiliate of a declarant," it is possible that 20% of the unit owners may "act in concert" to control the activities of the association. While the mere casting of these votes at an association meeting would not normally constitute "concerted action" by those unit owners, other acts by individual unit owners might constitute such concerted action. The consequences of that result are determined under Section 3-104.

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

4. Definitions (6) and (29), treating "common elements" and "units," should be examined in light of Section 2-102, which specifies in detail how the precise differentiation between units and common elements is to be determined in any given condominium to the extent that the declaration does not provide a different scheme. No exhaustive list of items comprising the common elements is necessary in this Act or in the declaration; as long as the boundaries between units and common elements can be ascertained with certainty, the common elements include by definition all of the real estate in the condominium not designated as part of the units.

The definition of "common elements" also includes easements or other forms of servitudes which benefit the community and which run either to the unit owners association or to all the unit owners in the association. Examples of such interests include access easements to a landlocked parcel on which the community is located, easements for shared parking, etc. This easement, as any commonly held interest in real estate, is and should be a common element.

The Act distinguishes between real estate owned or leased by the unit owners association which is subject to the declaration, and similar real estate which is not subject to the declaration. Most condominiums are not likely to experience a need to acquire real estate in addition to the land originally submitted to the declaration. However, it is not difficult to envision cases where that result would be desirable to the unit owners — for example, to acquire additional parking areas or open space. There is no reason to either prohibit the association from securing this result, or to require the formalities of an amendment of the declaration to redefine the boundaries of the condominium.

In a condominium, fee title to the common elements is vested in the unit owners, not the unit owners association. Thus, in the condominium, all the real estate subject to the declaration, except the units, is a "portion of the condominium" and therefore is a common element. Real estate which is not subject to the declaration is neither a unit nor a common element.

5. Definition (9), "condominium," makes clear that, unless the ownership interest in the common elements is vested in the owners of the units, the project is not a condominium. Thus, for example, if the common elements were owned by an association in which each unit owner was a member, the project would not be a condominium. Similarly, if a declarant sold units in a building but retained title to the common areas, granting easements over them to unit owners, no condominium would have been created. Such projects have many of the attributes of condominiums, but they are not covered by this Act.

6. Definition (10), "conversion building," is important because of the protection which the Act provides in Section 1-112 for tenants of buildings which are being converted into a condominium. The definition distinguishes between buildings which have never been occupied by any person before the time that the building is submitted to the condominium form of ownership and buildings (whether new or old) which have been previously occupied by tenants. In the former case, because there have been no tenants in the building, the building would not be a conversion building, and no protection of tenants is necessary.

7. Definition (12), "declarant," is designed to exclude persons who may be called upon to execute the declaration to ratify the creation of the condominium, but who are not intended to be charged with the responsibilities imposed on declarants by this Act if that is all they do. Examples of such persons include holders of pre-existing liens and, in the case of leasehold condominiums, ground lessors. [Of course, such a person could become a declarant by subsequently succeeding to a special declarant right.] Other persons similarly protected by the narrow wording of this definition include real estate brokers, because they do not offer to dispose of their own interest in a unit. Similarly, unit owners reselling their units are not declarants because their units were "previously disposed of" when originally conveyed. The last bracketed clause in this definition must be deleted in any state which chooses not to enact Article 5 of the Act.

8. Definition (14), "development rights," includes a panoply of sophisticated development techniques that have evolved over time throughout the United States and which have been expressly recognized (and regulated) in an increasing number of jurisdictions, beginning with Virginia in 1974. Some of these techniques relate to the phased (or incremental) development of condominiums which the declarant hopes, but cannot be sure, will be successful enough to grow to include more land than the declarant is initially willing to commit to the condominium. For example, a declarant may be building (or converting) a 50-unit building on Parcel A with the intention, if all goes well, to "expand" the condominium by adding an additional building on Parcel B, containing additional units, as part of the same condominium. If the declarant reserves the right to do so, i.e., to "add real estate to a condominium," the declarant has reserved a "development right." In certain cases, however, the declarant may desire, for a variety of reasons, to include both parcels in the condominium from the outset, even though the declarant may subsequently be obliged to withdraw all or part of one parcel. Assume, for example, that in

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

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

9. Definition (15), "dispose" or "disposition," includes voluntary transfers to purchasers of any interest in a unit, other than as security for an obligation. Consequently, the grant of a mortgage or other security interest is not a "disposition," nor is any transfer of any interest to a person who is excluded from the definition of "purchaser," infra. However, the term includes more than conveyances and would, for example, cover contracts of sale.

10. Definition (18), "leasehold condominium," should be distinguished from land which is leased to a condominium but not subjected to the condominium regime. A leasehold condominium means, by definition, real estate which has been subjected to the condominium form of ownership. In such a case, units located on the leasehold real estate are typically leased for long terms. At the expiration of such a lease, the condominium unit or the real estate underlying the unit would be removed from the condominium if the lease were not extended or renewed. By contrast, real estate may not be subjected to condominium ownership, but may be leased directly to the association or to one or more unit owners for a term of years.

11. Definition (23), "purchaser," includes a person who acquires any interest in a unit, even as a tenant, if the tenancy entitles the person to occupy the premises for more than 20 years. This would include a tenant who holds a lease of a unit in a fee simple condominium for one year, if the lease entitles the tenant to renew the lease for more than four additional years. Excluded from the definition, however, are mortgagees, declarants, and people in the business of selling real estate for their account. Persons excluded from the definition of "purchaser" do not receive certain benefits under Article 4, such as the right to a public offering statement (Section 4-102(c)) and the right to rescind (Section 4-108).

12. Definition (24), "real estate," is very broad, and is very similar to the definition of "real estate" in Section 1-201(16) of the Uniform Land Transactions Act. Although often thought of in two-dimensional terms, real estate is a three-dimensional concept and the third dimension is unusually important in the condominium context. Where real estate is described in only two dimensions (length and width), it is correctly assumed that the property extends indefinitely above the earth's surface and downwards toward a point in the center of the planet. In most condominiums, however, as in so-called "air rights" projects, ownership does not extend *ab solo usque ad coelum*, because units are stacked on top of units or units and common elements are interstratified. In such cases the upper and lower boundaries must be identified with the same precision as the other boundaries.

13. Definition (26), "residential purposes," includes "recreational purposes." This common sense definition is used to avoid repeated use of a lengthier defined term, such as "residential or consumer owned recreational purposes." The Act contemplates that "recreational purposes" would be "consumer owned" recreational purposes commonly marketed for sale to individual owners — uses such as dock spaces for boats, campgrounds, airplane tie downs, etc. By including these kinds of uses within the definition, the Act intends to provide the same consumer protections which it offers to individual residential purchasers — persons who typically buy for their own use — as distinguished from commercial users. Thus, the definition would exclude commercial recreational facilities which are operated as a business or available to the public on a fee for use basis, such as movie theaters, athletic or country clubs, golf courses, and the like.

Further, the definition is not intended to override, and thus perhaps expand on, existing local zoning ordinances which permit only "residential" use.

However, by including these recreational purposes within the defined term "residential purposes," no change in the plain and traditional meaning of the word "residential" is intended. Thus, the drafters recognize that owners of residential units — i.e., a unit which is designed for use as a residential dwelling — may hold those units for investment purposes, or that individual owners may occasionally or regularly rent their units on an individual or rental pool basis. This is a common practice, for example, with residential condominiums built near ski or ocean resort areas. Rental occupancy does not change the residential character of the condominium, or the consumer protections that must be offered to purchasers.

14. Definition (27), "special declarant rights," seeks to isolate those rights reserved for the benefit of a declarant which are unique to the declarant and not shared in common with other unit owners. The list, while short, encompasses virtually every significant right which a declarant might seek in the course of creating or expanding a condominium. Any person who possesses a special declarant right would be a "declarant", including any who succeed under Section 3-104 to any of those rights. Thus, the concept of special declarant rights triggers the imposition of obligations on those who possess the rights. Under Section 3-104, those obligations vary significantly, depending upon the particular special declarant rights possessed by a particular declarant. These circumstances are described more fully in the comments to Section 3-104.

The amendments create three new "special declarant rights" and, like all special declarant rights, they are rights which exist only to the extent they are "reserved for the benefit of a declarant" in the declaration. See Section 2-105(a)(8). The most unusual of the three is the right to control what is commonly called a design review committee. Under the amended Act, no such committee may exist unless properly authorized in the declaration. See Section 2-105(a)(14). In contrast, the new special declarant rights to attend unit owner meetings and to access records of the association resolve questions that have arisen in practice and that track the reasonable expectations of the parties.

15. Definition (28), "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" and then required disclosure of any time share provisions in the condominium; 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-Share 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 "condominium." If it does, then the Act would apply in the same degree as it would to any condominium.

16. Definition (29), "unit," describes a tangible, physical part of the project, rather than a right in, or claim to, a tangible physical part of the property. Therefore, for example, a "time-share" arrangement in which a unit is sold to 12 different persons each of whom has the right to occupy the unit for one month does not create 12 new units—there are, rather, 12 owners of the unit. [Under the section on voting (Section 2-110), a majority of the time-share owners of a unit are entitled to cast the votes assigned to that unit.] While a separately described part of the project is not a unit unless it is designed for, and is subject to, separate ownership by persons other than the association, the association developer can hold or acquire units unless otherwise provided in the declaration.

17. Definition (30), "unit owners," contemplates that a seller under a land installment contract would remain the unit owner until the contract is fulfilled. As between the seller and the buyer, various rights and responsibilities might be assigned to the buyer by the contract itself, but the association would continue to look to the seller (for payment of any arrears in common expense assessments, for example) as long as the seller holds title.

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

18. The amendments create four new definitions: "Assessment" [Section 1-103(3)]; "Bylaws", [Section 1-103(5)], "Common expense liability" [Section 1-103(8)], and "Record" [Section 1-103(25)].

By defining the term "assessment" as the "sum attributable to each unit and due to the association pursuant to Section 3–115", the Act ties the term directly to the common expense liability of each unit, and to those sections of the Act where each unit's common expense liability is calculated. It also distinguishes each unit's assessment from the other sums that may be due from a unit owner — such as the sums described in Section 3-116(a) — which are not a part of the association's budget and therefore are not included in that unit's assessment but which "are enforceable in the same manner as unpaid assessments."

The definition of "bylaws" reflects the common functional meaning of that term, regardless of what different phrase might be used in the declaration to describe this instrument. The definition makes clear that: (i) the bylaws is the instrument that "contains the procedures for conduct of the affairs of the association" — as distinguished from the substantive role played by the declaration; (ii) the functional role of the bylaws remains consistent under the Act even if the association is organized as, for example, a limited liability company where the term "bylaws" is not used in the statute authorizing such entities and the instrument serving that function is identified as an "operating agreement"; and (iii) amendments to the bylaws are incorporated into the amended document for purposes of this Act. However, regardless of the name of the instrument used in the declaration, this Act mandates the minimum contents of the bylaws; see Section 3-106. Further, any provision of the State's statutes governing the content of the bylaws or, as appropriate, the operating agreement, to the extent inconsistent with the requirements of Section 3-106, would be overridden by this Act; see Section 1-108.

"Common expense liability" is defined primarily by reference to the substantive section of the Act where the term is used. The term appeared in the original Act without being defined.

The new definition of "Record" in Section 1-103(25) makes clear that the definition applies only when the term is used as a noun. The definition derives directly from federal and statute statutes governing electronic signatures; the term is commonly substituted for the word "writing" or "written" in other law.

**SECTION 1-104. NO VARIATION BY AGREEMENT.** Except as expressly provided in this [act], the effect of its provisions may not be varied by agreement, and rights conferred by it may not be waived. Except as otherwise provided in Section 1-207, a declarant

may not act under a power of attorney, or use any other device, to evade the limitations or prohibitions of this [act] or the declaration.

**Comment**

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

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

3. The following sections permit variation:

Section 1-102. Applicability. Preexisting condominiums may elect to conform to the Act.
Section 1-103. Definitions. All definitions used in the declaration and bylaws may be varied in the declaration, but not in interpretation of the Act.
Section 1-107. Eminent Domain. The formulas for reallocation upon taking a part of a unit, and for allocation of proceeds attributable to limited common elements, may be varied.
Section 2-102. Unit Boundaries. The declaration may vary the distinctions as to what constitutes the units and common elements.
Section 2-105. Contents of Declaration. A declarant may add any information desired to the required content of the declaration.
Section 2-107. Allocation of Common Element Interests, Votes, and Common Expense Liabilities. A declarant may allocate the interests in any way desired, subject to certain limitations.
Section 2-108. Limited Common Elements. The Act permits reallocation of limited common elements unless prohibited by the declaration.
Section 2-109. Plats and Plans. There is a presumption regarding horizontal boundaries of units, unless the declaration provides otherwise.
Section 2-111. Alterations Within Units. Subject to the provisions of the declaration, unit owners may make alterations and improvements to units.
Section 2-112. Relocation of Boundaries Between Adjoining Units. Subject to the provisions of the declaration, boundaries between adjoining units may be relocated by affected unit owners.
Section 2-113. Subdivision of Units. If the declaration expressly so permits, a unit may be subdivided into two or more units.
Section 2-115. Use for Sales Purposes. The declarant may maintain sales offices,

management offices, and model units only if the declaration so provides. Unless the declaration provides otherwise, the declarant may maintain advertising on the common elements.
Section 2-116. Easement Rights. Subject to the provisions of the declaration, the declarant has an easement for these purposes.
Section 2-117. Amendment of Declaration. The declaration of a non-residential condominium may specify less than a two-thirds vote to amend the declaration. Any declaration may require a larger majority.
Section 2-118. Termination of Condominium. The declaration may specify a majority larger than 80 percent to terminate and, in a non-residential condominium, a smaller majority. The declarant may require that the units be sold following termination even though none of them have horizontal boundaries.
Section 2-120. Master Associations. The declaration may provide for some of the powers of the Executive Board to be exercised by a master association.
Section 3-102. Powers of Unit Owners' Association. The declaration may limit the right of the association to exercise any of the listed powers, except in a manner which discriminates in favor of a declarant. The declaration may authorize the association to assign its rights to future income.
Section 3-103. Executive Board Members and Officers. Except as limited by the declaration or bylaws, the Executive Board may act for the association.
Section 3-106. Bylaws. Subject to the provisions of the declaration, the bylaws may contain any matter in addition to that required by the Act.
Section 3-107. Upkeep of Condominium. Except to the extent otherwise provided by the declaration, maintenance responsibilities are set forth in this section, and income from real estate subject to development rights inures to the declarant.
Section 3-108. Meetings. The bylaws may provide for special meetings at the call of less than 20 percent of the Executive Board or the unit owners.
Section 3-109. Quorums. This section permits statutory quorum requirements to be varied by the bylaws.
Section 3-110. Voting; Proxies. A majority in interest of the multiple owners of a single unit determine how that unit's vote is to be cast unless the declaration provides otherwise. The declaration may require that lessees vote on specified matters.
Section 3-113. Insurance. The declaration may vary the provisions of this section in non-residential condominiums, and may require additional insurance in any condominium.
Section 3-114. Surplus Funds. Unless otherwise provided in the declaration, surplus funds are paid or credited to unit owners in proportion to common expense liability.
Section 3-115. Assessments for Common Expenses. To the extent otherwise provided in the declaration, common expenses for limited common elements must be assessed against the units to which they are assigned, common expenses benefiting fewer than all the units must be assessed only against the units benefited, insurance costs must be assessed in proportion to risk, and utility costs must be assessed in proportion to usage.
Section 4-101. Applicability; Waiver. All of Article 4 is modifiable or waivable by agreement in a condominium restricted to non-residential use.
Section 4-115. Exclusion or Modification of Implied Warranties of Quality. Implied warranties of quality may be excluded or modified by agreement.
Section 4-116. Statute of Limitations for Warranties. The 6-year limitation may be

modified by agreement of the parties.

4. The second sentence of the section is an important limitation upon the rights of a declarant. It is the practice in many jurisdictions today, particularly jurisdictions in which statutes do not] permit expansion of a condominium, for a declarant to secure powers of attorney from all unit purchasers permitting the declarant unilaterally to expand the condominium by "unanimous consent" to include new units and to reallocate common element interests, common expense liability, and votes. With such powers of attorney, many declarants have purported to comply with the typical provision of "first generation" condominium statutes requiring unanimous consent for amendments of the declaration concerning such matters.
Section 2-117 requires unanimous consent to make certain amendments to the declaration and bylaws. If a declarant were permitted to use powers of attorney to accomplish such changes, the substantial protection which Section 2-117(d) provides to unit owners would be illusory. Section 1-104 prohibits the declarant from using powers of attorney for such purposes.

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

**SECTION 1-105. SEPARATE TITLES AND TAXATION.**

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

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

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

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

**Comment**

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

2. Even if real estate subject to development rights is a part of the condominium and lawfully "owned" by the unit owners in common, it is in fact an asset of the declarant, and must not be taxed and assessed against unit owners. Under subsection (c), the declarant is exclusively liable for those taxes.

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

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

**SECTION 1-106. APPLICABILITY OF LOCAL ORDINANCES, REGULATIONS, AND BUILDING CODES.**

(a) A zoning, subdivision, building code, or other real estate use law, ordinance, or regulation may not prohibit the condominium form of ownership or impose any requirement upon a condominium which it would not impose upon a physically identical development under a different form of ownership.

(b) Except as provided in subsection (a), no provision of this [act] invalidates or modifies any provision of any zoning, subdivision, building code, or other real estate use law, ordinance,

rule, or regulation governing the use of real estate.

**Comment**

1. Section 1-106(a) prohibits discrimination against condominiums by local law-making authorities. Thus, if a local law, ordinance, or regulation imposes a requirement which cannot be met if property is subdivided as a condominium but which would not be violated if all of the property constituting the condominium were owned by a single owner, this section makes it unlawful to apply that requirement or restriction to the condominium. For example, in the case of a high-rise apartment building, if a local requirement imposing a minimum number of parking spaces per apartment would not prevent a rental apartment building from being built, this Act would override any requirement that might impose a higher number of spaces per apartment merely by virtue of the same building being owned as a condominium.

2. Section 1-106(b) makes clear that, except for the prohibition on discrimination against condominiums, the Act has no effect on real estate use laws. For example, a particular piece of real estate submitted to the condominium form of ownership might be of such size that all of the real estate is required to support a proposed density of units or to satisfy minimum setback requirements. Under this Act, part of the submitted real estate might be subject to a development right entitling the declarant to withdraw it from the condominium but the mere reservation of this right would not constitute a subdivision of the parcel into separate ownership. If a declarant or foreclosing lender at a later time sought to exercise the option to withdraw the real estate, however, withdrawal would constitute a subdivision and would be illegal if the effect of withdrawal would be to violate setback requirements, or to exceed the density of units permitted on the remaining parcel.

**SECTION 1-107. EMINENT DOMAIN.**

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

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

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

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

**Comment**

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

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

> **EXAMPLE 1:** Suppose that all allocated interests in a nine-unit condominium were originally allocated to the units on the basis of size. If eight of the units are equal in size and one is twice as large as the others, the allocated interests would be 20% for the

largest unit and 10% for each of the other eight units. Suppose that one of the smaller units is taken out of the condominium by a condemning authority. Subsection (a) provides that the allocated interests would automatically shift, at the time of the taking, so that the larger unit would have 22 2/9% while each of the small units would have 11 1/9%.

**EXAMPLE 2:** Suppose, in Example 1, that the condemnation only reduced the size of one of the smaller units by 50%, leaving the remaining half of the unit usable. Subsection (b) provides that the allocated interests would automatically shift to 5 5/19% for the partially taken unit, 21 1/19% for the largest unit, and 10 10/19% for each of the other units. Note that the fact that the partially taken unit was reduced to half its former size does not mean that its allocated interests are only half as large as before the taking. Rather, that unit participates in the reallocation in proportion to its reduced size. That is why the partially taken unit's reallocated interests are 5 5/19% rather than 5%.

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

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

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

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

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

5. Even before the amendment formally acknowledging the reallocation of percentages required by this section is recorded, the reallocation is deemed to have occurred simultaneously with the taking. This rule is necessary to avoid the hiatus that otherwise could occur between the taking and reallocation of interests, votes, and liabilities.
6. Subsection (c) provides that, if part of the common elements is acquired, the award is paid to the association. This would not normally be the rule in the absence of such a provision.

**SECTION 1-108. SUPPLEMENTAL GENERAL PRINCIPLES OF LAW APPLICABLE.** The principles of law and equity, including the applicable law governing the form of the association, the law of real estate and the law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance, or other validating or invalidating cause supplement the provisions of this [act], except to the extent inconsistent with this [act].

**Comment**

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

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

**SECTION 1-109. CONSTRUCTION AGAINST IMPLICIT REPEAL.** This [act] being a general act intended as a unified coverage of its subject matter, no part of it shall be construed to be impliedly repealed by subsequent legislation if that construction can reasonably

be avoided.

**Comment**

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

**SECTION 1-110. UNIFORMITY OF APPLICATION AND CONSTRUCTION.**

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

**Comment**

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

**SECTION 1-111. SEVERABILITY.** If any provision of this [act] or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provisions or applications, and to this end the provisions of this [act] are severable.

**SECTION 1-112. UNCONSCIONABLE AGREEMENT OR TERM OF CONTRACT.**

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

(b) Whenever it is claimed, or appears to the court, that a contract or any contract clause is or may be unconscionable, the parties, in order to aid the court in making the determination,

must be afforded a reasonable opportunity to present evidence as to:

(1) the commercial setting of the negotiations;

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

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

(4) if a sale, any gross disparity, at the time of contracting, between the amount charged for the property and the value of that property measured by the price at which similar property was readily obtainable in similar transactions, but a disparity between the contract price and the value of the property measured by the price at which similar property was readily obtainable in similar transactions does not, of itself, render the contract unconscionable.

**Comment**

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

**SECTION 1-113. OBLIGATION OF GOOD FAITH.** Every contract or duty governed by this [act] imposes an obligation of good faith in its performance or enforcement.

**Comment**

This section sets forth a basic principle running throughout this Act: in condominium transactions, good faith is required in the performance and enforcement of all agreements and duties. Good faith, as used in this Act, means observance of two standards, "honesty in fact" and observance of reasonable standards of fair dealing. While the term is not defined, the term is derived from and used in the same manner as in Section 1-201 of the Uniform Simplification of Land Transfers Act and Sections 1-201(b)(20) and 1-304 of the Uniform Commercial Code.

**SECTION 1-114. REMEDIES TO BE LIBERALLY ADMINISTERED.** The remedies provided by this [act] shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. However, consequential,

special, or punitive damages may not be awarded except as specifically provided in this [act] or by other rule of law.

**SECTION 1-115. [RESERVED].**

**SECTION 1-116. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

## ARTICLE 1

## PART 2

**SECTION 1-201. APPLICABILITY TO NEW CONDOMINIUMS.** Except as otherwise provided in this [part], this [act] applies to all condominiums created within this state after [the effective date of this act]. The provisions of [insert reference to all present statutes expressly applicable to condominiums] do not apply to condominiums created after [the effective date of this act]. Amendments to this [act] apply to all condominiums created after [the effective date of this act] or made subject to this [act] by amendment of the declaration of the condominium**,** regardless of when the amendment state to this [act] becomes effective.

### Comment

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

Two conflicting policies are proposed when considering the applicability of this Act to “old” and “new” condominiums located in the enacting state. On the one hand, it is desirable for reasons of

uniformity for the Act to apply to all condominiums located in a particular state, regardless of whether the condominium was created before or after adoption of the Act in that state. To the extent that different laws apply within the same state to different condominiums, confusion results in the minds of both lenders and consumers. Moreover, because of the inadequacies and uncertainties of condominiums created under old law, and because of the requirements placed on declarants and unit owners' associations by this Act which might increase the costs of new condominiums, different markets might tend to develop for condominiums created before and after adoption of the Act. On the other hand, to make all provisions of this Act automatically apply to "old" condominiums might violate the constitutional prohibition of impairment of contracts. In addition, aside from the constitutional issue, automatic applicability of the entire Act almost certainly would unduly alter the legitimate expectations of some present unit owners and declarants.

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

2. In carrying out this philosophy with respect to "new" condominiums, the Act applies to all condominiums "created" within the state after the Act's effective date. This is the effect of the first sentence of Section 1-201. The second sentence makes clear that the provisions of old statutes expressly applicable to condominiums do not apply to condominiums created after the effective date of this Act. "Creation" of a condominium pursuant to this Act occurs upon recordation of a declaration pursuant to Section 2-101; however, the definition of "condominium" in Section 1-103(9) contemplates that de facto condominiums may exist, if the nature of the ownership interest fits the definition, and the Act would apply to such a condominium. Any real estate project which includes individually owned units and common elements owned by the unit owners as tenants in common is therefore subject to the Act if created within the state after the Act's effective date. No intent to subject the condominium to the Act is required, and an express intention to the contrary is invalid and ineffective.

The reference in this section to "all present statutes expressly applicable to condominiums" is intended to distinguish between a State's condominium and other enabling statutes and those statutes which apply not only to condominiums, but to other forms of real estate, such as taxation statutes or subdivision statutes. Thus, reference to the State's condominium enabling statutes should be included here, while references to taxation, subdivision, or other statutes which are not restricted solely to condominiums should not be included.

3. If an amendment to the Act is adopted after the Act is initially adopted in any State, the same body of law will thereafter apply to all condominiums created under the Act or subjected to it. Note that the amendment would not automatically apply to condominiums created before the original effective date of the Act even though limited provisions of the Act do apply retroactively under Section 1-204. Instead, an "old" project would have to be "subjected" to the Act by vote of its unit owners under Section 1-206. Because the Act permits the declaration to vary the default results under the Act, the drafters also contemplate that, in those cases where the pre-existing declaration conflicts with the new amendment to the Act, the old declaration will prevail, unless the owners vote to amend the declaration to change that result.

**SECTION 1-202. [RESERVED.]**

**SECTION 1-203. [RESERVED.]**

**SECTION 1-204. APPLICABILITY TO PRE-EXISTING CONDOMINIUMS.**

(a) the following sections apply to a condominium created in this state before [the effective date of this act]:

(1) Section 1-105;

(2) Section 1-106;

(3) Section 1-107;

(4) Section 1-206;

(5) Section 2-102;

(6) Section 2-103;

(7) Section 2-104;

(8) Section 2-117 (h) and (i);

(9) Section 2-121;

(10) Section 2-124;

(11) Section 3-102(a)(1) through (6) and (11) through (16);

(12) Section 3-103;

(13) Section 3-108;

(14) Section 3-111;

(15) Section 3-116;

(16) Section 3-118;

(17) Section 3-124;

(18) Section 4-109;

(19) Section 4-117; and

(20) Section 1-103 to the extent necessary to construe those sections.

(b) The sections described in subsection (a) apply only to events and circumstances occurring after the effective date of this [act] and do not invalidate existing provisions of the [declaration, bylaws, or plats or plans] of those condominiums.

**Comment**

1. This section states the general rules of applicability of the Act to condominiums which were created before the effective date of this Act.

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

3. Elaboration of the principles described in Comment 2 may be helpful.

First, Section 1-204 provides that the enumerated provisions automatically apply to condominiums created under pre-existing law, even without action by the unit owners. Many of the sections which do apply should measurably increase the ability of the unit owners to manage the association effectively, and should help encourage the marketability of condominiums created under early condominium statutes. To avoid possible constitutional challenges, these provisions, as applied to "old" condominiums, apply only to "events and circumstances occurring after the effective date of this Act"; moreover, the provisions of this Act are subject to the provisions of the instruments creating the condominium, and this Act does not invalidate those instruments.

> **EXAMPLE 1:** Under Section 1-204, Section 4-109 of this Act (Resale Certificates) automatically applies to "old" condominiums. Accordingly, unit owners in condominiums established prior to adoption of the Act would be obligated after the Act's effective date to provide resale certificates to future purchasers of units in "old" condominiums. However, the failure of a unit owner to provide such a certificate to a purchaser who acquired the unit before the effective date of the Act would not create a cause of action in the purchaser, because the conveyance was an event occurring before the effective date of the Act.

**EXAMPLE 2:** Under Section 1-204, Section 3-118 of this Act (Association Records) automatically applies to "old" condominiums. As a result, a unit owners' association of an "old" condominium must maintain certain financial records, and all the records of the association "shall be made reasonably available for examination by any unit owner and his authorized agents", even if the "old" law did not require that records be kept, or access provided. If the declaration or bylaws, however, provided that unit owners could not inspect the records of the association without permission of the president of the association, the restriction in the declaration would continue to be valid and enforceable.

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

Third, the Act seeks to alleviate any undesirable consequences of "old" law, by a limited "opt-in" provision. More specifically, Section 1-206 permits the owners of a pre-existing condominium to take advantage of the salutary provisions of this statute to the extent that can be accomplished consistent with the procedures for amending the condominium instruments as specified in those instruments and in the pre-existing statute.

**EXAMPLE 3:** Under most "first generation" condominium statutes, unit owners have no power to relocate boundaries between adjoining units. Under Section 2-112 of this Act, unit owners have such power, unless limited by the declaration. While Section 2-112 does not automatically apply to "old" condominiums, if the unit owners of a pre-existing condominium amend their condominium instruments in the manner permitted by the old statute and their existing instruments to permit unit owners to relocate boundaries, this section would validate that amendment, even if it were invalid under old law.

4. The amendments to this section add several existing and new sections of the Act that apply to projects created before the effective date of this Act in a particular state. Those new sections are:

**Section 1-206**, which addresses amendments to governing instruments of a project;

**Section 2-102**, dealing with Unit boundaries;

**Section 2-117 (h) and (i)**, which ease the amendment process, both for amendments that require lender consent and for amendments requiring a greater than 80% vote of unit owners;

**Section 2-124**, a new section dealing with termination of a project following a catastrophe;

**Section 3-103,** dealing with the make-up of the executive board and the declarant's right to control the association at the outset of the project;

**Section 3-108,** dealing with meetings of unit owners and of the executive board; and

**Section 3-124**, a new section dealing with litigation involving the declarant.

5. In considering which sections of the Act might be applied automatically to projects created under other law, the drafters remain concerned to avoid constitutional infirmity as a consequence of challenges under Article I, Section 10 of the United States Constitution, which bars a State — but not the federal government — from passing any law "... impairing the Obligation of Contracts...." That subject has subsequently been raised in a number of litigated cases, with mixed results. Compare, e.g., Fourth La Costa Condominium Owners Ass'n v. Seith, 159 Cal. App. 4th 563 (2008) (statute not unconstitutional) with Association of Apartment Owners of Maalaea Kai, Inc. V. Stillson, 116 P.3d 644 (Hawai'i 2005) (statute unconstitutional as applied).

The policy issues are not free from difficulty. On the one hand, for reasons of consistent management, judicial interpretation and consumer expectations among condominium communities in the same State, a single body of law that applies with equal force to all condominiums in a State (regardless of when created) would be greatly preferable. This, of course, is the general result in the field of corporate law, where all amendments to corporate statutes generally apply to all corporations in a state, regardless of whether they have retroactive application. On the other hand, aside from the issue of possible constitutional infirmity, at least one practical reason — that being the "law of the project", which is known to all residents of a condominium from the time they first became residents — is often raised to justify a refusal to apply new real estate laws retroactively to older projects. The amendments strike a middle ground between these positions.

**SECTION 1-205. [RESERVED.]**

**SECTION 1-206. AMENDMENTS TO GOVERNING INSTRUMENTS.**

(a) The declaration, bylaws, or plats and plans of any condominium created before [the effective date of this act] may be amended to achieve any result permitted by this [act], regardless of what applicable law provided before this [act] was adopted.

(b) Except as otherwise provided in Section 2-117(i) and (j), an amendment to the declaration, bylaws, or plats and plans authorized by this section must be adopted in conformity with any procedures and requirements for amending the instruments specified by those instruments or, if there are none, in conformity with the amendment procedures of this [act]. If an amendment grants to a person a right, power, or privilege permitted by this [act], any correlative obligation, liability, or restriction in this [act] also applies to the person.

## Comment

1. This section provides a straightforward mechanism by which the documents of pre-Act condominiums may be amended to take advantage of desirable provisions of the Act.

2. In considering the permissible amendments under Section 1-206, it is important to distinguish between the substance of the amendments and the law governing the procedure for amending declarations. An amendment to the declaration of a condominium created under "old" law, even if permissible under this Act, must nevertheless be adopted "in conformity with the procedures and requirements specified" by the original condominium instruments, and in compliance with the old law.

> **EXAMPLE 1:** Suppose an "old" condominium declaration and "old" state law both provide that approval by 100% of the unit owners is required to amend the declaration, but the unit owners wish to amend the declaration to provide for only 67% of the unit owners' approval of future amendments, as permitted by Section 2-117 of this Act. The amendment would not be valid unless 100% of the unit owners approved it, because of the procedural requirement of the declaration and "old" law. Once approved, however, only 67% would be required for subsequent amendments.

3. This section does not address the issue of contract rights of unit purchasers which may be affected by amendments under the new Act. Whether an amendment is effective against unit owners who purchased their units prior to the effective date of the Act and prior, therefore, to the amendment in question is controlled by the contract and constitutional law of the State.

> **EXAMPLE 2:** Assume "old" state law required that 5% of the purchase price of each unit sold by a declarant must be held in escrow until all the common elements in the condominium are completed. Assume further that a declarant created a condominium under "old" law, sold 10 units to purchasers prior to the effective date of the Act, and now is holding 5% of the purchase prices for those 10 units in escrow, since the common elements are not yet completed. Immediately following the effective date of the Act, the declarant amends the declaration pursuant to Section 1-206 to provide that no escrow of any portion of the purchase price is required. The amendment is approved by the requisite votes — all held by declarant — but not by any of the 10 unit owners. On its face, the amendment would appear to comply with the provisions of this Act, since it accomplishes a result — no escrow — which is permitted by this Act and was not permitted by "old" law. Whether that amendment is effective, however, to either permit the declarant to terminate the escrow with respect to the 10 unit owners, or even to terminate the escrow scheme with respect to future unit owners (since the original 10 owners may reasonably have expected that 5% of all purchase prices would be held in escrow) is not addressed by this Act. That determination must be based on the contractual and constitutional rights of the original purchasers.

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

> **EXAMPLE 3:** Assume that, pursuant to the provisions of the "old" law, the declarant may exercise control over the association for only three years from the date the condominium is created, but the control may be maintained during that period for so long as declarant owns any units. In the absence of any amendment, a provision in the declaration taking full advantage of the "old" law would be valid and enforceable. Assume further that, in the second year following creation of the condominium in question, this Act is adopted. The declarant then properly amends the declaration pursuant to subsection (b) to extend the period of declarant control for five years from the date of creation. The amendment would effectively extend control for two additional years, because Section 3-103(d) does not limit the number of the years the declarant may specify as a control period. Nevertheless, if the declarant, before that extended time limit has expired, conveys 75 percent of the units that may ever be a part of the condominium, or fails for two years to exercise development rights or offer units for sale in the ordinary course of business, the period of declarant control would terminate by virtue of the limitations in Section 3-103(d). That limitation is imposed on the declarant even if the amendment called for retaining control for so long as any units were owned by declarant, and despite the provision in the "old" law permitting such a restriction.

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

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

7. The changes to subsection (b) are important exceptions to the general rule that amendments to existing declarations and bylaws must be adopted in conformity with the procedures for amendments contained in those documents. Any effort to change by statute the amendment provisions of existing documents confronts the same constitutional issues discussed in the comments to Section 1-204 by the "impairment of contract" clause of the United States Constitution; similar provisions often appear in state constitutions. At the same time, lawyers in the field have long recognized that the amendment process can be fatally impeded by provisions commonly found in the declarations of existing communities. Two of the most significant are requirements that amendments cannot be effective unless approved by a specified number of unit lenders, or unless approved by very large and often unrealistic majorities of unit owners. Recognizing this issue, Connecticut approved amendments to Connecticut's version of Section 2-117(i) and (j) in 1995 which are very similar to those appearing here; see Connecticut Public Act

95-187. Practice under those amendments demonstrates the significant value these relaxed procedures add in accomplishing desired amendments in pre-act declarations.

**SECTION 1-207. APPLICABILITY TO NONRESIDENTIAL AND MIXED-USE CONDOMINIUMS.**

(a) Except as otherwise provided in subsection (d), this section applies only to a condominium in which all units are restricted exclusively to nonresidential purposes.

(b) A nonresidential condominium is not subject to this [act] except to the extent the declaration provides that:

(1) this entire [act] applies to the condominium; or

(2) [Articles] 1 and 2 apply to the condominium.

(c) If this entire [act] applies to a nonresidential condominium, the declaration may also require, subject to Section 1-112, that:

(1) notwithstanding Section 3-105, any management, maintenance, operations, or employment contract, lease of recreational or parking areas or facilities, and any other contract or lease between the association and a declarant or an affiliate of a declarant continues in force after the declarant turns over control of the association; and

(2) notwithstanding Section 1-104, purchasers of units must execute proxies, powers of attorney, or similar devices in favor of the declarant regarding particular matters enumerated in those instruments.

(d) A condominium that contains units restricted exclusively to nonresidential purposes and other units that may be used for residential purposes is not subject to this [act] unless the units that may be used for residential purposes would comprise a condominium that would be subject to this [act] in the absence of the nonresidential units or the declaration provides that this [act] applies as provided in subsection (b) or (c).

## Comment

1. Section 1-207 permits all nonresidential condominiums to "opt out" of the Act. However, except for mixed use projects, Section 1-207 is restricted to condominiums which contain only nonresidential units. The term "residential purposes" is defined and discussed in detail in Section 1-103(26) and its Comments.

In addition, Section 1-207 offers the declarant of a nonresidential condominium significantly more flexibility than was allowed in the original Act. This responds to those concerns which commentators have identified as important to developers of commercial condominiums.

2. The default rule is that the Act does not apply at all to a nonresidential condominium. However, the declarant may want the Act to apply in at least some circumstances. Therefore, the developer has three choices: (i) applying the default rule, i.e., none of the Act applies, which would require a very substantial drafting effort to address all the issues covered by the statute; (ii) the entire Act applies, which brings the consumer protection complexities of Articles 3 and 4 of the Act, even with the drafting exceptions permitted by subsection (c); or (iii) only Articles 1 and 2 of the Act apply. By electing the third option, the document drafter can take advantage of the provisions validating legal structures of the condominium, and thus allow shorter, clearer and more certain documents for non-residential projects than practice has permitted under the existing Act.

3. A declarant may find the full range of the Act to be a desirable outcome, particularly in light of those many sections which permit waiver or variation by agreement. Those sections already permitting waiver are detailed in the Official Comments to Section 1-104.

However, even in that case, subsection (c) provides two additional major enhancements to flexibility. First, subsection (c) contemplates that the declaration may provide that the entire Act applies but that the declarant may require that the association must continue certain contracts and leases in place after turnover, even though such contracts would otherwise be subject to cancellation by the Association under Section 3-105. Second, subsection (c) allows the declarant to use proxies, powers of attorney, or other devices to accomplish other results which would be prohibited in the case of residential condominiums. The sole limitation in both instances is the rule of unconscionability in Section 1-112.

4. Subsection (d) addresses the Act's applicability to mixed use projects. The default rule is nonapplicability unless the definition of a condominium would be met "in the absence of the nonresidential units." Thus, if the "residential" units and their obligations under the declaration did not satisfy the definitional threshold in Section 1-103(9) — basically, a payment obligation on the unit extending by covenant to "non-unit" expenses — the Act would not apply.

## SECTION 1-208. APPLICABILITY TO OUT-OF-STATE CONDOMINIUMS.

This [act] does not apply to a condominium located outside this state, but Sections 4-102 and 4-

103 and, to the extent applicable, Sections 4-104 through 4-106**,** apply to a contract for the

disposition of a unit in that condominium signed in this state by any party unless exempt under Section 4-101(b) [and the agency regulation provisions under [Article] 5 apply to any offering thereof in this state].

**Comment**

Section 1-208 reflects the fact that there are practical as well as constitutional limits regarding the extent to which a State should or may extend its jurisdiction to out-of-state transactions. A State may, of course, properly exercise its authority to protect its citizens from false or misleading information relating to condominiums located in other states but sold in that State. However, where sales contracts are executed wholly outside the enacting State and relate to condominiums located outside the State, it seems more appropriate for the courts of the jurisdiction(s) in which the condominium is located and where the transaction occurs to have jurisdiction over the transaction.

**SECTION 1-209. OTHER EXEMPT REAL ESTATE ARRANGEMENTS.**

(a) An arrangement between the associations for two or more condominiums to share the costs of real estate taxes, insurance premiums, services, maintenance or improvements of real estate, or other activities specified in their arrangement or declarations does not create a separate condominium.

(b) An arrangement between an association and the owner of real estate that is not part of a condominium to share the costs of real estate taxes, insurance premiums, services, maintenance or improvements of real estate, or other activities specified in their arrangement does not create a separate condominium. However, assessments against the units in the condominium required by the arrangement must be included in the periodic budget for the condominium, and the arrangement must be disclosed in all public offering statements and resale certificates required by this [act].

**Comment**

Section 1-209 addresses once again the scope of the Act. It should be considered in connection with the revised definition of "condominium". The subsections address two separate aspects of this issue: (a) whether contractual arrangements for cost sharing between two or more

condominiums require creation of a third separate condominium; and (b) whether contractual arrangements for cost sharing between an association and an owner of real estate located outside the condominium's boundaries require creation of a separate condominium.

The following analysis may help frame the issues. First, there appear to be numerous situations in which a declaration of easements or a covenant to share costs would suffice to establish the relationship between two parcels without the need to establish another unit owners association to "manage" that relationship. Also, the sharing is not always a matter of shared use — it might be a shared concern for maintenance of public rights-of-way through a condominium, or shared benefit of a roving security patrol, or sharing of costs of street lights on thoroughfares. Here are examples of common situations:

> **EXAMPLE 1.** A homeowners association maintains the entry features, median and right-of-way landscaping, and sidewalks along a public street that also serves a commercial parcel (e.g., hotel or country club). The developer wants the hotel or country club to be obligated to pay a share of the costs that the association incurs in performing this maintenance, so it records a declaration on the club or hotel parcel with a covenant obligating the club/hotel to share costs incurred by the association in performing this responsibility and setting out a formula for computing its share. If both parties are agreeable, no purpose is served by another association.
>
> **EXAMPLE 2.** Same situation as Example 1, except that the hotel is performing the maintenance instead of the association. The association is obligated under the covenant to share the costs to pay its share and a formula is set out in the covenant for computing the association's share, which it then includes in its common expense budget and collects as part of its regular assessment, and pays to the hotel. There is no need here for another association in which the property owners and hotel are members, with organizational documents, contracts, meetings, etc. The hotel doesn't want to be subject to membership in an association controlled by other property owners and the existing association can adequately represent the interest of its members in dealing with the hotel.
>
> **EXAMPLE 3.** Assume a vertical subdivision with a commercial parcel on the ground floor and a 15-story residential condominium above it. There is a recorded instrument creating reciprocal easements, obligating the condominium association to insure the entire building, among other things, and obligating the commercial owner to share certain costs incurred by the condominium association in accordance with a formula set out in the recorded instrument. Again, if the parties accept this arrangement, no purpose is served by mandating creation of another association.
>
> **EXAMPLE 4.** Four residential condominium projects share a common road. The first association to be created is responsible for maintaining the road. Each of the other three, at the time it is created, is made subject to a recorded covenant to share cost requiring it to pay 1/4 of the cost that the first association incurs in maintaining the road. Again, there is little benefit conferred in mandating creation of a master association to own and maintain the road.

Subsection (a) makes clear that in the case of arrangements between associations, a separate association would not be required in any of the above examples.

However, the drafters did not intend that the section result in an arrangement where the unit owners are left without a remedy in those instances where, for example, the sharing arrangement appears to unreasonably allocate the costs or other important aspects of the arrangement between the parties.

Cost, of course, would be only one concern of unit owners and their associations arising out of an agreement to share in the use of and expenses for other land. The drafters are aware of situations in which developers have included amenities, such as clubhouses, swimming pools, tennis courts, as well as access roads, in one condominium and then grant to a second condominium the right to use the facilities together with the obligation to pay a pro rata share of the cost of operation. The decisions concerning the operation and maintenance of the facilities, however, remain with the first condominium. Such arrangements have the potential to breed frustration, acrimony, and abuse.

One of the examples above suggests that a residential association and a commercial venture such as a hotel share certain common facilities and expenses and that the hotel might defer to the residential association for the operation of these amenities. This may not always be realistic. Because the hotel developer, if it is not the declarant itself, usually has a seat at the table while the overall structure of the condominium is being negotiated, while the individual unit owners do not, the developer of the hotel may seek to negotiate a deal best suited to its needs, perhaps to the detriment of the unit owners. Whether or not the deal as it is finally structured contains some semblance of a "reasonable" formula for cost sharing, the other, non-financial terms of the arrangement may vest control, decision making, etc., including the level of maintenance desired, solely with the hotel.

In several provisions, the Act does offer remedies for such circumstances, and those provisions would apply here with equal force. By way of example, if the arrangement were created for purposes of avoiding the limitations of the Act, if the organizers of the arrangement had not acted in good faith, or if the allocated interests between the associations were unconscionable, the mandates of sections 1-104, 1-108 and 1-112 would apply.

In the case of arrangements between associations and third parties other than associations, sub-section (b) avoids the need for a separate unit owners association so long as the costs to be borne by the unit owners in the existing association are reflected in the periodic budget for the association and are subject to approval by the unit owners.

**SECTION 1-210. OTHER EXEMPT COVENANTS.** A covenant that requires the owners of separately owned parcels of real estate to share costs or other obligations associated with a party wall, driveway, well, or other similar use does not create a condominium unless the owners otherwise agree.

## Comment

While these various forms of simple shared arrangements might arguably satisfy the definition of "condominium," there is no policy reason to vary common practice, which is to treat these arrangements as governed exclusively by the agreement of the parties, supplemented by common law. Accordingly, Section 1-210 expressly excludes these arrangements from the Act.

# ARTICLE 2

# CREATION, ALTERATION, AND TERMINATION OF CONDOMINIUMS

## SECTION 2-101. CREATION OF CONDOMINIUM.

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

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

## Comment

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

persons executing the declaration appear in the index for a searcher to locate all instruments in the land records, that language is not included in brackets.

2. In Section 1-103, the Act defines the term "Declaration" as any instruments, however denominated, which create a condominium and any amendments to those instruments. "Condominium," in turn, is defined as "real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions." It is important to emphasize that other covenants, conditions or restrictions applicable to the real estate in the condominium might be recorded before or after the instruments are recorded which divide the real estate into units and common elements, thereby creating the condominium. Until the actual recordation of the document which accomplished that result, however, the condominium has not been created.

3. A condominium has not been lawfully created unless the requirements of this section have been complied with. Nevertheless, a project which meets the definition of "condominium" in Section 1-103(9) is subject to this Act even if this or other sections of the Act have not been complied with.

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

5. Except when development proceeds pursuant to Section 5-103, this Act contemplates that two different stages of construction must be reached before (1) a condominium may be created or (2) a unit in the condominium may be conveyed. These stages are described, respectively, in subsection (b) and Section 4-120. The purpose of imposing these requirements is to insure that a purchaser will in fact take title to a unit which may be used for its intended purpose. If a condominium were said to consist from the beginning of a certain number of units, even though some of those units had not yet been completed or even begun, serious problems would arise if the remaining units were never constructed and if no obligation to complete the construction could be enforced against any solvent person. For example, if the insolvent owner of the unbuilt units failed to pay common expense assessments, the unit owners' association might be left with no remedy except a lien of doubtful value against mere cubicles of airspace. Moreover, votes in the unit owners' association could be assigned to units, and those votes could be cast, even though the units were never built. The Act therefore requires that significant construction take place before units are assigned an interest in the common elements, a vote in the association, and a share of the common expense liabilities, and before units are conveyed. This requirement of substantial completion [or the alternative bonding procedure and other assurances required by Section 5-103] reduces the possibility that a failure to complete will upset the expectations of purchasers or otherwise harm their interests in case the declarant becomes insolvent and no solvent person has the obligation to complete the unit.

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

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

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

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

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

8. Section 2-101(b) and 4-120 require that completion certificates be recorded, or local certificates of occupancy be issued, as evidence of the fact that the required levels of construction have been met. In the case of "substantial completion," issuance of "a certificate of occupancy authorized by law," as is commonly required by local ordinance or state building codes, will suffice. Once the certificates have been recorded, or issued, as the case may be, good title to the units may be conveyed in reliance on the record. It is possible, of course, that the

declarant may have failed to complete the required levels of construction; the architect, surveyor or engineer (whichever is appropriate in a particular jurisdiction) may have filed a false certificate. Such acts would create a cause of action in the purchaser under Section 4-115, but would not affect the validity of the purchasers' title to the condominium.

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

10. Requiring "substantial completion" of the structural components and mechanical systems in the buildings containing or comprising the units in a condominium may encourage creation of more phased condominiums under Section 2-105 in projects which once were in fact built in phases, but under a single nonexpandable declaration. Experience in the several states where significantly more rigorous requirements are imposed by statute, however, has shown that this does not create a difficult situation either for the developer or the lender. Moreover, it appears likely that the size of the initial phase of a multi-building project will be dictated largely by economics, as occurs in most jurisdictions today, rather than this Act. Finally, many lenders and developers are increasingly sensitive to the secondary mortgage market requirements particularly those of Fannie Mae and Freddie Mac. Experience indicates that the pre-sale requirements imposed by Fannie Mae and Freddie Mac frequently dictate that multi-building condominium projects be structured on a phased or expandable condominium basis.

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

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

**SECTION 2-102. UNIT BOUNDARIES.** Except as provided by the declaration:

(1) If walls, floors or ceilings are designated as boundaries of a unit, all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other

materials constituting any part of the finished surfaces thereof are a part of the unit, and all other portions of the walls, floors, or ceilings are a part of the common elements.

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

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

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

**Comment**

1. It is important for title purposes, for purposes of defining maintenance responsibilities, and for other reasons to have a clear guide as to which parts of a condominium constitute the units and which parts constitute the common elements. This section fills the gap left when the declaration merely defines unit boundaries in terms of floor, ceilings, and perimetric walls.

The provisions of this section may be varied, of course, to the extent that the declarant wishes to modify the details for a particular condominium. For example, in a townhouse project structured as a condominium, it may be desirable that the boundaries of the unit constitute the exterior surfaces of the roof and exterior walls, with the center line of the party walls constituting the perimetric boundaries of the units in that plane, and the undersurface of the bottom slab dividing the unit itself from the underlying land. Alternatively, the boundaries of the units at the party walls might be extended to include actual division of underlying land itself. In those cases it would not be appropriate for walls, floors and ceilings to be designated as boundaries, and the declaration would describe the boundaries in the above manner.

2. The differentiations made clear here, in conjunction with the provisions of Section 3-107, will assist in minimizing disputes which have historically arisen in association administration with respect to liability for repair of such things as pipes, porches and other components of a building which unit owners may expect the association to pay for and which the association may wish to have repaired by unit owners. Problems which may arise as a result of negligence in the use of

components—such as stoops and pipes—are resolved by Section 3-107, which imposes liability on the unit owner who causes damage to common elements, or under the broader provisions of Section 3-115(e), which permits the association to assess common expenses "caused by the misconduct of any unit owner" exclusively against that owner. This would include, of course, not only damages to common elements, but fines or unusual service fees, such as clean-up costs, incurred as a result of the unit owner's misuse of common elements.

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

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

**SECTION 2-103. CONSTRUCTION AND VALIDITY OF DECLARATION AND BY-LAWS.**

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

(b) The rule against perpetuities may not be applied to defeat any provision of the declaration, bylaws or rules.

(c) If a conflict exists between the declaration and the bylaws, the declaration prevails except to the extent the declaration is inconsistent with this [act].

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

**Comment**

1. Subsection (b) does not totally invalidate the rule against perpetuities as applied to condominiums. The language does provide that the rule against perpetuities is ineffective as to documents which would govern the condominium during the entire life of the project, regardless

of how long that should be. With respect to deeds or devises of units, however, the policies underlying the rule against perpetuities continue to have validity and remain applicable under this Act.

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

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

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

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

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

**SECTION 2-104. DESCRIPTION OF UNITS.** A description of a unit which sets forth the name of the condominium, the [recording data] for the declaration, the [county] in which the condominium is located, and the identifying number of the unit, is a sufficient legal

description of that unit and all rights, obligations, and interests appurtenant to that unit which were created by the declaration or bylaws.

**Comment**

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

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

**SECTION 2-105. CONTENTS OF DECLARATION.**

(a) The declaration for a condominium must contain:

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

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

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

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

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

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

(7) a description of any real estate (except real estate subject to development rights) which may be allocated subsequently as limited common elements, other than limited

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

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

(9) if any development right may be exercised with respect to different parcels of real estate at different times, a statement to that effect together with:

(A) either a statement fixing the boundaries of those portions and regulating the order in which those portions may be subjected to the exercise of each development right or a statement that no assurances are made in those regards; and

(B) a statement as to whether, if any development right is exercised in any portion of the real estate subject to that development right, that development right must be exercised in all or in any other portion of the remainder of that real estate;

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

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

(12) any restrictions on alienation of the units, including any restrictions on leasing which exceed the restrictions on leasing units which executive boards may impose pursuant to Section 3-120(d) and on the amount for which a unit may be sold or on the amount that may be received by a unit owner on sale, condemnation, or casualty loss to the unit or to the condominium, or on termination of the condominium;

(13) the [recording data] for recorded easements and licenses appurtenant to or

included in the condominium or to which any portion of the condominium is or may become subject by virtue of a reservation in the declaration;

(14) any authorization pursuant to which the association may establish and enforce construction and design criteria and aesthetic standards as provided in Sections 3-106 and 3-120; and

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

(b) The declaration may contain any other matters the declarant deems appropriate, including any restrictions on the uses of a unit or the number or other qualifications of persons who may occupy units.

**Comment**

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

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

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

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

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

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

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

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

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

5. Paragraph (a)(5) requires that the boundaries of each unit created by the declaration be identified. The words "created by the declaration" emphasize that in an expandable project, new units may be created in the future by amendments to the declaration. Until those new units are actually added to the project by amending the declaration, however, they are not units within the meaning of that defined term, and they need not be described.

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

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

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

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

10. Paragraph (a)(12) includes certain requirements which were not applicable to condominiums under the original Act. This paragraph requires the declaration to include any information which restricts the amount for which a unit may be sold, or the amount to be received by a unit owner upon sale, condemnation, or casualty loss. Such restrictions are increasingly common in the development of "limited equity" condominiums or condominiums designed to minimize the increased value of the condominium upon resale to preserve housing for a particular income group. The Act in no way restricts the use of such provisions, but does require that explicit provisions concerning such restrictions appear in both the declaration and the Public Offering Statement.

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

12. Paragraph (a)(15) is a cross-reference to other sections of the Act which require the declaration to contain particular matters. Some of these sections, such as 2-107 on the allocations

of allocated interests or 2-109 on plats and plans, will affect all projects. Others, such as 2-106 on leasehold condominiums, will apply only to particular kinds of projects.

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

14. The amendments to paragraph (a)(12) and subsection (b) are an effort to clarify the law of "use and occupancy" restrictions in condominiums and make that law more rational. Specifically, these amendments describe the pattern of what use and occupancy restrictions must appear in the declaration, what amendment procedures must be used to change those use and occupancy restrictions, what discretion the executive board has in enforcing such restrictions, and what protection the Act provides to unit owners, either to be free of regulation inside their units or to be protected from new restrictions on a once permitted activity. This is a complex subject, and amendments in several sections of the Act were required.

The amendments begin in Section 2-105. Previously, the Act required all use, occupancy, and alienation restrictions to appear in the declaration; see old Section 2-105(a)(12). No amendment to a "use" restriction was allowed, except with unanimous consent; see old Section 2-117(d). The Act was unclear as to whether or not such things as leasing restrictions or pet rules were "use" restrictions requiring unanimous consent.

The amendments make two important changes. First, leasing restrictions which exceed the restrictions allowed by the secondary mortgage market, see Section 3-102(c)(2), still must appear in the declaration. No other use or occupancy restrictions must appear in the declaration, but any such restrictions may so appear. See Section 2-105(b). Presumably, a provision in the declaration pursuant to this subsection (b) could permit the executive board to develop evolving use restrictions, in its discretion.

Amended subsection (b) generally distinguishes between "uses of a unit" and "the number or qualifications of persons who occupy units;" this distinction emphasizes that "occupancy" focuses on characteristics of individual persons while "use" focuses on the purposes to which the space is devoted. Amendments to other sections bear on these issues in important ways. See, e.g., Section 2-117(d) and (f) and Section 3-102.

15. Paragraph (a)(14) requires that if the unit owners association is to be authorized to establish and enforce construction and design criteria or aesthetic standards, that authority must appear in the declaration. This mandate tracks the requirement that if the declarant is to have that power during the time it is developing the project, the declarant must treat that power as a special declarant right; see Section 1-103(27)(H). If the association is so empowered, then, pursuant to Section 3-106(a)(4) and (7), the bylaws would have to provide for administration of that program if administration is to be done by any committee or officer other than the executive board. Further, under Section 3-120(c), the association would adopt criteria for consideration of design

criteria, and procedures for enforcing them. Taken together, these requirements are intended to instill a reasonable and transparent process regarding a subject which has been controversial in the condominium field.

**SECTION 2-106. LEASEHOLD CONDOMINIUMS.**

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

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

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

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

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

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

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

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

(c) Acquisition of the leasehold interest of any unit owner by the owner of the reversion

or remainder does not merge the leasehold and fee simple interests unless the leasehold interests of all unit owners subject to that reversion or remainder are acquired.

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

**Comment**

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

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

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

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

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

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

pay their share of the rent.

Subsection (b) does not address the issue of whether a unit owner's tenant may cure a default by the unit owner under the unit owner's lease so as to prevent termination of the unit owner's lease.

> **Example:** Assume that A leases 100 acres of land to B for 50 years. B, in turn, leases the same 100 acres to C, for the duration of the 50 year term. C creates a condominium on the leasehold land, and thereby becomes the declarant; thereafter, C leases a unit in the condominium to D, together with a lease of this allocated undivided interest in the leasehold underlying the unit, for the duration of the 50 year term. D then leases the unit to E for a term of five years. Both A and B must execute the declaration; see Section 2-106(a). So long as D meets D's obligations to C — or any other persons — under the declaration and D's sublease, D's interest in the leasehold may not be terminated by either A, B, or C; see Section 2-106. For that reason, A and B will likely take appropriate steps to protect their interests in the event that D makes timely payment to C, if called for in the declaration or lease, but C fails to meet C's obligations to either A or B. If D fails to make timely payment to C — or to B or A if those persons have so required — then D's interest may be terminated by the person entitled to payment, unless E is entitled to cure. E may cure and thereby prevent default, however, only if other law of the State permits transferees of partial interests to cure defaults of the transferor. Because E is not a unit owner, E is not entitled to rights under this Act.

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

**SECTION 2-107. ALLOCATION OF ALLOCATED INTERESTS.**

(a) The declaration must allocate to each unit a fraction or percentage of undivided interests in the common elements and in the common expenses of the association, and a portion of the votes in the association.

(b) The declaration must state the formulas used to establish allocations of interests. Those allocations may not discriminate in favor of units owned by the declarant or an affiliate of the declarant.

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

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

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

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

**Comment**

1. Most existing condominium statutes require a single common basis, usually related to the "value" of the units, to be used in the allocation of common element interests, votes in the association, and common expense liabilities. This Act departs radically from such requirements by permitting each of these allocations to be made on different bases, and by permitting allocations which are unrelated to value. Thus, all three allocations might be made equally among all units, or in proportion to the relative size of each unit, or on the basis of any other formula the declarant may select, regardless of the values of those units.

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

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

3. If size is chosen as a basis of allocation, the declarant must choose between reliance on area or volume, and the choice must be indicated in the declaration. The declarant might further refine the formula by, for example, excluding unheated areas from the calculation or by partially discounting such areas by means of a ratio. Again, the declarant must indicate the choices made and explain the formulas chosen.

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

5. The purpose of subsection (c) is to require a comprehensive scheme for reallocation of allocated interests in a condominium subject to development rights, and to afford some advance disclosure to purchasers of units in the first phase of a flexible condominium of how allocated interests will be reallocated if additional units are added.

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

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

7. This section recognizes that there may be certain instances in which class voting in the association would be desirable. For example, in a mixed-use condominium consisting of both residential and commercial units, there may be certain kinds of issues upon which the residential

or commercial unit owners should have a special voice, and the device described in Comment 6 was not desired. To prevent abuse of class voting by the declarant, subsection (d) permits class voting only with respect to specified issues directly affecting the designated class and only as necessary to protect valid interests of the designated class.

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

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

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

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

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

Section 2-110(d)(2).

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

11. Questions have arisen concerning the drafters' intent regarding the language in subsection (b), which prohibits the declaration from "discriminating in favor of units owned by the declarant" in allocating votes and common expense liabilities among the units. Specifically, the question is whether this section imposes a special level of scrutiny on the allocation of votes and common expense liability to units that the declarant may own, compared to similar units that are owned by persons who are not declarants.

The answer is that the language means what it says. If the allocated interests would change at the time the declarant sold the unit, then the allocated interests are improper because they discriminate in favor of the declarant's ownership of that unit. However, if the allocation of common expenses and votes is permanent rather than dependent on the owner's identity and one whose formula is identified in the declaration, then the allocation is proper. Subject to the obligations of good faith in Section 1-113 and the prohibition on unconscionable terms in Section 1-112, this would be true even if the effect of the allocation were to create a relative benefit in favor of units that the declarant or its affiliate intended to own for an indefinite period.

> **Example:** A condominium consists of a high-rise building containing ten floors of equal size. There are four units on each floor except the top floor, where there is only one penthouse unit. Even though the penthouse unit is four times the size of the units on the nine other floors, and is clearly more valuable than the other 36 units, the declaration allocates an equal share of the common expenses to all the units, including the penthouse unit. The effect of this allocation is that the penthouse unit bears a 1/37th share of the common expenses — this is only 25% of the cost on a per square foot basis — of the share borne by each unit owner on a lower floor. Assume that the declaration properly contains the formula used for the allocation of common expenses among the units and properly discloses the material and unusual circumstance that the penthouse benefits substantially from the formula used to allocate expenses. The fact that the declarant intends to retain ownership of the penthouse unit and live in that unit for an indefinite period does not mean that the standard contained in section 2-107 (b) has been violated. However, the Act would be violated if the declaration provided that, upon the declarant's sale of the penthouse, the formula for allocating common expenses would be changed to an allocation among all the units based on their relative sizes.

In the example, this appears to yield an unjust result and a court might be invited to consider the extent to which the declarant had acted in bad faith or unconscionably in making such an allocation. Nevertheless, any other rule would simply encourage challenges to any allocation of common expenses, because an argument can always be made that any allocation — whether done on relative size, number of rooms, "value', location within a building, equality or any other

basis — inevitably works to the relative disadvantage of some owners compared to others in the condominium.

**SECTION 2-108. LIMITED COMMON ELEMENTS.**

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

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

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

**Comment**

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

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

would not have to be complied with to allocate it or to reallocate it.

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

**SECTION 2-109. PLATS AND PLANS.**

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

(b) Each plat must show or project:

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

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

(3) a legally sufficient description of any real estate subject to development rights, labeled to identify the rights applicable to each parcel, but plats and plans need not designate or label which development rights are applicable to each parcel if that information is clearly delineated in the declaration;

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

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

(6) except as otherwise provided in subsection (h), the approximate location and dimensions of any vertical unit boundaries not shown or projected on plans recorded pursuant to subsection (d) and that unit's identifying number;

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

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

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

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

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

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

(d) Except as otherwise provided in subsection (h), to the extent not shown or projected on the plats, plans of the units must show or project:

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

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

(3) the approximate location of any units in which the declarant has reserved the right to create additional units or common elements, identified appropriately.

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

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

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

(h) Plats and plans need not show the location and dimensions of the units' boundaries or their limited common elements if:

(1) the plat shows the location and dimensions of all buildings containing or comprising the units; and

(2) the declaration includes other information that shows or contains a narrative description of the general layout of the units in those buildings and the limited common elements allocated to those units.

**Comment**

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

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

Thus, the plans under this Act are not conceived to be "as built" plans.

2. Subsection (c) permits, but does not require, the plats to show the location of contemplated improvements. Because construction of contemplated improvements by a declarant involves the exercise of development rights, a declarant may not create any improvement within real estate where no development rights have been reserved, unless the plats actually show that proposed improvement or unless the association (which the declarant may control) makes the improvement pursuant to Section 3-102(7). Of course, as to existing unit owners, the improvements which may be made by the declarant and the areas within which they may be made are limited by the declarant's contract with those unit owners. Because this is true, the declarant may not violate that contract directly — by undertaking improvements for which the declarant reserved no rights — or indirectly by making improvements through the association which the declarant controls or by seeking to amend the declaration in violation of the contract. Moreover, under Section 2-117(d), no amendment to the declaration may create or increase special declarant rights without the unanimous consent of the unit owners.

Within land subject to development rights, of course, construction may take place in accordance with the reserved rights, even if no contemplated improvements are shown on the plats. As to the declarant's obligation to complete an improvement that is shown, see Section 4-119(a).

3. As noted in the Comments to Section 2-101, a condominium unit may consist of unenclosed ground and/or airspace, with no "building" involved. If this were true of all units in a particular condominium, the provisions of Section 2-109 relating to plans (but not plats) would be inapplicable.

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

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

The amendment to subsection (b)(3) relieves the declarant from the obligation of identifying each applicable development right in the labeling of those portions of the plats and plans that show land subject to development rights if the actual development rights for each such parcel are "clearly delineated" in the declaration itself. While constituting a marginal reduction in the information shown on the plats and plans, the fact is that in some complexes, the reduced information may make the documents more legible. In any event, the statute continues to require disclosure of this information in the declaration.

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

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

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

9. The amendments to subsections (6), (7), and (10) balance the need for disclosure and certainty in understanding what a unit owner "owns" and the practical limitations of the surveying profession. They require that the plat or survey — as a minimum — actually show only the kinds of limited common elements that most people would understand to be an important appurtenance to their units. All other kinds of limited common elements — parking spaces, window boxes, etc., — may be either shown on the survey or simply described in words.

10. New subsection (h) eliminates the need for any unit boundary survey so long as the building location is shown on the project survey and a practical means exists by which the potential purchaser can understand the unit layout and its assigned common elements.

**SECTION 2-110. EXERCISE OF DEVELOPMENT RIGHTS.**

(a) To exercise any development right reserved under Section 2-105(a)(8), the declarant

must prepare, execute, and record an amendment to the declaration and comply with Section 2-109. The declarant is the unit owner of any units thereby created. The amendment to the declaration must assign an identifying number to each new unit created, and, except in the case of subdivision or conversion of units described in subsection (b), reallocate the allocated interests among all units. The amendment must describe any common elements and any limited common elements thereby created and, in the case of limited common elements, designate the unit to which each is allocated to the extent required by Section 2-108.

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

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

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

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

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

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

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

**Comment**

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

2. The reservation and exercise of development rights is and must be closely coordinated with financing for the project. As a result, lender review and control of that process is common, and the financing documents should reflect the proposed development process. A typical construction loan mortgage on a portion of a phased condominium might provide that as soon as new units are built on new land to be added (or, if the portion is also designated withdrawable land, as soon thereafter as anyone other than the declarant becomes the unit owner of a unit in the withdrawable land) the mortgage on that land converts into a mortgage on all of the units located within that portion, together with their respective common element interests. The common element interest of those units will, of course, extend to the common elements in other sections of the condominium. However, failure of a construction loan mortgage to so provide is inconsequential, because conveyance of the units in that phase to the lender or to a purchaser at a foreclosure sale would automatically transfer all of those units' common element interests, as a result of the requirements of Sections 2-107(d) and (e).

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

4. As indicated in the Comment to Section 1-106, the withdrawal of real estate from a condominium may constitute a subdivision of land under the applicable subdivision ordinance. Under most subdivision ordinances, the owner of the real estate is regarded as the "subdivider."

In the event of a withdrawal under this section, however, the declarant is in fact the subdivider because of the declarant's unique interest in and control over the real estate, even though the real estate, for title purposes, is a common element until withdrawn. Accordingly, the declarant would bear the cost of compliance with any subdivision ordinance required to withdraw a part of the real estate from the condominium.

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

For example, a declarant of a five-story office building condominium may have purchasers committed at the time of the filing of the condominium declaration but a lack of purchasers for the upper two floors. In such a circumstance, the declarant could designate the upper two floors as a unit, reserving the right to subdivide or convert that unit into additional units, common elements or a combination of units and common elements as needed to suit the requirements of ultimate purchasers. If, at a later time, a purchaser wishes to purchase half of one floor as a unit, the declarant could exercise the development right to subdivide the two-floor unit into two or more units. The declarant may also wish to reserve a portion of the divided floor as a corridor which will constitute common elements. In that case, the declarant would proceed pursuant to this subsection to reallocate the allocated interests among the units in the manner described in this section.

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

The declarant may state in the declaration any conditions or limitations on the time limits reserved for the exercise of development rights which would cause that development right to lapse before the time established in the declaration. It would, of course, be possible for a declarant to voluntarily relinquish those rights prior to the time that they automatically lapsed, and an instrument recorded by the declarant would be effective to cause that lapse, subject to any constraints imposed on voluntary relinquishment by the declarant's lender.

**SECTION 2-111. ALTERATIONS OF UNITS.** Subject to the provisions of the declaration and other provisions of law, a unit owner:

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

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

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

**Comment**

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

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

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

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

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

**SECTION 2-112. RELOCATION OF UNIT BOUNDARIES.**

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

(b) Subject to the provisions of the declaration and other provisions of law, boundaries between units and common elements may be relocated to incorporate common elements within a unit by an amendment to the declaration upon application to the association by the owner of the unit who proposes to relocate a boundary. Unless the declaration provides otherwise, the amendment may be approved only if persons entitled to cast at least [67] percent of the votes in the association, including [67] percent of the votes allocated to units not owned by the declarant, agree to the action. The amendment may describe any fees or charges payable by the owner of the affected unit in connection with the boundary relocation and the fees and charges are assets of the association. The amendment must be executed by the unit owner of the unit whose boundary is being relocated and by the association, contain words of conveyance between them, and on recordation be indexed in the name of the unit owner and the association as grantor or grantee, as appropriate.

(c) The association shall prepare and record plats or plans necessary to show the altered

boundaries between affected units and their dimensions and identifying numbers.

**Comment**

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

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

3. Experience under the original Act indicates that it did 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 the amendments do not prohibit use of that device — the amendments offer a more direct means to address this situation.

While subsection (b) sets the default rule for such additions, local zoning and other rules would continue to limit its applicability.

Subsection (b) 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. In addition, the Act contemplates that the declaration of a particular project may be drafted or amended to address the particular concerns of those unit owners most directly affected by such a relocation as a result of the addition's proximity, or by its aesthetic impact.

Thus, for example, the declaration may state who is entitled to vote and what percentage of unit owners' approval is required. For instance, the declaration may provide for voting only by owners in a particular building or neighborhood, or it may delegate that decision to the executive board on a case by case basis.

An amendment pursuant to this subsection may not, by itself, alter the allocated interests in the community; such a change may be made only pursuant to Section 2-117(d). As a consequence, a fee or charge described in the amendment will likely be in the nature of either a single one-time fee or charge, or a recurring surcharge which is payable in addition to the periodic common expense charge originally set out in the declaration, or both.

> **Example:** The declaration might be amended to state that the owner of a unit with a 100 square foot addition shall, in addition to regularly calculated monthly common charges, pay a monthly fee of $10, increased each year by a percentage equal to the percentage

increase in the association budget.

4. If the only common element being incorporated into a unit is a wall separating two adjoining units owned by different owners, the amendment should be made under Section 2-112(a), not (b). However, if one owner owns two adjoining units, the wall may be removed pursuant to Section 2-111 without altering the boundaries, and without the need for any amendment to the declaration.

**SECTION 2-113. SUBDIVISION OF UNITS.**

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

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

**Comment**

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

2. At the same time, situations will often occur where future subdivision is appropriate, and this section permits the declaration to provide for it. Most state statutes do not presently provide for subdivision of units. An analogous concept in the context of development rights is subdivision of units by a declarant. The development right is described in Section 2-110.

3. If a unit owned only by the declarant — as opposed to the same unit if owned by another person — may be subdivided into two or more units but cannot be converted in whole or in part into common elements, it is still a unit that may be subdivided or converted into two or more units or common elements, within the meaning of the definition of development rights. It is therefore governed by Section 2-110 and not by this section.

**SECTION 2-114. [ALTERNATIVE A] EASEMENT FOR ENCROACHMENTS.**

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

**SECTION 2-114. [ALTERNATIVE B] MONUMENTS AS BOUNDARIES.**

[The existing physical boundaries of a unit or the physical boundaries of a unit reconstructed in substantial accordance with the description contained in the original declaration are its legal boundaries, rather than the boundaries derived from the description contained in the original declaration, regardless of vertical or lateral movement of the building or minor variance between those boundaries and the boundaries derived from the description contained in the original declaration. This section does not relieve a declarant or any other person of liability in case of willful misconduct or relieve a declarant or any other person of liability for failure to adhere to any plats and plans.]

**Comment**

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

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

**SECTION 2-115. USE FOR SALES PURPOSES.** A declarant may maintain sales offices, management offices, and models in units or on common elements in the condominium only if the declaration so provides and specifies the rights of a declarant with regard to the number, size,

location, and relocation thereof. Any sales office, management office, or model not designated a unit by the declaration is a common element. If a declarant ceases to be a unit owner, the declarant ceases to have any rights with regard thereto unless it is removed promptly from the condominium in accordance with a right to remove reserved in the declaration. Subject to any limitations in the declaration, a declarant may maintain signs on the common elements advertising the condominium. This section is subject to the provisions of other state law and to local ordinances.

**Comment**

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

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

**SECTION 2-116. EASEMENT AND USE RIGHTS.**

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

(b) Subject to Sections 3-102(a)(6) and 3-112, the unit owners have an easement in the common elements for access to their units.

(c) Subject to the declaration and rules, the unit owners have a right to use the common

elements that are not limited common elements and all real estate that must become common elements for the purposes for which they were intended.

**Comment**

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

2. The declarant is also required to repair and restore any portion of the condominium used for the easement granted under this section. See Section 4-119(b).

3. The amendments add subsection (c), which clarifies the extent to which unit owners may use the common elements in ways which the Act implicitly permitted, but now permits explicitly. The original Act made no distinction between the right to use common elements and limited common elements. However, because the very definition of limited common elements precludes the unbridled use of limited common elements, subsection (c) makes that outcome explicit. Finally, the original Act suggested that unit owners could use the common elements for "all other purposes," in addition to the purpose of "access" to their units. It is plain that various common elements — parking lots, roofs, elevators, for example — may not literally be used for "all ... purposes" but simply for their intended purposes.

**SECTION 2-117. AMENDMENT OF DECLARATION.**

(a) Except in cases of amendments that may be executed by a declarant under Section 2-109(f) or 2-110; the association under Section 1-107, 2-106(d), 2-108(c), 2-112(a), or 2-113; or certain unit owners under Section 2-108(b), 2-112(a), 2-113(b), or 2-118(b), and except as limited by subsections (d), (f), (g), and (h), the declaration, including any plats and plans, may be amended only by vote or agreement of unit owners of units to which at least [67] percent of the votes in the association are allocated, unless the declaration specifies a different percentage for all amendments or for specific subjects of amendment. If the declaration requires the approval of

another person as a condition of its effectiveness, the amendment is not valid without that approval.

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

(c) Every amendment to the declaration must be recorded in every [county] in which any portion of the condominium is located, and is effective only upon recordation. An amendment, except an amendment pursuant to Section 2-112(a), must be indexed [in the Grantee's index] in the name of the condominium and the association and [in the grantor's index] in the name of the parties executing the amendment.

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

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

(f) An amendment to the declaration may prohibit or materially restrict the permitted uses of or behavior in a unit or the number or other qualifications of persons who may occupy units only by vote or agreement of unit owners of units to which at least 80 percent of the votes in the association are allocated, unless the declaration specifies that a larger percentage of unit owners must vote or agree to that amendment or that such an amendment may be approved by unit owners of units having at least 80 percent of the votes of a specified group of units that would be

affected by the amendment. An amendment approved under this subsection must provide reasonable protection for a use or occupancy permitted at the time the amendment was adopted.

(g) The time limits specified in the declaration pursuant to Section 2-105(a)(8) within which reserved development rights must be exercised may be extended, and additional development rights may be created, if persons entitled to cast at least 80 percent of the votes in the association, including 80 percent of the votes allocated to units not owned by the declarant, agree to that action. The agreement is effective 30 days after an amendment to the declaration reflecting the terms of the agreement is recorded unless all the persons holding the affected special declarant rights, or security interests in those rights, record a written objection within the 30-day period, in which case the amendment is void, or consent in writing at the time the amendment is recorded, in which case the amendment is effective when recorded.

(h) A provision in the declaration creating special declarant rights that have not expired may not be amended without the consent of the declarant.

(i) If any provision of this [act] or of the declaration requires the consent of a holder of a security interest in a unit as a condition to the effectiveness of an amendment to the declaration, that consent is deemed granted if a refusal to consent in a record is not received by the association within 60 days after the association delivers notice of the proposed amendment to the holder at an address for notice provided by the holder or mails the notice to the holder by certified mail, return receipt requested, at that address. If the holder has not provided to the association an address for notice, the association shall provide notice to the address in the security instrument of record. Notwithstanding this section, an amendment to the declaration that affects the priority of a holder's security interest or the ability of that holder to foreclose its security interest may not be adopted without that holder's consent in a record if the declaration

requires that consent as a condition to the effectiveness of the amendment.

(j) If the declaration contains a provision requiring that amendments to the declaration may be adopted only by the vote or agreement of unit owners of units to which more than 80 percent of the votes in the association are allocated, the amendment is approved:

(1) if:

(A) unit owners of units to which at least 80 percent of the votes in the association are allocated vote for or agree to the proposed amendment;

(B) no unit owner votes against the proposed amendment; and

(C) notice of the proposed amendment is delivered to the unit owners holding the votes in the association which have not voted or agreed to the proposed amendment and no written objection to the proposed amendment is received by the association within 60 days after the association delivers notice; or

(2) unit owners of units to which at least 80 per cent of the votes in the association are allocated vote for or agree to the proposed amendment but at least one unit owner objects to the proposed amendment and, pursuant to an action brought by the association in [insert appropriate court] against all objecting unit owners, the court finds that the objecting unit owners do not have an interest, different in kind from the interests of the other unit owners, that the voting requirement of the declaration was intended to protect.

**Comment**

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

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

The amendments to subsection (a) significantly ease the ability of the drafter to vary the process for adopting amendments to the declaration. Under prior law, all amendments to the declaration — other than the variety of "special" amendments exempted in the introductory clause — required a 67% unit owner vote unless a larger vote was required. This amendment permits the declaration to provide for any percentage unit owner vote — whether smaller or larger — and also allows the declaration to mandate different percentages of votes of different subjects.

Note that subsection (a) permits the amendment to be accomplished "by vote or agreement" of unit owners. The distinction between those two processes is clear, and the "agreement" permitted under Section 2-117(a) could be quite different than, for example, a ballot without a meeting, as permitted in Section 3-110(d). It is the practice in some jurisdictions, particularly in larger condominiums, to circulate what amount to petitions asking unit owners to "sign off" on proposed amendments, or agreement forms with many counterparts, all of which are deemed to be part of a single agreement. These are useful procedures and would comprise valid forms of "agreement", so long as appropriate safeguards were in place to confirm the validity of the signatures on the "petition" or counterparts.

As amended, subsection (a) also allows the declaration to require "another person" to consent to the effectiveness of an amendment, and states that the amendment is not effective without such consent. This amendment reflects an expansion of the concept contained in subsection (i) that various interested parties — lenders, project sponsors, municipalities that might have underwritten a subsidized project — might seek to insure the continued vitality of a project by requiring continued involvement in the project through a compulsory document oversight. In contrast, the provision is not intended to grant the declarant an indirect means of reserving a veto right over amendments that the declarant found objectionable following the mandated turnover of declarant control of the association in Section 3-103(d), (e) and (f). Such an attempt to extend control of the project would plainly violate that statute, as well as a range of other provisions of the Act, including Sections 1-104, 1-112, 1-113 and 1-114. At the same time, the declarant plainly has a legitimate interest in the continued validity of its reserve special declarant rights, and subsection (h) expressly prohibits amendment of any reserved special declarant right before its expiration without the declarant's consent.

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

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

4. The amendment to subsection (d) deletes the prohibition on amendments which restrict the uses of units. In the original Act, Section 2-105(a)(12) required that the declaration specify all

restrictions on use, occupancy, and alienation of units. The deleted provision in subsection (d) created the anomaly that unanimous consent was required to amend a use restriction but a lesser number could amend restrictions on occupancy or alienation of a unit.

5. New subsection (f) responds to the growing belief that restrictions on use and occupancy which unit owners would like to impose after the declaration is recorded ought to be adopted only by a supermajority and only after providing protection for those whose use or occupancy will be affected by the amendment. For example, a community may seek to prohibit pets after a number of owners have purchased and occupied their units in reliance on the absence of such a restriction. Under this amendment, if the community votes to impose the limitation, it can do so only with the vote of a high percentage of owners and only on such conditions as reasonably protect the interests of existing pet owners. Whether the amendment "grandfathers" the right of the existing pet to remain or the right of the current owner to have a pet is not determined by the language of the subsection but will depend on the circumstances of each community and its owners.

Subsection (f) reflects the practical reality that, in large projects, requiring an 80% vote of all unit owners to change a use restriction in the community may be impossible to secure. For that reason, the amendment allows the declaration to designate the units that might be affected by a change in use amendment, and allows an 80% vote of only that group of units.

6. Subsection (g) addresses the possibility that development rights may be about to expire — and thus potentially halt completion of the project — at a time which neither the association nor the unit owners find desirable. This section allows extension of development rights, or creation of new rights, by a vote of the same percentage of unit owners as would be required to sell the common elements in the condominium.

7. Subsections (i) and (j) are adapted from the Connecticut version of UCIOA, codified as Conn. Gen. Stat. § 47-237. This draft expands the Connecticut statute by applying those provisions not only to condominiums created under this Act, but to pre-existing condominiums that now fall partially under the Act, because some of the most difficult mortgagee consent provisions can be found in the documents of older condominiums. These may arguably have made some sense in the earlier days of development when most unit mortgages were held by local financial institutions concerned that unit owners might routinely adopt irresponsible amendments, and when the lenders whose consent was required were often readily available. Now that most mortgages are held by distant entities unable to respond to requests for needed amendments in a timely way, however, provisions requiring lender approval frequently hinder condominium residents in their efforts to adopt necessary changes to their documents.

**SECTION 2-118. TERMINATION OF CONDOMINIUM.**

(a) Except for a taking of all the units by eminent domain or in the circumstances described in Section 2-124, a condominium may be terminated only by agreement of unit owners of units to which at least 80 percent of the votes in the association are allocated, or any larger

percentage the declaration specifies, and with any other approvals required by the declaration. The declaration may specify a smaller percentage only if all of the units in the condominium are restricted exclusively to nonresidential uses.

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

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

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

(e) The association, on behalf of the unit owners, may contract for the sale of real estate in the condominium, but the contract is not binding on the unit owners until approved pursuant to subsections (a) and (b). If any real estate in the condominium is to be sold following termination, title to that real estate, upon termination, vests in the association as trustee for the holders of all interests in the units. Thereafter, the association has all powers necessary and

appropriate to effect the sale. Until the sale has been concluded and the proceeds thereof distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale must be distributed to unit owners and lien holders as their interests may appear, in accordance with subsections (h) and (i). Unless otherwise specified in the termination agreement, as long as the association holds title to the real estate, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit. During the period of that occupancy, each unit owner and the unit owner's successors in interest remain liable for all assessments and other obligations imposed on unit owners by this [act] or the declaration.

(f) If the real estate constituting the condominium is not to be sold following termination, title to the common elements and, in a condominium containing only units having horizontal boundaries described in the declaration, title to all the real estate in the condominium, vests in the unit owners upon termination as tenants in common in proportion to their respective interests as provided in subsection (i), and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit.

(g) Following termination, the proceeds of a sale of real estate, together with the assets of the association, are held by the association as trustee for unit owners and holders of liens on the units as their interests may appear.

(h) Following termination, creditors of the association holding liens on the units, which were [recorded] [docketed] [insert other procedures required under state law to perfect a lien on real estate as a result of a judgment] before termination, may enforce those liens in the same manner as any lien holder. All other creditors of the association are to be treated as if they had

perfected liens on the units immediately before termination.

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

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

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

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

an amendment excluding the real estate from the condominium.

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

**Comment**

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

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

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

4. Subsection (b) describes the procedure for execution of the termination agreement. It recognizes that not all unit owners will be able to execute the same instrument, and permits execution or ratification of the master termination agreement. Because the transfer of an interest in real estate is being accomplished by the agreements, each of the ratifications must be executed in the same manner as a deed. Importantly, the agreement must specify the time within which it

will be effective; otherwise, the project might be indefinitely in "limbo" if ratifications had been signed by some, but not all, required unit owners, and the signing unit owners fail to revoke their agreements. Importantly, the agreement becomes effective only when it is recorded.

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

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

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

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

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

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

**EXAMPLE 1:**

HYPOTHETICAL FOR EXAMPLES 1A-1H: A condominium consists of 5 detached single family homes on 5 individually owned lots, together with a 6th lot which is undeveloped but intended for future construction of a swimming pool serving all units. The development is served by a private road. Lot 6 and the private road are common elements owned on an undivided interest basis by the unit owners. The declaration provides that: (1) upon termination, all units and the common elements must be sold; (2) the association is permitted to encumber Lot 6, and to grant a security interest in that lot for any purpose; and (3) common element interest votes and common expense liabilities are allocated equally among the units. For purposes of the example, we have assumed that the documents do not require the consent of first mortgage holders before the unit owners may vote to terminate.

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

A shopping center developer has offered $380,000 for the purchase of the entire condominium. The association's members unanimously vote in favor of termination, and otherwise comply with Section 2-118. The appraisal required by Section 2-118(h) shows that the units are still of equal value.

**EXAMPLE 1A:**

At the time of termination, the 5 units were financed as follows:
Unit 1: The owner's first mortgage had an unpaid balance of $50,000.
Unit 2: The owner's first mortgage had an unpaid balance of $40,000.
Unit 3: The owner's first mortgage had an unpaid balance of $25,000.
Units 4 and 5: The owners paid cash, and there is no mortgage on either unit.
In addition, all common expenses had been paid when due. The other assets of the association, including reserves, bank account, and all other personal property, total $20,000.
Under the Act (Section 2-118(e)), the association, following sale, holds the proceeds of sale together with the assets of the association, "as trustee for the holders of all interests in the units." In these circumstances, the interests of each party in the total value of $400,000 would be as follows:

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

**EXAMPLE 1B:**

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

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

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

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

Of course, the association has, and the lender may have, a claim against the unit owner, personally, for the unpaid sums due them. Importantly, however, neither the other unit owners nor their units are subject to any liability for those claims. Because the lien of the first mortgage holder, at termination or foreclosure, is junior to the first 6 months of unpaid assessments due the association, lenders may protect themselves under the Act by requiring the escrow of 6 months' common expense assessments, as they often do for real property taxes.

**EXAMPLE 1C:**

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

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

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

**EXAMPLE 1D:**

All facts stated in example 1C remain true, except that XYZ Pool Company, at the time it contracts to build the pool, takes a security interest in Lot 6, pursuant to Section 3-112, and that security interest includes a release of that real estate, upon default, from all restrictions imposed on the real estate by the declaration. At termination, XYZ has not instituted any action against the association to enforce its claim. In these circumstances, XYZ, as a secured creditor with respect to Lot 6, holds an interest superior to the declaration, and would have the right to exclude that real estate from the project. Any sale of the entire condominium would be subject to the superior interest of XYZ. For that reason, in the normal circumstances, the association would not be able to secure a release of that lien unless XYZ were paid in full from the proceeds of the sale, which would have the effect of reducing the value of the sale to $280,000. Note that this has the economic effect of placing the XYZ claim, at termination, ahead of prior first mortgages. For this reason, first mortgage holders will typically require their consent before common elements may be subjected to a lien.

**EXAMPLE 1E:**

The facts stated in Example 1C remain true so that XYZ holds only a perfected judgment lien, not a security interest in the common elements. After the XYZ lien was perfected, a $50,000 uninsured judgment is entered against the owner of Unit 4, resulting from the owner's personal business. The lien is perfected, and rests only against Unit 4. In these circumstances, the interests of the parties are as follows:

| UNIT # | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| Share of Proceeds | 80,000 | 80,000 | 80,000 | 80,000 | 80,000 |
| Due Association (Priming 1st Mortgage) | 600 | -0- | -0- | -0- | -0- |
| Due 1st Mortgage Holders | 50,000 | 40,000 | 25,000 | -0- | -0- |
| Due Association (Not Priming 1st Mortgage) | 600 | -0- | -0- | -0- | -0- |

| | | | | | |
|---|---|---|---|---|---|
| Due XYZ | 20,000 | 20,000 | 20,000 | 20,000 | 20,000 |
| Personal Lien, Unit 4 | -0- | -0- | -0- | 50,000 | -0- |
| Due Owners | 8,800 | 20,000 | 35,000 | 10,000 | 60,000 |

**EXAMPLE 1F:**

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

| UNIT # | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| Share of Proceeds | 80,000 | 80,000 | 80,000 | 80,000 | 80,000 |
| Due Association (Priming 1st Mortgage) | 600 | -0- | -0- | -0- | -0- |
| Due 1st Mortgage Holders | 50,000 | 40,000 | 25,000 | -0- | -0- |
| Due Association (Not Priming 1st Mortgage) | 600 | -0- | -0- | -0- | -0- |
| Due XYZ | 20,000 | 20,000 | 20,000 | 20,000 | 20,000 |
| Personal Lien, Unit 4 | -0- | -0- | -0- | 50,000 | -0- |
| Tort Lien | 8,800 | 20,000 | 20,000 | 10,000 | 20,000 |
| Due Owners | -0- | -0- | 15,000 | -0- | 40,000 |

Note that the child's lien realizes only $78,800; the estate is not entitled to participate in the proceeds available to Units 3 and 5 to satisfy the unmet claims against Units 1 and 4, because those units are liable only for their pro rata share of the claim, which is the same amount any of those units would have had to pay prior to termination to secure a partial release. Thus, if Unit 5, prior to termination, had secured a partial release for $20,000 from the estate, the result would be the same. Note also that the value of the common elements is not segregated from the values of the units, because the sales values of the units reflect all of the value of the real estate. Similarly, note that, after termination, the tort claimant is not entitled to reach or segregate the personal property of the corporation, valued before termination at $20,000, even though the claimant could have reached the bank account or other assets prior to termination. Any other rule would create enormous complexity, would impose arbitrary losses on creditors out of priority, and would tend to shift economic losses to unit owners who had paid their share of claims.

**EXAMPLE 1G:**

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

and secures a judgment. In these circumstances, the interests of the parties are as follows:

| UNIT # | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| Share of Proceeds | 80,000 | 80,000 | 80,000 | 80,000 | 80,000 |
| Due Association (Priming 1st Mortgage) | 600 | -0- | -0- | -0- | -0- |
| Due 1st Mortgage Holders | 50,000 | 40,000 | 25,000 | -0- | -0- |
| Due Association (Not Priming 1st Mortgage) | 600 | -0- | -0- | -0- | -0- |
| XYZ Pool Lien | 20,000 | 20,000 | 20,000 | 20,000 | 20,000 |
| Personal Lien, Unit 4 | -0- | -0- | -0- | 50,000 | -0- |
| P Paving Lien | 8,800 | 10,000 | 10,000 | 10,000 | 10,000 |
| Tort Lien | -0- | 10,000 | 20,000 | -0- | 20,000 |
| Due Owners | -0- | -0- | 5,000 | -0- | 30,000 |

Note that, just as in the case of the tort lien, when Unit 1 could not contribute its share of the mechanics' lien, the remaining units were not liable for the balance. In the example, the common expense lien arises before P Paving lien had arisen. If the common expense lien arose after the P Paving lien, we would be faced with circular liens, where: (a) the P Paving lien would prime the common expense lien; (b) 6 months of the common expense lien would prime the mortgage; and (c) the mortgage would prime the P Paving lien. Such circular lien problems, however, are not unique in the law.

**EXAMPLE 1H:**

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

| UNIT # | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| Share of Proceeds | 80,000 | 80,000 | 80,000 | 80,000 | 80,000 |
| Common Expense Lien | 600 | -0- | -0- | -0- | -0- |
| First Mortgage Liens | 50,000 | 40,000 | 25,000 | -0- | -0- |
| Common Expense Lien | 600 | -0- | -0- | -0- | -0- |
| XYZ Pool Lien | 20,000 | 20,000 | 20,000 | 20,000 | -0- |
| Personal Lien, Unit 4 | -0- | -0- | -0- | 50,000 | -0- |
| P Paving Lien | 8,800 | 10,000 | 10,000 | 10,000 | -0- |
| Tort Lien | -0- | 10,000 | 20,000 | -0- | -0- |
| Due Owners | -0- | -0- | 5,000 | -0- | 80,000 |

**EXAMPLE 2:**

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

| UNIT # | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| Sale Proceeds | 66,666 | 66,666 | 66,666 | 66,666 | 133,332 |
| Common Expense Lien | 600 | -0- | -0- | -0- | -0- |
| First Mortgage Lien | 50,000 | 40,000 | 25,000 | -0- | -0- |
| Common Expense Lien | 600 | -0- | -0- | -0- | -0- |
| XYZ Pool Lien | 15,466 | 16,666 | 16,666 | 16,666 | 33,333 |
| Personal Lien, Unit 4 | -0- | -0- | -0- | 50,000 | -0- |
| P Paving Lien | -0- | 10,000 | 13,333 | -0- | 26,666 |
| Tort Lien | -0- | 1,667 | 16,666 | -0- | 33,333 |
| Due Owners | -0- | -0- | -0- | -0- | 50,000 |

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

**EXAMPLE 3:**

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

| | | |
|---|---|---|
| Unit 1: | (15.09433%) | $ 60,377 |
| Unit 2: | (18.86793%) | $ 75,472 |
| Unit 3: | (18.86793%) | $ 75,472 |
| Unit 4: | (18.86793%) | $ 75,472 |
| Unit 5: | (28.30188%) | $113,207 |
| | 100.00000% | $400,000 |

| UNIT # | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| Sales Proceeds | 60,377 | 75,472 | 75,472 | 75,472 | 113,207 |
| Common Expense Lien | 600 | -0- | -0- | -0- | -0- |
| First Mortgage Lien | 50,000 | 40,000 | 25,000 | -0- | -0- |

| | | | | | |
|---|---|---|---|---|---|
| Common Expense Lien | 600 | -0- | -0- | -0- | -0- |
| XYZ Pool Lien | 9,177 | 20,000 | 20,000 | 20,000 | 20,000 |
| Personal Lien, Unit 4 | -0- | -0- | -0- | 50,000 | -0- |
| P Paving Lien | -0- | 10,000 | 10,000 | 5,472 | 10,000 |
| Tort Lien | -0- | 5,472 | 20,000 | -0- | 20,000 |
| Due Owners | -0- | -0- | 472 | -0- | 63,207 |

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

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

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

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

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

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

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

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

The amendment to subsection (k) clarifies the effect of foreclosure of a security interest in common elements which the association may have granted under Section 3-112.

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

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

**SECTION 2-119. RIGHTS OF SECURED LENDERS.**

(a) The declaration may require that all or a specified number or percentage of the lenders who hold security interests encumbering the units or who have extended credit to the association approve specified actions of the unit owners or the association as a condition to the effectiveness of those actions, but no requirement for approval may operate to (i) deny or delegate control over the general administrative affairs of the association by the unit owners or the executive board, or (ii) prevent the association or the executive board from commencing, intervening in, or settling any litigation or proceeding, or (iii) prevent any insurance trustee or the association from receiving and distributing any insurance proceeds except pursuant to Section 3-113.

(b) A lender who has extended credit to an association secured by an assignment of income or an encumbrance on the common elements may enforce its security agreement in accordance with its terms, subject to the requirements of this [act] and other law. Requirements that the association must deposit its periodic common charges before default with the lender to which the association's income has been assigned, or increase its common charges at the lender's

direction by amounts reasonably necessary to amortize the loan in accordance with its terms, do not violate the prohibitions on lender approval contained in subsection (a).

**Comment**

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

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

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

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

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

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

7. The delegation of consent powers to the lenders may, of course, be limited to particular kinds or classes of lenders — such as holders of first security interests — and may also establish eligibility criteria. Such criteria may include, for example, notice requirements. It is possible, for example, to require that only those lenders who notify the association may have consent powers, or be for a specified period of time — say, during the period of declarant control.

8. The amendments to subsections (a) and (b) are designed to resolve issues which lenders to associations have raised regarding their authority to require approval of association activities as conditions of the effectiveness of those actions, and to include otherwise standard lending

requirements in their loan documents.

**SECTION 2-120. MASTER ASSOCIATIONS.**

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

(b) Unless 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 condominiums which are part of the master association or expressly described in the delegations of power from those condominiums to the master association.

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

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

(e) Even if a master association is also an association described in Section 3-101, the certificate of incorporation or other instrument creating the master association and the declaration of each condominium, the powers of which are assigned by the declaration or

delegated to the master association, may provide that the executive board of the master association must be elected after the period of declarant control in any of the following ways:

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

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

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

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

**Comment**

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

2. Subsection (a) states the general rule that the powers of a unit owners' association may only be exercised by, or delegated to, a master association by, the declaration for the condominium permits that result. The declaration may have originally provided for a master association; alternatively, the unit owners of several condominiums may amend their declarations in similar fashion to provide for this power. Subsection (a) makes it clear that, if any of the powers of the unit owners' association may be exercised by, or delegated to, a master association, all other provisions of this Act which apply to a unit owners' association apply to that master association except as modified by this section. Accordingly, such provisions on notice, voting, quorums, records, meetings, and other matters which apply to the unit owners' association would apply with equal validity to such a master association.

3. Subsection (b) limits the ability of a master association to exercise the powers of the unit owners' association, except in those cases where the master association is actually acting as the only association for one or more common interest communities. In those cases where it is not so acting, however, the only powers of the unit owners' association which the master association

may exercise are the ones expressly permitted in the declaration or in the delegation of power. This is in significant contrast with the rule of Section 3-102 that all of the powers described in that section may be exercised unless limited by the declaration.

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

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

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

**SECTION 2-121. MERGER OR CONSOLIDATION OF CONDOMINIUMS.**

(a) Any two or more condominiums, by agreement of the unit owners as provided in subsection (b), may be merged or consolidated into a single condominium. In the event of a merger or consolidation, unless the agreement otherwise provides, the resultant condominium is the legal successor, for all purposes, of all of the preexisting condominiums and the operations and activities of all associations of the preexisting condominiums are merged or consolidated

into a single association that holds all powers, rights, obligations, assets and liabilities of all preexisting associations.

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

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

**Comment**

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

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

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

termination.

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

Subsection (c) states two alternative rules in this respect. First, the reallocations may be accomplished by stating specifically the allocation of common element interests, common expense liability, and votes in the association to each unit, or by stating the formulas by which those interests may be allocated to each unit in all of the pre-existing condominiums. Alternatively, the merger or consolidation agreement may state the percentage of overall common element interests, common expense liabilities, and votes in the association allocated to "all of the units comprising each of the pre-existing condominiums." The agreement might then also provide that the portion of the percentage allocated to each unit from among the shares allocated to each condominium will be equal to the percentage of common expense liability and votes in the association allocated to that unit by the declaration of the pre-existing condominium. An example of how this alternative formulation would operate may be useful.

> **EXAMPLE:** Assume that two adjoining condominiums wish to merge their activities into one condominium. Assume that the first condominium (Condominium 1) consists of ten one-bedroom units, with an annual budget of $10,000. Assume further that each of the units, being identical, has a common element interest of 10%, equal common expense liability of 10%, and one vote per unit. The second condominium (Condominium 2) consists of 40 units, with 20 2-bedroom units and 20 3-bedroom units. The budget of the second condominium consists of $70,000 per year. Each of the two-bedroom units has been allocated a 2% interest in the common elements and a 2% common expense liability, while each of the three-bedroom units has been allocated a 3% interest in the common elements, and a 3% common expense liability. Finally, each of the units in the second condominium also has an equal vote.
>
> There is no provision in the Act which mandates a particular allocation among Condominium 1 and Condominium 2 as to either common element interest, common expense liabilities or votes. Should the unit owners wish to retain as much similarity to their previous common element interests and common expense liabilities, however, and should they wish to retain equal voting in a merged project, it would be possible for them, pursuant to subsection (c)(ii), to state "the percentage of overall allocated interests of the new condominium" as follows: as to common element interests and common expense liabilities, they might allocate 12.5% of those interests in the merged project to Condominium 1, and 87.5% thereof to Condominium 2. If the agreement further provided that "the portion of the percentages allocated to each unit formerly comprising a part of the pre-existing condominium must be equal to the percentages of allocated interests allocated to that unit by the declaration of the pre-existing condominium" as required by subsection (c), each unit in Condominium 1 would then have allocated to it 1.25% of both the common element interests and common expense liabilities in the new

condominium. It happens that 1.25% of the common expenses of a merged condominium which has a budget of $80,000 equals $1,000. Under the same rationale, if each of the two-bedroom units in Condominium 2 to which were formerly allocated 2% of the common element interests and common expense liabilities, now has allocated 2% of the 87.5% allocated to Condominium 2, each of those units would then have allocated to it 1.75% of the common element interest and common expense liabilities of the new condominium. 1.75% of $80,000 is $1,400. Similarly, each of the three-bedroom units would then have allocated to it 2.625% of the common element interest and common expense liabilities in the merged condominium. That percentage of the common expense liabilities of $80,000 would yield an annual cost of $2,100, the same cost as previously obtained in this condominium.

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

**SECTION 2-122. [RESERVED.]**

**SECTION 2-123. [RESERVED.]**

**SECTION 2-124. TERMINATION FOLLOWING CATASTROPHE.** If substantially all the units in a condominium have been destroyed or are uninhabitable and the available methods for giving notice under Section 3-121 of a meeting of unit owners to consider termination under Section 2-118 will not likely result in receipt of the notice, the executive board or any other interested person may commence an action in [insert appropriate court] seeking to terminate the condominium. 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 condominium 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

condominium.

**Comment**

Section 2-124 is broadly based on a Florida statute that was adopted as the result of several condominium projects that could not be rebuilt following storm damage. See Fla. Stat. Ann. § 718.117(4), (5). In those cases, termination was appropriate, but it proved impossible to secure the needed unit owner vote to terminate the project.

In such circumstances, the section permits "any interested" person to petition the court for an order terminating the common interest community or reducing its size. Recognizing that the statute cannot contemplate every possible eventuality, the section grants the court powers to issue whatever temporary orders the court deems "appropriate," including the power to appoint a receiver. Further, after a hearing, the court is empowered to "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."

## ARTICLE 3

## MANAGEMENT OF CONDOMINIUM

**SECTION 3-101. ORGANIZATION OF UNIT OWNERS' ASSOCIATION.** A unit owners' association must be organized no later than the date the first unit in the condominium is conveyed. The membership of the association at all times consists exclusively of all the unit owners or, following termination of the condominium, of all former unit owners entitled to distributions of proceeds under Section 2-118, or their heirs, successors, or assigns. The association must have an executive board. The association must be organized as a profit or nonprofit corporation, trust, limited liability company, partnership, [unincorporated association], or any other form of organization authorized by the law of this state.

**Comment**

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

2. The bracketed language preserves the flexibility to organize the association as a profit or non-profit corporation or as an unincorporated association. Although at least one state (Georgia)

requires the organization of the association in corporate form, it is not desirable to mandate this result in a uniform act. If a state wishes to mandate incorporation, it should delete the bracketed language.

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

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

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

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

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

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

(5) may make contracts and incur liabilities;

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

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

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

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

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

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

(B) services provided to unit owners;

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

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

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

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

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

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

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

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

(19) may suspend any right or privilege of a unit owner that fails to pay an

assessment, but may not:

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

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

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

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

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

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

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

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

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

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

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

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

(3) enforce any other rights against the tenant for the violation which the unit owner as landlord could lawfully have exercised under the lease or which the association could lawfully have exercised directly against the unit owner, or both.

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

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

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

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

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

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

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

(3) although a violation may exist or may have occurred, it is not so material as to

be objectionable to a reasonable person or to justify expending the association's resources; or

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

(g) The executive board's decision under subsection (f) not to pursue enforcement under one set of circumstances does not prevent the executive board from taking enforcement action under another set of circumstances, but the executive board may not be arbitrary or capricious in taking enforcement action.

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

**Comment**

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

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

2. Paragraph (a)(2) is amended expressly to enable the association to "invest funds of the association." However, the investment standards contained in Uniform Prudent Investor Act and similar statutes should not apply to the association's investment of reserves or other funds of the association. Anecdotal evidence suggests that the reserves of most common interest community associations, as a matter of practice, are invested in cash or near-cash (i.e., short term bond fund) equivalents. The UPIA by its terms applies to trust investing. It is the nearly universal practice for associations to be organized as non-stock corporations or other forms of business entities, but rarely as trusts. In the typical association, the business judgment rule rather than the prudence norm of trust law should apply.

Regardless of the form of organization, the drafters concluded that the Act should not make special provision for association investments because actual or contingent liquidity needs will predominate in most circumstances affecting the association. Unlike a family trust, an association board is not meant to be making long-term investment decisions for capital growth;

accordingly, most such investing is appropriately done in interest-bearing cash equivalents.

Finally, because the subject has not been problematic in practice, the drafters saw no need to make special provision for it. Of course, subject to the business judgment rule, in those unusual cases where long-term capital growth might be appropriate, the Act would not bar a board's decision to invest the reserves in suitable vehicles designed to achieve that goal.

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

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

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

Under the Act, fines levied by the Association must be "reasonable" and may be imposed only after notice and an opportunity for a hearing. Moreover, in an effort to minimize potential abuse of the association's powers, the Act bars any foreclosure of a unit if the only sums due are fines and related charges. See Section 3-115(p). However, the Act does not codify the precise dollar amount of late charges or fines, or detail the standards for conduct of a hearing. Thus, the Act does not follow the enactments of states such as North Carolina, which impose a default cap on the amount of late fees, N.C. Gen. Stat. § 47F-3-102, and detailed default provisions regarding the conduct of the hearing, N.C. Gen. Stat. § 47F-3-107.1.

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

Amended paragraph (a)(14) reverses the presumption in the original Act as to whether the association may pledge its assessments as security for a loan. Previously, the Act provided that the association could do so only "to the extent the declaration expressly so provides." Because many declarations do not so provide, the prior Act forced the association to amend its declaration

to borrow funds, because lenders will commonly require a pledge of the income stream as a condition to extending credit to the association. The increasing use of this important financing technique and the extraordinarily low default rate on such loans across the country justify empowering the association to borrow funds with a pledge of its income stream, subject only to the restrictions appearing in the declaration. Moreover, under Section 1-204, this section automatically applies to condominiums created under prior law. It may be appropriate for the declaration to include some restrictions on such borrowing, such as a requirement that the proposal to borrow funds be put to a vote of the unit owners before the loan is closed. However, while some commentators urged that the Act require a majority vote of unit owners before the association borrows any funds, this Act avoids a fixed rule that may be inappropriate in some communities, and instead chose to defer such decision-making to the drafters of each community's declaration or to the discretion of the executive board, or the unit owners, in a particular case.

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

8. New paragraph (a)(18) permits the association to impose mandatory nonbinding arbitration or other non-judicial procedures to resolve disputes in the development before litigation commences. This reflects a policy judgment that non-judicial dispute resolution should be available to parties as an economical and efficient form of alternative dispute resolution.

9. New paragraph (a)(19) allows the executive board to "suspend and right or privilege of a unit owner that fails to pay an assessment." This is similar to statutes in other States; compare, e.g., N.C. Gen. Stat. § 47F-3-102 (11). However, unlike other States, paragraph (a)(19) specifically precludes suspending the right to vote or the right to run for an association office if a unit owner has not paid assessments.

10. Subsection (b) addresses the extent to which a declarant may insert provisions into a declaration designed to impede the association's future flexibility and discretion in managing its affairs. The declarant may not impose unique limits on the association's power to deal with the declarant.

The amendments to subsection (b) cross-reference new Section 3-124, which imposes a "cooling off" period before an association may commence coercive proceedings against a declarant arising out of the project's construction. Consistent with UCIOA amendments that have sought to re-balance the association's relationship with individual unit owners, the amended subsection (b) requires that unit owners be notified of all significant legal proceedings to which the association is a party.

11. New subsections (c), (d), and (e) enable the association to enforce directly against a tenant or other occupant of a leased unit all the powers which either the statutes or the declaration, bylaws, or association rules provide against that person. The section also provides

the association all the powers the owner itself would have under the lease against the tenant, so long as the violation of the lease also violates the declaration, bylaws, or rules.

12. New subsection (f) addresses the important question of whether the association may "selectively enforce" its rules or whether it is obliged to enforce the rules to the letter in every instance, at the risk of being found by a court to have failed to meet its fiduciary duties, or to have waived its right to enforce the rules based upon prior action or inaction.

Subsection (f) takes a "middle-ground" approach to guide an Executive Board as it considers whether or how to enforce a particular rule. The text identifies those circumstances where the Board might conclude, in any given case, not to enforce the rules as they have been drafted. These criteria are premised, of course, in all instances on the recognition that the decision-making process of the Executive Board is subject to the "Business Judgment Rule"; see Comments to Section 3-103.

In those circumstances where the Board declines to enforce a rule, nothing in this Act precludes an individual unit owner from seeking independently to enforce the rules in a particular instance pursuant to Section 4-117. Alternatively, the unit owner could seek to require enforcement of the rule by the Executive Board for a breach of its duty; such a suit would be measured by the extent the board had abused its discretion under subsection (f).

13. While subsection (f) deals with the executive board's discretion in enforcing its rules in any single instance, subsection (g) provides that the board's decision in one instance is not binding in another future instance, under another set of circumstances. At the same time, subsection (g) emphasizes that the Board may not act in an arbitrary or capricious fashion. As with every provision of this Act, Section 1-108 makes clear that "principles of law and equity . . . supplement the provisions of this Act, except to the extent inconsistent with this Act." Principles of law and equity, including the law of waiver and course of performance, supplement subsection (g), as they have often been applied by courts in appropriate circumstances as they consider the extent to which an absence of enforcement over time has modified recorded covenants affecting real estate.

**SECTION 3-103. EXECUTIVE BOARD MEMBERS AND OFFICERS.**

(a) Except as otherwise provided in the declaration, the bylaws, in subsection (b), or other provisions of this [act], the executive board acts on behalf of the association. In the performance of their duties, officers and members of the executive board appointed by the declarant shall exercise the degree of care and loyalty to the association required of a trustee. Officers and members of the executive board not appointed by the declarant shall exercise the degree of care and loyalty to the association required of an officer or director of a corporation organized, and

are subject to the conflict of interest rules governing directors and officers, under [insert reference to state nonprofit corporation law]. The standards of care and loyalty described in this section apply regardless of the form in which the association is organized.

(b) The executive board may not:

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

(2) amend the bylaws;

(3) terminate the condominium;

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

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

(c) The executive board shall adopt budgets as provided in Section 3-123. (d) Subject to subsection (e), the declaration may provide for a period of declarant control of the association, during which a declarant, or persons designated by the declarant, may appoint and remove the officers and members of the executive board. A declarant may voluntarily surrender the right to appoint and remove officers and members of the executive board before the period ends. In that event, the declarant may require during the remainder of the period that specified actions of the association or executive board, as described in a recorded instrument executed by the declarant, be approved by the declarant before they become effective. Regardless of the period provided in the declaration, and except as provided in Section 2-123(g), a period of declarant control terminates no later than the earliest of:

(1) [60] days after conveyance of [three-fourths] of the units which may be

created to unit owners other than a declarant;

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

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

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

(e) Not later than 60 days after conveyance of [one-fourth] of the units that may be created to unit owners other than a declarant, at least one member and not less than 25 percent of the members of the executive board must be elected by unit owners other than the declarant. Not later than 60 days after conveyance of [one-half] of the units that may be created to unit owners other than a declarant, not less than [one-third] of the members of the executive board must be elected by unit owners other than the declarant.

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

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

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

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

## Comment

1. As amended, subsection (a) conforms the Act to match the expectations of owners, members of executive boards, and courts. The duty owed by an elected member of an executive board ought to parallel the standard imposed on directors of non-profit corporations. The original Act set out a lesser standard. By making reference to the non-profit corporate model, members will also obtain the benefits of the business judgment rule, now commonly applied by courts in the non-profit context; see, e.g., Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y.2d 530 (1990). The Act continues to rely on the Business Judgment Rule as the basis for evaluating the actions of the Board. "As long as directors of a corporation decide matters rationally, honestly, and without a disabling conflict of interest, the decision will not be reviewed by the courts." Atkins v. Hibernia Corp., 182 F3d 320, 324, (5th Cir. 1999), quoted in Block, Barton & Radin, The Business Judgment Rule, (5th ed. 1998) in 2002 Supp. Page 6.

> The business judgment rule is a tool of judicial review, not a standard of conduct. The rule (1) shields directors from liability and protects decisions made by directors when the rule's elements – a business decision, disinterestedness, and independence, due care, good faith and no abuse of discretion – are present and a challenged decision does not constitute fraud, illegality, ultra-vires conduct or waste, and (2) creates a presumption that directors have acted in accordance with each of the elements of the rule. [Block et al at page 110.]

In a 2007 decision, the Supreme Court of New Jersey confirmed the continuing vitality of the business judgment rule as the basis for evaluating the activities of the executive board of a unit owners association. See Committee for a Better Twin Rivers v. Twin Rivers Homeowners Association, 192 N.J. 344; 929 A.2d 1060 (2007).

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

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

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

As amended, subsection (d) adds a fourth category regarding voluntary relinquishment of retained rights to control any aspect of the affairs of the association. This category frequently has been written into declarations under the Act. The amendment incorporates this practice and is important to track the time when statutes of limitation involving the declarant begin to run. See Section 3-111.

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

5. Subsection (g) is similar to a comparable provision adopted in UCIOA in 2008, and accommodates the possibility, especially in senior living projects and in subsidized "first time home buyer" complexes, that it may assist the long term viability of the project if a non-controlling percentage of the directors — appointed by persons other than unit owners — could provide independent outside expertise to the Board, even if those directors are not directly responsive to the owners themselves. Subsection (g) contains safeguards intended to guard adequately against the potential for abuse by the original declarant or outside lenders. Such directors could sit only if the declaration provided for such an outcome.

Subsection (g) must be read in conjunction with subsection (a), which emphasizes that the duty of care and loyalty of all directors is to the association and not to the appointing authority. This clear statement of duty should ameliorate the concerns of undue influence that may flow from potential conflicting interests from "outside" directors.

As with any provision of the declaration, this provision for "outside directors" could be removed from the declaration by the vote or agreement of unit owners holding 67% of the voting power in the association, or any other number or percentage required for amendment contained in the declaration. The potential for amendment provides an alternative form of protection against the possibility that if the unit owners conclude that the "outside" directorships are detrimental to unit owners, the owners can rid themselves of the system. However, as provided in Section 2-117(a), the unit owners' ability to enact such an amendment may be subject to approval of the amendment by another person.

**SECTION 3-104. TRANSFER OF SPECIAL DECLARANT RIGHTS.**

(a) A special declarant right created or reserved under this [act] may be transferred only by an instrument evidencing the transfer recorded in every [county] in which any portion of the condominium is located. The instrument is not effective unless executed by the transferee.

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

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

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

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

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

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

declarant rights requested.

(d) Upon foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, judicial sale, or sale under Bankruptcy Code or receivership proceedings, of all interests in a condominium owned by a declarant:

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

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

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

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

(2) A successor to any special declarant right, other than a successor described in paragraph (3) or (4), who is not 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

(ii) on the transferor, other than:

(A) misrepresentations by any previous declarant;

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

(C) breach of any fiduciary obligation by any previous declarant or

the previous declarant's appointees to the executive board; or

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

(3) A successor to only a right reserved in the declaration to maintain models, sales offices, and signs 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 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 the transferor to control the executive board in accordance with Section 3-103(d) for the duration of any period of declarant control, and any attempted 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 the successor declarant's acts and omissions under Section 3-103(d).

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

## Comment

1. This section deals with the extent to which obligations and liabilities imposed upon a declarant by this Act are transferred to a third party by a transfer of the declarant's interest in a condominium. There are two parts to be problem. The first is what obligations and liabilities to unit owners (both existing unit owners and persons who become unit owners in the future) a declarant should retain, notwithstanding the declarant's transfer of interests. The second is what obligations and liabilities may fairly be imposed upon the declarant's successor in interest.

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

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

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

4. The obligations and liabilities imposed upon transferee declarants under the Act are set forth in subsection (e). In general, a transferee declarant (other than an affiliate of the original declarant and other than a successor whose interest in the project is solely for the protection of debt security) becomes subject to all obligations and liabilities imposed upon a declarant by the Act or by the declaration with respect to any promises, acts, or omissions undertaken subsequent

to the transfer which relate to the rights the transferee holds. Such a transferee is liable for the promises, acts, or omissions of the original declarant undertaken prior to the transfer, except as set forth in paragraph (e)(2)(ii). For example, a successor declarant would not be liable for the warranty obligations of the original declarant with respect to improvements to the project made by the original declarant.

Similarly, a successor would not be liable, under normal circumstances, for any misrepresentation or breach of fiduciary duty by the original declarant prior to the transfer. The successor is liable, however, to complete improvements labeled "MUST BE BUILT" on the original plans.

5. To preclude declarants from evading their obligations and liabilities under this Act by transferring their interests to affiliated companies, paragraph (e)(1) makes clear that any successor declarant who is an affiliate of the original declarant is subject to all obligations and liabilities imposed upon the original declarant by the Act or by the declaration. Similarly, as previously noted, paragraph (b)(2) provides that an original declarant who transfers the declarant's rights to an affiliate remains jointly and severally liable with the successor for all obligations and liabilities imposed upon declarants by the Act or by the declaration.

6. Section 3-104 handles the problem of certain successor declarants (i.e., persons whose sole interest in the condominium project is the protection of debt security) in three ways. First, subsection (c) provides that, in the case of a foreclosure of a mortgage, a sale by a trustee under a deed of trust, or a sale by a trustee in bankruptcy of any units owned by a declarant, any person acquiring title to all of the units being foreclosed or sold may request the transfer of special declarant rights. In that event, and only upon such request, such rights will be transferred in the instrument conveying title to the units and such transferee will thereafter become a successor declarant subject to the other provisions of this section. If the transferee of such units does not request the transfer of special declarant rights, then, under subsection (d), such special declarant rights cease to exist and any period of declarant control terminates.

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

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

Under Section 2-110, a declarant may reserve the right to create additional units in portions of the condominium which were originally designated as common elements. The declarant becomes the owner of any units created, but, prior to creation of units, the title to those portions of the condominium is in the unit owners. The right to create the units is an interest in land in which a security interest might be granted. If the mortgagee of that interest forecloses, the purchaser at the foreclosure sale has the choices concerning development rights and resulting liability which are described in the preceding paragraph. That is, under subsections (c) and (d), the purchaser may limit the purchaser's liability by agreeing to hold the developments only for the purpose of transfer as provided by paragraph (e)(4) or may buy the rights under subsection (c).

**SECTION 3-105. TERMINATION OF CONTRACTS AND LEASES OF DECLARANT.**

(a) Within two years after the executive board elected by the unit owners pursuant to Section 3-103(f) takes office, the association may terminate without penalty, upon not less than [90] days' notice to the other party, any of the following if it was entered into before the executive board was elected:

(1) any management, maintenance, operations, or employment contract, or lease of recreational or parking areas or facilities; or

(2) any other contract or lease between the association and a declarant or an affiliate of a declarant;

(b) The association may terminate without penalty, at any time after the executive board elected by the unit owners pursuant to Section 3-103(f) takes office upon not less than (90) days' notice to the other party, any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into.

(c) This section does not apply to:

(1) any lease the termination of which would terminate the condominium or reduce its size, unless the real estate subject to that lease was included in the condominium for the purpose of avoiding the right of the association to terminate a lease under this section; or

(2) a proprietary lease.

**Comment**

1. This section deals with a common problem in the development of condominium projects: the temptation on the part of the developer, while in control of the association, to enter into, on behalf of the association, long-term contracts and leases with the developer or with an affiliated entity. The Act deals with this problem is two ways. First, Section 3-103(a) imposes upon all executive board members appointed by the declarant liability as fiduciaries of the unit owners for all of their acts or omissions as members of the board. Second, Section 3-105 provides for the termination of certain contracts and leases made during a period of declarant control.

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

As amended, the Act limits the rights of unit owners to cancel declarant-imposed contracts to a two-year period. Contracts not cancelled during that two-year period would become non-cancellable and presumably enforceable in accordance with their terms, subject to the rules of unconscionability in section 1-112 and in subsection (c) of this section. On balance, associations are better served by the ability of third parties to rely on the enforceability of contracts between themselves and the associations if the association's right to unilaterally cancel those contracts was subject to a reasonable outer limit of two years after the time the independent directors assumed office. The two-year limit is appropriate as the amendments increase the types of enumerated contracts that are subject to cancellation to include maintenance and operations

contracts, regardless of whether those contracts were entered into with the declarant or an independent third party. The two-year limitation on the power to cancel contracts does not apply to contracts that were not "bona fide" at the time entered into, or were unconscionable. This preserves the rule as it existed in earlier versions of the Act, and is consistent with Section 1-112.

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

**SECTION 3-106. BYLAWS.**

(a) The bylaws of the association must:

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

(2) provide for election by the executive board or, if the declaration requires, by the unit owners, of a president, treasurer, secretary, and any other officers of the association the bylaws specify;

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

(4) specify the powers the executive board or officers may delegate to other persons or to a managing agent;

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

(6) specify a method for the unit owners to amend the bylaws;

(7) contain any provision necessary to satisfy requirements in this [act] or the declaration concerning meetings, voting, quorums, and other activities of the association; and

(8) provide for any matter required by law of this state other than this [act] to appear in the bylaws of organizations of the same type as the association.

(b) Subject to the declaration and this [act], the bylaws may provide for any other necessary or appropriate matters, including matters that could be adopted as rules.

**Comment**

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

2. The requirement, set forth in paragraph (a)(5), that the bylaws designate which of the officers of the association has the responsibility to prepare, execute, certify, and record amendments to the declaration reflects the obligation imposed upon the association by several provisions of this Act to record such amendments in certain circumstances. These provisions include Section 1-107 (Eminent Domain), Section 2-106 (expiration of certain leases), Section 2-112 (Relocation of Boundaries Between Adjoining Units), and Section 2-113 (subdivision or conversion of units). Section 2-117(e) provides that, if no officer is designated for this purpose, it shall be the duty of the president.

Paragraph (a)(6) requires the bylaws to state a method by which the unit owners may amend the bylaws. This provision complements the new text in Section 3-102 (b) that precludes the executive board from amending the bylaws.

3. Paragraphs (a)(7), (a)(8), and subsection (b) conform this Act with comparable UCIOA amendments. Paragraph (a)(7) requires the bylaws to contain any provision necessary to satisfy this Act and the declaration concerning association meetings, voting, and quorum rules. Paragraph (a)(8) requires the bylaws to address any matters that would have to be addressed in the bylaws of an organization of the same type as the association.

**SECTION 3-107. UPKEEP OF CONDOMINIUM.**

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

inflicted on the common elements, or on any unit through which access is taken, the unit owner responsible for the damage, or the association if it is responsible, is liable for the prompt repair thereof.

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

**Comment**

1. The Act permits the declaration to separate maintenance responsibility from ownership. This is commonly done in practice. In the absence of any provision in the declaration, maintenance responsibility follows ownership of the unit or rests with the association in the case of common elements. Under this Act, limited common elements (which might include, for example, patios, balconies, and parking spaces) are common elements. See Section 1-103(19). As a result, under subsection (a), unless the declaration requires that unit owners are responsible for the upkeep of such limited common elements, the association will be responsible for their maintenance. Under Section 3-115(c), the cost of maintenance, repair, and replacement for such limited common elements is assessed against all the units in the condominium, unless the declaration provides for such expenses to be paid only by the units benefited. See Section 2-108, Comment 1.

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

**SECTION 3-108. MEETINGS.**

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

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

(2) An association shall hold a special meeting of unit owners to address any matter affecting the condominium or the association if its president, a majority of the executive

board, or unit owners having at least 20 percent, or any lower percentage specified in the bylaws, of the votes in the association request that the secretary call the meeting. If the association does not notify unit owners of a special meeting within 30 days after the requisite number or percentage of unit owners request the secretary to do so, the requesting members may directly notify all the unit owners of the meeting. Only matters described in the meeting notice required by paragraph (3) may be considered at a special meeting.

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

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

(B) any budget changes; and

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

(4) The minimum time to give notice required by paragraph (3) may be reduced or waived for a meeting called to deal with an emergency.

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

(6) The declaration or bylaws may allow for meetings of unit owners to be conducted by telephonic, video**,** or other conferencing process**,** if the alternative process is consistent with subsection (b)(7).

(7) Except as otherwise provided in the bylaws, meetings of the association must

be conducted in accordance with the most recent edition of Roberts' Rules of Order Newly Revised.

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

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

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

(B) discuss existing or potential litigation or mediation, arbitration, or administrative proceedings;

(C) discuss labor or personnel matters;

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

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

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

(3) During the period of declarant control, the executive board shall meet at least

four times a year. At least one of those meetings must be held at the condominium or at a place convenient to the condominium. After termination of the period of declarant control, all executive board meetings must be at the condominium or at a place convenient to the condominium unless the unit owners amend the bylaws to vary the location of those meetings.

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

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

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

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

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

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

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

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

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

**Comment**

1. The amendments to Section 3-108 are significant and track comparable changes in previous amendments to the meetings provision in UCIOA. Subsection (a) imposes a variety of requirements dealing exclusively with unit owner meetings, while subsection (b) contains new "open meeting" requirements for executive board meetings and meetings of committees which are authorized to act for the Board. This section will apply to all condominiums in the adopting state, including "old" communities created before the effective date of the Act, by virtue of Section 1-204(a)(13).

Subsection (a) creates several new provisions designed to enhance unit owner participation in unit owner meetings. For example, paragraph (a)(5) requires that unit owners be provided the opportunity to address the executive board during each meeting of the unit owners. While this provision is an important part of the democratization process in community associations, it is implicit that the officers and executive board members have the inherent right to establish reasonable controls over the behavior of unit owners during the meetings. Thus, for example, the board could prevent unit owners from interrupting the regular conduct of business and the time of other speakers, and could set reasonable limits on the number of speakers at any one meeting, the repetitiveness of unit owner comments, and the aggregate time that unit owners may consume during the meeting.

2. Paragraph (a)(2) provides that, with respect to special meetings of the unit owners, "only

matters described in the meeting notice . . . may be considered at" that meeting. The purpose of limiting the agenda of a special meeting to the subjects identified in the notice is to allow a member, who has no concern about the items listed in the notice, to decide not to attend the meeting, secure in the knowledge that other topics cannot be raised and voted on without the member's knowledge. A generic heading such as "New Business" would not be sufficient to permit items to be taken up if they were not otherwise described in the notice. In contrast, of course, at an annual meeting, unit owners are entitled to consider any matter, whether or not on an agenda.

3. Paragraph (a)(3) continues to detail the procedures and minimum content of the notice sent to unit owners. Importantly, the notice must contain "a statement of the general nature of any proposed amendment to the declaration or bylaws," rather than containing the precise text of any proposed amendment. Thus, the unit owners are entitled to make germane amendments to whatever text is proposed at the meeting; they are not bound to a "yes" or "no" vote on text fixed in that notice.

4. The "town meeting" model for unit owner meetings, where only those persons physically present at a meeting of unit owners may vote, is no longer suited to a considerable number of communities — particularly larger communities and communities made up largely of second homes. While the Act has always contemplated the possibility of proxy voting, see, e.g., Section 3-110(c), this section greatly expands the available procedures for voting, to include absentee ballots and voting without a meeting by electronic means or paper ballots. See Section 3-110(a) and (d). In addition, paragraph (a)(6) contemplates that the declaration or bylaws may provide for unit owners to "meet" "by telephonic, video or other conferencing method . . . ."

5. Paragraph (a)(7) provides that meetings of the association must be conducted in accordance with Robert's Rules of Order unless the bylaws otherwise provide. As a consequence of this default rule, it was not necessary for this Act to address a range of procedural issues and, in the normal situation, it will be unnecessary for the association to adopt detailed meeting procedures, either in the bylaws or in separate rules. By way of example, we might assume that a regularly scheduled unit owners' meeting was properly noticed and held, but that a quorum was not present. In that case, the procedural issue is presented as to whether that meeting might be recessed in these circumstances to enable solicitation of more attendance, or proxies, in order to conduct business. The statute might be drafted to address the issue, either directly or by requiring the bylaws to address it. The default rule of relying on Robert's Rules, however, completely resolves the issue, by expressly permitting a recess in these circumstances. See Robert's Rules of Order Newly Revised (10th ed. 2000) at 336-37. Of course, it may be that the board of an association may prefer a more simplified set of meeting procedures. The bylaws could be amended to adopt such procedure, and many models are available. See, e.g., Nagle, Meetings and Elections: How Community Associations Exercise Democracy (CAI Press, 2005).

6. Subsection (b) sets out an entirely new set of "open meeting" requirements for meetings of the executive board and committees to which the board has delegated authority. The provisions are generally consistent with several existing state statutes. See, e.g., Va. Stat. Ann. § 55-510.1. The highlights of the section are these: First, the section provides generally that all meetings of the executive committee (except executive sessions) must be open to unit owners. To make this right

meaningful, the section requires that unit owners be given notice of those meetings, access to the same materials provided to members of the executive board, and the right to speak at executive board meetings. Second, while the executive board may meet in executive session, the purposes for which such meetings may be held, and the permissible outcomes of those meetings are considerably limited. Such sessions may only be held in conjunction with a regular or special meeting of the executive board (and therefore noticed to unit owners); no final vote or action may be taken during an executive session; and the purposes for which an executive session may be held are considerably circumscribed. Third, the Act provides that the board and its members "may not use incidental or social gatherings of board members or any other method to evade" the open meeting requirements of this section. Fourth, the Act mandates that the executive board meet at least four times a year, and that those meetings "must be at" or "at a place convenient to" the common interest community. Fifth, while the executive board may meet telephonically, by video or other conferencing method, it may only do so if unit owners have a means to participate in that conference and hear or perceive the proceedings. Sixth, while the executive board may act without a meeting by unanimous written consent — a procedure uniformly allowed by all corporate statutes — they may do so after the period of declarant control "only to undertake ministerial actions or to implement actions previously taken at a meeting of the executive board."

7. Paragraph (b)(5) does provide that the need for notice to unit owners of executive board meetings may be avoided in the event of an "emergency." While the Act does not define that term, the concept plainly includes the notion of "immediate irreparable harm" or other circumstances where the board must act promptly to either avoid an adverse outcome or avoid failing to take advantage of an opportunity. "Emergency" includes the further notion that there is insufficient time from the time the issue came to the attention of the directors to give complete notice to owners.

8. Paragraph (b)(10) seeks to strike a balance between the open meeting requirements of subsection (b) and the legitimate expectations of third parties who may rely on the action of an executive board that, in hindsight, was taken without complying with the notice or other constraints imposed on executive board actions by this section. Under this section, a decision of the executive board will be insulated from challenge because of defective notice to unit owners or other failure if the challenge is not brought within 60 days after the minutes of the executive board at which the action is taken are distributed, or those minutes are approved, whichever is later.

**SECTION 3-109. QUORUM.**

(a) Unless the bylaws otherwise provide, a quorum is present throughout any meeting of the unit owners if persons entitled to cast [20] percent of the votes in the association:

(1) are present in person or by proxy at the beginning of the meeting;

(2) have cast absentee ballots solicited in accordance with Section 3-110 (c)(4) which have been delivered to the secretary in a timely manner; or

(3) are present by any combination of paragraphs (1) and (2).

(b) Unless the bylaws specify a larger number, a quorum of the executive board is present for purposes of determining the validity of any action taken at a meeting of the executive board only if individuals entitled to cast a majority of the votes on that board are present at the time a vote regarding the action is taken. If a quorum is present when a vote is taken, the affirmative vote of a majority of the board members present is the act of the executive board unless a greater vote is required by the declaration or bylaws.

**Comment**

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

**SECTION 3-110. VOTING; PROXIES; BALLOTS.**

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

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

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

(2) If only one of several owners of a unit is present, that owner is entitled to cast all the votes allocated to that unit. If more than one of the owners are present, the votes allocated to that unit may be cast only in accordance with the agreement of a majority in interest of the owners, unless the declaration expressly provides otherwise. There is majority agreement if any

one of the multiple owners casts the votes allocated to the unit without protest being made promptly to the person presiding over the meeting by any of the other owners of the unit.

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

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

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

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

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

(2) If a unit is owned by more than one person, each owner of the unit may vote or register protest to the casting of votes by the other owners of the unit through a duly executed proxy.

(3) A unit owner may not revoke a proxy given pursuant to this section except by actual notice of revocation to the person presiding over a meeting of the association.

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

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

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

(d) Unless prohibited or limited by the declaration or bylaws, an association may conduct a vote without a meeting. In that event**,** the following requirements apply:

(1) The association shall notify the unit owners that the vote will be taken by ballot.

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

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

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

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

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

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

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

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

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

(e) If the declaration requires that votes on specified matters affecting the condominium be cast by lessees rather than unit owners of leased units;

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

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

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

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

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

**Comment**

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

2. The original Act did not contain any provision by which unit owners may cast ballots except during a physical meeting of the unit owners. As discussed in the comments to Section 3-108, these amendments significantly alter that outcome, and offer a very broad range of voting options. The text incorporates both existing and proposed laws from a significant number of the corporate and common interest community statutes in various states, as well as existing provisions of the Model Non-Stock Corporation Act.

3. New subsection (d), which permits voting by ballot without the need for a meeting, borrows significantly from Florida statutes governing the election of directors of the unit owners association. See Fla. Stat. Ann. § 718.112 (Bylaws) (2)(d)2, 3.

4. Proxy voting has been the subject of some controversy, primarily as a consequence of some unit owners seeking to collect very large numbers of undirected proxies to be cast at meetings where contested matters are to be voted on. While the declaration and bylaws may impose further restrictions on proxy voting, this section imposes only two: paragraph (c)(5) limits the validity of proxy only to the meeting at which it is cast; and paragraph (c)(6) limits the proxies that any one person may cast to a percent set by statute.

5. New subsection (g) confirms that votes allocated to units owned by the association will be counted towards the quorum for any meeting, but will otherwise not affect the outcome of the voting by other unit owners.

**SECTION 3-111. TORT AND CONTRACT LIABILITY; TOLLING OF LIMITATION PERIOD.**

(a) A unit owner is not liable, solely by reason of being a unit owner, for an injury or damage arising out of the condition or use of the common elements. Neither the association nor any unit owner except the declarant is liable for that declarant's torts in connection with any part of the condominium which that declarant has the responsibility to maintain.

(b) An action alleging a wrong done by the association, including an action arising out of the condition or use of the common elements, may be maintained only against the association and not against any unit owner. If the wrong occurred during any period of declarant control and the association gives the declarant reasonable notice of and an opportunity to defend against the action, the declarant who then controlled the association is liable to the association or to any unit owner for all tort losses not covered by insurance suffered by the association or that unit owner, and all costs that the association would not have incurred but for a breach of contract or other wrongful act or omission. Whenever the declarant is liable to the association under this section, the declarant is also liable for all expenses of litigation, including reasonable attorney's fees, incurred by the association.

(c) Except as provided in Section 4-116(d) with respect to warranty claims, any statute of limitation affecting the association's right of action against a declarant under this [act] is tolled until the period of declarant control terminates. A unit owner is not precluded from bringing an action contemplated by this section because he is a unit owner or a member or officer of the association. Liens resulting from judgments against the association are governed by Section 3-117.

**Comment**

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

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

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

4. The form in which common elements are owned should not impose joint and several personal liability on condominium owners, when no such liability exists for owners in planned communities. Subsection (a) rejects the decision in Ruoff v. Harbor Creek Community Association, 10 Cal.App.4th 1624, 13 Cal. Rptr 2d 755 (1992). Rather, the result under both this section and Section 3-117 — which imposes liability on unit owners for unsatisfied judgments against the association in proportion to their common expense liabilities — is consistent with the decision in Dutcher v. Owens, 647 S.W.2d 948 (Tex. 1983).

5. Subsection (b) makes clear that no period of limitation regarding an association's claim against the declarant, including a limit appearing in this or any other section of this Act, begins to run against the association until the period of declarant control terminates. This would include warranty claims for common elements arising under Section 4-116, unless a declarant elects to permit an independent unit owner review as described in that section. See Section 4-116(d) and Comments. Thus, for example, the six-year — or two-year — limitation period within which a claim for breach of warranty must be brought under Section 4-116(a) would not commence until the earlier of either: (a) the date on which the period of declarant control terminates by operation of law (see Sections 3-103(d) and 3-111(b)), or the date the declarant empowers an independent executive board committee to evaluate and enforce warranty claims (see Section 4-116(d)).

**SECTION 3-112. CONVEYANCE OR ENCUMBRANCE OF COMMON ELEMENTS.**

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

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

(c) The association, on behalf of the unit owners, may contract to convey common

elements pursuant to subsection (a), but the contract is not enforceable against the association until approved pursuant to subsections (a) and (b). Thereafter, the association has all powers necessary and appropriate to effect the conveyance or encumbrance, including the power to execute deeds or other instruments.

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

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

(f) Unless the declaration otherwise provides, if the holders of first security interests on 80 percent of the units that are subject to security interests on the day the unit owners' agreement under subsection (b) is recorded consent in writing:

(1) a conveyance of common elements pursuant to this section terminates both the undivided interests in those common elements allocated to the units and the security interests in those undivided interests held by all persons holding security interests in the units; and

(2) an encumbrance of common elements pursuant to this section has priority over all preexisting encumbrances on the undivided interests in those common elements held by all persons holding security interests in the units.

(g) The consents by holders of first security interests on units described in subsection (f), or a certificate of the secretary affirming that those consents have been received by the association, may be recorded at any time before the date on which the agreement under subsection (b) becomes void. Consents or certificates so recorded are valid from the date they are recorded for purposes of calculating the percentage of consenting first security interest holders, regardless of later sales or encumbrances on those units. Even if the required percentage

of first security interest holders so consent, a conveyance or encumbrance of common elements does not affect interests having priority over the declaration, or created by the association after the declaration was recorded.

**Comment**

1. Subsection (a) provides that, on agreement of unit owners holding 80% of the votes in the association, parts of the common elements may be sold or encumbered. [80% is the percentage required for termination of the condominium under Section 2-118.] This power may be exercised during the period of declarant control, but, to be effective, 80% of non-declarant unit owners must approve the action. The ability to sell a portion of the common elements without termination of the condominium gives the condominium regime desirable flexibility. For example, the unit owners, some years after the initial creation of the condominium, may decide to convey away a portion of the open space which has been reserved as a part of the common elements because they no longer find the area useful or because they wish to use sale proceeds to make other improvements. Similarly, the ability to encumber common elements gives the association power to raise money for improvements through the device of mortgaging the improvements themselves. Of course, recreational improvements will frequently not be sufficient security for a loan for their construction. Nevertheless, the ability to take a security interest in such improvements may lead lenders to be more favorably disposed toward making a loan in larger amounts and at lower interest rates.

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

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

4. Subsection (g) cuts off the interests of unit lenders whose lien extends to the owner's undivided interest in the common elements, and states precisely the procedure needed to

accomplish this result. To the extent that a lien on a unit (whether in the nature of a security interest, tax lien, attachment, or construction lien) also reaches the owner's interest in the common elements, subsection (g) makes clear that a proper vote of unit owners and first mortgage holders cuts off that lien.

This section does not affect the interests of persons who hold a direct lien on the common elements nor does it affect the priority or validity of any interest with respect to the unit itself.

5. The effect of foreclosure of security interests granted pursuant to this section is governed by Section 2-118.

**SECTION 3-113. INSURANCE.**

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

(1) property insurance on the common elements insuring against risks of direct physical loss commonly insured against, which insurance, after application of any deductibles, must be not less than 80 percent of the actual cash value of the insured property at the time the insurance is purchased and at each renewal date, exclusive of land, excavations, foundations and other items normally excluded from property policies;

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

(3) fidelity insurance.

(b) In the case of a building that contains units divided by horizontal boundaries described in the declaration, or vertical boundaries that comprise common walls between units, the insurance maintained under subsection (a)(1), to the extent reasonably available, must

include the units, but need not include improvements and betterments installed by unit owners.

(c) If the insurance described in subsections (a) and (b) is not reasonably available, the association promptly shall cause notice of that fact to be given to all unit owners. The declaration may require the association to carry any other insurance, and the association may carry any other insurance it considers appropriate to protect the association or the unit owners.

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

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

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

(3) no act or omission by a unit owner, unless acting within the scope of the owner's authority on behalf of the association, voids the policy or is a condition to recovery under the policy; and

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

(e) Any loss covered by the property policy under subsections (a)(1) and (b) must be adjusted with the association, but the insurance proceeds for that loss are payable to any insurance trustee designated for that purpose, or otherwise to the association, and not to any holder of a security interest. The insurance trustee or the association shall hold any insurance proceeds in trust for the association, unit owners, and lien holders as their interests may appear. Subject to subsection (h), the proceeds must be disbursed first for the repair or replacement of the damaged property, and the association, unit owners, and lien holders are not entitled to

receive payment of any portion of the proceeds unless there is a surplus of proceeds after the property has been completely repaired or replaced, or the condominium is terminated.

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

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

(h) Any portion of the condominium for which insurance is required under this section which is damaged or destroyed must be repaired or replaced promptly by the association unless:

(1) the condominium is terminated, in which case Section 2-118 applies;

(2) repair or replacement would be illegal; or

(3) [80] percent of the unit owners, including every owner of a unit or assigned limited common element that will not be rebuilt, vote not to rebuild.

(i) The cost of repair or replacement in excess of insurance proceeds, deductibles, and reserves is a common expense. If the entire condominium is not repaired or replaced;

(1) the insurance proceeds attributable to the damaged common elements must be used to restore the damaged area to a condition compatible with the remainder of the condominium;

(2) except to the extent that other persons will be distributes:

(A) the insurance proceeds attributable to units and limited common

elements which are not repaired or replaced must be distributed to the owners of those units and the owners of the units to which those limited common elements were allocated, or to lienholders, as their interests may appear; and

(B) the remainder of the proceeds must be distributed to all the unit owners or lienholders, as their interests may appear, in proportion to the common element interests of all the units.

(j) If the unit owners vote not to rebuild any unit, that unit's allocated interests are automatically reallocated upon the vote as if the unit had been condemned under Section 1-107(a), and the association promptly shall prepare, execute, and record an amendment to the declaration reflecting the reallocations.

(k) This section may be varied or waived in the case of a condominium all of whose units are restricted to nonresidential use.

**Comment**

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

Subsection (a) is amended to permit only "reasonable deductibles" in the context of mandatory insurance that the association must carry. The subject is one of some controversy, because large premium increases in parts of the country, coupled with dropping property values, have caused some associations to explore all means of reducing common expense assessments; self-insurance in the form of large deductibles is one possible and superficially attractive means.

The issue becomes more complex because of the theoretical alternatives that present themselves for dealing with the consequences of substantial deductibles when the association suffers an actual loss. Indeed, a recurring issue under Section 3-113 has been whether and under what circumstances the association may charge the cost of repair for damage to a unit or common elements to an individual unit owner, whether or not the association has insurance covering that loss. The theoretical possibilities are several, including: (i) charging only the deductible to the damaged unit(s) regardless of fault; (ii) charging the entire cost of repair of units and common elements against the damaged units, regardless of fault, rather than filing a claim against the association's policy; or (iii) doing either (i) or (ii) but only in circumstances evidencing "fault."

During the drafting process for the 2008 amendments to UCIOA, the drafters learned of legislative proposals requiring, for example, that "the amount of any deductible on any property and liability insurance maintained by the association is a common expense." On the other hand, the drafters became aware of situations where association lawyers include in their declarations a provision that the amount of any deductible must be allocated among the units damaged, regardless of fault, or solely to the unit damaged if the owner was negligent. The reasons most often advanced in support of this latter position is that the individual unit owner will most commonly carry a form of homeowners insurance for which the premiums are generally low and which, in any event, have already been paid. The argument is that by passing along the costs to the unit owner and thence to the individual carrier, the association will enjoy the benefits flowing from being able to carry larger deductibles, and from filing fewer claims with its primary insurance carrier. Certain philosophical and practical consequences flow from the efforts to pass along risk to individual owners. One of the fundamental provisions of the Act from its inception was the concept, which remains in paragraph (d)(2), that property and commercial general liability insurance policies must waive the carriers' right of subrogation against any unit owner or member of the owner's household. Thus, to the extent the association files a claim under its policy, the individual unit owner would not be responsible to repay the insurance company. This appears consistent with traditional insurance practice, because a homeowner that carries fire insurance on the home and pays the premium for that policy is not held liable for negligence when the house burns and the carrier is required to pay the cost of rebuilding. In the common interest ownership context, the insurance premiums are paid by the association, and the assessments to pay those premium dollars are typically raised by assessments against all the unit owners based on their relative shares of the common expenses. Moreover, to the extent the association chooses to self-insure against so-called "first dollar" losses by purchasing a policy with a deductible, the benefit of the reduced premium paid by the association is typically shared by those same owners in the form of reduced common charges. Thus, to the extent that any portion of the costs resulting from a casualty loss are passed through to the unit owners whose units are damaged, rather than paid by the association as a whole, the result is contrary to the policy underlying mandatory waiver of subrogation.

Nevertheless, the practical aspects of who pays, and under what circumstances, are difficult to ignore. Anecdotal evidence suggests that too-frequent claims against a carrier may result in dramatic premium increases, or in policy cancellation; careful directors of unit owner associations will surely seek to avoid those results. Moreover, unlike the individual home owner carrying an individual policy, the association suffers from the risk of the careless unit owner whose risky behavior incurs no consequences to the unit owner, because the unit owner in a condominium is not at risk of having the owner's individual policy cancelled. In the absence of the same incentives, it is difficult to assume that individuals in the condominium will behave with the same care that a single home owner will behave. A closely related circumstance that may arise is when the association would prefer not to file a claim against its policy for a small loss, but the owner of the damaged unit wishes to do so, especially if the consequence of the association's decision would be to force the damaged unit owner to pay.

The Act takes a middle position in all these regards; see the discussion of the 2008 amendments to § 3-115(e), which permit the association to pass along the cost of damage to the unit owner, in the circumstances described in that section.

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

3. The amendments require the association to carry more insurance than under the original Act. First, subsection (a)(3) requires the association to carry "fidelity" insurance. Typically, fidelity insurance protects against loss of money or physical property as a result of criminal behavior. Common claims under fidelity policies involve employee dishonesty, embezzlement, forgery, robbery, computer fraud, wire transfer fraud, counterfeiting, and other criminal acts. Second, subsection (b) significantly expands the mandatory property and casualty coverage that associations must carry on units. The original Act mandated that units be covered by the association's policy only if they were separated by "horizontal boundaries" — that is, where units in a building were "stacked" above or below one another, as in a high-rise building. The amendments extend this mandatory coverage to townhouse projects or other units that share a common wall between units.

4. The distinction between what is a common element and what is a unit with respect to the insurance coverage required by this section is complex. The definitions of "common elements" and "unit" in Section 1-103(6) and (29) are not sufficient for this purpose. To determine the distinction between the common elements and units, one must refer first to the declaration's section on unit boundaries. That section will define the unit boundaries. If the declaration fails to do so, the provisions of Section 2-102 apply. In summary, Section 2-102 provides that, if the declaration is silent, all non-loadbearing and non-structural portions of the walls, floors and ceilings are part of the unit, while all loadbearing and structural portions of the walls, floors and ceilings are common elements. Further, with respect to any structure partially within and partially outside of the boundaries of a unit, any portion thereof serving only that unit is a limited common element (see definition in Section 1-103(19)), and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements. This treats and defines ownership of all portions of the electrical, plumbing and mechanical systems serving the building not entirely within the boundaries of a unit.

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

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

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

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

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

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

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

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

Significantly, such insurance proceeds may not be paid to any mortgagee or other outside party. This provision is necessary to insure that insurance proceeds are available to effectuate any repairs or replacement to the condominium that may be required.

10. In the case of commercial or industrial condominiums, unit owners may prefer to act as self-insurers or make other arrangements with respect to property insurance. Accordingly, subsection

(k) provides that the insurance requirements of this section may be varied or waived in the case of a condominium all of the units of which are reserved exclusively for non-residential use. Such waiver or modification is not possible in the case of a mixed-use condominium, some of the units of which are used for residential purposes.

**SECTION 3-114. SURPLUS FUNDS.** Unless otherwise provided in the declaration, any surplus funds of the association remaining after payment of or provision for common expenses and any prepayment of reserves must be paid annually to the unit owners in proportion to their common expense liabilities or credited to them to reduce their future common expense assessments.

**Comment**

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

**SECTION 3-115. ASSESSMENTS FOR COMMON EXPENSES.**

(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). The association may charge interest on any past due assessment or portion thereof at the rate established by the association, not exceeding [18] percent per year.

(c) To the extent required by the 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 that 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 benefited; and

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

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

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

(f) If common expense liabilities are reallocated, common expense assessments and any installment thereof not yet due must be recalculated in accordance with the reallocated common expense liabilities.

**Comment**

1. This section contemplates that a declarant might find it advantageous, particularly in the early stages of condominium development, to pay all of the expenses of the condominium rather than assessing each unit individually. Such a situation might arise, for example, where a declarant owns most of the units in the condominium and wishes to avoid building the costs of each unit separately and crediting payment to each unit.

It might also arise in the case of a declarant who, although willing to assume all expenses of the condominium, is unwilling to make payments for replacement reserves or for other expenses which the declarant expects will ultimately be part of the association's budget. Subsection (a) grants the declarant such flexibility while at the same time providing that once an assessment is made against any unit, all units, including those owned by the declarant, must be assessed for their full portion of the common expense liability.

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

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

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

5. Assisted living communities organized as condominiums may provide food, janitorial, nursing and other services to residents of individual units as part of the common expense budget of the association. This may occur whether or not the occupants are the owners of those units. Clearly, there are other means by which those charges might be paid. For example, rather than including meals in the annual budget of the association and then having those costs reflected in the periodic common charge assessment, a more direct means would be to charge the beneficiaries of those services directly on a "fee for service" basis.

If some forms of unusual or unique services are included in the common expense budget for the entire association, rather than being charged to individual service recipients, then the drafter might use the mechanism permitted under paragraph (c)(2) to insure that the non-benefitted owners should not be assessed, and possibly have a lien against their units, for services provided to other persons.

6. Subsection (e) of the original Act provided that "[i]f any common expense is caused by the misconduct of any unit owner, the association may assess that expense exclusively against his unit." It did not directly address the concerns discussed in the commentary to Section 3-113, where the association may incur an insurable loss to a unit or common element as a result of a unit owner's actions.

As revised, subsection (e) does address that issue. As noted, it strikes a middle position on the questions of whether and under what circumstances a unit owner may be charged with the costs of repair. First, the section makes clear that such a charge back may be appropriate, notwithstanding the policy underlying the mandated waiver of subrogation rights contained in Section 3-113(d)(2), even when the association does carry an insurance policy covering that loss. Thus, in an appropriate case, the association might choose not to submit a claim under its insurance policy, and instead proceed directly against the unit owner for the entire amount of the cost of repair, including any sum that would otherwise be paid from the deductible.

However, in contrast to the practice of some associations, the section does not permit a charge back in a "no fault" or in a "simple negligence" situation. Instead, the unit owner to be assessed, or the owner's guest or invitee, must be guilty either of "willful misconduct" or "gross negligence." These comments are not intended to identify all those circumstances that might satisfy those standards, and those determinations will ultimately be left to the finder of fact. At the same time, some common situations are clear.

> Example 1: Assume a fire were to occur in Unit A as a result of a frayed electrical cord hidden behind a wall. It is difficult to imagine a finder of fact concluding that the owner of Unit A was guilty either of "willful misconduct" or "gross negligence."
>
> Example 2: Assume an association for a high rise building were to adopt a policy requiring periodic replacement of water heaters in all units. Thereafter, the property manager personally notified each unit owner, including the owner of Unit B, of the owner's obligation to replace that heater in a timely way. If the owner refused to do so after personal notice, and the heater thereafter failed and caused water damage to the owner's unit and the units below, a finder of fact would likely conclude that the refusal on the part of the owner of Unit B constituted willful misconduct.
>
> Example 3: Assume the association for a common interest community at a western ski area has a history of frozen pipes bursting and causing water damage during the week, when unit owners are often absent. This history is well known to unit owners, who are repeatedly advised in the mail to maintain a minimum heat in their units of 55 degrees. The teenage son of the Owner of Unit C turns off all the heat after his last run on Sunday, and on Monday night, the pipes in Unit C burst. A finder of fact might properly conclude that the son of the owner of Unit C was grossly negligent.

**SECTION 3-116. LIEN FOR SUMS DUE ASSOCIATION; ENFORCEMENT.**

(a) The association has a statutory lien on a unit for any assessment attributable to that unit or fines imposed against its unit owner. Any priority accorded to the association's lien under this section is a priority in right and not merely a priority in payment from the proceeds of the sale of the unit by a competing lienholder or encumbrancer. Unless the declaration otherwise provides, reasonable attorney's fees and costs, other fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11) and (12), and any other sums due to the association under the declaration, this [act], or as a result of an administrative, arbitration, mediation, or judicial decision are enforceable in the same manner as unpaid assessments under this section. If an assessment is payable in installments, the lien is for the full amount of the

assessment from the time the first installment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except:

(1) liens and encumbrances recorded before the recordation of the declaration;

(2) except as otherwise provided in subsection (c), a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent;

(3) liens for real estate taxes and other governmental assessments or charges against the unit; and

(4) mechanics' or materialmen's liens to the extent that law of this state other than this [act] gives priority to mechanics' or materialmen's liens.

(c) A lien under this section also has priority over a security interest described in subsection (b)(2), but only to the extent of:

(1) the unpaid amount of assessments for common expenses, not to exceed six months for each budget year of the association, as based on the periodic budget adopted by the association under Section 3-115(a) for the applicable year; and

(2) reasonable attorney's fees and costs incurred by the association in enforcing the association's lien.

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

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

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

(g) This section does not prohibit actions against unit owners to recover sums for which

subsection (a) creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

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

(i) The association upon request made in a record shall furnish to a unit owner a recordable statement setting forth the amount of unpaid assessments against the unit. If the unit owner's interest is real estate, the statement must be in recordable form. The statement must be furnished within (10) business days after receipt of the request and is binding on the association, the executive board, and every unit owner.

(j) On nonpayment of an assessment on a unit, the association is entitled to obtain possession of the unit under [insert reference to forcible entry and detainer act of this State].

(k) The association's lien may be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]] and as provided in subsection (o). In a foreclosure under [insert reference to state power of sale statute], the association shall give the notice required by statute or, if there is no such requirement, reasonable notice of its action to all lien holders of the unit whose interest would be affected].

(*l*) In an action by an association to collect assessments or to foreclose a lien on a unit under this section, the court may appoint a receiver to collect all sums alleged to be due and owing to a unit owner before commencement or during pendency of the action. The receivership is governed by [insert state law generally applicable to receiverships]. The court may order the receiver to pay any sums held by the receiver to the association during pendency of the action to the extent of the association's common expense assessments based on a periodic budget adopted by the association pursuant to Section 3-115.

(m) An association may not commence an action to foreclose a lien on a unit under this

section or to evict a unit owner under subsection (j) unless:

(1) the unit owner, at the time the action is commenced, owes a sum equal to at least [three] months of common expense assessments based on the periodic budget last adopted by the association pursuant to Section 3-115(a) and the unit owner has failed to accept or comply with a payment plan offered by the association; and

(2) the executive board votes to commence a foreclosure action specifically against that unit.

(n) Unless the parties otherwise agree, the association shall apply any sums paid by unit owners that are delinquent in paying assessments in the following order:

(1) unpaid assessments;

(2) late charges;

(3) reasonable attorney's fees and costs and other reasonable collection charges; and

(4) all other unpaid fees, charges, fines, penalties, interest, and late charges.

(o) If the only sums due with respect to a unit are fines and related sums imposed against the unit, a foreclosure action may not be commenced against the unit unless the association has a judgment against the unit owner for the fines and related sums and has perfected a judgment lien against the unit under [insert reference to state statute on perfection of judgments].

(p) Every aspect of a foreclosure, sale, or other disposition under this section, including the method, advertising, time, date, place, and terms, must be commercially reasonable.

[(q) Foreclosure of a lien under this section does not terminate an interest that is subordinate to the lien to any extent unless the association provides notice of the foreclosure to the record holder of the subordinate interest.]

***Legislative Note:*** *In a state that permits only judicial foreclosure of an association's lien, subsection (q) should be omitted. In a state that permits nonjudicial foreclosure, but by statute provides that a foreclosure sale does not extinguish a subordinate lien unless the subordinate lienholder was provided notice of the sale, subsection (q) should be omitted.*

**Comment**

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

The original Act provided that the association had a lien "from the time the assessment or fine becomes due." Revised subsection (a) deletes this language. The language was intended to make clear that the lien was enforceable at the time the assessment became due. Commentators have observed, however, that the language caused confusion with respect to priority issues. The intention of the statute was that the association's inchoate lien was the functional equivalent of real estate taxes except with respect to the special priorities identified in subsection (b) of the section. The deletion of the language as suggested makes clear that the lien arises immediately upon the effective date of the statute for old condominiums and upon recording of the declaration for new ones. As a result of this deletion, it is clear that in the absence of an exception in a title insurance policy for common charges, a title insurer would be liable for post-insurance obligations which have a priority established prior to the time the policy was issued. This, however, is no different than with other inchoate liens such as real estate taxes and mechanics liens, all of which have become standard exceptions in the title industry.

2. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (b) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first security interests recorded before the date the assessment became delinquent (except as provided in subsection (c), as described below).

The original Act provided that the association's lien did have priority to the extent of six months of unpaid common expense assessments, based on the association's periodic budget. The six-month limited priority for association liens constituted a significant departure from pre-existing practice, and was viewed as striking an equitable balance between the need to enforce collection of unpaid assessments and the need to protect the priority of the security interests of lenders to facilitate the availability of first mortgage credit to unit owners. This equitable balance was premised on the assumption that, if an association took action to enforce its lien and the unit owner failed to cure its assessment default, the first mortgage lender would promptly institute foreclosure proceedings and pay the unpaid assessments (up to six months' worth) to the

association to satisfy the association's limited priority lien. This was expected to permit the mortgage lender to preserve its first lien and deliver clear title in its foreclosure sale — a sale that was expected to be completed within six months (in jurisdictions with nonjudicial foreclosure) or a reasonable period of time thereafter, thus minimizing the period during which unpaid assessments would accrue for which the association would not have first priority. Likewise, it was expected that in the typical situation, a unit would have a value sufficient to produce a sale price high enough for the foreclosing lender to recover both the unpaid mortgage balance and six months of assessments.

The real estate market facing condominiums post-2007 is substantially different from the one contemplated by the drafters of the original Act. Many units are "underwater," with values below the outstanding first mortgage balance. More significantly, long delays have developed in the completion of foreclosures. In states permitting only judicial foreclosures, these delays were often beyond lender control. In many situations, however, mortgage lenders strategically delayed the institution or completion of foreclosure proceedings on units affected by common interest assessments. When a lender acquires a unit at a foreclosure sale by way of a credit bid, it becomes legally obligated to pay assessments arising during the lender's period of ownership. Some lenders have chosen to delay scheduling or completing a foreclosure sale, fearful that they may be unable to resell the unit quickly for an appropriate return in a depressed market. During this period of delay, neither the unit owner nor the mortgage lender is paying the common expense assessments — the unit owner is often unable or unwilling to do so, and the mortgagee is not legally obligated to do so prior to acquiring title. In the meantime, the association (and the remaining unit owners) bear the full financial consequences of this situation, because the association must either force the remaining owners to bear increased assessments to meet budgeted expenses or reduce expenditures for (or the level of) condominium maintenance, insurance and services.

If other unit owners have to pay the burden of increased assessments to preserve condominium services or amenities, the delaying lender receives a benefit in that the value of its collateral is preserved while the lender waits to foreclose. Yet this preservation comes through the condominium's imposition of assessments that the lender does not have to pay or reimburse. This benefit constitutes unjust enrichment of the mortgage lender, particularly to the extent that the lender enjoys this benefit by virtue of a conscious decision to delay completing a foreclosure sale.

In addition to its inadequacy to protect the legitimate financial interests of condominium residents, the language used to create the limited priority lien in subsection (c) has also prompted a number of interpretive disputes. For example:

> First, there has been a developing split of judicial authority as to whether subsection (c) creates in the association a true lien priority or merely a payment priority. For example, suppose that a condominium association forecloses its lien and conducts a sale following a unit owner's default in assessment payments, and the first mortgage lender does not participate in the sale. As originally drafted, subsection (c) was intended to create a true lien priority, and thus the association's foreclosure properly should be viewed as extinguishing the lien of the first lienholder (to the same extent that foreclosure of a real

estate tax lien would extinguish an otherwise-first mortgage lien). See, e.g., SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 334 P.3d 408 (Nev. 2014); Chase Plaza Condominium Ass'n, Inc. v. JPMorgan Chase Bank, N.A., 98 A.3d 166 (D.C. Ct. App. 2014); 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A., 979 F.Supp.2d 1142 (D.Nev.2013); Summerhill Village Homeowners Ass'n v. Roughley, 270 P.3d 639 (Wash.Ct.App. 2012). Nevertheless, several trial court decisions have held that an association's nonjudicial foreclosure of its assessment lien does not extinguish the lien of the first mortgage lender. See, e.g., Weeping Hollow Ave. Trust v. Spencer, 2013 WL 2296313 (D.Nev. May 24, 2013); Diakonos Holdings, LLC v. Countrywide Home Loans, Inc., 2013 WL 531092 (D. Nev. Feb. 11, 2013).

Second, a split of authority has developed as to whether the association may extend its six-month lien priority by filing successive lien foreclosure actions at six month intervals. Compare Drummer Boy Homes Ass'n v. Britton, 2011 Mass. App. Div. 186 (2011) (UCIOA lien priority cannot be extended beyond six months through repetitive foreclosure actions by association) with Bank of America, N.A. v. Morganbesser, No. 675-10-10 (Vt. Super. Ct. Jan. 18, 2013) (recognizing continuation of association's priority for assessments accruing during pendency of association foreclosure, even beyond six months, because subsection (c) would allow repetitive actions every six months).

For the reasons discussed above, subsections (a), (b) and (c) are amended to clarify the scope of the association's limited lien priority, as follows:

First, subsection (a) affirms the result in Summerhill Village Homeowners Ass'n v. Roughley, 270 P.3d 639 (Wash.Ct.App. 2012), and makes clear that the association's lien has true priority over the lien of an otherwise first mortgage lender to the extent of the amount specified in subsection (c). Thus, if the association conducts a foreclosure sale of its association lien and the otherwise first mortgagee does not act to redeem its interest by satisfying the association's limited priority lien, the mortgagee's lien would be extinguished.

Second, subsection (c) makes clear that the association's lien is not capped at only six months of unpaid common expense assessments. Instead, the association's lien is entitled to priority under subsection (c) to the extent of six months of unpaid common expense assessments each year, based on each year's periodic budget as adopted by the association for the applicable year. By allowing the association to extend its priority for six months per year throughout any period of delay by a foreclosing lender, paragraph (c)(1) strikes a more appropriate and equitable sharing of the costs of preserving the value of the mortgagee's security.

The following examples demonstrate the application of subsection (c):

**Example 1**. Owner owns a unit subject to a first mortgage held by Bank (but no other liens). Owner fails to pay any assessments during either 2012 or 2013. In December 2013, the association conducts a foreclosure sale (having given proper notice of the sale

to both Owner and Bank). Based on the association's annual budgets, assessments were $100/month for 2012 and $125/month for 2013. The unpaid balance of Owner's assessments was thus $2,700, and the association incurred an additional $1,000 in reasonable attorney fees and costs in enforcing its lien. Under subsection (c), the association's lien would be entitled to priority over Bank's mortgage to the extent of $2,350, which represents (1) six months of unpaid 2012 assessments (a total of $600), (2) six months of unpaid 2013 assessments (a total of $750), and (3) $1,000 in attorney fees and costs. The association's foreclosure sale extinguishes Bank's mortgage lien. The association receives the first $2,350 in sale proceeds for application to Owner's unpaid assessments. The sale proceeds would next be applied to the balance secured by Bank's mortgage. If there remained any surplus sale proceeds following the satisfaction of Bank's mortgage, those proceeds would be applied to the remaining balance of the Owner's unpaid assessments.

**Example 2.** Owner owns a unit subject to a first mortgage held by Bank (but no other liens). In December 2013, the association conducts a foreclosure sale (having given proper notice of the sale to both Owner and Bank). Based on the association's annual budgets, assessments were $100/month for 2012 and $125/month for 2013. At the time of the sale, Owner had neither paid assessments for March and April of 2012 (a total of $200) nor for the period March-December 2013 (a total of $1,250). The unpaid balance of Owner's assessments was thus $1,450, and the association incurred an additional $1,000 in reasonable attorney fees and costs in enforcing its lien. Under subsection (c), the association's lien would be entitled to priority over Bank's mortgage only to the extent of $1,950, which represents (1) two months of unpaid 2012 assessments (a total of $200), (2) six months of unpaid 2013 assessments (a total of $750), and (3) $1,000 in attorney fees and costs. The association's foreclosure sale extinguishes Bank's mortgage lien. The association receives the first $1,950 in sale proceeds for application to Owner's unpaid assessments. The sale proceeds would next be applied to the balance secured by Bank's mortgage. If there remained any surplus sale proceeds following the satisfaction of Bank's mortgage, those proceeds would be applied to the remaining balance of the Owner's unpaid assessments.

**Example 3.** Owner owns a unit subject to a first mortgage held by Bank (but no other liens). In December 2013, the association schedules a foreclosure sale (having given proper notice of the sale to both Owner and Bank). Based on the association's annual budgets, assessments were $100/month for 2013, and Owner had not paid any assessments for 2013. The unpaid balance of Owner's assessments was thus $1,200, and the association incurred an additional $1,000 in reasonable attorney fees and costs in enforcing its lien. Just prior to the scheduled foreclosure sale, however, Bank paid the association a total of $1,600, which represents (1) six months of unpaid 2013 assessments (a total of $600) and (2) $1,000 in the association's attorney fees and costs. Bank's payment extinguishes the priority that the association's lien would otherwise have had pursuant to subsection (c); therefore, if the association proceeds with its foreclosure sale, the sale will not extinguish Bank's mortgage lien, and the buyer at the sale will take the unit subject to Bank's mortgage lien.

3. Units may be part of two condominiums. For example, a large real estate development may consist of one or more condominium projects which are also part of a larger master condominium. In that case, the master association might assess the condominium units for the general maintenance expenses of the master community and the condominium association would assess for the direct maintenance expenses of the building itself. In such a situation, subsection (d) provides that unpaid liens of the two associations have equal priority regardless of the relative time of creation of the two regimes and regardless of the time the assessments were made or became delinquent.

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

5. UCIOA Section 3-116(j) provides an additional remedy for cooperative associations dealing with defaulting or recalcitrant unit owners, under which upon nonpayment the cooperative unit owner can be evicted in the same manner as an unlawful holdover commercial tenant. The original UCA did not provide such a possessory remedy to an condominium association, on the theory that a unit owner's failure to pay assessments on a timely basis would have less significant consequences for the association and that the association's foreclosure remedy was sufficient.

By contrast, Illinois has adopted procedures that allow a condominium association to use forcible entry and detainer to obtain possession of a unit from a defaulting owner, and to lease the unit to a tenant and apply the rents toward the satisfaction of unpaid assessments. 735 ILCS 5/9-111. Upon recovering possession of the unit, the association has the power (though not the obligation) to lease the unit to a tenant for a period not to exceed 13 months; if the association so leases the property, the association must apply rents collected to unpaid assessments, fines, and ongoing assessments as they come due, with any surplus returned to the unit owner. 735 ILCS 5/9-111.1. Once the unit owner has paid off the unpaid assessments and becomes current on its obligations to the association, the unit owner may obtain an order vacating the judgment; if the premises are being leased by the association as described above, the judgment would be vacated effective at the end of the lease term. 735 ILCS 5/9-111. The Illinois statute discourages strategic default by underwater unit owners in possession of their units (defaults which can place a serious financial burden on the association and other unit owners). The potential benefit of such a remedy is additionally magnified in jurisdictions (such as Illinois) that permit only judicial foreclosure. In those states in which a year or longer might elapse before an association could complete a judicial foreclosure of its assessment lien, and there is a viable market for rental of such units, this possessory remedy would enhance the ability of the association to reduce the assessment delinquency (and thereby help meet its budgeted expenses) pending completion of the foreclosure of the association lien.

For this reason, amended subsection (j) of this Section extends a comparable possessory remedy to condominium associations. A state that adopts amended subsection (j) may need to consider conforming amendments in its forcible entry and detainer statute that are similar in character to the provisions in the Illinois statute, 735 ILCS 5/9-111 and 9-111.1.

6. Subsection (l) makes clear that the courts have authority to appoint receivers upon request by associations to aid in collection of common charges.

7. Few issues are more contentious in condominiums than the prospect of unit owners losing their homes as a consequence of non-payment of common charges — and the loss of all or most of their equity — when the association forecloses. The reaction in state legislatures in recent years has been widespread. At the same time, it is crucial that the association be able to secure timely payment of common charges in order to provide services to all the residents of the condominium. In an effort to balance these competing interests, this section as revised provides additional safeguards governing foreclosure of liens for unpaid common charges. These procedures may be summarized as follows: First, subsection (m) bars foreclosure for sums that are less than 3 months of common charges. Likewise, subsection (m) also bars the association from pursuing a possessory remedy against a defaulting unit owner unless more than 3 months of common charges are unpaid. Second, subsection (m) also requires the association board, to first, offer the delinquent owner a payment plan which the owner rejects, and second, expressly approve each foreclosure action. Third, subsection (n) requires that payments of delinquent assessments be applied first to principal rather than to interest and fees, in order to avoid the usual practice of accruing additional interest and late charges as the monthly fees remain unsatisfied while the attorneys' fees and interest are paid first. Fourth, subsection (o) bars any foreclosure for fines alone unless the association first secures a personal judgment against the unit owner. Finally, subsection (q) requires that if a foreclosure does go forward, any sale of a unit must be commercially reasonable. In the first reported case of foreclosure arising in a state that has adopted this Act, the court required that the sale be reasonable. See Will v. Mill Condo. Owners Ass'n, 848 A.2d 336 (Vt. 2004).

These special procedures would comprise an overlay on existing state foreclosure procedures, whether judicial or non-judicial. Taken together, they respond in a concise but responsible way to the widespread reports of abuses in this field. Hopefully, they will also be viewed by the various States as a responsible and balanced response to the issues confronting elected officials, defaulting unit owners and association board directors with a fiduciary responsibility to maintain the property.

8. In states that permit an association to foreclose its association lien by nonjudicial foreclosure, questions may arise regarding the finality of a sale in which a person holding a subordinate lien did not receive notice of the nonjudicial sale. In some states, nonjudicial foreclosure procedures require notice to subordinate lienholders only when those lienholders have recorded a timely request for notice of sale on the real property records. There also is authority in some nonjudicial foreclosure states to the effect that a subordinate lien can be extinguished in favor of a bona fide purchaser at the sale even if the subordinate lienholder who had requested notice did not receive it. In other states, a subordinate lienholder that does not receive notice of a nonjudicial foreclosure sale does not have its lien extinguished by that sale. See, e.g., Wash. Rev. Code Ann. § 61.24.040(7).

The issue of notice to subordinate lienholders becomes more critical under this Act, given that subsection (c) gives the association a limited priority over the otherwise-first mortgage lender, thus rendering that lender a subordinate lienholder. It would be manifestly unfair for an

association's foreclosure sale to extinguish the lien of the otherwise-first mortgage lender if the association did not in fact provide the lender with notice of that sale. For this reason, subsection (q) is added to make clear that the association's foreclosure does not terminate a subordinate lien unless the association provides notice of the foreclosure to the person that is the record holder of the subordinate interest. Subsection (q) is not necessary in judicial foreclosure-only states, nor in states (such as Washington) that provide that a nonjudicial foreclosure can extinguish subordinate liens only if such lienholders were provided notice prior to the sale.

9. The issue of how the association protects itself from non-payment of assessments may be of concern in a state with a homestead exemption. Either direct foreclosure of the association's statutory lien for unpaid assessments, or foreclosure of a perfected judgment lien which the association might have secured in lieu of foreclosure, may conflict with existing homestead statutes. Further consideration of this issue in those states, in order to reconcile conflicting statutes, would then be appropriate.

**SECTION 3-117. OTHER LIENS.**

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

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

(c) Whether perfected before or after the creation of the condominium, if a lien, other than a deed of trust or mortgage, including a judgment lien or lien attributable to work performed or materials supplied before creation of the condominium, becomes effective against two or more units, the unit owner of an affected unit may pay to the lienholder the amount of the lien attributable to the unit, and the lienholder, upon receipt of payment, promptly shall deliver a release of the lien covering that unit. The amount of the payment must be proportionate to the

ratio 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.

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

**Comment**

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

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

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

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

(1) The unit owner can discharge the unit from the lien and free it from the possibility of being subsequently assessed by the association for the judgment by making a payment directly to the lien holder. This ability may be valuable to a unit owner who is in the process of selling or securing a mortgage on the unit during the period between the time the judgment is entered and the time the association makes a formal assessment against individual unit owners for the amount of the judgment lien.

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

In the rare case where, under corporation law an association could avoid payment of a judgment by dissolution of the association and vesting of title to the units in the unit owners as tenants-in-common or otherwise, the Uniform Law Commission believes that that result is inappropriate, and that the unit in the condominium itself should be viewed as equity property of the association capable of being reached by judgment creditors in satisfaction of the judgment. As a matter of social policy, the condominium association is in quite a different position than the ordinary corporation. The corporation statutes provide shareholders immunity from liability for debts of the corporation to encourage investment in corporations whose entrepreneurial activities in the marketplace contribute to the general wealth and well-being of society.

The condominium association, in managing the affairs of the homeowners, does not serve the same entrepreneurial function. It seems reasonable, as a matter of social policy, that an individual homeowner who would be fully liable for debts incurred in the renovation and maintenance of the home or for torts caused by the owner's failure to adequately maintain the premises should not be able to entirely avoid that liability through the device of organizing with other homeowners into a condominium association. By contrast, it is perhaps unfair to a unit owner in a condominium regime to have all of the owner's assets at risk based on the contracts of the association over which the owner has little control and as to which the owner has only a fractional interest or benefit.

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

**SECTION 3-118. ASSOCIATION RECORDS.**

(a) An association must retain the following:

(1) detailed records of receipts and expenditures affecting the operation and administration of the association and other appropriate accounting records;

(2) minutes of all meetings of its unit owners and executive board other than executive sessions, a record of all actions taken by the unit owners or executive board without a meeting, and a record of all actions taken by a committee in place of the executive board on behalf of the association;

(3) the names of unit owners in a form that permits preparation of a list of the names of all owners and the addresses at which the association communicates with them, in alphabetical order showing the number of votes each owner is entitled to cast;

(4) its original or restated organizational documents, if required by law other than this [act], bylaws and all amendments to them, and all rules currently in effect;

(5) all financial statements and tax returns of the association for the past three years;

(6) a list of the names and addresses of its current executive board members and officers;

(7) its most recent annual report delivered to the [Secretary of State], if any;

(8) financial and other records sufficiently detailed to enable the association to comply with Section 4-109;

(9) copies of current contracts to which it is a party;

(10) records of executive board or committee actions to approve or deny any requests for design or architectural approval from unit owners; and

(11) ballots, proxies, and other records related to voting by unit owners for one year after the election, action, or vote to which they relate.

(b) Subject to subsections (c) and (d), all records retained by an association must be available for examination and copying by a unit owner or the owner's authorized agent:

(1) during reasonable business hours or at a mutually convenient time and location; and

(2) upon [five] days' notice in a record reasonably identifying the specific records of the association requested.

(c) Records retained by an association may be withheld from inspection and copying to the extent that they concern:

(1) personnel, salary, and medical records relating to specific individuals;

(2) contracts, leases, and other commercial transactions to purchase or provide goods or services, currently being negotiated;

(3) existing or potential litigation or mediation, arbitration, or administrative proceedings;

(4) existing or potential matters involving federal, state, or local administrative or other formal proceedings before a governmental tribunal for enforcement of the declaration, bylaws, or rules;

(5) communications with the association's attorney which are otherwise protected by the attorney-client privilege or the attorney work-product doctrine;

(6) information the disclosure of which would violate law other than this [act];

(7) records of an executive session of the executive board; or

(8) individual unit files other than those of the requesting owner.

(d) An association may charge a reasonable fee for providing copies of any records under this section and for supervising the unit owner's inspection.

(e) A right to copy records under this section includes the right to receive copies by photocopying or other means, including copies through an electronic transmission if available upon request by the unit owner.

(f) An association is not obligated to compile or synthesize information.

(g) Information provided pursuant to this section may not be used for commercial purposes.

**Comment**

1. There are two significant policy issues connected with the association's records: first, what records the association must retain, and second, who has access to those records. The revised Act addresses both.

The original version of Section 3-118 dealt with these matters in a minimalist way. Regarding records maintenance, the first sentence of 3-118 required only that the association maintain those records needed to comply with Section 4-109 — i.e., the obligation to provide a resale certificate. This minimum requirement was far less expansive than the provisions of, for example, the Revised Model Non-Profit Corporation Act; it plainly did not address the significant issues of records maintenance that have arisen since UCIOA was first promulgated 25 years ago. Section 3-118 was similarly superficial regarding issues of records access; it mandated simply that "all" records of the association be "reasonably available for examination by any unit owner or his authorized agent" — leaving questions as to whether the word "reasonable" modified "all … records" as well as "available," and leaving unanswered the large range of issues that courts and legislatures have struggled with in this field over the last quarter century.

2. As amended, Section 3-118 replaces the "minimalist" provisions of the original Act with provisions generally consistent with the cognate provisions of the Revised Model Nonprofit Corporation Act, supplemented by specific provisions from other more modern State enactments. For example, amended subsections (a) and (b) require that minutes of all meetings must be kept, and authorize a unit owner to have access to a mailing list of unit owners (although the association may retain the right to mail materials to unit owners at their last known addresses to maintain the unit owners' privacy).

3. Subsection (a) outlines the records that the Association must retain. The subsection generally avoids any substantive requirements as to how the Association's financial records are to be maintained, relying simply on the obligation to retain "detailed records of receipts" and "appropriate accounting records," "all financial statements and tax returns for the past 3 years," and as in the original Act, "financial and other records sufficiently detailed to enable the association" to provide a resale certificate under Section 4-109." The Act rejects any proposal that it require records to be maintained in accordance with "generally accepted accounting principles"; there are simply too many associations for which that would be an unnecessary and

burdensome requirement.

4. The rules of various bar associations make it imprudent for this Act to characterize the files of an attorney representing the association as property of the association and thereafter to assert that those files are nevertheless exempt from disclosure. For that reason, the Act does not address the status of an attorney's records, but paragraph (c)(5) does make clear that communications with the association's attorney will generally be exempt from disclosure.

5. Many associations, especially smaller ones, may not have a complete set of records going back to the first organization of the association. This may be attributable to many reasons, and often are not the fault of the association or its current leadership. For example, the original declarant may not keep adequate records or may have failed to turn them over at transition. Managers may fail to turn records over when their contracts expire or are terminated. In either of these cases, the cost of suing to obtain the missing records is prohibitive, or certainly out of proportion to the loss or inconvenience caused by the missing documents. In many smaller communities, the minutes and other non-financial records are kept by a volunteer officer of the association. If someone dies, is taken ill or moves away, the records are often lost.

While this reality may impede the practical realization of the requirements in this Act, a goal of the section would be that over time, those "ancient" records may become of less practical importance in older associations, while newer associations will be guided by the requirements of this Section to adopt sound record keeping practices from the outset.

6. Paragraph (b)(1) permits the parties to agree on a mutually acceptable time and place for the inspection of the records. If they do not agree, the subsection provides that the inspection shall take place "during reasonable business hours or at a mutually convenient time and location." Another concern has to do with smaller self-managed associations where the records may be kept by a unit owner who works during the day. If the volunteer treasurer cannot easily leave a job during the day to meet with a unit owner, it may be unreasonable to insist that the unit owner, or the unit owner's attorney or accountant, have the power to make the treasurer take a day off from work.

**SECTION 3-119. ASSOCIATION AS TRUSTEE.** With respect to a third person dealing with the association in the association's capacity as a trustee, the existence of trust powers and their proper exercise by the association may be assumed without inquiry. A third person is not bound to inquiry whether the association has power to act as trustee or is properly exercising trust powers. A third person, without actual knowledge that the association is exceeding or improperly exercising its powers, is fully protected in dealing with the association as if it possessed and properly exercised the powers it purports to exercise. A third person is not

bound to assure the proper application of trust assets paid or delivered to the association in its capacity as trustee.

**Comment**

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

**SECTION 3-120. RULES.**

(a) Before adopting, amending, or repealing any rule, the executive board shall give all unit owners notice of:

(1) its intention to adopt, amend, or repeal a rule and provide the text of the rule or the proposed change; and

(2) a date on which the executive board will act on the proposed rule or amendment after considering comments from unit owners.

(b) Following adoption, amendment, or repeal of a rule, the association shall notify the unit owners of its action and provide a copy of any new or revised rule.

(c) An association may adopt rules to establish and enforce construction and design criteria and aesthetic standards if the declaration so provides. If the declaration so provides, the association shall adopt procedures for enforcement of those standards and for approval of construction applications, including a reasonable time within which the association must act after an application is submitted and the consequences of its failure to act.

(d) A rule regulating display of the flag of the United States must be consistent with federal law. In addition, the association may not prohibit display on a unit or on a limited common element adjoining a unit of the flag of this state, or signs regarding candidates for public or association office or ballot questions, but the association may adopt rules governing the

time, place, size, number, and manner of those displays.

(e) Unit owners may peacefully assemble on the common elements to consider matters related to the condominium, but the association may adopt rules governing the time, place, and manner of those assemblies.

(f) An association may adopt rules that affect the use of or behavior in units that may be used for residential purposes, only to:

(1) implement a provision of the declaration;

(2) regulate any behavior in or occupancy of a unit which violates the declaration or adversely affects the use and enjoyment of other units or the common elements by other unit owners; or

(3) restrict the leasing of residential units to the extent those rules are reasonably designed to meet underwriting requirements of institutional lenders that regularly make loans secured by first mortgages on units in condominiums or regularly purchase those mortgages.

(g) An association's internal business operating procedures need not be adopted as rules.

(h) Every rule must be reasonable.

**Comment**

1. This section, new to the amended Act, addresses in a single location many of the Act's provisions concerning rules, including procedures governing how rules are to be adopted, and several constraints on what rules may address. Thus, the section now includes — in new subsection (f) — text that previously appeared in Section 3-102(c) addressing the ability of the association to adopt rules that affect use and behavior in units. The section also addresses several new constraints on the association's ability to regulate unit owner behavior, consistent with increasing sentiment to this effect in a number of states.

2. Subsections (a) and (b) enable unit owners to be aware of and involved in the rules adoption process. Under these procedures, the association must notify unit owners of its intention to engage in changing the rules, and provide owners the text of any proposed change. Unit owners are also entitled to submit comments on the proposed rules, and to know of the date before which those comments may be submitted for consideration. Finally, under subsection (b), after a rule has been changed, the association must notify unit owners of the change, and provide them a

copy of any new or revised rule.

3. Subsection (c) addresses in several ways the subject of how and when unit owners may be subject to constraints on the owner's ability to make changes on the exterior appearance of a unit or engage in construction activity on a unit that would be visible from outside the unit. It is increasingly common throughout the United States for associations to assume the power to establish and enforce design criteria and control the exterior appearance of units. It is often asserted that the power of the association to maintain a uniformly attractive and consistent appearance throughout a condominium adds considerably to the value and desirability of many of these condominiums. At the same time, anecdotal evidence suggests that many of the decisions made during the design approval process have been controversial and, in some instances, are subject to abuse by those charged with enforcing the design criteria.

The original Act was silent on this subject, relegating it simply to the general reserved powers of the association. However, because of the importance of the subject, the revised Act adopts significant amendments to the design approval process. Taken as a whole, these changes confirm the ability of the association to adopt such a process, but subject to significant constraints intended to protect the interests of individual unit owners. First, the ability of the association to regulate the design process must be affirmatively reserved in the declaration. This tracks Section 2-105(a)(14) requiring that "[t]he declaration must contain ... any authorization pursuant to which the association may establish and enforce construction and design criteria and aesthetic standards...."

Note that the ability of the declarant to do so must similarly be reserved as a special declarant right pursuant to Section 2-105(a)(8). However, if that special declarant right is reserved, the association's power under this section would be subject to that reserved special declarant right to control the construction or design review process during the development process.

Second, assuming the authority exists in the declaration, the section requires that the rules of the design committee must be formally promulgated by the executive board, including a procedure for prompt consideration of an application. The rules must also describe the consequences flowing from the failure of the design committee or other group charged with enforcement of the criteria to act on an application within the time frame stated. This does not mean that the necessary effect of that failure is that the application will be deemed approved; the rules may state a different consequence, as they are permitted to do. As a practical matter, however, one might expect that in the usual case, the parties to an application pending before a design committee may choose to formally agree to extend the time within which the committee is otherwise required to act, and nothing in this Act is intended to affect the parties' ability to do so.

4. The Act creates a significant interplay between the declaration and the association's rules when the subject is the possibility of a change in a permitted "use occupancy, or behavior," as that term is used in subsection (d)(2).

First, Section 2-105(a)(12) makes clear that the declaration may contain any leasing restrictions in addition to those restrictions permitted under subsection (d) of this Section, and any other restrictions on alienation of the units. Section 2-105(b) permits the declaration to contain any

other "restrictions on the uses of a unit or the number or other qualifications of persons who may occupy units." Section 2-117(f) then provides significant protection for those permitted uses; it imposes an 80% vote requirement to "prohibit or materially restrict" any permitted uses of or behavior in a unit, or in the number or other qualifications of persons who may occupy units," although the declaration may also state that the 80% vote may be limited to a specific group of affected units. In addition, under the last sentence of subsection (f), any restrictions on uses "must provide reasonable protection for a use or occupancy permitted at the time of the amendment.

Then, under Section 3-120, the association's ability to adopt rules affecting use of or behavior in units is restricted to implementing provisions of the declaration, or regulating "any behavior in or occupancy of a unit which ...adversely affects the use and enjoyment of the units or the common elements by other unit owners." An obvious example of the latter would be noise regulations.

5. Subsections (d) and (e) expand existing federal law mandating that unit owners be allowed to display the flag of the United States, see the Freedom to Display the American Flag Act of 2005, Public Law 109-243, to provide greater freedom of action to unit owners. These sections increase the rights of unit owners to display flags of the enacting State, and political signs on their units. Like the federal law, the association is entitled to adopt regulations governing the time, place, size, number and manner of those displays." Similarly, the unit owners are entitled under subsection (e) to peacefully assemble on the common elements to consider matters related to the condominium.

6. Subsection (f), formerly Section 3-102(c), imposes clear limits on the association's power to control the use, occupancy, and leasing of units in residential projects. Basically, these amendments adopt the policy that unless the declaration otherwise provides, "use" restrictions must appear in the declaration in order to be enforceable by the association, and the association's regulatory power over "occupancy" activities is limited to those situations in which a unit owner's activities inside a unit affect other owners.

7. In perhaps the most significant change affecting rules, subsection (h) requires all rules to be "reasonable." The reasonableness standard, unlike the business judgment rule, is likely to lead to considerable controversy over the impact of particular rules; it may also lead to more constraint in the adoption of a variety of rules, which some unit owners may find onerous.

**SECTION 3-121. NOTICE TO UNIT OWNERS.**

(a) An association shall deliver any notice required to be given by the association under this [act] to any mailing or electronic mail address a unit owner designates. Otherwise, the association may deliver notices by:

(1) hand delivery to each unit owner;

(2) hand delivery, United States mail postage paid, or commercially reasonable

delivery service to the mailing address of each unit;

(3) electronic means, if the unit owner has given the association an electronic address; or

(4) any other method reasonably calculated to provide notice to the unit owner.

(b) The ineffectiveness of a good faith effort to deliver notice by an authorized means does not invalidate action taken at or without a meeting.

**Comment**

1. The alternatives listed in subsection (a) include all the forms of notice previously authorized in Section 3-108, which required that unit owners be given notice of meetings. The new additional forms of notice are electronic transmissions and "(4) any other method reasonably calculated to provide notice to the unit owner." Depending on the circumstances, this might include posting notice on bulletin boards, placing large and legible "sandwich boards" at the entrances to the condominium, or other methods. As a consequence, the Act no longer designates the method of giving notice in particular instances. The basic concept reflected in the language permitting electronic notice is taken from a 2004 Maryland statute; see Maryland Stat. Ann. § 11B-113.1.210.

2. The Act no longer requires that notice be given in a particular manner, and it does not require that the bylaws must specify the method by which notice is to be given. However, there is no reason why either the declaration or the bylaws could not specify a particular form or method of giving notice to the unit owners, and such a requirement would be binding on the association. Whether or not the documents designate a specific form of notice, the declaration cannot override the statement in subsection (b) that protects actions taken at a meeting despite the failure of the notice to actually be delivered, so long as the notice was given in good faith.

3. Note that whatever form of notice may be used or required in a particular condominium, subsection 3-108(b)(5) requires that the unit owners receive the same notice of a meeting of the executive board that is given to the members of the board.

**SECTION 3-122. REMOVAL OF OFFICERS AND DIRECTORS.**

(a) Notwithstanding any provision of the declaration or bylaws to the contrary, unit owners present in person, by proxy, or by absentee ballot at any meeting of the unit owners at which a quorum is present, may remove any member of the executive board and any officer elected by the unit owners, with or without cause, if the number of votes cast in favor of removal

exceeds the number of votes cast in opposition to removal, but:

(1) a member appointed by the declarant may not be removed by a unit owner vote during the period of declarant control;

(2) a member appointed under Section 3-103(g) may be removed only by the person that appointed that member; and

(3) the unit owners may not consider whether to remove a member of the executive board or an officer elected by the unit owners at a meeting of the unit owners unless that subject was listed in the notice of the meeting.

(b) At any meeting at which a vote to remove a member of the executive board or an officer is to be taken, the member or officer being considered for removal must have a reasonable opportunity to speak before the vote.

**Comment**

1. New Section 3-122 simplifies the procedures available for removal of officers or directors, compared to the spare provisions contained in Section 3-103(g) of the original Act. For example, while the section speaks in terms of a "meeting" of unit owners held for the purpose of removal, the section should be read in conjunction with Section 3-110 on voting. There, unless the declaration or bylaws prohibits or limits the various means by which voting may be conducted, the full panoply of decision making by vote would be available in the context of a "meeting" to consider removal. Accordingly, subject to any limitations contained in the condominium's documents, a removal vote could be taken by electronic or paper ballot.

2. For the same reasons discussed in comment 1, proxies will commonly be permitted in recall votes. The drafters recognize that generally, if both sides are soliciting proxies, the unit owners are likely to be given a realistic opportunity to choose between positions. In any event, there is no reason to distinguish those votes where proxies are permitted from others where they are prohibited.

3. While the amended Act simplifies the procedures for a removal vote, other provisions of the new section are designed to protect the reasonable expectations of other stakeholders in the process, and to reflect a basic sense of fairness. Thus, for example, the Act requires that any person who is subject to a removal vote must be given an opportunity to speak before the vote. Further, if the vote were to be taken by ballot without a meeting, then the procedures in the Act that allow informational materials to be distributed before the ballots are due would satisfy the policy underlying this provision. Similarly, the Act provides that no one but the person who

appoints or elects a director may remove that director, thus protecting the legitimate interests of parties who may be entitled to appoint "outside" directors.

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

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

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

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

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

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

(3) the executive board may spend the funds paid on account of the emergency

assessment only for the purposes described in the vote.

**Comment**

1. Subsection (a) follows the text of Section 3-103(c) of the original Act, except that it requires each annual budget to address explicitly the subject of reserves.

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

3. State laws vary as to whether (and to what extent) they mandate that declaration create a reserve fund for the replacement of common elements. This is a subject of considerable scholarly debate. As drafted, while subsection (a) requires the association to provide a summary of the budget — including any provisions for reserves and a statement of the basis on which the reserves are calculated — the Act does not require that the association maintain any reserves.

This is not the policy of all States. Some states either mandate that reserves be maintained or establish a default rule that such reserves be created in the absence of an affirmative vote by the association membership not to create reserves. Other states require that the association board undertake periodic studies of the association's need for reserves. It is also true that the underwriting guidelines used by Fannie Mae when deciding whether to purchase condominium mortgages not only require that the association maintain reserves but that those reserves be "adequate," without defining the meaning of that word.

Evidence suggests that the needs, practices and expectations of unit owners in condominiums differ widely, depending on, for example, the size, age, location and design of the physical structures as well as the age, economic circumstances and other demographic characteristics of the unit owners. For example, small, self-managed associations commonly will maintain minimal reserves and will typically self-assess for repairs as needed. Other larger associations, particularly in high maintenance buildings, may choose to establish substantially higher reserves. Very few associations maintain reserves at a level which would be actuarially required by evaluating the useful life of each component of the building and then accumulating reserves through increases in the monthly common charges paid by each owner, based on a schedule reflecting each component's useful life.

Associations confront the same choices that a single family homeowner confronts in thinking about, for example, the future need to replace the roof on the house. That owner has at least three choices: (1) set aside a sum of money each month in a segregated fund — perhaps even calling it a "reserve" fund — so that when the roof or other parts of the home need to be replaced, the needed funds will be available; (2) maintain savings which are not segregated and pay cash from those savings at the time the roof replacement occurs; or (3) borrow the needed funds, and pay that money back during the years when the owner is enjoying a dry home. The owner can also use a combination of these techniques.

Today, encouraged by state laws such as UCIOA § 3-102(a)(8), which enables associations to pledge their future common charges as security for a loan, UCIOA § 3-112, which enables associations to mortgage the common elements as security for a loan, and UCIOA § 2-119, which confirms the rights of lenders to enforce conventional loan terms against associations, associations are increasingly borrowing as an alternative to self-funding of reserves by unit owners who may be unable to realize the economic value of those reserve payments if they sell their units early in the life of the project.

The drafters were also mindful of the impact of a possible law mandating reserves on the needs of the elderly and those of limited economic means. In practice, older unit owners often resist reserves, while younger families may perceive a greater long term value in their creation. There are also special concerns for lower income owners, where poorer owners may default on their mortgages and abandon their units because of their inability to maintain mortgage payments and monthly common charges. If a statute were to mandate fully funded reserve payments, policy makers should then be concerned with two possible unintended consequences: first, such a mandate might so raise the monthly common charges that many potential buyers might be disqualified from homeownership; and second, the increases in charges might accelerate the collapse of associations that house existing owners of marginal incomes, who might abandon their units in increased numbers. Neither of these outcomes would be desirable.

At the same time, the drafters understood the natural interest of elected officials, who may often be faced with constituent demands that government "do something" about an association that has not prudently managed its affairs, with the result that needed repairs have not been made and the needed funding is not readily identifiable.

For these reasons, this Act is drafted on the assumption that the most appropriate statutory means of addressing this concern was to first, require the declarant to address the issue of reserves in the public offering statement prepared pursuant to Section 4-103. The text in subsection 4-103(b) — relocated from former 4-103(a)(5) — requires in pertinent part that

> (b) The public offering statement must contain any current balance sheet and a projected budget for the association, …. The budget must include:
>
> > (A) a statement of the amount, or a statement that there is no amount, included in the budget as a reserve for repairs and replacement;
> >
> > (B) a statement of any other reserves;
> >
> > (C) the projected common expense assessment by category of expenditures for the association; and
> >
> > (D) the projected monthly common expense assessment for each type of unit.

Besides mandatory disclosure of the status of reserves in the initial public offering statement, Section 4-109(5) of the Act confirms that the issue of reserves be fully disclosed in later resale documents.

Clearly, these sections simply require that the declarant affirmatively address the issue one way or the other, and that the association continue the practice for later purchasers. Presumably, once required to address the issue, the declarant and its professional advisors will draft a reasoned provision consistent with their best sense of the nature of the particular condominium and the likely financial circumstances of their purchasers.

Second, the Act addresses this concern by requiring the issue of reserves to be considered during the budget adoption process pursuant to Section 3-123(a). This provision does not require a particular outcome. But it does require that the budget must affirmatively address the issue one way or the other. Again, like the declarant, once the association is required to address the issue, the association will likely adopt a reasoned budget consistent with the financial needs and circumstances of its members.

These provisions do not in any way interfere with the flexibility of a declarant in addressing this and many other subjects of the budget process of associations. The provisions do not mandate fully funded reserves or "adequate" reserves and do not prevent future unit owners, after the end of the period of declarant control, from changing the initial result created by the declarant.

Thus, what this Act accomplishes is to make certain that the subject of reserves be consciously addressed by the party best suited at the time to understand the likely expectations and requirements of the unit owners. Over the long term, however, better education of declarants and unit owners alike, and the growth of "best practices" in the condominium field under the leadership of national and state interest groups, must provide the optimal outcome in each particular circumstance.

4. Subsection (b) addresses the issue of special assessments, a subject not addressed in the original Act. The policy of the subsection assumes that, except in the case of an emergency, the executive board should follow the same procedures as apply in adoption of the regular periodic budget of the association. By contrast, it is not unusual for the executive board to be confronted with an emergency. In that event, as discussed in subsection (c), if two-thirds of the executive board determine that an emergency exists, the board may dispense with the unit owner vote and proceed directly to adopt a special assessment.

The balance of subsection (c) describe various safeguards designed to avoid abusive use of the emergency special assessment. Note that the term "special assessment" is not defined. However, as used in subsection (b), it refers to any assessment that is not part of the regular budget. Given the safeguards contained in (b), it is not likely that the procedure will be commonly abused.

5. The Act as drafted does not limit or prohibit the imposition of so-called "transfer fees." It does require their disclosure. A transfer fee is, by definition, not assessed against all units in accordance with their percentages as required by Subsection 3-115(b) and it does not meet the description of a "common expense" in Section 3-115. Some courts, in reviewing similar statutory provisions, have held that transfer fees are not permitted; see, e.g., Micheve, LLC vs. Wyndham Place at Freehold Condominium Association, 885 A.2d 35 (N.J. Super. Ct. App. Div. 2005.).

In any event, the Act takes no position on the validity or suitability of "transfer fees," whether imposed by the declarant, the association, or some third party. Plainly, there are abusive circumstances where some persons assert the right to be paid a fee on transfer of title; some states have sought to regulate such efforts. In other cases, advocates assert that transfer fees can measurably assist in the betterment of associations, despite the fact that the fees are generally levied against persons who are departing from the association and are therefore not likely to enjoy whatever theoretical benefits are to be realized as a consequence of these fees. The subject becomes more significant, of course, depending on the magnitude of the fees, and the extent to which the fees are paid at a time of rapidly increasing — rather than decreasing — property values. Because of these variables, the drafters were unable to identify any obvious rule applicable to all such fees, other than to be clear that any such fees must be disclosed in the public offering statement and in any resale certificate issued under Section 4-109. An amendment to Section 4-103(a)(7) requires disclosure of any fee due from either purchaser or seller at the time of sale.

**SECTION 3-124. LITIGATION INVOLVING DECLARANT.**

(a) The following requirements apply to an association's authority under Section 3-102 (a)(4) to institute and maintain a proceeding alleging a construction defect with respect to the condominium, whether by litigation, mediation, arbitration, or administratively, against a declarant or an employee, independent contractor, or other person directly or indirectly providing labor or materials to a declarant:

(1) Subject to subsection (e), before the association institutes a proceeding described in this section, it shall provide notice in a record of its claims to the declarant and those persons that the association seeks to hold liable for the claimed defects. The text of the notice may be in any form reasonably calculated to give notice of the general nature of the association's claims, including a list of the claimed defects. The notice may be delivered by any method of service and may be addressed to any person if the method of service used:

(A) provides actual notice to the person named in the claim; or

(B) would be sufficient to give notice to the person in connection with commencement of an action by the association against the person.

(2) Subject to subsection (e), the association may not institute a proceeding

against a person until [45] days after the association sends notice of its claim to that person.

(3) During the period described in paragraph (2), the declarant and any other person to which the association gave notice may present to the association a plan to repair or otherwise remedy the construction defects described in the notice. If the association does not receive a timely remediation plan from a person to which it gave notice, or if the association does not accept the terms of any plan submitted, the association may institute a proceeding against the person.

(4) If the association receives one or more timely remediation plans, the executive board shall consider promptly those plans and notify the persons to which it directed notice whether the plan is acceptable as presented, acceptable with stated conditions, or not accepted.

(5) If the association accepts a remediation plan from a person the association seeks to hold liable for the claimed defect, or if a person agrees to stated conditions to an otherwise acceptable plan, the parties shall agree on a period for implementation of the plan. The association may not institute a proceeding against the person during the time the plan is being diligently implemented.

(6) Except as otherwise provided in Section 4-116(d) for warranty claims, any statute of limitation affecting the association's right of action against a declarant or other person is tolled during the period described in paragraph (2) and during any extension of that time because a person to which notice was directed has commenced and is diligently pursuing the remediation plan.

(b) After the time described in subsection (a)(2) expires, whether or not the association agrees to any remediation plan, a proceeding may be instituted by:

(1) the association against a person to which notice was directed which fails to

submit a timely remediation plan, the plan of which is not acceptable, or which fails to pursue diligent implementation of that plan; or

(2) a unit owner with respect to the owner's unit and any limited common elements assigned to that unit, regardless of any action of the association.

(c) This section does not preclude the association from making repairs necessary to mitigate damages or to correct any defect that poses a significant and immediate health or safety risk.

(d) Subject to the other provisions of this section, the determination of whether and when the association may institute a proceeding described in this section may be made by the executive board. The declaration may not require a vote by any number or percent of unit owners as a condition to institution of a proceeding.

(e) This section does not prevent an association from seeking equitable relief at any time without complying with subsection (a)(1) or (2).

**Comment**

1. New Section 3-124 responds to the concerns of the home building industry, and to many condominium advocates, who believe that policies designed to resolve construction disputes without resort to litigation are preferable to the existing common pattern of litigation following turnover of control of the association. This new section recognizes the broad support that various groups have expressed for this approach to dispute resolution, as well as the extent to which similar statutes have been adopted in the States. At the same time, this section adopts controls and limitations on the use of the technique designed to avoid harm to associations in appropriate circumstances.

2. This section does not address issues that might arise under the warranty provisions of the Act, see Sections 4-113 through 4-116, or the possibility of litigation against the declarant under other theories or in other circumstances.

Consider, for example, the broad array of litigation that is commonly undertaken today involving land use hearings and appeals. If a declarant were to file an application for a zone change or site plan approval relating to a condominium, the association might choose to object to the application in part because it believes the declarant failed to construct the existing facilities properly. In such a circumstance, the declarant might argue that the intervention by the

association "involved" a construction defect. The term "administrative proceedings," however, was not intended to apply to these kinds of proceedings, in that they do not involve "construction defects" arising in the instant proceeding.

Further, subsection (e) allows the association to seek injunctive or other equitable relief, without the delays imposed by this section. Revised Section 3-102(b) also makes clear that the declaration may not impose any other limitations on the right of the association to commence litigation, except as provided in this section.

3. The possibility exists under Section 3-124 that there will be situations in which the association will send a notice to the declarant which the declarant will not consider to be sufficiently specific or where the declarant will respond to the association's notice with a plan that the association considers to be completely inadequate and rejects out of hand. If the association then sues the declarant, arguments will perhaps arise over whether or not the association had satisfied the preconditions for suit. Even if the court were to dismiss the suit and if the statute of limitations on the claim has run in the meantime, the association will not be without remedy, because of the tolling provisions contained in paragraph (a)(6).

## ARTICLE 4

## PROTECTION OF CONDOMINIUM PURCHASERS

### SECTION 4-101. APPLICABILITY; WAIVER.

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

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

(1) a gratuitous disposition of a unit;

(2) a disposition pursuant to court order;

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

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

(5) a disposition to a dealer;

(6) a disposition that may be canceled at any time and for any reason by the

purchaser without penalty; or

(7) a disposition of a unit restricted to nonresidential purposes.

**Comment**

In the case of commercial and industrial condominiums, the purchaser is often more sophisticated than the purchaser of residential units and thus better able to bargain for necessary protections. While this may not always be true, no objective test can be developed which easily distinguishes those commercial purchasers who can protect themselves from those who, in the ordinary course of business, have not developed such sophistication. At the same time, the cost of protection imposed by Article 4 may be substantial.

Accordingly, subsection (a) permits waiver or modification of Article 4 protection in condominiums where all units are restricted to non-residential use, e.g., in the case of most commercial and industrial condominiums. However, except for certain waivers of implied warranties of quality (see Section 4-115) and certain exemptions from public offering statement and resale certificate requirements (see subsection (b)), subsection (a) permits no express waiver of the protections of this Article with respect to the purchasers of residential units. Accordingly, by operation of Section 1-104, the rights provided by this Article may not be waived in the case of residential purchasers. Moreover, because of the interrelated rights of residential and commercial owners in mixed-use condominiums, waiver or modification of rights conferred by this Article is restricted to purchasers in wholly non-residential condominiums.

**SECTION 4-102. LIABILITY FOR PUBLIC OFFERING STATEMENT REQUIREMENTS.**

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

(b) A declarant may transfer responsibility for preparation of all or a part of the public offering statement to a successor declarant or to a dealer that intends to offer units in the condominium. In the event of any such transfer, the transferor shall provide the transferee with any information necessary to enable the transferee to fulfill the requirements of subsection (a).

(c) Any declarant or dealer that offers a unit to a purchaser shall deliver a public offering statement in the manner prescribed in Section 4-108(a). The declarant or dealer that prepared all

or a part of the public offering statement is liable under Sections 4-108 [and] [,] 4-117 [, 5-105, and 5-106] for any false or misleading statement set forth therein or for any omission of material fact therefrom.

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

**Comment**

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

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

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

(1) the name and principal address of the declarant and of the condominium;

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

(3) the number of units in the condominium;

(4) copies and a brief narrative description of the significant features of the declaration, other than the plats and plans, and any other recorded covenants, conditions,

restrictions and reservations affecting the condominium; the bylaws and any rules of the association; copies of any contracts and leases to be signed by purchasers at closing; and a brief narrative description of any contracts or leases that will or may be subject to cancellation by the association under Section 3-105;

(5) the financial information required by subsection (b);

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

(7) any initial or special fee due from the purchaser or seller at the time of sale, together with a description of the purpose and method of calculating the fee;

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

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

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

(11) a statement that:

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

(B) if a declarant fails to provide a public offering statement to a purchaser before conveying a unit, that purchaser may recover from the declarant (10) percent of the sales price of the unit plus (10) percent of the share, proportionate to the purchaser’s common expense

liability, of any indebtedness of the association secured by security interests encumbering the condominium; and

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

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

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

(14) any restraints on alienation of any portion of the condominium and any restrictions:

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

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

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

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

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

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

(19) any unusual and material circumstances, features, and characteristics of the condominium and the units; and

(20) a description of any arrangement described in Section 1-209 binding the association.

(b) The public offering statement must contain any current balance sheet and a projected budget for the association, either within or as an exhibit to the public offering statement, for [one] year after the date of the first conveyance to a purchaser, and thereafter the current budget of the association, a statement of who prepared the budget, and a statement of the budget's assumptions concerning occupancy and inflation factors. The budget must include:

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

(2) a statement of any other reserves;

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

(4) the projected monthly common expense assessment for each type of unit.

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

(d) A declarant promptly shall amend the public offering statement to report any material

change in the information required by this section.

**Comment**

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

2. Paragraph (a)(2) requires a general description of the condominium and, to the extent possible, the declarant's schedule for commencement and completion of construction for all building amenities that will comprise portions of the condominium.

Under Section 2-109, the declarant is obligated to label all improvements which may be made in the condominium as either "MUST BE BUILT" or "NEED NOT BE BUILT." Under Section 4-119, the declarant is obligated to complete all improvements labeled "MUST BE BUILT." The estimated schedule of commencement and completion of construction dates provides a standard for judging whether a declarant has complied with the requirements of Section 4-119.

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

4. The disclosure requirement of paragraph (6) is intended to eliminate the common deceptive sales practice known as "lowballing," a practice by which a declarant intentionally underestimates the budget for the association by providing many of the services directly during the initial sales period. In such a circumstance, the declarant commonly intends that, after a certain time, these services (which might include lawn maintenance, painting, security, bookkeeping, or other services) will become expenses of the association, thereby substantially

increasing the periodic common expense assessments which association members must ultimately bear. By requiring the disclosure of these services (including the projected common expense assessment attributable to each) in paragraph (6), the Act seeks to minimize "lowballing." To comply fully with the provisions of paragraph (5), the declarant must calculate the budget on the basis of the best estimate of the number of units which will be part of the condominium during that budget year. This requirement also operates to negate the effects of any attempted "lowballing."

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

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

7. Paragraph (14) requires that the declarant disclose the existence of any right of first refusal or other restrictions on the uses for which or classes of persons to whom units may be sold. It also requires disclosure of any provisions limiting the amount for which units may be sold or on the part of the sales price which may be retained by the selling unit owner, such as a provision under which the developer shares in any appreciation in value.

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

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

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

11. In addition to the information required to be disclosed by paragraphs (1) through (18), paragraph (19) requires that the declarant disclose all other "unusual and material circumstances, features, and characteristics" of the condominium and all units therein. This requires only information which is both "unusual and material." Thus, the provision does not require the disclosure of "material" factors which are commonly understood to be part of the condominium, e.g., the fact that a condominium has a roof, walls, doors, and windows. Similarly, the provision does not require the disclosure of "unusual" information about the condominium which is not also "material," e.g., the fact that a condominium is the first condominium in a particular community. Information which would normally be required to be disclosed pursuant to paragraph (19) might include, to the extent that they are unusual and material, environmental conditions affecting the use or enjoyment of the condominium, features of the location of the condominium, e.g., near the end of an airport runway or a planned rendering plant, and the like.

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

**SECTION 4-104. SAME; CONDOMINIUMS SUBJECT TO DEVELOPMENT RIGHTS.** If the declaration provides that a condominium is subject to any development rights, the public offering statement must disclose, in addition to the information required by Section 4-103:

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

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

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

of the floor areas of all units that may be created therein, that are not restricted exclusively to residential use;

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

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

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

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

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

(9) a statement that any limited common elements created pursuant to any development right reserved by the declarant will be of the same general types and sizes as the limited common elements within other parts of the condominium, or a statement of the types and sizes planned, or a statement that no assurances are made in that regard;

(10) a statement that the proportion of limited common elements to units created pursuant to any development right reserved by the declarant will be approximately equal to the proportion

existing within other parts of the condominium, or a statement of any other assurances in that regard, or a statement that no assurances are made in that regard;

(11) a statement that all restrictions in the declaration affecting use, occupancy, and alienation of units will apply to any units created pursuant to any development right reserved by the declarant, or a statement of any differentiations that may be made as to those units, or a statement that no assurances are made in that regard; and

(12) a statement of the extent to which any assurances made pursuant to this section apply or do not apply in the event that any development right is not exercised by the declarant.

**Comment**

This section requires disclosure in the public offering statement of the manner in which the declarant's exercise of development rights may affect purchasers who acquire units before those rights have been fully exercised. The purpose is to put the purchaser on notice of the extent to which the exercise of those rights may alter, sometimes quite dramatically, both the physical and the legal aspects of the project. For example, the prospective purchaser may be contemplating the acquisition of a particular unit because it enjoys a view of open, undeveloped land over which the declarant has, however, reserved development rights. It may be that the boundary of the parcel as to which development rights have been reserved actually coincides with, or runs quite close to, the outer wall of the unit in question. The disclosures or statements made pursuant to paragraphs (8) and (12) of this section will indicate to the prospective purchaser the extent (if any) to which the purchaser can rely on the declarant not to do anything which would radically alter the view from the unit.

**SECTION 4-105. SAME; TIME SHARES.** If the declaration provides that ownership or occupancy of any units, is or may be in time shares, the public offering statement shall disclose, in addition to the information required by Section 4-103:

(1) the number and identity of units in which time shares may be created;

(2) the total number of time shares that may be created;

(3) the minimum duration of any time shares that may be created; and

(4) the extent to which the creation of time shares will or may affect the enforceability of the association's lien for assessments provided in Section 3-116.

## Comment

1. Time sharing has become increasingly important in recent years, particularly with respect to resort condominiums. In recognition of this fact, this section requires the disclosure of certain information with respect to time sharing.

2. Virtually all existing state condominium statutes are silent with respect to time-share ownership. The inclusion of disclosure provisions for certain forms of time sharing in this Act, however, does not imply that other law regulating time sharing is affected in any way in a state merely because that state enacts this Act.

The Uniform Law Commissioners' Model Real Estate Time-Share Act specifies more extensive disclosures for time-share properties. A "time-share property" may include part or all of the condominium, and Section 1-109 of the Model Act governs conflicts between this Act and time-share legislation.

### SECTION 4-106. SAME; CONDOMINIUMS CONTAINING CONVERSION BUILDINGS.

(a) The public offering statement of a condominium containing any conversion building must contain, in addition to the information required by Section 4-103:

(1) a statement by the declarant, based on a report prepared by an independent [registered] architect or engineer, describing the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the building;

(2) a statement by the declarant of the expected useful life of each item reported on in paragraph (1) or a statement that no representations are made in that regard; and

(3) a list of any outstanding notices of uncured violations of building code or other municipal regulations, together with the estimated cost of curing those violations.

(b) This section applies only to buildings containing units that may be occupied for residential use.

## Comment

1. In the case of a condominium containing one or more conversion buildings, the disclosure of additional information relating to the condition of those buildings is required in the public

offering statement because of the difficulty inherent in a single purchaser attempting to determine the condition of what is likely to be an older building being renovated for the purpose of condominium sales.

2. Paragraph (a)(1) requires the person who gives the public offering statement to retain an independent architect or engineer to report on the present condition of all structural components and fixed mechanical and electrical installations in the conversion building. Such information is as useful to declarant as to the purchaser since, under the implied warranty provisions of Section 4-114, a declarant impliedly warrants all improvements made by any person to the building "before creation of the condominium" unless such improvements are specifically excluded from the implied warranty of quality pursuant to Section 4-115(b).

3. See Comment 6 to Section 2-101 concerning the meaning of "structural components" as used in paragraph (a)(1). Any material changes in the "present condition" of these systems must be reported by an amendment to the public offering statement.

4. Under paragraph (a)(3), the person required to give the public offering statement is required to provide purchasers with a list of all outstanding notices of uncured violations of building codes or other municipal regulations. The literal wording of this provision does not require disclosure of known violations of such building codes or municipal regulations (at least violations having no effect upon the structural components or fixed mechanical and electrical installations of the condominium) unless actual "notices" of such violations have been received. To the extent that outstanding notices of uncured violations do exist, the cost of curing such violations would become a liability of the unit owners or the association following transfer of the unit to a purchaser. For that reason, the estimated cost of curing any outstanding violations must also be disclosed.

5. For the same reasons set forth in the Comment to Section 4-101(a), this section does not apply to units which are restricted exclusively to non-residential use.

**SECTION 4-107. SAME; CONDOMINIUM SECURITIES.** If an interest in a condominium is currently registered with the Securities and Exchange Commission of the United States, a declarant satisfies all requirements relating to the preparation of a public offering statement of this Act if the declarant delivers to the purchaser [and files with the Agency] a copy of the public offering statement filed with the Securities and Exchange Commission. [An interest in a condominium is not a security under the provisions of (insert appropriate state securities regulation statutes.)]

**Comment**

1. Some condominiums are regarded as "investment contracts" or other "securities" under federal law because they exhibit certain investment features such as mandatory rental pools. See SEC Securities Act Release No. 5347 (January 1973). The purpose of this section is to permit the declarant to file or deliver, in lieu of a public offering statement specifically prepared to comply with the provisions of this Act, the prospectus filed with and distributed pursuant to the regulations of the United States Securities and Exchange Commission. Absent this provision, prospective purchasers of condominiums classified by the SEC as "securities" would have to be given two public offering statements, one prepared pursuant to this Act and the other prepared pursuant to the Securities Act of 1933. Not only would this result increase the declarant's costs (and thus the price) of units, it might also reduce the likelihood of either public offering statement actually being read by prospective purchasers.

2. The bracketed language in the first sentence of this section should be inserted by states which choose to adopt the agency provisions of Article 5 of the Act. The second sentence should also be inserted by states opting to incorporate Article 5 of the Act to avoid duplicative regulation of condominiums by the agency administering the State's securities regulation statutes.

**SECTION 4-108. PURCHASER'S RIGHT TO CANCEL.**

(a) A person required to deliver a public offering statement pursuant to Section 4-102(c) shall provide a purchaser of a unit with a copy of the public offering statement and all amendments thereto before conveyance of that unit, and not later than the date of any contract of sale. Unless a purchaser is given the public offering statement more than 15 days before execution of a contract for the purchase of a unit, the purchaser, before conveyance, may cancel the contract within 15 days after first receiving the public offering statement.

(b) If a purchaser elects to cancel a contract pursuant to subsection (a), the purchaser may do so by hand-delivering notice thereof to the offeror or by mailing notice thereof by prepaid United States mail to the offeror or to the offeror's agent for service of process. Cancellation is without penalty, and all payments made by the purchaser before cancellation must be refunded promptly.

(c) If a person required to deliver a public offering statement pursuant to Section 4-102(c) fails to provide a purchaser to whom a unit is conveyed with that public offering statement and

all amendments thereto as required by subsection (a), the purchaser, in addition to any rights to damages or other relief, is entitled to receive from that person an amount equal to [10] percent of the sales price of the unit, plus [10] percent of the share, proportionate to the purchaser's common expense liability, of any indebtedness of the association secured by security interests encumbering the condominium.

**Comment**

1. The "cooling off" period provided to a purchaser in this section is similar to provisions in many current state condominium statutes.

2. Subsection (a) requires that each purchaser be provided with both the public offering statement and all amendments thereto prior to the time that the unit is conveyed. If there is a contract for the sale of the unit, these documents must be provided not later than the date of the contract. The section makes clear that any amendments to the public offering statement prepared between the date of any contract and the date of conveyance must also be provided to the purchaser.

3. This section does not require the delivery of a public offering statement prior to the execution by the purchaser of an agreement pursuant to which the purchaser reserves the right to buy a unit but is not contractually bound to do so. Because such agreements (frequently referred to as "non-binding reservation agreements") may be unilaterally cancelled at any time by a prospective purchaser without penalty, they do not constitute "contract[s] of sale" within the meaning of the section.

4. The requirement set forth in subsection (a) that a purchaser be provided with subsequent amendments to the public offering statement during the period between execution of the contract for purchase and conveyance of the unit does not, in itself, extend the "cooling off" period. Indeed, the delivery of such amendments is required even if the "cooling off" period has expired. The purpose of this requirement is to assure that purchasers of units are advised of any material change in the condominium which may affect their sales contracts under general law. While many such amendments will be merely technical and will not affect the bargain that the purchaser and declarant entered into, each purchaser should be permitted to judge the materiality of any change in the nature of the condominium.

5. Under the scheme set forth in this section, it is at least theoretically possible that there will be a contract for sale of the unit, and that a public offering statement will be given to the purchaser at closing just prior to conveyance. However, the available evidence suggests that such practice would be rare, and that the provision of a public offering statement moments prior to conveyance would, in itself, tend to dampen the enthusiasm of the purchaser for immediate closing. In such circumstances, under subsection (a), the purchaser would, as a matter of right, be able to extend the date of closing for 15 days from the time the public offering statement was provided. This

fact, together with the generally unsatisfactory experience with mandatory "cooling off" periods such as that imposed under the federal Real Estate Settlement Procedures Act, supports the conclusion that it is inappropriate to require a minimum period of delay between delivery of a public offering statement and conveyance.

6. Under subsection (a), the failure to deliver a public offering statement before conveyance does not result in a statutory right by the purchaser to cancel the conveyance or to reconvey the unit once conveyance has occurred. Any such cancellation or reconveyance right following an actual conveyance could create serious mechanical and title problems that could not be easily resolved. The failure of the Act to provide for such cancellation or reconveyance is not, however, intended to diminish any right which a purchaser may otherwise have under general state law. For example, where it appears that a seller, by deliberately failing to disclose certain material information with respect to a transaction, substantially changed the bargain which the seller and the purchaser entered, it is possible under the common law in some states that reconveyance would be an available remedy.

Even absent such resort to general law, however, the penalty provisions of subsection (c) are designed to provide a sufficient incentive to the seller to insure that the public offering statement is provided in the timely fashion required by the Act. The penalty so specified in the subsection is in addition to any right a prevailing purchaser may have under Section 4-117 to collect punitive damages and attorney's fees in connection with an action against the declarant.

**SECTION 4-109. RESALES OF UNITS.**

(a) Except in the case of a sale in which delivery of a public offering statement is required, or unless exempt under Section 4-101(b), a unit owner shall furnish to a purchaser before the earlier of conveyance or transfer of the right to possession of a unit, a copy of the declaration, other than any plats and plans, the bylaws, the rules or regulations of the association, and a certificate containing:

(1) a statement disclosing the effect on the proposed disposition of any right of first refusal or other restraint on the free alienability of the unit held by the association;

(2) a statement setting forth the amount of the periodic common expense assessment and any unpaid common expense or special assessment currently due and payable from the selling unit owner;

(3) a statement of any other fees payable by the owner of the unit being sold;

(4) a statement of any capital expenditures anticipated by the association for the current and succeeding fiscal years;

(5) a statement of the amount of any reserves for capital expenditures and of any portions of those reserves designated by the association for any specified projects;

(6) the most recent regularly prepared balance sheet and income and expense statement, if any, of the association;

(7) the current operating budget of the association;

(8) a statement of any unsatisfied judgments against the association and the status of any pending suits in which the association is a defendant;

(9) a statement describing any insurance coverage provided for the benefit of unit owners;

(10) a statement as to whether the executive board has given or received notice in a record that any existing uses, occupancies, alterations or improvements to the unit or to the limited common elements assigned thereto violate any provision of the declaration;

(11) a statement as to whether the executive board has received notice in a record from a governmental agency of any violations of environmental, health, or building codes with respect to the unit, the limited common elements assigned thereto or any other portion of the condominium which has not been cured;

(12) a statement of the remaining term of any leasehold estate affecting the condominium and the provisions governing any extension or renewal thereof.

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

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

(15) a statement disclosing the effect on the unit to be conveyed of any restrictions on the owner's right to use or occupy the unit or to lease the unit to another person.

(b) The association, within 10 days after a request by a unit owner, shall furnish a certificate containing the information necessary to enable the unit owner to comply with this section. A unit owner providing a certificate pursuant to subsection (a) is not liable to the purchaser for any erroneous information provided by the association and included in the certificate.

(c) A purchaser is not liable for any unpaid assessment or fee greater than the amount set forth in the certificate prepared by the association. A unit owner is not liable to a purchaser for the failure or delay of the association to provide the certificate in a timely manner, but the purchase contract is voidable by the purchaser until the certificate has been provided and for (five) days thereafter or until conveyance, whichever first occurs.

**Comment**

1. In the case of the resale of a unit by a private unit owner who is not a declarant or a person in the business of selling real estate for the person's own account, a public offering statement need not be provided. See Section 4-102(c). Nevertheless, there are important facts which a purchaser should have to make a rational judgment about the advisability of purchasing the particular condominium unit. Accordingly, each unit owner not required to furnish a public offering statement under Section 4-102(c) and not exempt under Section 4-101(b) is required to furnish to a resale purchaser, before the execution of any contract of sale, a copy of the declaration, bylaws, and rules and regulations of the association and a variety of fiscal, insurance, and other information concerning the condominium and the unit.

The amendments to subsection (a) track amendments in States that have adopted this Act which simplified the contents of the resale certificate.

2. While the obligation to provide the information required by this section rests upon each unit owner (because the purchaser is in privity only with that unit owner), the association has an obligation to provide the information to the unit owner within ten days after a request for such

information. Under Section 3-102(a)(12), the association may charge the unit owner a reasonable fee for the preparation of the certificate. Should the association fail to provide the certificate as required, the unit owner would have a right to action against the association pursuant to Section 4-117.

3. Under subsection (c), if a purchaser receives a resale certificate which fails to state the proper amount of the unpaid assessments due from the purchased unit, the purchaser is not liable for any amount greater than that disclosed in the resale certificate. Because a resale purchaser is dependent upon the association for information with respect to the outstanding assessments against the unit which the purchaser contemplates buying, it is altogether appropriate that the association should be prohibited from later collecting greater assessments than those disclosed prior to the time of the resale purchase.

**SECTION 4-110. ESCROW OF DEPOSITS.** Any deposit made in connection with the purchase or reservation of a unit from a person required to deliver a public offering statement pursuant to Section 4-102(c) must be placed in escrow and held either in this state or in the state where the unit is located in an account designated solely for that purpose by [a licensed title insurance company] [an attorney] [a licensed real estate broker] [an independent bonded escrow company or] an institution whose accounts are insured by a governmental agency or instrumentality until (i) delivered to the declarant at closing; (ii) delivered to the declarant because of purchaser's default under a contract to purchase the unit; or (iii) refunded to the purchaser.

**Comment**

1. This section applies to the sale by persons required to furnish public offering statements of residential units and of non-residential units unless waived pursuant to the provisions of Section 4-101. It does not apply, however, to resales of units between private parties. Escrow provisions are not part of the law in several jurisdictions.

2. This section provides declarant a number of choices as to the appropriate escrow agent. Whether the escrow agent must deposit the funds in an insured institutional depository, or in a particular type of account, depends on state law or the agreement of the parties. To minimize record keeping, the institutional depository could itself be the escrow agent. The section does not require a separate account for each unit, so that mingling of funds in a single escrow account would be permitted. The account may be held whether in the state where the unit is located, or in the enacting state, in recognition that buyers are often from outside the state where the unit is located.

3. The escrow requirements of this section apply in connection with any deposit made by a purchaser, whether such deposit is made pursuant to a binding contract or pursuant to a nonbinding reservation agreement (with respect to which no public offering statement is required under Section 4-101(b)(6)).

4. In some states current practice permits escrows to be held by certain title insurance or escrow companies, attorneys, or real estate brokers. Accordingly, the bracketed language should be included or deleted in accordance with local practice.

5. Under this section, any interest earned on an escrow deposit may, but need not, be credited to the purchaser at closing, added to any deposit forfeited to the seller, or added to any deposit refunded to the purchaser. In short, disposition of any interest is left to agreement of the parties.

6. In some states, such as New York, the substitution of a bond in place of a deposit escrow is permitted. The evidence indicates, however, that in many instances the use of the bonding device has forced purchasers to incur substantial costs and delay prior to obtaining refunds to which they are entitled. For this reason, this Act does not include bonding as an alternative to the required escrow of deposits.

**SECTION 4-111. RELEASE OF LIENS.**

(a) In the case of a sale of a unit where delivery of a public offering statement is required pursuant to Section 4-102(c), a seller:

(1) before conveying a unit, shall record or furnish to the purchaser releases of all liens, that the purchaser does not expressly agree to take subject to or assume and that encumber that unit and its common element interest, except liens on real estate that a declarant has the right to withdraw from the condominium; or

(2) shall provide a surety bond or substitute collateral for or insurance against the lien as provided for liens on real estate in (insert appropriate references to general state law or Sections 5-211 and 5-212 of the State Uniform Simplification of Land Transfers Act).]

(b) Before conveying real estate to the association, the declarant shall have that real estate released from:

(1) all liens the foreclosure of which would deprive unit owners of any right of access to or easement of support of their units; and

(2) all other liens on that real estate unless the public offering statement describes certain real estate which may be conveyed subject to liens in specified amounts.

**Comment**

1. The exemption for withdrawable real estate set forth in subsection (a) is designed to preserve flexibility for the declarant in terms of financing arrangements. Theoretically, a developer might partially avoid the lien release requirement of subsection (a) by placing part of the common element improvements such as a swimming pool or tennis court on withdrawable real estate. By doing so, it could separately mortgage that part of the common elements without being obligated to discharge the mortgage or secure partial releases when individual units are sold. [However, even if there were no withdrawable real estate exemption from the release of lien requirement, developers could still separately mortgage such improvements as pools and tennis courts without having to discharge the mortgage on sale of units. All they would have to do is leave the particular real estate out of the condominium and then convey it directly to the association subject to the mortgage.]

If a mortgage or other lien created by or arising against the developer attaches to withdrawable real estate after the declaration has been recorded, a lapse of the developer's right to withdraw the real estate would also terminate the rights of the lienor, because the lien would attach only to the developer's interest (the right to withdraw). However, an alert lienor would not permit the right to withdraw to lapse without taking steps to see that the right to withdraw is exercised. If the mortgage or other lien attached to the real estate and was perfected before the condominium declaration was recorded, lapse of the right to withdraw would not affect the lienor's rights and the lienor could foreclose on the real estate whether or not the developer had lost the right to withdraw. As a practical matter, whether the mortgage or other lien against withdrawable real estate arises before or after the declaration is recorded, unit owners may find that, if the association does not release liens on withdrawable real estate containing common elements, the lienor will be able to withdraw the land and deprive the unit owners of its use. Therefore, unit purchasers and their counsel should be alert to that possibility.

If units are created in withdrawable real estate, the units, when sold, are subject to the release-of-lien rule of paragraph (b)(1) and, after a unit in a particular withdrawable parcel is sold, that parcel can no longer be withdrawn. In that case, any lien created by or arising against the developer which attached to the real estate and is subordinate to the condominium declaration would automatically expire.

2. Subsection (b) will apply in the event the declarant conveys to the condominium unit owners' association other real estate, such as units or other real property not subject to the declaration.

**SECTION 4-112. CONVERSION BUILDINGS.**

(a) A declarant of a condominium containing conversion buildings, and any dealer who intends to offer units in such a condominium shall give each of the residential tenants and any

residential subtenant in possession of a portion of a conversion building notice of the conversion and provide those persons with the public offering statement no later than 120 days before the tenants and any subtenant in possession are required to vacate. The notice must set forth generally the rights of tenants and subtenants under this section and must be hand delivered to the unit or mailed by prepaid United States mail to the tenant and subtenant at the address of the unit or any other mailing address provided by a tenant. No tenant or subtenant may be required to vacate upon less than 120 days' notice, except by reason of nonpayment of rent, waste, or conduct that disturbs other tenants' peaceful enjoyment of the premises, and the terms of the tenancy may not be altered during that period. Failure to give notice as required by this section is a defense to an action for possession.

(b) For [60] days after delivery or mailing of the notice described in subsection (a), the person required to give the notice shall offer to convey each unit or proposed unit occupied for residential use to the tenant who leases that unit. If a tenant fails to purchase the unit during that [60]-day period, the offeror may not offer to dispose of an interest in that unit during the following [180] days at a price or on terms more favorable to the offeree than the price or terms offered to the tenant. This subsection does not apply to any unit in a conversion building if that unit will be restricted exclusively to non-residential use or the boundaries of the converted unit do not substantially conform to the dimensions of the residential unit before conversion.

(c) If a seller, in violation of subsection (b), conveys a unit to a purchaser for value who has no knowledge of the violation, the recordation of the deed conveying the unit extinguishes any right a tenant may have under subsection (b) to purchase that unit if the deed states that the seller has complied with subsection (b), but the conveyance does not affect the right of a tenant to recover damages from the seller for a violation of subsection (b).

(d) If a notice of conversion specifies a date by which a unit or proposed unit must be vacated and otherwise complies with the provisions of (insert appropriate state summary process statute), the notice also constitutes a notice to vacate specified by that statute.

(e) Nothing in this section permits termination of a lease by a declarant in violation of its terms.

**Comment**

1. One of the most controversial issues in the field of condominium development relates to conversion of rental buildings to condominiums. Opponents of conversions point out that the frequent result of conversions, which occur principally in large urban areas, is to displace low- and moderate-income tenants and provide homes for more affluent persons able to afford the higher prices which the converted apartments command. Indeed, studies indicate that the burden of conversion displacement falls most frequently on low- and moderate-income and elderly persons. At the same time, the conversion of a building to condominium ownership can lead to a substantial increase in property value, a result which proponents believe can be an important factor in curtailing the problem of declining urban tax bases. Proponents also point out that the conversion of rental units in inner-city areas to individual ownership frequently results in the stabilization of the buildings concerned, thus providing an important technique for use in neighborhood preservation and revitalization. This section, which seeks to balance these competing interests, is based principally on similar provisions set forth in the condominium statutes of Virginia and the District of Columbia.

2. In an attempt to strike a fair balance between the competing interests of rental tenants and prospective owners, subsection (b) provides the tenant a right for 60 days to purchase the unit which the tenant leases at a price and on terms offered by the declarant. The subsection discourages unreasonable offers by declarants by providing that, if the tenant fails to accept the terms offered, the declarant may not thereafter sell the unit at a lower price or upon more favorable terms to a third person for at least 180 days. However, the declarant is not required to offer residential tenants the right to purchase commercial units or to offer to sell to tenants if the dimensions of their previous apartments have been substantially altered. The reason for this exception is that, if an apartment is subdivided or if two apartments are merged into a single condominium unit, compliance with the requirements of subsection (b) would be impossible.

3. Jurisdictions with rent control statutes should consider whether amendments to this section are necessary to conform to the procedures or substantive requirements set out in the rent control laws or whether modifications to the rent control laws may be required as a result of the enactment of this section.

4. Except for the restrictions on permissible evictions stated in subsection (a), this Act does not change the law of summary process in a state. As a result, if a tenant refuses to vacate the premises following the 120-day notice, the usual provisions of the state's summary process

statutes would apply, while any defenses available to a tenant would also be available.

**SECTION 4-113. EXPRESS WARRANTIES OF QUALITY.**

(a) Express warranties made by a declarant to a purchaser of a unit, if relied upon by the purchaser, are created as follows:

(1) any affirmation of fact or promise which relates to the unit, its use, or rights appurtenant thereto, area improvements to the condominium that would directly benefit the unit, or the right to use or have the benefit of facilities not located in the condominium, creates an express warranty that the unit and related rights and uses will conform to the affirmation or promise;

(2) any model or description of the physical characteristics of the condominium, including plans and specifications of or for improvements, creates an express warranty that the condominium will conform to the model or description unless the model or description clearly discloses that it is only proposed or is subject to change;

(3) any description of the quantity or extent of the real estate comprising the condominium, including plats or surveys, creates an express warranty that the condominium will conform to the description, subject to customary tolerances; and

(4) a provision that a purchaser may put a unit only to a specified use is an express warranty that the specified use is lawful.

(b) Neither formal words, such as "warranty" or "guarantee," nor a specific intention to make a warranty, are necessary to create an express warranty of quality, but a statement purporting to be merely an opinion or commendation of the real estate or its value does not create a warranty.

(c) Any conveyance of a unit transfers to the purchaser all express warranties of quality

made by the declarant.

**Comment**

1. This section, together with Sections 4-114, 4-115, and 4-116, are adapted from the real estate warranty provisions contained in the Uniform Land Transactions Act (ULTA).

2. This section, which parallels Section 2-308 of ULTA, deals with express warranties, i.e., with the expectations of the purchaser created by particular conduct of the declarant in connection with inducement of the sale. It is based on the principle that, once it is established that the declarant has acted so as to create particular expectations in the purchaser, warranty should be found unless it is clear that, prior to the time of final agreement, the declarant has negated the conduct which created the expectation.

3. Subsection (b) makes it clear that no specific intention to make a warranty is necessary if any of the factors mentioned in subsection (a) are made part of the basis of the bargain between the parties. In actual practice, representations made by a declarant concerning condominium property during the bargaining process are typically regarded as a part of the description. Therefore, no particular reliance on the representations need be shown to weave them into the fabric of the agreement. Rather, the burden is on the declarant to show that representations made in the bargaining process were not relied upon by the purchaser at the time of contracting.

4. Paragraph (a)(1) provides that representations as to improvements and facilities not located in the condominium may create express warranties. Declarants often assert that recreational facilities, such as swimming pools, golf courses, tennis courts, etc., will be constructed in the future and that unit owners will have the right to use such facilities once constructed. Such assertions are intended to be included within the language "have the benefit of facilities not located in the condominium." If, under the circumstances, such improvements would benefit the unit being sold, then the declarant may be liable for breach of express warranty if they are not completed. Such liability is distinct from the declarant's obligations, under Section 4-119, to complete all improvements labeled "MUST BE BUILT" on plats and plans.

5. Under paragraph (a)(4), a contract provision permitting the purchaser to use a condominium unit only for a specified use or uses creates an express warranty that the unit may lawfully be used for that purpose. Therefore, if there is a limitation on use, the resulting express warranty could not be disclaimed by a disclaimer of implied warranties under Section 4-115.

6. The precise time when representations set forth in subsection (a) are made is not material. The sole question is whether the language or other representations of the declarant are fairly to be regarded as part of the contract between the parties.

7. Subsection (b) makes clear that it is not necessary to the existence of a warranty that the declarant have intended to assume a warranty obligation. By contrast, mere statements of opinion or commendations by the declarant do not necessarily create warranties. Whether a particular statement purports to be merely opinion or commendation is basically a question of whether the purchaser could reasonably rely upon the statement as a meaningful representation or promise

with respect to the condominium. That determination depends, in turn, not merely upon the words used but also upon the relative characteristics and skills of the parties. Thus a representation by a declarant to a novice purchaser that a particular condominium unit is in "good condition" may be more than mere opinion or commendation, while the same statement by a novice seller to a professional buyer would likely be only opinion or commendation, and thus not a warranty.

8. The provision of subsection (c) that the conveyance of a unit transfers to the purchaser all express warranties made by prior declarants is intended, in part, to avoid the possibility that a declarant could negate warranty obligations through the device of transferring a unit through a shell entity to the ultimate purchaser.

**SECTION 4-114. IMPLIED WARRANTIES OF QUALITY.**

(a) A declarant and any dealer warrants that a unit will be in at least as good condition at the earlier of the time of the conveyance or delivery of possession as it was at the time of contracting, reasonable wear and tear excepted.

(b) A declarant and any dealer impliedly warrants that a unit and the common elements in the condominium are suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by the declarant or dealer or made by any person before the creation of the condominium, will be:

(1) free from defective materials; and

(2) constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner.

(c) A declarant and any dealer warrants to a purchaser of a unit that may be used for residential use that an existing use, continuation of which is contemplated by the parties, does not violate applicable law at the earlier of the time of conveyance or delivery of possession.

(d) Warranties imposed by this section may be excluded or modified as specified in Section 4-115.

(e) For purposes of this section, improvements made or contracted for by an affiliate of a

declarant are made or contracted for by the declarant.

(f) Any conveyance of a unit transfers to the purchaser all of the declarant's implied warranties of quality.

**Comment**

1. This section, which is based upon Section 2-309 of ULTA, overturns the rule still applied in many states that a professional seller of real estate makes no implied warranties of quality (the rule of "caveat emptor"). In recent years, that rule has been increasingly recognized as a relic of an earlier age whose continued existence defeats reasonable expectations of purchasers. Since the 1930s, more and more courts have completely or partially abolished the caveat emptor rule, and it is clear that the judicial tide is now running in favor of seller liability.

2. The principal warranty imposed under this section is that of suitability of both the unit and common elements for ordinary uses of real estate of similar type, and of quality of construction. Both of these warranties, which arise under subsection (b), are imposed only against declarants and not against unit owners selling their units to others.

3. Many recent cases have held that a seller of new housing impliedly warrants that the houses sold are habitable. The warranty of suitability under this Act is similar to the warranty of habitability. However, under the Act, the warranty of suitability applies to both units and common elements in both commercial and residential condominiums. If, for example, a commercial unit is sold for commercial use although it is not suitable for the ordinary uses of condominium units of that type, the warranty of suitability has been breached. Moreover, this warranty of suitability arises in the case of used, as well as new, buildings or other improvements in the condominium.

4. The warranty of suitability and of quality of construction arises only against a declarant and persons in the business of selling real estate for their own account. As in the case of sales of goods, a non-professional seller is liable, if at all, only for any express warranties made by the seller. However, a non-professional seller who fails to disclose known defects may be liable to the purchaser for fraud or misrepresentation under the common law of the state where the transaction occurred. Also, the warranties imposed by this section may be used to give content to a general "guarantee" by a non-professional seller.

5. The warranty as to quality of construction for improvements made or contracted for by the declarant or made by any person before the creation of the condominium is broader than the warranty of suitability. Particularly, it imposes liability for defects which may not be so serious as to render the condominium unsuitable for ordinary purposes of real estate of similar type. Moreover, subsection (e) prevents a declarant from avoiding liability with respect to the quality of construction warranty by having an affiliated entity make the desired improvements.

6. Under subsection (c), a declarant also warrants to a residential purchaser that an existing use contemplated by the parties does not violate applicable law. The declarant, therefore, is liable for

any violation of housing codes or other laws which renders any existing use of the condominium unlawful.

7. The issue of declarant liability for warranties is an important one in cases where a transfer of the declarant's rights occurs, either as an arm's length transaction, as a transfer to an affiliate, or as a transfer by foreclosure or a deed in lieu of foreclosure. Subsection (f) makes clear that a conveyance of a unit transfers to the purchaser all warranties of quality made by any declarant, and Section 3-104(b)(1) makes clear that the original declarant remains liable for all warranties of quality with respect to improvements made by the declarant, even after the transfer of all declarant rights, regardless of whether the unit is purchased from the declarant who made the improvements. If the successor declarant is an affiliate of the original declarant, it is clear, under both Sections 3-104(b)(2) and 4-114(f), that the original declarant remains liable for warranties of quality or improvements made by a successor even after the declarant ceases to have any special declarant rights.

8. As to the liabilities of successor declarants for warranties of quality, a successor who is an affiliate of a declarant is liable, pursuant to Section 3-104(e)(1), for warranties or improvements made by the original declarant. However, any non-affiliated successor of the original declarant is liable only for warranties of quality for improvements made or contracted for by the non-affiliated successor, and is not liable for warranties which may lie against the original declarant even if the successor sells units completed by the original declarant to a purchaser. See Section 3-104(e)(2). In the case of a foreclosing lender, this is the same result as that reached under Section 2-309(f) of ULTA. The same result is also reached under ULTA in the case of a successor who, under ULTA Section 3-309(b), would be a seller in the business of selling real estate because under that subsection the seller is liable only for warranties or improvements made or contracted for by the seller.

**SECTION 4-115. EXCLUSION OR MODIFICATION OF IMPLIED WARRANTIES OF QUALITY.**

(a) Except as limited by subsection (b) with respect to a purchaser of a unit that may be used for residential use, implied warranties of quality:

(1) may be excluded or modified by agreement of the parties; and

(2) are excluded by expression of disclaimer, such as "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties.

(b) With respect to a purchaser of a unit that may be occupied for residential use, no general disclaimer of implied warranties of quality is effective, but a declarant and any dealer

may disclaim liability in an instrument signed by the purchaser for a specified defect or specified failure to comply with applicable law, if the defect or failure entered into and became a part of the basis of the bargain.

**Comment**

1. This section parallels Section 2-311(b) and (c) of ULTA.

2. Under this section, implied warranties of quality may be disclaimed. However, a warranty disclaimer clause, like any other contract clause, is subject to a possible court holding of unconscionability. Although the section imposes no requirement that a disclaimer be in writing, except in the case of residential units, an oral disclaimer might be ineffective under the law of parol and extrinsic evidence.

3. Except as against purchasers of residential units, there are no formal standards for the effectiveness of a disclaimer clause. All that is necessary under this section is that the disclaimer be calculated to notify the purchaser effectively of the nature of the disclaimer.

4. Under subsection (b), general disclaimers of implied warranties are not permitted with respect to purchasers of residential units. However, a declarant may disclaim liability for a specified defect or a specified failure to comply with applicable law in an instrument signed by such a purchaser. The requirement that the disclaimer as to each defect or failure be in a signed instrument is designed to insure that the declarant sufficiently calls each defect or failure to the purchaser's attention and that the purchaser has the opportunity to consider the effect of the particular defect or failure upon the bargain of the parties. Consequently, this section imposes a special burden upon the declarant who desires to make a "laundry list" of defects or failures by requiring him to emphasize each item on such a list and make its import clear to prospective purchasers. For example, the declarant of a conversion condominium might, consistent with this subsection, disclaim certain warranties for "all electrical wiring and fixtures in the building, the furnace, all materials comprising or supporting the roof, and all components of the air conditioning system."

5. This section is not intended to be inconsistent with, or to prevent, the use of insured warranty programs offered by some home builders. However, under the Act, the implied warranty that a new condominium unit will be suitable for ordinary uses (i.e., habitable) and will be constructed in a sound, workmanlike manner, and free of defective materials, cannot be disclaimed by general language.

**SECTION 4-116. STATUTE OF LIMITATIONS FOR WARRANTIES.**

(a) Unless a period of limitation is tolled under Section 3-111 or affected by subsection (d), a judicial proceeding for breach of any obligation arising under Section 4-113 or 4-114 must

be commenced within six years after the [claim for relief] [cause of action] accrues, but the parties may agree to reduce the period of limitation to not less than two years. With respect to a unit that may be occupied for residential use, an agreement to reduce the period of limitation must be evidenced by a separate instrument executed by the purchaser.

(b) Subject to subsection (c), a [claim for relief] [cause of action] for breach of warranty of quality, regardless of the purchaser's lack of knowledge of the breach, accrues:

(1) as to a unit, at the time the purchaser to whom the warranty is first made enters into possession if a possessory interest was conveyed or at the time of acceptance of the instrument of conveyance if a nonpossessory interest was conveyed; and

(2) as to each common element, at the time the common element is completed or, if later, as to:

(A) a common element that may be added to the condominium or portion thereof by exercise of development rights, at the time the first unit which was added to the condominium by the same exercise of development rights is conveyed to a bona fide purchaser; or

(B) a common element within any other portion of the condominium, at the time the first unit is conveyed to a bona fide purchaser.

(c) If a warranty of quality explicitly extends to future performance or duration of any improvement or component of the condominium, the [claim for relief] [cause of action] accrues at the time the breach is discovered or at the end of the period for which the warranty explicitly extends, whichever is earlier.

(d) During the period of declarant control, the association may authorize an independent committee of the executive board to evaluate and enforce any warranty claims involving the common elements, and to compromise those claims. Only members of the executive board

elected by unit owners other than the declarant and other persons appointed by those independent members may serve on the committee, and the committee's decision must be free of any control by the declarant or any member of the executive board or officer appointed by the declarant. All costs reasonably incurred by the committee, including attorney's fees, are common expenses, and must be added to the budget annually adopted by the association under Section 3-115. If the committee is so created, the period of limitation for a warranty claim considered by the committee begins to run from the date of the first meeting of the committee.

**Comment**

1. Under subsection (a), the parties may agree that the statute of limitations be reduced to as little as two years. However, such a contract provision (which, in the case of residential units, must be reflected in a separate written instrument executed by the purchaser) could, like other contract provisions, be subject to attack on grounds of unconscionability in particular cases.

2. Except for warranties of quality which explicitly refer to future performance or duration, a cause of action for breach of a warranty of quality would normally arise when the purchaser to whom it is first made enters into possession. Suit on such a warranty would thus have to be brought within six years thereafter. Even an inability to discover the breach would not delay the running of the statute of limitations in this regard.

3. Real estate sales frequently include warranties that certain components (e.g., furnaces, hot water heaters, air conditioning systems, and roofs) will last for a particular period of time. In the case of such warranties, the statute of limitations would not start running until the breach is discovered or, if not discovered before the end of the warranty term, until the end of the term.

4. The common elements typically have many components. While always dependent on the particular unit boundaries of the particular project, typical common elements include retaining walls, a swimming pool, water lines, sidewalks, party walls, etc. A phase for this purpose consists of the units, common elements and limited common elements created upon each occasion of the exercise by the declarant of development rights reserved by such declarant.

5. Under paragraph (b)(2)(ii), if the declarant has not reserved development rights to expand the condominium by adding units and common elements or limited common elements, the claim for relief or cause of action for a common element accrues at the later of the time of the first unit sale or the time that common element is completed. However, under amended Section 3-111, that period does not begin to run until declarant control terminates. By contrast, if the declarant has retained development rights to expand the condominium, the cause of action accrues upon the first conveyance of a unit within the phase which includes that particular common element.

6. New subsection (d) creates an alternative mechanism by which a declarant may create an independent board committee to evaluate and enforce warranty claims. The committee is analogous to an independent audit committee composed of outside directors in a publicly held corporation. This section strikes a balance between the legitimate interest of a declarant in not having to provide warranties on the common elements for an unreasonable time, and the equally legitimate interest of unit owners in having an independent analysis of warranty claims before those claims expire.

**SECTION 4-117. EFFECT OF VIOLATIONS ON RIGHTS OF ACTION; ATTORNEY'S FEES.**

(a) A declarant, association, unit owner, or any other person subject to this [act] may bring an action to enforce a right granted or obligation imposed by this [act], the declaration, or the bylaws. [Punitive damages may be awarded for a willful failure to comply with this [act].] The court may award reasonable attorney's fees and costs.

(b) Parties to a dispute arising under this [act], the declaration, or the bylaws may agree to resolve the dispute by any form of binding or nonbinding alternative dispute resolution, but:

(1) a declarant may agree with the association to do so only after the period of declarant control has expired unless the agreement is made with an independent committee of the executive board elected pursuant to Section 4-116(d); and

(2) an agreement to submit to any form of binding alternative dispute resolution must be in a record authenticated by the parties.

**Comment**

1. This section provides a general clause of action or claim for relief for failure to comply with the Act by either a declarant or any other person subject to the Act's provisions. Such persons might include unit owners, persons exercising a declarant's rights of appointment pursuant to Section 3-103(d), or the association itself. A claim for appropriate relief might include damages, injunctive relief, specific performance, rescission or reconveyance if appropriate under the law of the state, or any other remedy normally available under state law.

The language of subsection (a) is intentionally broad, and emphasizes the traditional authority of a court in equity to fashion a remedy suited to the circumstances of the case. Importantly, the provisions of this section would apply with equal force to a violation of either this Act or the

declaration or by-laws by "any person" besides the declarant — including, for example, the association in its dealings with unit owners, a property manager, or unit owners whose own behavior violates those same laws or instruments. In appropriate cases involving association or executive board activities, the court might grant relief in the form of requiring new elections, removal of officers from office, and orders requiring offending parties to make the association whole for improperly expended funds. A civil action may lie, in an appropriate case, for failure of the executive board to comply with the "open meeting" requirement of §3-108. These examples are not intended to exhaust the traditional authority of a judge to grant "appropriate relief," and that authority is emphasized by the specific grant of discretion to authorize punitive damages or attorneys fees, as the circumstances warrant. The brackets around the punitive damages provisions in subsection (a) reflect the drafters' awareness of differing policies on that subject among the states.

2. Subsection (b) reflect the Uniform Law Commission's judgment that resolving disputes by non-judicial means is a desirable outcome, subject to the limitations contained in this section.

3. Nothing in this section prohibits a unit owner from seeking independently to enforce any provision of the declaration, bylaws or rules. However, limitations in those instruments may require that the unit owner participate in some form of alternative dispute resolution before commencing suit. See Section 3-102(a)(18).

**SECTION 4-118. LABELING OF PROMOTIONAL MATERIAL.** No promotional material may be displayed or delivered to prospective purchasers which describes or portrays that improvement that is not in existence unless the description or portrayal of the improvement in the promotional material is conspicuously labeled or identified either as "MUST BE BUILT" or as "NEED NOT BE BUILT."

**Comment**

This section requiring the labeling of improvements depicted on promotional material is necessary to assure that purchasers are not deceived with respect to improvements the declarant indicates the declarant intends to make in a condominium.

**SECTION 4-119. DECLARANT'S OBLIGATION TO COMPLETE AND RESTORE.**

(a) Except for improvements labeled "NEED NOT BE BUILT," the declarant must complete all improvements depicted on any site plan or other graphic representation, including any plats or plans prepared pursuant to Section 2-109, whether or not that site plan or other

graphic representation is contained in the public offering statement or in any promotional material distributed by or for the declarant.

(b) The declarant is subject to liability for the prompt repair and restoration, to a condition compatible with the remainder of the condominium, of any portion of the condominium affected by the exercise of rights reserved pursuant to or created by Sections 2-110, 2-111, 2-112, 2-113, 2-115, and 2-116.

**Comment**

1. The duty imposed by subsection (a) is a fundamental obligation of the declarant and is one with which a successor declarant is obligated to comply under Section 3-104.

2. Section 4-119(b) requires the declarant to repair and restore the condominium following the exercise of any rights reserved or created to exercise a development right (Section 2-110), to alter units (Section 2-112), relocate the boundaries between adjoining units (Section 2-112), subdivide units (Section 2-113), use units or common elements for sales purposes (Section 2-115), or exercise of easement rights (Section 2-116). Plainly, this obligation on the declarant exists only if the declarant, in the declarant's capacity as a unit owner, exercises these rights. If any right to alter units, for example, is exercised by another unit owner, that unit owner and not the declarant would be responsible for the consequences of those acts.

**SECTION 4-120. SUBSTANTIAL COMPLETION OF UNITS.** In the case of a sale of a unit in which delivery of a public offering statement is required, a contract of sale may be executed, but no interest in that unit may be conveyed, until the declaration is recorded and the unit is substantially completed, as evidenced by a recorded certificate of substantial completion executed by an independent [registered] architect, surveyor or engineer, or by issuance of a certificate of occupancy authorized by law.

**Comment**

The purpose of this section, complemented by Section 4-110, is to assure that the declarant is not able to obtain use of the purchaser's money until the purchaser is able to get a completed unit.

# ARTICLE 5

# ADMINISTRATION AND REGISTRATION OF CONDOMINIUMS

## Prefatory Comment to Article 5

Administrative agencies have become an essential and accepted part of state government. Accordingly, the procedures by which those agencies adopt their rules and reach their decisions, as well as the powers of those agencies, have assumed great importance.

The existence of government regulation reflects the common belief that adequate enforcement of a particular field of law requires both public oversight of private compliance with law, and an ability in government to promulgate new regulations to meet new circumstances. Often, regulation also reflects the regulated industry's desires for certainty and for an administrative agency knowledgeable of, and perhaps sympathetic to, the needs of the industry.

At the same time, in some states the public's response to administrative regulation has become increasingly negative. The adoption of so-called "sunshine" and "sunset" laws, consolidation or merger of many agencies, and abolition of some outmoded boards and commissions, reflect a growing public perception that administrative enforcement may at times be neither efficient nor effective.

The debate on the general desirability of state agency regulation is reflected in the question of regulation of condominium development. While many states with widespread condominium activity, such as California, Florida, Virginia, and New York, have created agencies to regulate condominiums or have placed the regulation of condominiums in an existing governmental body, other states with substantial condominium activity, such as Illinois and Maryland, have chosen not to regulate condominiums, relying instead on the private market and lenders for consumer protection.

State administrative law does not demand uniformity between the States. For example, the Revised Model State Administrative Procedure Act (1961), noted that there was a demand for an act covering that subject, but that administrative procedure was a subject upon which uniformity between the states was neither necessary nor desirable. "Every student of administrative law recognizes that many of the procedural details involved in administrative action must necessarily vary more or less from state to state and even from agency to agency within the same state." Comment, Content of the Model State Administrative Procedure Act, Uniform Laws Annotated, Master Edition (see U.L.A. Directory of Acts for location).

The same reasoning applies to the law of condominiums. While uniform substantive law regarding condominiums and the protection to be provided to consumers is important, the means by which the substantive law is enforced does not require uniformity. Nevertheless, it appears desirable to provide the states the option of choosing agency regulation of condominiums, as many states have already chosen to do, by providing an optional article on agency administration which is closely integrated with the Uniform Condominium Act.
Accordingly, Article 5 may or may not be adopted, depending on whether or not a state chooses

to have agency regulation. The article has been drafted in such a way as to minimize the number of changes necessary in the body of the first four articles of the Act. However, in order to provide for close integration of Article 5 with the remainder of the Act, there are a number of sections in the Act where bracketed references to the agency or to Article 5 now exist. These sections are Sections 1-103(12), 1-208, 2-101(b), 2-101(c), 3-103(f), 3-104(e)(3), and 4-105. In the event that a state determines not to adopt Article 5, the bracketed clauses or provisions in each of the above sections which refer to Article 5 should be deleted. In the event a state adopts Article 5, the brackets should be removed and the clauses or provisions retained.

**SECTION 5-101. ADMINISTRATIVE AGENCY.** As used in this [act], "agency" means [insert appropriate administrative agency], which is an agency within the meaning of [insert appropriate reference to state administrative procedure act]. [Insert any related provisions on creation, selection, and remuneration of personnel, budget, annual reports, fees, and other administrative provisions appropriate to the particular state].

**Comment**

1. Each state should insert in lieu of the bracketed language in the first sentence that agency, whether it be the Real Estate Commission, the Attorney General's Office, or any other existing or new agency, which the state deems appropriate for regulation of condominiums.

2. The Revised Model State Administrative Procedure Act (the "Model Act") had been adopted in 20 states and the District of Columbia by 1981. The appropriate reference in those states to the definition of "Agency" would be the statute adopting Section 1(1) of the Model Act. In those states which have not adopted the Model Act, reference to a similar statute should be made to insure that the procedures of the agency regulating condominiums are undertaken in accordance with the principles of procedural due process which underlie the Model Act. In those states which do not have an administrative procedure act, appropriate administrative procedures should be included, either in this section or elsewhere in this article, to provide for hearings, appellate review, regulations, and other administrative matters.

3. As indicated, Article 5 was not designed to solve all procedural matters which are appropriate for an agency. Rather, the Act relies on the cross reference to a state administrative procedure act. Even in such states, however, it may be appropriate to include other provisions, either in Section 5-101 or elsewhere in this article, which are necessary under state practice to insure the proper functioning of a state agency. This might include budget authority, salary levels, civil service requirements, and the like. This may be particularly important when a new state agency is created.

**SECTION 5-102. REGISTRATION REQUIRED.** A declarant may not offer or dispose of a unit intended for residential use unless the condominium and the unit are registered with the agency, but a condominium consisting of no more than 12 units and which is not subject to development rights is exempt from the requirements of this section and Section 5-103(a).

**Comment**

1. Registration of a condominium is only required in the case of a condominium or unit intended for residential use. Commercial and industrial condominiums, accordingly, are exempt from registration under this Act. Also exempt from the requirement of registration is a small condominium containing 12 or fewer units, so long as the condominium is not subject to development rights. However, the small condominium and the industrial or commercial condominium are still subject to scrutiny by the agency under its general powers, despite the fact that registration is not required.

2. If Article 5 were adopted in a particular state, a declarant could not offer or dispose of a residential unit unless that unit were registered with the agency. However, a declarant could offer and dispose of the unit after registration was approved but before the condominium was created, subject to the requirements of Sections 2-101 and 5-103.

**SECTION 5-103. APPLICATION FOR REGISTRATION; APPROVAL OF UNCOMPLETED UNITS.**

(a) An application for registration must contain the information and be accompanied by any reasonable fees required by the agency's [rules] [regulations.] A declarant promptly shall file amendments to report any actual or expected material change in any document or information contained in the application.

(b) If a declarant files with the agency a declaration or proposed declaration, or an amendment or proposed amendment to a declaration, creating units which the declarant proposes to convey before they are substantially completed in the manner required by Sections 2-101(b) and 4-120, the declarant shall also file with the agency:

(1) a verified statement showing all costs involved in completing the buildings containing those units;

(2) a verified estimate of the time of completion of construction of the buildings containing those units;

(3) satisfactory evidence of sufficient funds to cover all costs to complete the buildings containing those units;

(4) a copy of the executed construction contract and any other contracts for the completion of the buildings containing those units;

(5) a 100 percent payment and performance bond covering the entire cost of construction of the buildings containing those units;

(6) plans for the units which shall conform to the requirements of Section 2-109(c);

(7) if purchasers' funds are to be utilized for the construction of the condominium, an executed copy of the escrow agreement with an escrow company or financial institution authorized to do business within the state which provides that:

(A) disbursements of purchasers' funds may be made from time to time to pay for construction of the condominium, architectural, engineering, finance, and legal fees, and other costs for the completion of the condominium in proportion to the value of the work completed by the contractor as certified by an independent [registered] architect or engineer, or bills submitted and approved by the lender of construction funds or the escrow agent;

(B) disbursement of the balance of purchasers' funds remaining after completion of the condominium must be made only when the escrow agent or lender receives satisfactory evidence that (i) the period for filing mechanic's and materialman's liens has expired, (ii) the right to claim those liens has been waived, or (iii) adequate provision has been made for satisfaction of any claimed mechanic's or materialman's lien; and

(C) any other restriction relative to the retention and disbursement of purchasers' funds required by the agency; and

(8) any other materials or information the agency may require by its [rules] [regulations.]

(c) The agency may not register the units described in the declaration or the amendment unless the agency determines, on the basis of the material submitted by declarant and any other information available to the agency, that there is a reasonable basis to expect that the units to be conveyed will be completed by the declarant following conveyance.

**Comment**

1. Subsection (a) is a general provision empowering the agency by regulation to develop requirements for information to be submitted to the agency, and for the imposition of reasonable fees by the agency. Such rules or regulations, under the Model Act, could be adopted only after providing notice to interested persons and an opportunity to be heard. See Section 3 of the Model Act. The article encourages, but does not require, development of uniform regulations between states adopting Article 5. See Section 5-107(e).

2. Under Section 2-101(b), a condominium declaration may not be recorded until all structural and mechanical systems for units which will be created by the recording are substantially completed. Under Section 4-120, no unit in a condominium may be conveyed unless the unit itself is substantially completed.

In addition, under Section 4-110, any deposit made in connection with the purchase or reservation of a unit must be held in escrow until closing. The combined effect of Sections 2-101, 4-120 and 4-110 is to insure that any funds of a purchaser are held in escrow until the unit is substantially completed, and the purchaser has title.

Subsection (b) is a departure from the requirements of Sections 2-106(b) and 4-120. The need for consumer protection suggests that substantial completion of a residential unit should be a prerequisite for adding that unit to the condominium or conveying the unit to a purchaser, in the absence of an agency to control and review condominium projects. Under subsection (b), however, a declarant may file a declaration or proposed declaration, or an amendment to a declaration, for the purpose of creating a condominium in which the buildings are not structurally completed.

Subsection (b) contemplates that the agency might nevertheless register the units described in the declaration or amendment, if the agency were satisfied that the units would be completed. Registration would then permit the declarant to offer to sell and convey units which had not yet

been built and to record the declaration.

In addition, paragraph (7) of Section 5-103(b) contemplates that purchaser's funds might be used, despite the language of Section 4-110 for construction of the condominium. Controls are imposed, however, to insure that disbursements are made in accordance with the value of work completed and approved by an escrow agent.

Note that the common elements in the condominium under the Act need not be completed at the time of the sale, even in the absence of an agency. Completion of common elements, however, is governed by Section 4-119 (Obligation to Complete and Restore).

3. The agency, by regulation, should determine the parties whom the payment and performance bond required under paragraph (b)(5) indemnifies.

**SECTION 5-104. RECEIPT OF APPLICATION; ORDER OR REGISTRATION.**

(a) The agency shall acknowledge receipt of an application for registration within [five] business days after receiving it. Within [60] days after receiving the application, the agency shall determine whether:

(1) the application and the proposed public offering statement satisfy the requirements of this Act and the agency's [rules] [regulations];

(2) the declaration and bylaws comply with this Act; and

(3) it is likely that the improvements the declarant has undertaken to make can be completed as represented.

(b) If the agency makes a favorable determination, it shall issue promptly an order registering the condominium. Otherwise, unless the declarant has consented in writing to a delay, the agency shall issue promptly an order rejecting registration.

**Comment**

1. This section provides reasonable deadlines for agency review of an application for registration, and describes the standards by which the application should be measured. The agency is directed to review the documents provided to the purchaser, and is given a great deal of discretion in mandating the form and content of the public offering statement; see Section 5-110.

2. The agency is also charged with reviewing those common element improvements which a declarant has promised to make, and which would be labeled under Section 4-118 as "MUST BE BUILT," to determine whether the declarant has the financial capacity to build them.

3. In the event the agency were to issue an order rejecting registration under subsection (b), an important issue concerning judicial review of that order may arise in some states. The order would appear to be a rejection of an application for a license, as defined in Section 1(3) of the Model Act; it would be a "contested case", however, within the meaning of Section 1(2) of the Model Act, only if "an opportunity for hearing" is provided. No right to a hearing, or right of appeal, is provided in the Act.

The order rejecting registration thus might not be appealable under Section 15 of the Model Act, because judicial review is provided under Section 15 only for "contested cases." While that section does not limit use of, or the scope of judicial review available under, other means of review, some courts have held that, in the absence of specific statutory authority to hear an appeal from an administrative decision, courts have no jurisdiction to entertain such an appeal. See, e.g., Rybinski v. State Employees' Retirement Comm., 173 Conn. 462 (1977).

Accordingly, the law of each state should be carefully reviewed. In cases where the state administrative procedure act provides for appeals from decision on licensing matters made by state agencies regardless of the availability of a hearing, no amendment would be required.

**SECTION 5-105. CEASE AND DESIST ORDERS.** If the agency determines, after notice and hearing, that any person has disseminated or caused to be disseminated orally or in writing any false or misleading promotional materials in connection with a condominium, or that any person has otherwise violated any provision of this Act or the agency's [rules] [regulations] or orders, the agency may issue an order to cease and desist from that conduct, to comply with the provisions of this Act and the agency's [rules] [regulations] and orders, or to take affirmative action to correct conditions resulting from that conduct or failure to comply.

**SECTION 5-106. REVOCATION OF REGISTRATION.**

(a) The agency, after notice and hearing, may issue an order revoking the registration of a condominium upon determination that a declarant or any officer or principal of a declarant has:

(1) failed to comply with a cease and desist order issued by the agency affecting that condominium;

(2) concealed, diverted, or disposed of any funds or assets of any person in a manner impairing rights of purchasers of units in that condominium;

(3) failed to perform any stipulation or agreement made to induce the agency to issue an order relating to that condominium;

(4) misrepresented or failed to disclose a material fact in the application for registration; or

(5) failed to meet any of the conditions described in Sections 5-103 and 5-104 necessary to qualify for registration.

(b) A declarant shall not convey, cause to be conveyed, or contract for the conveyance of any interest in a unit while an order revoking the registration of the condominium is in effect, without the consent of the agency.

(c) In appropriate cases the agency, in its discretion, may issue a cease and desist order in lieu of an order of revocation.

**Comment**

1. This section permits the agency, after notice and hearing, to revoke a prior registration of a condominium. Under Section 15 of the Model Act, the revocation would not be effective until the last day for seeking review of the agency order. While the filing of the appeal would not stay the agency's decision, the agency or reviewing court could grant a stay of the revocation. Naturally, this result may vary in a particular state.

2. A declarant is prohibited from disposing of any interest in a unit when registration has been revoked, without consent of the agency.

**SECTION 5-107. GENERAL POWERS AND DUTIES OF AGENCY.**

(a) The agency may adopt, amend, and repeal [rules] [regulations] and issue orders consistent with and in furtherance of the objectives of this [act], but the agency may not intervene in the internal activities of an association except to the extent necessary to prevent or cure violations of this [act]. The agency may prescribe forms and procedures for submitting

information to the agency.

(b) If it appears that any person has engaged, is engaging, or is about to engage in any act or practice in violation of this [act] or any of the agency's rules or orders, the agency without prior administrative proceedings may maintain an action in the [appropriate court] to enjoin that act or practice or for other appropriate relief. The agency is not required to post a bond or prove that no adequate remedy at law exists.

(c) The agency may intervene in any action involving the powers or responsibilities of a declarant in connection with any condominium for which an application for registration is on file.

(d) The agency may accept grants in aid from any governmental source and may contract with agencies charged with similar functions in this or other jurisdictions, in furtherance of the objectives of this [act].

(e) The agency may cooperate with agencies performing similar functions in this and other jurisdictions to develop uniform filing procedures and forms, uniform disclosure standards, and uniform administrative practices, and may develop information that may be useful in the discharge of the agency's duties.

(f) In issuing any cease and desist order or order rejecting or revoking registration of a condominium, the agency shall state the basis for the adverse determination and the underlying facts.

(g) The agency, in its sound discretion, may require bonding, escrow of portions of sales proceeds, or other safeguards it may prescribe by its [rules] [regulations] to guarantee completion of all improvements which a declarant is obligated to complete pursuant to Section 4-119 (Declarant's Obligation to Complete and Restore).

**Comment**

1. Under subsection (a), the agency is empowered to adopt regulations and issue orders in furtherance of the objectives of this Act. Those objectives are the same as the underlying purposes of the Act. The agency, however, is prohibited from intervening in the internal activities of the association except to the extent necessary to prevent or cure violations of this Act. The principal purpose of the agency is to regulate the behavior of the declarant, not the behavior of individual unit owners. If, however, the declarant is misusing the association by virtue of the declarant's power to control its activities, and thereby violating the Act, the agency may act to prevent the violation.

2. Subsection (g) empowers the agency to require bonding, escrow, or other safeguards to guarantee completion of improvements which a declarant must complete pursuant to Section 4-119.

A substantive requirement for bonding is not included under Article 4 for all condominiums in all circumstances. While some states have adopted bonding and escrow requirements for completion of the common elements, see, e.g., Conn. Gen. Stat. § 47-74d, the available economic evidence indicates that a universal bonding requirement would increase the cost of condominiums, and that the cost of such provisions may not always be justified. The principal concern for consumer protection in this regard has been resolved in the Act by requiring substantial completion of all units prior to conveyance (Section 4-120) and by requiring labeling of common elements as either "MUST BE BUILT" or "NEED NOT BE BUILT."

At the same time, particularly in the case of condominiums registered under Section 5-103(b), there may be individual cases where the agency, in its discretion, may find escrowing or bonding to be in the public interest. For that reason, this power is included only as a permissible power for the agency under Article 5.

**SECTION 5-108. INVESTIGATIVE POWERS OF AGENCY.**

(a) The agency may initiate public or private investigations within or outside this State to determine whether any representation in any document or information filed with the agency is false or misleading or whether any person has engaged, is engaging, or is about to engage in any unlawful act or practice.

(b) In the course of any investigation or hearing, the agency may subpoena witnesses and documents, administer oaths and affirmations, and adduce evidence. If a person fails to comply with a subpoena or to answer questions propounded during the investigation or hearing, the agency may apply to the [appropriate court] for a contempt order or injunctive or other

appropriate relief to secure compliance.

**Comment**

The powers enumerated in Sections 5-107 and 5-108 are specifically granted to the agency because of judicial determinations in various states that, in the absence of such statutory powers, agencies have no authority to act.

**SECTION 5-109. ANNUAL REPORT AND AMENDMENTS.**

(a) A declarant, within 30 days after the anniversary date of the order of registration, annually shall file a report to bring up-to-date the material contained in the application for registration and the public offering statement. This provision does not relieve the declarant of the obligation to file amendments pursuant to subsection (b).

(b) A declarant promptly shall file amendments to the public offering statement with the agency.

(c) If an annual report reveals that a declarant owns or controls units representing less than [25] percent of the voting power in the association and that a declarant has no power to increase the number of units in the condominium, or to cause a merger or confederation of the condominium with other condominiums, the agency shall issue an order relieving the declarant of any further obligation to file annual reports. Thereafter, so long as the declarant is offering any units for sale, the agency has jurisdiction over the declarant's activities, but has no other authority to regulate the condominium.

**Comment**

1. This section requires annual reports from a declarant to the agency to keep the information filed with the agency current. This requirement parallels the declarant's obligation to provide a current public offering statement to unit owners. See Section 4-103(c).

2. Under subsection (c), if the period of declaration control has passed, the declarant is relieved of the obligation to continue to file an annual report. However, the obligation to continue to provide public offering statements is imposed on a declarant under Section 4-103 so long as the declarant is offering any unit for sale. The agency would thus continue to have jurisdiction over

the declarant's activities, but would have no other authority to regulate the condominium.

**SECTION 5-110. AGENCY REGULATION OF PUBLIC OFFERING STATEMENT.**

(a) The agency at any time may require a declarant to alter or supplement the form or substance of a public offering statement to assure adequate and accurate disclosure to prospective purchasers.

(b) The public offering statement may not be used for any promotional purpose before registration and afterwards only if it is used in its entirety. No person may advertise or represent that the agency has approved or recommended the condominium, the disclosure statement, or any of the documents contained in the application for registration.

(c) In the case of a condominium situated wholly outside of this State, an application for registration or proposed public offering statement filed with the agency which has been approved by an agency in the state where the condominium is located and substantially complies with the requirements of this [act] may not be rejected by the agency on the grounds of non-compliance with any different or additional requirements imposed by this [act] or by the agency's [rules] [regulations.] However, the agency may require additional documents or information in particular cases to assure adequate and accurate disclosure to prospective purchasers.

**Comment**

1. Subsection (c) attempts to facilitate interstate sales of units by requiring the agency in the enacting state to accept an agency-approved public offering statement from the state where the condominium is located. This avoids the need for a different public offering statement in several states for the same project. If no agency exists in the state where the condominium is located, however, a public offering statement must be prepared and approved before offering an out-of-state unit in an enacting state.

2. Because of the bracketed language contained in Section 1-208, which should be inserted in the Act if Article 5 is enacted, a foreign condominium must only be registered under this Article in an enacting state if a declarant is "offering" the condominium in the enacting state. Thus, general

advertising which did not meet the definition of "offering" could be circulated in the enacting state without registration. If an "offering" is once made, however, then all of Article 5 applies to the foreign condominium. Any "disposition" of a foreign residential condominium in an enacting state, of course, would require delivery of a public offering statement even in the absence of an agency; see Section 1-208. If an agency exists in the enacting state, any disposition in that state would be illegal if the condominium were not registered in the enacting state; see Section 5-102.