

DRAFT  
FOR DISCUSSION ONLY

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

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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March 20, 2020 Drafting Committee Meeting

*REDLINE DRAFT*



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March 19, 2020

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

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AND THE UNIFORM CONDOMINIUM ACT**

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1       **AMEND OR REVISE THE UNIFORM COMMON INTEREST OWNERSHIP ACT**  
2                   **AND THE UNIFORM CONDOMINIUM ACT**

3  
4               \* \* \*

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

6               \* \* \*

7               (34) “Time share” means a right to occupy a unit or any of several units during [five] or  
8 more separated time periods over a period of at least [five] years, including renewal options,  
9 whether or not coupled with ~~an a freehold~~ estate or ~~interest an estate for years~~ in a common  
10 interest community or a specified portion thereof.

11              \* \* \*

12              (36) “Unit owner” means a declarant or other person that owns a unit, ~~or a~~ lessee of a  
13 unit in a leasehold common interest community whose lease expires simultaneously with any  
14 lease the expiration or termination of which will remove the unit from the common interest  
15 community, ~~or an owner or co-owner of a time share~~, but does not include a person having an  
16 interest in a unit solely as security for an obligation. In a condominium or planned community,  
17 the declarant is the owner of any unit created by the declaration. In a cooperative, the declarant  
18 is treated as the owner of any unit to which allocated interests have been allocated until that unit  
19 has been conveyed to another person.

20                               **Reporter’s Drafting Notes**

21  
22               1. The Study Committee Report (topic # 12) asks:” Should UCIOA deal  
23 with Time shares? Should each time share be fractionalized or treated as a  
24 separate unit?” In addition, the Study Committee recommends that the Drafting  
25 Committee “consider clarification and amplification of the definitions in UCIOA  
26 regarding time shares.” See also Study Committee Report pp. 37-38 for  
27 discussion of time-share issues. The Drafting Committee at its January 2020  
28 meeting discussed various time-share issues and asked the Reporter to draft  
29 language for consideration.  
30

2. The proposed amendment to the definition of “Time share” tracks the precise language of the definition of “time share” in the ULC’s Model Real Estate Time-Share Act. It avoids use of the word “interest,” which may create ambiguity – every time-share right, even if only a license, contract right, or membership right, might be an “interest” in a common interest community.

3. It is not clear that the definition of “Unit owner” includes a person who holds time-share rights. Is that a person “that owns a unit.? The proposed amendment tracks the language of the model act and expressly includes time-share owners as unit owners. If UCOIA is to cover time-shares to some extent, a time-share owner should always be a “unit owner.”

### Comment

\* \* \*

25. Definition (30) (34), “Time share,” is based on Section 1-102(14) and (18) of the Model Real Estate Time-Share Act.

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

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

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

26. Definition (35), “Unit,” describes a tangible, physical part of the project rather than a right in, or claim to, a tangible physical part of the property. Therefore, for example, ~~a “time-share” arrangement in which at the sale of a unit is sold to 12 different~~<sup>5</sup> persons as tenants in common, each of whom has the right to occupy the unit for one month does not create ~~12-5~~<sup>5</sup> new units – there are, rather, ~~12-5~~<sup>5</sup> owners of the unit. (Under the section on voting (Section ~~2-1103-110~~), a majority of the ~~time-share owners of a unit~~<sup>tenants in common</sup> are entitled to cast the vote assigned to that unit.)



common interest communities created after [the effective date of this act] or made subject to this [act] by amendment of the declaration of the common interest community, regardless of when the amendment to this [act] becomes effective.

**SECTION 1-204. APPLICABILITY TO PRE-EXISTING COMMON INTEREST COMMUNITIES.**

(a) Except for a cooperative or planned community described Section 1-205 or a nonresidential common interest community described in Section 1-207, the following sections apply to a common interest community 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 3-111;
- (14) Section 3-116;
- (15) Section 3-118;

1 (16) Section 3-124;

2 (17) Section 4-109;

3 (18) Section 4-117; and

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

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

8 **SECTION 1-205. APPLICABILITY TO SMALL PREEXISTING**  
9 **COOPERATIVES AND PLANNED COMMUNITIES.** If a cooperative or planned  
10 community created within this state before [the effective date of this act] contains no more than  
11 12 units and is not subject to any development right, it is subject only to Sections 1-105, 1-106,  
12 and 1-107 unless the declaration is amended in conformity with applicable law and with the  
13 procedures and requirements of the declaration to take advantage of Section 1-206, in which  
14 case, all the sections enumerated in Section 1-204(a) apply to that cooperative or planned  
15 community.

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

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

20 (b) Except as otherwise provided in Section 2-117(i) and (j), an amendment to the  
21 declaration, bylaws, or plats and plans authorized by this section must be adopted in conformity  
22 with any procedures and requirements for amending the instruments specified by those  
23 instruments or, if there are none, in conformity with the amendment procedures of this [act]. If

1 an amendment grants to a person a right, power, or privilege permitted by this [act], any  
2 correlative obligation, liability, or restriction in this [act] also applies to the person.

### 3 **Reporter's Drafting Notes**

4  
5 The Study Committee Report (topic #11) identifies the question of  
6 retroactive application of UCIOA "as one of the more significant issues on their  
7 agenda." The Study Committee observed "there is increasing sentiment that:

- 8  
9 (1) the lack of uniformity within a state regarding which laws apply and  
10 which do not has become a complex issue for the legal community;  
11 (2) it would be a considerable improvement in the administration of law  
12 and practice within a state if all communities were, to the maximum extent  
13 feasible, subject to the same law; and  
14 (3) the Study Committee members thought that courts would likely look  
15 more favorably on the topic today than once might have been the case."

16  
17 UCIOA presently addresses questions of prospective and retrospective  
18 application in several of the sections in Part 2 dealing with "Applicability." Some  
19 of these are "scope" provisions that exempt certain communities from UCIOA,  
20 whether they were formed before or after the effective date of UCIOA: Section 1-  
21 202 (small cooperatives), Section 1-203 (planned communities with very small  
22 common expenses), and Section 1-207 (nonresidential and mixed-use common  
23 interest communities). For all three of these types, the common interest  
24 community is able to opt-in by a provision in the declaration stating that UCIOA  
25 applies.  
26

27 Section 1-201, Section 1-204, Section 1-205, and Section 1-206 (all  
28 reproduced above) are the four sections that address prospective and retrospective  
29 application. The general rule is that UCIOA applies only prospectively, to  
30 common interest communities created after the effective date of the enacting  
31 legislation. Section 1-201. Then Section 1-204 provides an exception to the  
32 general rule, mandating the retroactive application of certain specified UCIOA  
33 sections to pre-existing communities.  
34

35 Significantly, the 1994 UCIOA amendments departed from the general  
36 rule of prospective-application-only when it added a new sentence to Section 1-  
37 201 dealing with amendments to UCIOA: "Amendments to this [act] apply to all  
38 common interest communities created after [the effective date of this act] or made  
39 subject to this [act] by amendment of the declaration of the common interest  
40 community, regardless of when the amendment to this [act] becomes effective."  
41 This is a bright-line rule that makes common interest communities already subject  
42 to UCIOA automatically subject to all statutory amendments, whether those  
43 amendments are minor or major changes.  
44

1 UCOIA allows existing communities to opt-in to the act. This is perhaps  
2 not as explicit as it could be, but it follows from Section 1-206 (amendments to  
3 governing instruments) and the last sentence of Section 1-201 (although  
4 discussing amendments to UCOIA, this allows preexisting communities to be  
5 “made subject to the act by amendment of the declaration”).  
6

7 If the Drafting Committee decides to amend the UCOIA retroactivity  
8 sections to make more preexisting communities subject to the act, we might  
9 replace Section 1-201 and Section 1-204 with a single section that starts with the  
10 general proposition that after a future transition date, all preexisting communities  
11 are subject to the Act. Then the next, essential, step would be to decide what  
12 exceptions should apply to the general principle. This is the model that legislation  
13 generally follows when it applies to institutions with a long life-span. For  
14 example, this is what typically happens when state legislatures revise their laws  
15 governing corporations and other organizations. The act designates an effective  
16 date several years in the future. E.g., Tex. Bus. Orgs. Code § 402.005,  
17 Applicability to Existing Entities (new business organizations code, enacted in  
18 2003 with an effective date of January 1, 2006, provides: “On or after January 1,  
19 2010 . . . this code applies to [entities formed before 2006] and all actions taken  
20 by the managerial officials, owners, or members of the entity, except as otherwise  
21 expressly provided by this title”). The new Texas Business Organizations Code  
22 also allowed early adoption of the new code by entities before the mandatory date  
23 of January 1, 2010. Id. §§ 402.003, 402.004.  
24

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

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

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

34 (c) Except as provided in subsection (d), a ~~A~~-common element not previously allocated  
35 as a limited common element may be so allocated only pursuant to provisions in the declaration

1 made in accordance with Section 2-105(a)(7). The allocations must be made by amendments to  
2 the declaration.

3 (d) A unit owner may apply to the association to amend the declaration to designate a  
4 common element immediately adjacent to the owner's unit as a limited common element  
5 allocated for the exclusive use of the unit. Unless the declaration provides otherwise, the  
6 amendment may be approved only if persons entitled to cast at least [67] percent of the votes in  
7 the association, including [67] percent of the votes allocated to units not owned by the declarant,  
8 agree to the action; provided, no vote is required if the limited common element does not exceed  
9 [50] square feet in area and is generally inaccessible and not of general use to any unit owner  
10 other than the unit owner requesting the allocation. The amendment may describe any fees or  
11 charges payable by the owner of the benefitted unit in connection with the allocation of the  
12 limited common element, and the fees and charges are assets of the association. The amendment  
13 must be executed by the owner of benefitted unit and recorded in the county where the original  
14 declaration is recorded.

### 15 Reporter's Drafting Notes

16  
17 1. The Study Committee Report (topic # 16) asks: "Should the HOA's  
18 Board of Directors be allowed to convert common elements into limited common  
19 elements benefitting fewer than all the unit owners without a vote of some or all  
20 of the unit owners?" New subsection (d) addresses this topic. The language of  
21 subsection (d) borrows from the existing text of Section 2-112(b), added to  
22 UCOIA as part of the 1994 amendments, which allows a unit owner to  
23 incorporate a common element into the owner's unit with a vote of the  
24 membership. Under new subsection (d), a vote of the unit owners is required for  
25 the reallocation of a common element as a limited common element unless the  
26 area of the common element to be reallocated is small and not generally  
27 accessible to other owners. Examples are (1) extending an upstairs balcony of a  
28 unit, (2) opening up the attic space over a unit, and (3) creating a storage closet  
29 from the airspace under a stairway that adjoins only the unit of the requesting  
30 owner.  
31  
32

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

## Alternative A

**[SECTION 2-114. EASEMENT FOR ENCROACHMENTS.** To the extent that any unit or common element encroaches on any other unit or common element, a valid easement for the encroachment exists. The easement does not relieve a unit owner of liability in case of his willful misconduct nor relieve a declarant or any other person of liability for failure to adhere to any plats and plans or, in a cooperative, to any representation in the public offering statement.]

## Alternative B

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

## End of Alternatives

### Comment

Two approaches are presented here as alternatives, since uniformity on this issue is not essential, and various States have adopted one approach or the other. Both theories recognize the

1 fact that the actual physical boundaries may differ somewhat from what is shown on the plats  
2 and plans, and the practical effect of both is the same.

3  
4 The easement approach of Alternative A creates easements for whatever discrepancies  
5 may arise, while the “monuments as boundaries” approach of Alternative B would make the title  
6 lines move to follow movement of the physical boundaries caused by such discrepancies or  
7 subsequent settling or shifting.

### 8 9 **Reporter’s Drafting Notes**

10  
11 The Study Committee Report (topic #4) calls for a consideration of the  
12 topic of shifting unit boundaries addressed by Section 2-114. Commissioner Cardi  
13 prepared an extensive analysis of the topic, identifying potential problems and  
14 raising a number of questions. His analysis is reproduced in the Study Committee  
15 Report, beginning at p. 45. The Drafting Committee at its January 2020 meeting  
16 briefly discussed this topic and asked the Reporter to study the matter further and  
17 report back at our April 2020 meeting.

18  
19 The Reporter believes that Commissioner Cardi has identified substantial  
20 problems and recommends that the committee consider amendments to the  
21 statutory text and the comments, guided by a discussion of Commissioner Cardi’s  
22 materials. Both Section 2-114 Alternatives leave a number of points open and  
23 unsettled and leave much to the imagination. The basic idea of Section 2-114 is  
24 clear and simple: Most encroachments ought to be cleared up by the creation of an  
25 easement (Alternative A) or by an adjustment of the legal boundary to conform to  
26 the space occupied by the encroachment (Alternative B). The problems and  
27 questions arise at the next level and include:

- 28
- 29 • What does “most” mean? Which encroachments should not be tolerated,  
30 leaving the encroached-upon owner to pursue the normal equitable and legal  
31 remedies available for trespass?
  - 32 • When a unit owner acquires an easement for encroachment or more space due  
33 to a boundary adjustment, should the unit owner ever have to pay  
34 compensation to the “victim”?
  - 35 • What does “willful misconduct” mean? Is this the same as proof that a unit  
36 owner knowingly trespassed when making the encroachment?
  - 37 • What is the relevance of deviations from plats and plans contained in the  
38 declaration? Who are the “other persons” described in both Alternatives who  
39 must comply with plats and plans? Is the unit owner an “other person”?
  - 40 • What is “substantial accordance” with the original boundaries or a “minor  
41 variance” from the original boundaries? Why does this matter for Alternative  
42 B but not for Alternative A?
  - 43 • Is there a difference between encroachments arising from the declarant’s  
44 original construction of improvements and subsequent changes? (See  
45 Commissioner Cardi’s condominium hypothetical and stone wall  
46 hypothetical.)

- Is there a difference between encroachments on units and encroachments on common areas?

The Comment asserts that “the practical effect of both [Alternatives] is the same.” This may be true in the general sense that awarding an easement for encroaching improvements versus transferring fee title to the airspace occupied by encroaching improvements does not make a significant difference for either party. But if the Comment’s assertion means that actual cases should be resolved the same way under both Alternatives, the Reporter doubts this is accurate (see bullet points above and Commissioner Cardi’s extensive analysis).

## **SECTION 2-118. TERMINATION OF COMMON INTEREST COMMUNITY.**

(a) Except for a taking of all the units by eminent domain, foreclosure against an entire cooperative of a security interest that has priority over the declaration, or in the circumstances described in Section 2-124, a common interest community may be terminated only ~~by agreement of unit owners of units to which~~ if 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 declaration may specify a ~~are allocated, or any~~ larger percentage and may require the declaration specifies, and with any other approvals ~~required by the declaration for~~ termination. The declaration may specify a smaller percentage only if all of the units 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 common interest community is situated and is effective only upon recordation.

(c) In the case of a condominium or planned community containing only units having horizontal boundaries described in the declaration, a termination agreement may provide that all

1 of the common elements and units of the common interest community must be sold following  
2 termination. If, pursuant to the agreement, any real estate in the common interest community is  
3 to be sold following termination, the termination agreement must set forth the minimum terms of  
4 the sale.

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

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

14 (1) title to ~~that the~~ real estate not already owned by the association shall vest,  
15 upon termination, ~~vests~~ in the association as trustee for the holders of all interests in the units;  
16 and

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

19 Thereafter, the association has all powers necessary and appropriate to effect the sale. Until the  
20 sale has been concluded and the proceeds thereof distributed, the association continues in  
21 existence with all powers it had before termination. Proceeds of the sale must be distributed to  
22 unit owners and lien holders as their interests may appear, in accordance with subsections (h), (i),  
23 and (j). Unless otherwise specified in the termination agreement, as long as the association holds

1 title to the real estate, each unit owner and the unit owner's successors in interest have an  
2 exclusive right to occupancy of the portion of the real estate that formerly constituted the unit.  
3 During the period of that occupancy, each unit owner and the unit owner's successors in interest  
4 remain liable for all assessments and other obligations imposed on unit owners by this [act] or  
5 the declaration.

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

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

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

23 (i) In a cooperative, the declaration may provide that all creditors of the association have

1 priority over any interests of unit owners and creditors of unit owners. In that event, following  
2 termination, creditors of the association holding liens on the cooperative which were [recorded]  
3 [docketed] [insert other procedures required under state law to perfect a lien on real estate as a  
4 result of a judgment] before termination may enforce their liens in the same manner as any lien  
5 holder, and any other creditor of the association is to be treated as if the creditor had perfected a  
6 lien against the cooperative immediately before termination. Unless the declaration provides that  
7 all creditors of the association have that priority:

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

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

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

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

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

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

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

(1) Except as otherwise provided in paragraph (2), the respective interests of unit owners are the fair market values of their units, allocated interests, and any limited common elements immediately before the termination, as determined by one or more independent appraisers selected by the association. The decision of the independent appraisers must be distributed to the unit owners and becomes 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 their allocated interests.

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

(A) in a condominium, their respective common element interests immediately before the termination;

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

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

(k) In a condominium or planned community, except as otherwise provided in subsection (l), foreclosure or enforcement of a lien or encumbrance against the entire common interest community does not terminate, of itself, the common interest community, and foreclosure or enforcement of a lien or encumbrance against a portion of the common interest community, other than withdrawable real estate, does not withdraw that portion from the common interest

1 community. Foreclosure or enforcement of a lien or encumbrance against withdrawable real  
2 estate, or against common elements that have been subjected to a security interest by the  
3 association under Section 3-112, does not withdraw, of itself, that real estate from the common  
4 interest community, but the person taking title thereto may require from the association, upon  
5 request, an amendment excluding the real estate from the common interest community.

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

#### 11 **Reporter's Drafting Notes**

12  
13 1. The Study Committee Report (topic # 5) recommends: "A drafting  
14 committee should consider whether amendments are needed to UCIOA § 2-118  
15 regarding termination of a common interest community." A variety of issues are  
16 identified. The first issue concerns the existing text in Section 2-118(a), which  
17 allows termination with a vote of at least 80 percent of the declared units. See  
18 Study Committee Report pp. 16-17. Section 2-118(a) allows a declarant who has  
19 sold less than 20 percent of the units to terminate the project without the approval  
20 of any of the buyers of units. This may create substantial hardships for buyers.  
21 One problem is that termination results in a tenancy in common, which may lead  
22 to partition by sale at a price that does not fully compensate the buyers who are  
23 forced to sell their units.

24  
25 The Drafting Committee discussed this issue at its January 2020 meeting,  
26 with the consensus that the Reporter prepare language adding a requirement of  
27 approval by the owners of 80 percent of the sold units. The amendment to  
28 subsection (a) modifies the voting procedure by requiring the approval of 80  
29 percent of the sold units in addition to 80 percent of all units. This adopts an  
30 existing voting procedure used in Section 2-117(g) for creating new development  
31 rights or extending the time limit for the exercise of development rights.

32  
33 2. The second issue identified by the Study Committee is whether separate  
34 provisions are advisable to deal with condominium "deconversions" that have  
35 taken place frequently in recent years. See Study Committee Report pp. 17-18.  
36 The present approval requirement for a termination and a sale of all of the

1 common interest community turns on whether all of the units have horizontal  
2 boundaries (the typical condominium with stacked units). If there are only units  
3 with horizontal boundaries, Section 2-118(c) authorizes a sale with an 80-percent  
4 supermajority vote of unit owners. But if community consists of units without  
5 horizontal boundaries (or is a hybrid with both stacked and non-stacked units), a  
6 unanimous vote of the unit owners is required under Section 2-118(d). This  
7 section might be simplified by requiring the same vote for all condominiums (or  
8 planned communities) regardless of unit configuration. The Illinois Condominium  
9 Property Act takes this approach for condominiums. 765 ILCS 605/15 makes a  
10 75-percent supermajority vote binding on all condominium unit owners.  
11

12 Another issue stemming from condominium deconversions is the proper  
13 division of sales proceeds among unit owners. Presumably, few problems should  
14 result when all unit owners have approved a sale, but when the vote for sale is not  
15 unanimous, an objecting unit owner might not receive adequate compensation.  
16 After the payment of liens, unit owners are to receive proportions of sales  
17 proceeds based on “the fair market values of their units . . . immediately before  
18 termination.” Section 2-118(j)(1). The executive board is in control of the process.  
19 Section 2-118(j)(1) requires the association to obtain one or more independent  
20 appraisals, which become final unless disapproved by a vote of at least 25 percent  
21 of the unit owners. The Illinois act, like several other condominium statutes,  
22 affords greater rights to dissident unit owners. 765 ILCS 605/15 guarantees a unit  
23 owner not voting in favor of sale a share of the proceeds equal to the greater of (i)  
24 the owner’s mortgage debt secured by the unit or (ii) a “fair appraisal,”  
25 determined in the case of disagreement by a panel of three expert appraisers (one  
26 appointed by the unit owner, one by the prospective purchaser, and one by the  
27 first two appraisers).  
28

29 The above text does not include proposed amendments to handle voting or  
30 the division of sales proceeds for deconversions. The Drafting Committee should  
31 consider these issues further.  
32

33 3. The third issue identified by the Study Committee concerns what  
34 happens to title to real property at the time of termination. See Study Committee  
35 Report p. 18. If termination is to result in a sale, the existing text provides that  
36 title to the real estate vests in the association as trustee. Section 2-118(e) But the  
37 association already has title to the real estate in a cooperative and title to common  
38 areas in a planned community. The amendment to subsection (e) clarifies the  
39 meaning by stating that title vests only for the real estate not already owned by the  
40 association. In addition, the amendment requires that the termination agreement  
41 recite the fact that title to the units passes to the association. This makes the  
42 transfer of record because the termination agreement is recorded in the public land  
43 records. Section 2-118(b).  
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1 Comment 8. First, existing Comment focuses on subsection (f), which addresses  
2 only the termination without sale of condominiums and planned communities; yet  
3 the Comment discusses the termination of cooperatives. Second, language in the  
4 Comment discusses sales and includes a cross-reference to sales proceeds in  
5 subsection (g). The amendments limit Comment 8 to discussion of the operation  
6 of subsection (f) and add a new Comment 9 to address the termination of  
7 cooperatives without a sale of the real estate.

8  
9 **REVISE DEFINITION OF “MASTER ASSOCIATION” SECTION 1-103(22)**

10 (22) “Master association” means an organization ~~described in Section 2-120, whether or~~  
11 ~~not it is also an association that holds any of the powers described in Section 3-102 or other~~  
12 ~~powers on behalf of one or more common interest communities or for the benefit of the unit~~  
13 ~~owners of one or more common interest communities described in Section 3-101. A master~~  
14 ~~association may also be a unit owners association.~~

15 **Reporter’s Drafting Notes**

16  
17 The proposed amendment to the definition of “Master Association” moves  
18 some of the language from existing Section 2-120(a) (below) and is designed to  
19 achieve consistency of usage throughout section 2-120.

20  
21 **SECTION 2-120. MASTER ASSOCIATIONS.**

22 (a) ~~If the~~The declaration ~~provides that~~may assign any of the powers described in Section  
23 3-102 ~~are to be exercised by or may be delegated to a profit or nonprofit corporation [or~~  
24 ~~unincorporated association] that exercises those or other powers on behalf of one or more~~  
25 ~~common interest communities or for the benefit of the unit owners of one or more common~~  
26 ~~interest communities, all to a master association.~~

27 (b) Unless restricted by the declaration, an executive board of a unit owners association  
28 may delegate any of the powers described in Section 3-102 to a master association. At the next  
29 meeting of the unit owners association, consideration of the delegation shall be an item on the  
30 agenda for the meeting. The unit owners may revoke the delegation by a majority of the votes

1 cast at the meeting. This subsection does not limit the right of the executive board or the unit  
2 owners to revoke the delegation of any power to a master association at any other time.

3 (c) An assignment or delegation of powers to a master association is effective upon  
4 acceptance by the master association. All provisions of this [act] applicable to unit owners<sup>2</sup>  
5 associations apply to ~~any such corporation [or unincorporated a master~~ association], except as  
6 modified by this section.

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

12 ~~(ce) If the declaration of any common interest community provides that the executive~~  
13 ~~board may delegate certain powers to a master association, the~~ The members of the executive  
14 board of the unit owners association have no liability for the acts or omissions of the master  
15 association with respect to ~~those the~~ powers ~~following delegation~~ held by the master association.

16 ~~(fd)~~ The rights and responsibilities of unit owners with respect to the unit owners<sup>2</sup>  
17 association set forth in Sections 3-103, 3-108, 3-109, 3-110, and 3-112 apply in the conduct of  
18 the affairs of a master association only to persons who elect the board of a master association,  
19 whether or not those persons are otherwise unit owners within the meaning of this [act].

20 ~~(eg)~~ Even if a master association is also ~~an a unit owners~~ association ~~described in Section~~  
21 ~~3-101~~, the certificate of incorporation or other instrument creating the master association and the  
22 declaration of each common interest community, the powers of which are assigned by the  
23 declaration or delegated to the master association, may provide that the executive board of the

1 master association must be elected after the period of declarant control in any of the following  
2 ways:

3 (1) All unit owners of all common interest communities subject to the master  
4 association may elect all members of the master association's executive board.

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

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

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

### 13 **Reporter's Drafting Notes**

14  
15 1. The Study Committee Report (topic # 6) asks: "To what extent may the  
16 unit owners association in a common interest community delegate any of its  
17 statutory authority to a Master Association for a larger planned community of  
18 which that HOA is a part?" The Drafting Committee at its January 2020 meeting  
19 voted in favor of an amendment to allow the executive board to delegate powers  
20 to a master association, subject to the right of unit owners to disapprove of the  
21 delegation by majority vote.  
22

23 The amendments to subsections (a) and (b) clearly differentiate between  
24 provisions in the declaration that establish and assign powers to a master  
25 association and a subsequent decision of the executive board of the common  
26 interest community to delegate powers to a master association.  
27

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

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

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

## SECTION 2-123 [NEW]. ADVERSE POSSESSION AND PRESCRIPTION OF

**COMMON ELEMENTS.** No unit owner shall acquire any title by adverse possession or any easement by prescription to any common element in derogation of the title of the other unit owners or the association.

## Reporter's Drafting Notes

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

2. The proposed new Section 2-123 protects all the common elements from loss of title by claims of adverse possession or prescription. This immunity applies to claims made by any person, including unit owners and neighboring property owners. This immunity is limited to real estate defined as “common elements” in UCOIA.

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

possession claim of this type protects the unit owners' interest in the common elements, rather than jeopardizing the unit owners' expectations of ownership and use of the common elements.

4. The language in this section is based on Minn. Stat. § 508.02, which provides: "No title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession, but the common law doctrine of practical location of boundaries applies to registered land whenever registered."

Like the Minnesota statute, this section refers to both "adverse possession" and "prescription." A Minnesota court has interpreted the statutory reference to "prescription" to preclude the creation of a prescriptive easement against registered land. *Moore v. Henricksen*, 165 N.W.2d 209, 216–17 (Minn. 1968). Accordingly, this provision is intended to immunize the common elements from claims of prescriptive easements made by any person.

5. This section provides a more limited immunity than Approach 1 described in the Reporter's Memorandum in its protection of the common elements. This Section precludes only a claim made by a unit owner. When the unit owners own the common elements in tenancy in common, this provision modifies existing law by not allowing a unit owner to acquire adverse possession by proving an "ouster" of the other cotenants. When the association owns the common elements, this provision modifies existing law, which in most states lacks reported law clearly delineating the requirements for a person to acquire adverse possession title to property owned by an association of which the person is a member.

### **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

\* \* \*

\* \* \*

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

\* \* \*

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

1 common elements to any person other than a unit owner;

2 \* \* \*

### 3 **Reporter's Drafting Notes**

4  
5 This proposed amendment is a companion to the proposed amendment to  
6 Section 2-108 discussed above, dealing with the ability of the executive board to  
7 covert common elements into limited common elements. The amendment to  
8 Section 3-102(a)(9) is designed to make this section compatible with the  
9 procedures of Section 2-108 and Section 2-112, which generally require a vote of  
10 the membership for the executive board to allocate a common element for the  
11 exclusive use of a unit owner by redesignation as a limited common element or  
12 relocation of the boundary between the unit and the common element. A board  
13 might avoid these procedures by granting an easement or a long-term lease or  
14 license to a unit owner. Section 3-102(6) allows the board to "regulate the use" of  
15 common elements, but this should not be interpreted to allow the board to assign  
16 the exclusive use to one or less than all of the unit owners.

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

18  
19 (a) Except as otherwise provided in the declaration, the bylaws, subsection (b), or other  
20 provisions of this [act], the executive board acts on behalf of the association. In the performance  
21 of their duties, officers and members of the executive board appointed by the declarant shall  
22 exercise the degree of care and loyalty to the association required of a trustee. Officers and  
23 members of the executive board not appointed by the declarant shall exercise the degree of care  
24 and loyalty to the association required of an officer or director of a corporation organized, and  
25 are subject to the conflict of interest rules governing directors and officers, under [insert  
26 reference to state nonprofit corporation law]. The standards of care and loyalty described in this  
27 section apply regardless of the form in which the association is organized.

28 (b) The executive board may not:

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

30 (2) amend the bylaws;

31 (3) terminate the common interest community;

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

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

\* \* \*

### Reporter's Drafting Notes

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

10. The relationship of the HOA's board of directors with individual unit owners.

17. Should the Study Committee revisit the balance between the right of a unit owner to have information and comment and the need of the board to act in an efficient manner?

The Drafting Committee at its January 2020 meeting discussed the model of representative governance generally used in UCOIA Article 3 and the possibility of augmenting owner participation. One question is whether to allow unit owners to rescind a new rule or regulation passed by the board. Presently the avenue for relief is voting in a new board or recalling board members. The Drafting Committee agreed to defer consideration of this question for its April 2020 meeting.

### Comment

1. Subsection (a) makes officers and members of the executive board appointed by the declarant liable as trustees of the unit owners with respect to their actions or omissions as members of the board. This provision imposes a very high standard of duty because the board is vested with great power over the property interests of unit owners, and because there is a great potential for conflicts of interest between the unit owners and the declarant. The 1994 amendment to subsection (a) added precision by changing the standard of care for declarant-appointed officers and members from "fiduciary" to "trustee." The law contemplates many forms of fiduciary relationships; among them, the trustee's duty is the highest.

Originally subsection (a) specified that officers and members elected by the unit owners have a duty of "ordinary and reasonable care. The 1994 amendment conforms the Act to expectations of owners, members of executive boards, and courts. The duties owed by an elected officer or board member ought to parallel the standards imposed on persons holding equivalent

1 positions in non-profit corporations in the state where the common interest community is located.

2  
3 For both declarant-appointed and elected officers and members, subsection (a) looks to  
4 other state law to measure the standard of care and the basis of liability. For declarant-appointed  
5 persons, the law of trusts determines the precise content of the fiduciary duties, as well as other  
6 duties including conflict-of-interest rules, owed to the unit owners. For elected officers and  
7 members, the standards of conduct and the standards of liability are determined by the content of  
8 the state nonprofit corporation statute.

9  
10 A majority of states have adopted a version of the ABA's Model Nonprofit Corporation  
11 Act (MNCA) (3d ed. 1987; the ABA is presently working on a 4th edition). MNCA Section 8.30  
12 sets forth standards of conduct and section 8.31 sets forth standards of liability for directors.  
13 Executive board members are treated as “directors” whether or not they have the formal title of  
14 “director” as a member of the association’s governing board. Section 8-31 has several  
15 components, one of which reflects some of the principal elements of the common-law business  
16 judgment rule. In many judicial decisions, courts have decided to use the business judgment rule  
17 as the basis for evaluating the activities of the executive board of a unit owners association, e.g.,  
18 Committee for a Better Twin Rivers v. Twin Rivers Homeowners Association, 929 A.2d 1060  
19 (N.J. 2007). Under subsection (a) executive board members often will continue to obtain the  
20 benefits of the business judgment rule. MNCA Section 8.42 prescribes standards of conduct for  
21 officers; they include a duty to act with the care of “an ordinarily prudent person.” States without  
22 the model act may apply different rules for director conduct, such as a trust rule or the rules  
23 applicable to directors of standard, for-profit corporations, as well as different rules for officers.

24 . . . .

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

32  
33 ~~Comment 5 was expanded in 2008, because of the importance of this issue. The Act~~  
34 ~~continues to rely on the Business Judgment Rule as the basis for evaluating the actions of the~~  
35 ~~Board. “As long as directors of a corporation decide matters rationally, honestly, and without a~~  
36 ~~disabling conflict of interest, the decision will not be reviewed by the courts.” Atkins v. Hibernia~~  
37 ~~Corp., 182 F3d 320, 324, (5 th cir. 1999) quoted in Block, Barton & Radin, The Business~~  
38 ~~Judgment Rule, (5th ed. 1998) in 2002 Supp. Page 6.~~

39  
40 ~~The business judgment rule is a tool of judicial review, not a standard of conduct. The rule (1)~~  
41 ~~shields directors from liability and protects decisions made by directors when The rule’s~~  
42 ~~elements—a business decision, disinterestedness, and independence, due care, good faith and no~~  
43 ~~abuse of discretion—are present and a challenged decision does not constitute fraud, illegality,~~  
44 ~~ultra vires conduct or waste, and (2) creates a presumption that directors have acted in~~  
45 ~~accordance with each of the elements of the rule.~~

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

6  
7 The change from “fiduciary” to “trustee” as the standard of care for declarant appointed  
8 directors makes the standard of care more precise. The law contemplates many forms of  
9 fiduciary relationships; among them, the trustee’s duty is the highest.

10  
11 \* \* \*

## 12 **Reporter’s Drafting Notes**

13  
14 The Study Committee Report (topic # 17) asks: “Should the Study  
15 Committee revisit the balance between the right of a unit owner to have  
16 information and comment and the need of the board to act in an efficient  
17 manner?” The Study Committee identifies one subissue: “B. Whether the UCIOA  
18 standard of care for the board to act [is] the proper standard?” The Drafting  
19 Committee at its January 2020 meeting discussed the issue and asked the Reporter  
20 to draft a Comment explaining various types of standards of care and when  
21 UCOIA provides standards and when it points to other state law to provide  
22 standards.

23  
24 The proposed amendment to Comment 1 of Section 3-103 explains that  
25 UCOIA now looks outside the act to other state law to determine the standard of  
26 care and standard of liability for association officers and members of the  
27 executive board. The proposed amendment deletes Comment 5, which covers the  
28 same topic, and incorporates some of the deleted material into the additions to  
29 Comment 1.

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

31  
32 **NOTE – This revised section was formerly §3-104(a)**

33 (a) A declarant may transfer a special declarant right (Section 1-103(2933)) ~~created or~~  
34 reserved under this [act] ~~may be transferred~~ only by an instrument evidencing the transfer  
35 executed by the declarant and the transferee.

36 (b) Except as provided in Section 3-104D, a declarant who transfers less than all of its  
37 special declarant rights to a transferee retains all special declarant rights that are not transferred.

38 (c) An instrument transferring special declarant rights must be recorded in every [county]

1 in which any portion of the common interest community is located and is effective only upon  
2 recordation. ~~The instrument is not effective unless executed by the transferee.~~

### 3 **Reporter's Drafting Notes**

4  
5 1. The Study Committee Report (topic # 15) calls for consideration of  
6 issues concerning declarant liability and the liability of successor declarants, both  
7 those who are affiliates and not affiliates of the original declarant. See Study  
8 Committee Report pp. 51-58. The Drafting Committee at its January 2020  
9 meeting discussed many of the issues and asked the committee Chair and the  
10 Reporter to attempt to rewrite and reorganize the set of rules contained in existing  
11 Section 3-104. Their effort includes the division of content from existing Section  
12 3-104 into a series of new sections, denominated Section 3-104 (above), Sections  
13 3-104A through 3-104E (below), and a new definition of "Non-affiliate  
14 successor" that serves as a companion to the existing definition of "Affiliate of a  
15 declarant" in Section 1-103(1).  
16

17 2. New subsection (b) addresses a concern raised by the Study Committee  
18 based on a sentence in existing Comment 3 to Section 3-104: "The transfer by a  
19 declarant of all of his interest in a project to a successor without a concomitant  
20 transfer of the special rights of a declarant pursuant to this subsection, results in  
21 the automatic termination of such special declarant rights and of any period of  
22 declarant control." See Study Committee Report p. 56 (Issue Six). The Drafting  
23 Committee at its January 2020 meeting discussed this issue, with the consensus  
24 that special declarant rights that are not transferred remain with the declarant. The  
25 Comment does not have support in the existing statutory language. Subsection (b)  
26 calls for the opposite outcome, and Comment 3 should be deleted.  
27

28 3. The Study Committee questions whether a transfer of special declarant  
29 rights should be effective between the transferor and transferee before  
30 recordation. See Study Committee Report p. 54 (Issue Two). The language of  
31 existing Section 3-104(a) appears to indicate the transfer is effective only upon  
32 recordation. The Drafting Committee at its January 2020 meeting discussed the  
33 issue, with the consensus that recording is necessary. New subsection (c) makes  
34 this explicit, tracking the language used in Section 2-118(b) for the effectiveness  
35 of termination agreements. This is an exception to the normal rule that agreements  
36 and conveyances are effective between the parties when executed, prior to  
37 recordation. The purpose of delaying effectiveness, even between the parties, is to  
38 perform a notice function. Recording allows all third parties, including unit  
39 owners, to ascertain who holds and may exercise special declarant rights at all  
40 times, and thus who has obligations and liabilities stemming from special  
41 declarant rights.  
42

43 4. The Study Committee asks whether there should be limits on how many  
44 persons may receive and hold special declarant rights at one point in time, asking

whether it would be preferable to identify a single declarant who is in control and responsible. See Study Committee Report p. 55 (Issue Four). The Drafting Committee at its January 2020 meeting discussed the issue, with the consensus that the intent of existing Section 3-104 is not to limit transfers and the fragmentation of special declarant rights. Subsections (a) and (b) make it clearer that the act imposes no limits. Usually a developer will not find it advantageous to divide special declarant rights among more than a few persons. Fragmentation when it occurs may sometimes make it harder for third parties, including unit owners, to determine who holds what special declarant rights and who is responsible for certain obligations and liabilities. The recording rule discussed above (Note 3) and the reorganization of the rules addressing obligations and liabilities (see new sections below) should allow third parties to find this information.

### Comment

\* \* \*

3. Subsection (a) provides that a successor in interest to a declarant may acquire the special rights of the declarant only by recording an instrument which reflects a transfer of those rights. This recordation requirement is important to determine the duration of the period of declarant control pursuant to Section 3-103(d) and (e), as well as to place unit owners on notice of all persons entitled to exercise the special rights of a declarant under this Act. ~~The transfer by a declarant of all of his interest in a 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.~~

A declarant may wish to transfer special declarant rights as a part of his transfer to another person of units already constructed in a cooperative. . . .

### Reporter's Drafting Notes

This sentence in Comment 3 is deleted because it is inconsistent with the existing statutory text of Section 3-104 and with a proposed addition to Section 3-104. See Reporter's Drafting Note 2 to Section 3-104 (above).

### ADD A NEW DEFINITION TO ARTICLE 1, SECTION 1-103

(x) "Non-affiliate successor" means any person who succeeds to any special declarant right and is not an affiliate of the declarant who transferred special declarant rights to the person.

### SECTION 3-104A. LIABILITY OF A TRANSFEROR DECLARANT.

NOTE – This new section was formerly §3-104(b)

1        ~~(ba)~~ If a transferor declarant~~Upon~~ transfers ~~of~~ any special declarant right to an affiliate of  
2 the declarant, the ~~liability of a~~ transferor declarant and the successor declarant become jointly  
3 and severally ~~is as follows:~~

4        ~~(1)~~ A transferor is ~~not relieved of any obligation or liability arising before the transfer~~  
5 ~~and remains~~ liable for warranty-all obligations and liabilities imposed upon ~~him either party~~ by  
6 this [act] or the declaration. Lack of privity does not deprive any unit owner of standing to  
7 maintain an action to enforce any obligation or liability of the transferor or the transferee.

8        ~~(2b)~~ If a ~~succcessor to~~ transferor declarant transfers any special declarant right ~~is an~~ to a  
9 non-affiliate of a declarant (Section 1-103(1)) ~~successor~~, the transferor ~~is jointly and~~  
10 ~~severally~~ remains liable ~~with the successor~~ for any obligations or ~~liabilities~~ liability arising before  
11 the transfer, including warranty obligations imposed upon the transferor declarant by this [act] of  
12 the successor relating to the common interest community.

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

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

### 21        SECTION 3-104B. LIABILITY OF A SUCCESSOR DECLARANT.

22        NOTE – This new section was formerly §3-104-(e)(1)-(3)

23        ~~(ea)~~ Except as otherwise provided in this section, a ~~The liabilities and obligations of a~~

1 ~~person who succeeds to special declarant rights are as follows:~~

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

4 ~~(b) A non-affiliate successor who acquires less than all the special declarant rights held~~  
5 ~~by the transferor is not subject to obligations or liabilities that relate to special declarant rights~~  
6 ~~not acquired by the successor.~~

7 ~~(2c) A non-affiliate~~ successor ~~is not subject to any obligations or liabilities that to any~~  
8 ~~special declarant right, other than a successor described in paragraph (3) or (4) or a successor~~  
9 ~~who is an affiliate of a declarant, is subject to the obligations and liabilities imposed by this [act]~~  
10 ~~or the declaration:~~

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

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

14 ~~(A1)~~ misrepresentations by any previous declarant;

15 ~~(B2)~~ warranty obligations on improvements made by any previous declarant, or made  
16 before the common interest community was created;

17 ~~(C3)~~ breach of any fiduciary obligation by any previous declarant or his appointees to  
18 the executive board; or

19 ~~(D4)~~ any ~~liability or~~ obligation or liability imposed on the transferor as a result of the  
20 transferor's acts or omissions after the transfer.

21 ~~(3d) A non-affiliate~~ successor ~~to who acquires~~ only a special declarant right ~~reserved in~~  
22 ~~the declaration~~ to maintain offices, signs, and models, ~~sales offices, and signs~~ (Section 2-115);  
23 may not exercise any other special declarant right; and is not subject to any obligation or liability

1 ~~or obligation~~ as a declarant, except obligations and liabilities related to the obligation to provide a  
2 public offering statement ~~[,] and any liability arising as a result thereof [;~~ and obligations under  
3 [Article] 5].

4 (e) A successor who acquires special declarant rights after foreclosure of a security  
5 interest, tax sale, judicial sale, or sale in bankruptcy or receivership proceedings and complies  
6 with the requirements of Sections 104D, 104E, and 104F is not subject to any obligation or  
7 liability as a declarant other than liability for his acts and omissions under Section 3-103(d).

#### 8 **Reporter's Drafting Notes**

9  
10 One concern raised by the Study Committee is whether the existing  
11 language of Section 3-104(b) is sufficiently clear with respect to the allocation of  
12 liability for warranties between the transferor declarant and the transferee  
13 declarant. The proposed amendments clarify the issue. When the transferee is an  
14 affiliate, the joint and several liability of both parties under Section 3-104A(a)  
15 “for all obligations and liabilities” includes all warranty obligations, regardless of  
16 when improvements are made and when a breach occurs.

17  
18 When a transferor declarant transfers a special declarant right to a non-  
19 affiliate successor, under Section 3-104A(b) the transferor remains liable for  
20 “warranty obligations imposed upon the successor.” A transferee declarant who is  
21 not an affiliate of the transferor becomes liable for all warranty obligations except  
22 for “warranty obligations on improvements made by any previous declarant, or  
23 made before the common interest community was created” under Section 3-  
24 104B(c)(3). In other words, the transferee declarant is liable for warranties on  
25 improvements made after its acquisition of special declarant rights.

#### 26 **SECTION 3-104C. TRANSFER OF SPECIAL DECLARANT RIGHTS**

#### 27 **FOLLOWING INVOLUNTARY SALE.**

28 **NOTE – This new section was formerly §3-104(c)**

29  
30 (ea) This section applies if a declarant owned units or real estate in a common interest  
31 community subject to development rights that are sold in ~~Unless otherwise provided in a~~  
32 ~~mortgage instrument, deed of trust, or other agreement creating a security interest, in case of~~  
33 ~~foreclosure of a security interest, sale by a trustee under an agreement creating a security interest,~~

1 tax sale, judicial sale, or sale ~~under Bankruptcy Code~~ in bankruptcy or receivership proceedings,<sup>5</sup>  
2 ~~of any units owned by a declarant or real estate in a common interest community subject to~~  
3 ~~development rights,~~

4 (b) Unless otherwise provided in an instrument creating the security interest being  
5 foreclosed, a person acquiring title to all the property being foreclosed or sold, but only upon ~~his~~  
6 the person's request, succeeds to all special declarant rights related to ~~that the~~ property held by  
7 ~~that the~~ declarant, or only to any the special declarant rights ~~reserved in the declaration to~~  
8 maintain offices, signs, and models pursuant to Section 2-115 ~~and held by that declarant to~~  
9 ~~maintain models, sales offices, and signs.~~ The judgment or instrument conveying title must  
10 provide for transfer of only the special declarant rights requested.

### 11 **Reporter's Drafting Notes**

12  
13 This new section and the following two sections are a reorganization of  
14 the parts of existing Section 3-104 that address the foreclosure sales with the  
15 transfer of special declarant rights from the defaulting declarant to a foreclosure  
16 purchaser. The Chair and Reporter reorganized without attempting to make  
17 changes of substance to the existing statutory text.

18  
19 The Reporter, however, recommends that the Drafting Committee review  
20 the substance and consider whether changes are advisable, either to make changes  
21 of substance or to clarify how the provisions are intended to operate. Points to  
22 discuss include the following:

- 23  
24 • The scope of the provision is the foreclosure of real estate when the  
25 declarant owns development rights. Development rights are defined in  
26 Section 1-201(16) and they are one of the ten types of special declarant  
27 rights. See Section 1-201(33)(B). What if the declarant does not have  
28 development rights at the time of the foreclosure but owns other  
29 special declarants rights? Should the scope be expanded to cover  
30 transfer of special declarant rights in this situation?
- 31  
32 • The provision may mean that the foreclosure purchaser has three  
33 choices: take all of the declarant's special declarant rights, take none  
34 of them, or take only the special declarant right under Section 1-  
35 201(33)(C) to maintain offices, signs, and models. Should the  
36 purchaser have the right to "pick and choose," the same as in a

voluntary transfer under Section 3-104 above?

- The Reporter believes that most of the special declarant rights defined in Section 1-201(33) are intangible personal property; specifically, general intangibles under UCC Article 9. The existing provision appears to treat special declarant rights as if they are real property. Although the statute does not say this directly, Section 3-104 Comment 7 states that a declarant's "right to create additional units . . . is an interest in land which may be sold or in which a security interest may be granted." UCOIA defines "security interest" as "an interest in real estate or personal property, created by contract or conveyance, which secures payment or performance of an obligation." We should consider how our Section 3-104C, D, and E provisions fit with Article 9.
- Which involuntary transfers should the provision cover? Section 3-104 Comment 7 refers to "a conveyance in lieu of foreclosure" but this is not in the statutory text.
- The provision appears to contemplate that a foreclosure sale will transfer all of the declarant's units and real estate in the community. What if a foreclosure or other involuntary sale transfers only some of the declarant's units or property? Is that within the scope of the provision, and if so, what happens?

**SECTION 3-104D. CONSEQUENCES OF INVOLUNTARY SALE OF ALL  
REAL ESTATE IN A COMMON INTEREST COMMUNITY HELD BY A  
DEFAULTING DECLARANT.**

**NOTE – This new section was formerly §3-104(d)**

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

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

(2) the period of declarant control (Section 3-103(d)) terminates unless the

judgment or instrument conveying title provides for transfer of all special declarant rights held by that declarant to a successor declarant.

1           **SECTION 3-104E. LIMITATION ON LIABILITY OF A SUCCESSOR**

2           **HOLDING SPECIAL DECLARANT RIGHTS SOLELY FOR TRANSFER.**

3           NOTE – This new section was formerly §3-104(e)(4)

4           (a4) ~~A~~ If a successor to all special declarant rights held by a transferor ~~who~~ succeeded to  
5 those rights pursuant to Section 3-104C, the successor ~~a deed or other instrument of conveyance~~  
6 ~~in lieu of foreclosure or a judgment or instrument conveying title under subsection (e);~~ may  
7 declare its intention in a recorded instrument ~~the intention~~ to hold those rights solely for transfer  
8 to another person.

9           ~~(b) After recording the instrument, the~~ Thereafter, until transferring all special declarant  
10 ~~rights to any person acquiring title to any unit or real estate subject to development rights owned~~  
11 ~~by the successor, or until recording an instrument permitting exercise of all those rights, that~~  
12 successor may not exercise any ~~of those rights~~ special declarant right other than any right held by  
13 ~~his the~~ transferor to control the executive board in accordance with Section 3-103(d) ~~for the~~  
14 ~~duration of any period of declarant control,~~ and any ~~attempted attempt to~~ exercise ~~of those rights~~  
15 in violation of this section is void.

16           ~~(c) A successor declarant described in subsection (a) may, at any time until the periods~~  
17 ~~for exercising special declarant rights ends pursuant to Section 2-105(a)(8) expire, transfer some~~  
18 ~~or all its special declarant rights to any person acquiring title to some or all the units or real estate~~  
19 ~~subject to development rights owned by the successor.~~

20           ~~(d)~~ So long as a successor declarant described in subsection (a) complies with this  
21 ~~section may not exercise special declarant rights under this subsection,~~ the successor declarant is  
22 not subject to any obligation or liability ~~or obligation~~ as a declarant other than liability for ~~its his~~  
23 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.~~

#### **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 or by electronic ballot, 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 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 revoke a proxy given pursuant to this section only by actual notice of revocation to the person presiding over a meeting of the association.

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

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

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

(d) Unless prohibited or limited by the declaration or bylaws, an association may conduct a vote 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 common interest community be cast by lessees rather than unit owners of leased units:

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

(2) unit owners that have leased their units to other persons may not cast votes on

1 those specified matters; and

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

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

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

9 (h) All electronic ballots under this section require the use of an Internet-based online  
10 voting system that is able to:

11 (1) authenticate the unit owner's identity;

12 (2) authenticate the validity of each electronic vote to ensure that the vote is not altered in  
13 transit;

14 (3) transmit a receipt from the online voting system to each unit owner who casts an  
15 electronic vote; and

16 (4) create a record of electronic votes that is capable of retention, retrieval, and review.

17 A unit owner may revoke an electronic ballot either using the online voting system or by actual  
18 notice of revocation to the person presiding over a meeting of the association. Except as provided  
19 in subsection (d) for a vote without a meeting, an electronic ballot is valid only for the meeting at  
20 which it is cast and any recessed session of that meeting.

## 21 **Reporter's Drafting Notes**

22  
23 1. The Study Committee Report (topic # 20) asks: "Under UCIOA Sec. 3-  
24 110(d), an association is permitted to vote by electronic ballot. Should unit  
25 owners be allowed to change an electronic vote after viewing comments from  
26 others?" The Drafting Committee at its January 2020 meeting discussed various

1 issues concerning electronic ballots, including whether they should remain valid  
2 for postponed meetings. The consensus was that any ballot can be revoked or  
3 amended prior to the meeting when the vote is made.  
4

5 2. The existing language of Section 3-110 expressly authorizes electronic  
6 ballots, but only when a vote is conducted without a meeting. Section 3-  
7 110(a)(d). The provisions for absentee ballots and proxy votes (subsections (c)  
8 and (d)) do not say whether electronic absentee ballots or electronic proxies are  
9 allowed. The amendment authorizes electronic ballots for votes taken at live  
10 meetings and sets forth minimum requirements for an electronic voting system  
11 selected by the association. New subsection (h) is based on Fla. § 718.128,  
12 adopted in 2015 as a new section in the Florida condominium act to regulate  
13 electronic voting. The Florida statute has more detail and additional requirements  
14 than subsection (h).  
15

16 3. New subsection (h) authorizes a unit owner to revoke an electronic  
17 ballot by using the electronic voting system or by an appearance at the meeting  
18 (the same procedure allowed for revocation as a proxy under subsection (c)). A  
19 voter may decide to revoke based on comments made by other members or for  
20 any reason. The amendment does not require the association to organize a system  
21 for voters to post comments, but obviously the association or any member or  
22 members may do so.  
23

## 24 **SECTION 3-115. ASSESSMENTS.**

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

29 (b) Except for assessments under subsections (c), (d), ~~and (e)~~, (f), and (g), or as  
30 otherwise provided in this [act], all common expenses must be assessed against all the units in  
31 accordance with the allocations set forth in the declaration pursuant to Section 2-107(a) and (b).  
32 The association may charge interest on any past due assessment or portion thereof at the rate  
33 established by the association, not exceeding [18] percent per year.

34 (c) ~~To the extent required by the~~The declaration may expressly provide for:  
35 ~~(1) a~~ the assessment of common expenses associated with the maintenance, repair, or

1 replacement of a limited common element ~~must be assessed~~ against the units to which that  
2 limited common element is assigned. If the declaration so provides, the assessment must be made  
3 equally against the units, or in any other proportion set forth in the declaration ~~provides;~~

4 (2d) The declaration may expressly provide that a common expenses benefiting fewer  
5 than all of the units ~~or their owners may are to~~ be assessed exclusively against the units ~~or unit~~  
6 ~~owners~~ benefitted, but only if the declaration specifies which common expenses are to be  
7 assessed exclusively and which units or unit owners are subject to the assessment.; If the  
8 declaration so provides, the assessment must be made in accordance with the allocation set forth  
9 in the declaration. ~~and~~

10 (3e) The declaration may expressly provide for the assessment of the costs of insurance  
11 ~~must be assessed~~ in proportion to risk. If the declaration so provides, the assessment must be  
12 made in accordance with the allocation set forth in the declaration.

13 The declaration may expressly provide for the assessment of ~~and~~ the costs of utilities  
14 ~~must be assessed~~ in proportion to usage. If the declaration so provides, the assessment must be  
15 made in accordance with the allocation set forth in the declaration.

16 (4f) Assessments to pay a judgment against the association may be made only against the  
17 units in the common interest community at the time the judgment was entered, in proportion to  
18 their common expense liabilities.

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

(~~h~~) If common expense liabilities are reallocated, common expense assessments and any instalment thereof not yet due must be recalculated in accordance with the reallocated common expense liabilities.

### Reporter's Drafting Notes

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

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

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

Study Committee Report p. 21. The proposed amendments adopt the first approach. There is a strong norm that common expenses ought to be allocated to all the units. A departure from this norm is appropriate only when the declaration specifically describes certain common expenses that are to be assessed to certain specifically described units.

Example 1: A community has two buildings, a ten-story tower and a long two-story row-house building. Maintenance, repair, and replacement of the roofs are common expenses. The declaration states the common expenses must be assessed in accordance with their allocated interests in the common elements, but it allows the association "to assess a common expense benefiting fewer than all of the units

exclusively against the units benefitted.” The Board replaces the roof on the ten-story tower. Under subsection (d), the Board must assess the common expenses for the roof replacement to all units in both buildings. The Board has no discretion to assess the common expenses only to the units in the tower. The general reference in the declaration to assessing those units that are benefitted does not satisfy the requirement in subsection (d) that the declaration specify “which common expenses are to be assessed exclusively and which units or unit owners are subject to the assessment.” Under the existing language of Section 3-115, the Board arguably had discretion to assess the common expenses for the tower roof replacement only against the tower units.

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

### Comment

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

2. Common expenses are by their nature recurring, and the association must collect what the act calls the “periodic common expense assessment.” Subsection (a) requires assessment “at least annually” and allows any shorter period. Monthly assessments are most commonly used. The association may choose to change its periodic common expense assessment if it determines a shorter or longer period is appropriate.

### Reporter’s Drafting Notes

1. The Study Committee Report (topic # 9) asks “What is the meaning of ‘periodic

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

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

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

\* \* \*

#### **Comment**

\* \* \*

3. . . .

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

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

(B) a statement of any other reserves;

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

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

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

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

\* \* \*

(14) any restraints on alienation of any portion of the common interest community and any restrictions:

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

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

\* \* \*

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

(b) The public offering statement must contain any current balance sheet and a projected budget for the association, either within or as an exhibit to the public offering statement, for [one] year after the date of the first conveyance to a purchaser, and thereafter the current budget of the association, a statement of who prepared the budget, and a statement of the budget's assumptions concerning occupancy and inflation factors. The budget must include:

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

(B) a statement of any other reserves;

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

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

### Reporter's Drafting Notes

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

## Comment

\* \* \*

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

\* \* \*

10. In addition to the information required to be disclosed by paragraphs (1) through (18), paragraph (19) requires that the declarant disclose all other "unusual and material circumstances, features, and characteristics" of the common interest community and all units therein. This requires only information which is both "unusual and material." Thus, the provision does not require the disclosure of "material" factors which are commonly understood to be part of the common interest community; (*e.g.*, the fact that buildings have a roof, walls, doors, and windows.) Similarly, the provision does not require the disclosure of "unusual" information about the common interest community which is not also "material;" (*e.g.*, the fact that a common interest community is the first development of its type in a particular locality). Information which would normally be required to be disclosed pursuant to paragraph (19) might include, to the extent that they are unusual and material, environmental conditions affecting the use or enjoyment of the common interest community, features of the location of the common interest community; (*e.g.*, near the end of an airport runway or a planned rendering plant), a plan to convert any units to time-share ownership, and the like.

## Reporter's Drafting Notes

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

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

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

2. ~~Virtually all~~Some existing state statutes dealing with condominiums, planned communities, or cooperatives are silent with respect to time-share ownership. The inclusion of disclosure provisions for certain forms of time sharing in this Act, however, does not imply that other law regulating time sharing is affected in any way in a State merely because that State enacts this Act.

The Uniform Law Commissioners’ Model Real Estate Time-Share Act specifies more extensive disclosures for time-share properties. A “time-share property” may include part or all of the common interest community, and Section 1-109 of the Model Act governs conflicts between this Act and time-share legislation.

## Reporter's Drafting Notes

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

#### SECTION 4-107. SAME; COMMON INTEREST COMMUNITY

**~~SECURITIES REGISTERED WITH FEDERAL OR STATE AGENCY.~~** If an interest in a

1 common interest community is currently registered with the Securities and Exchange  
2 Commission of the United States or with the state pursuant to [insert appropriate state time-share  
3 statute], a declarant satisfies all requirements relating to the preparation of a public offering  
4 statement of this [act] if the declarant delivers to the purchaser ~~[and files with the agency]~~ a copy  
5 of the public offering statement filed with the Securities and Exchange Commission or the  
6 appropriate state agency. [An interest in a common interest community is not a security under  
7 the provisions of [insert appropriate state securities regulation statutes].]

#### 8 **Reporter's Drafting Notes**

9  
10 The proposed amendment provides an exemption from the public offering  
11 statement provisions of this article when the state has enacted a time-share statute  
12 that requires the developer or seller of time shares to prepare a public offering  
13 statement to be filed with a state agency and given to purchasers. The amendment  
14 follows the language of Nev. Rev. Stat. § 116.4107, which provides an exemption  
15 for a common interest community registered to sell time-shares with the Real  
16 Estate Division of the Department of Business and Industry.

#### 17 **SECTION 4-109. RESALES OF UNITS.**

18  
19 (a) Except in the case of a sale in which delivery of a public offering statement is  
20 required, or unless exempt under Section 4-101(b), a unit owner shall furnish to a purchaser  
21 before the earlier of conveyance or transfer of the right to possession of a unit, a copy of the  
22 declaration, other than any plats and plans, the bylaws, the rules or regulations of the association,  
23 and a certificate containing:

24 (1) a statement disclosing the effect on the proposed disposition of any right of  
25 first refusal or other restraint on the free alienability of the unit held by the association;

26 (2) a statement setting forth the amount of the periodic common expense  
27 assessment and any unpaid common expense or special assessment currently due and payable  
28 from the selling unit owner;

- 1                   (3) a statement of any other fees payable by the owner of the unit being sold;
- 2                   (4) a statement of any capital expenditures approved by the association for the
- 3 current and succeeding fiscal years;
- 4                   (5) a statement of the amount of any reserves for capital expenditures and of any
- 5 portions of those reserves designated by the association for any specified projects;
- 6                   (6) the most recent regularly prepared balance sheet and income and expense
- 7 statement, if any, of the association;
- 8                   (7) the current operating budget of the association;
- 9                   (8) a statement of any unsatisfied judgments against the association and the status
- 10 of any pending suits in which the association is a defendant;
- 11                   (9) a statement describing any insurance coverage provided for the benefit of unit
- 12 owners;
- 13                   (10) a statement as to whether the executive board has given or received notice in
- 14 a record that any existing uses, occupancies, alterations, or improvements in or to the unit or to
- 15 the limited common elements assigned thereto violate any provision of the declaration;
- 16                   (11) a statement as to whether the executive board has received notice in a record
- 17 from a governmental agency of any violation of environmental, health, or building codes with
- 18 respect to the unit, the limited common elements assigned thereto, or any other portion of the
- 19 common interest community which has not been cured;
- 20                   (12) a statement of the remaining term of any leasehold estate affecting the
- 21 common interest community and the provisions governing any extension or renewal thereof;
- 22                   (13) a statement of any restrictions in the declaration affecting the amount that
- 23 may be received by a unit owner upon sale, condemnation, casualty loss to the unit or the

1 common interest community, or termination of the common interest community;

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

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

7 (16) a statement disclosing ~~the effect on the unit to be conveyed of~~ any  
8 restrictions on the ~~owner's right to use or occupy the~~ occupancy of any unit, including  
9 restrictions on or to leases and other rentals ~~the unit to another person.~~

10 \* \* \*

### 11 Reporter's Drafting Notes

12  
13 The amendment expands the scope of the disclosure in Section 9-  
14 106(a)(16) to include not only standard leases, but also time-share arrangements  
15 and sharing platforms that sell licenses to guests, such as Airbnb. The amendment  
16 also expands the disclosure to include all units, not only the unit to be conveyed,  
17 because it is often important for purchasers to understand the extent to which the  
18 common interest community may be devoted to rentals.