MEMORANDUM ON THE SCOPE OF THE UNIFORM COMMON INTEREST OWNERSHIP ACT

FROM: Jim Smith, Reporter

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Note: This Memorandum does not address possible constitutional issues raised by the application of the Uniform Common Interest Ownership Act (UCOIA) to common interest communities created before a state's adoption of UCOIA. Constitutional issues are addressed in a separate *Memorandum on Constitutional Issues Raised by the Retroactive Application of the Uniform Common Interest Ownership Act*. The separate constitutional issues memorandum concludes that the full application of UCOIA to preexisting communities would not violate any provisions of the federal constitution. In a large majority of states, the outcome is the same under their state constitutions. In a few states, there is some risk of invalidation of certain UCOIA provisions as applied to particular facts.

I. Study Committee Report

The ongoing work of the Drafting Committee responds to recommendations made by a Study Committee appointed in 2018 "to consider the need for and feasibility of revisions to the Uniform Common Interest Ownership Act" (UCOIA). " The Study Committee's final report lists 21 issues for

consideration by a Drafting Committee, and the introduction to the report specifically notes that 3 of those "topics stand out as being of particular interest." With respect to scope (applicability) – one of the three – the report observes:

> **Applicability - UCIOA Article 1, Part 2, §§ 1-201 through 1-210.** The Study Committee discussion on February 25, 2019 revealed considerable controversy regarding how UCIOA applies in various contexts, particularly with regard to common interest communities created before adoption of UCIOA. It may be that with the passage of time, potential constitutional constraints that were perceived as significant limitations by the original drafting committee would be less compelling in today's environment and would permit the Act to apply to all common interest communities regardless of when created, thus eliminating the considerable confusion of deciding which laws apply to various aspects of pre-existing communities.[1]

The Study Committee in its Analysis and Recommendations more fully explains as follows:

> **11. On its effective date, does UCIOA apply retroactively?**
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> **Study Committee Recommendation (02-25-2019):** The Study Committee considered this one as one of the more significant issues on their agenda; the discussion as reflected in the minutes of February 25, 2019 was brief but clear. UCIOA presently addresses Applicability in some detail; see Article 1, Part 2, sections 1-201 through 1-210. However, both Vermont and Connecticut – the first two states to adopt UCIOA (2008) – made significant changes to the applicability provisions, and the retroactive application of the Act to pre-existing common interest communities continues to be a subject of considerable debate.
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> While constitutional considerations caused the original Drafting Committee to be conservative in determining which provisions of UCIOA might be applied retroactively to pre-existing communities, there is increasing sentiment that:
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> > (1) the lack of uniformity within a state regarding which laws apply and which do not has become a complex issue for the legal community;
> > (2) it would be a considerable improvement in the administration of law and practice within a state if all communities were, to the maximum extent feasible, subject to the same law; and
> > (3) the Study Committee members thought that courts would likely look more favorably on the topic today than once might have been the case.

[1] Study Committee Report 4-5 (May 30, 2019).

In these circumstances, the Study Committee strongly feels a drafting Committee should re-consider the applicability provisions of the Act.[2]

II. History and Organization of the UCOIA Scope Provisions

The ULC adopted UCOIA in 1982, with Article I, Part 2 titled "Applicability." For our purposes, we should view "applicability" and "scope" as synonymous, both indicating the transactions that the act regulates. Like all statutes, "applicability" and "scope" for UCOIA have a temporal function (what is the effective date and how does the effective date function?) and a non-temporal function (what transactions and events are covered?). Some statutes, including some ULC uniform acts, use a third title, "transition," as a heading for provisions that govern the temporal scope of legislation.

The 1982 UCOIA scope provision provides: "Except as otherwise provided in Sections 1-202 and 1-203, this Act applies to all common interest communities created within this state after the effective date of this Act." Section 1-201, *Applicability to New Common Interest Communities*. As the title to the section implies, this section adopts a baseline principle that, with limited exceptions, the act applies only to common interest communities created after the effective date of the act. UCOIA's 1982 scope provision precisely follows the scope rule established by the Uniform Condominium Act (1977), which generally applies only to post-effective-date condominiums. The baseline principle of prospective-only application has remained unaltered for over 40 years, although amendments to UCOIA in 1994 and 2008 made minor adjustments to the scope provisions.

UCIOA presently addresses questions of prospective and retrospective application (the temporal function of scope) in several of the sections in Article 1, Part 2 dealing with "Applicability." The organization of this part is idiosyncratic. The Part now contains 10 sections due to its expansion from 8 to 10 sections by the 2008 UCOIA amendments. Four of these sections address the prospective and retroactive application of UCIOA, to new communities created after the act's effective date and "preexisting common interest communities" (old communities):

Section 1-201, *Applicability to New Common Interest Communities*.
Section 1-204, *Applicability to Preexisting Common Interest Communities*.
Section 1-205, *Applicability to Small Preexisting Cooperatives and Planned Communities*.
Section 1-206, *Amendments to Governing Instruments*.

[2] Id. at 10-11.

Section 1-204 significantly modifies the general rule that UCOIA applies prospectively to new common interest communities with a list of nineteen UCOIA sections that automatically apply retroactively to preexisting communities. (Section 1-204 is discussed in more detail in Part III.C *infra*.)

The other six sections in Part 2 have nothing to do with retroactivity. They handle the non-temporal function of "scope," exempting certain transactions, activities, and communities from UCIOA, whether the communities were created before or after the effective date of UCOIA:

> Section 1-202, *Exception for Small Cooperatives*
> Section 1-203, *Exception for Small and Limited Expense Liability Planned Communities*
> Section 1-207, *Applicability to Nonresidential and Mixed-use Common Interest Communities*
> Section 1-208, *Applicability to Out-of-state Common Interest Communities*
> Section 1-209, *Other Exempt Real Estate Arrangements*
> Section 1-210, *Other Exempt Covenants*

For the first three types of communities singled out for special treatment – Section 1-202 (small cooperatives), Section 1-203 (small and limited expense planned communities), and Section 1-207 (nonresidential and mixed-use common interest communities) – the common interest community is able to opt-in to UCOIA by a provision in the declaration stating that UCOIA applies.[3]

III. Analysis of the Present UCOIA Scope Provisions

A. Justifications for Prospective Application Only to New Communities

The only published explanation of UCOIA's decision to apply the act prospectively is at the beginning of Comment 1 to Section 1-201. The Comment states:

> 1. The question of the extent to which a state statute should apply to particular common interest communities involves two major conceptual problems: (1) whether the statute should require or permit different results for common interest communities created before and after the statute takes effect; and (2) whether differences in the forms of ownership, and the history of their development, requires different levels of applicability to those various forms.

[3] Sections 1-202 and 1-203 allow opt-ins to the entire act, using the phrase "unless the declaration provides that this entire act is applicable." Section 1-207 allows opt-ins to the entire act or to only Articles 1 and 2 of the act.

> Two conflicting policies are posed when considering the applicability of this Act to "old" and "new" common interest communities in the enacting State. On the one hand, it is desirable, for reasons of uniformity, for the Act to apply to all common interest communities located in a particular State, regardless of whether the common interest community was created before or after adoption of the Act in that State. To the extent that different laws apply within the same State to different common interest communities, confusion results in the minds of both lenders and consumers. Moreover, because of the inadequacies and uncertainties of common interest communities created under prior law, if any, and because of the requirements placed on declarants and unit owners' associations by this Act which might increase the costs of new common interest communities, different markets might tend to develop for common interest communities created before and after adoption of the Act.
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> On the other hand, to make all provisions of this Act automatically applicable to "old" common interest communities might violate the constitutional prohibition of impairment of contracts. In addition, aside from the constitutional issue, automatic applicability of the entire Act almost certainly would unduly alter the legitimate expectations of some present unit owners and declarants.[4]

The Comment identifies only one reason for not making UCIOA fully retroactive: protection of the reliance interests "of some present unit owners and declarants." According to the Comment, these persons may have legitimately expected that state laws governing their investment in real estate would not change.

The issue of whether legal changes ought to be retroactive or prospective is a general problem of jurisprudence that arises frequently in all areas of law. The issue is not confined to laws affecting the ownership of real estate. Also, the issue is not limited to legislation. Judicial decision making and executive branch regulations present the same problem of retroactivity versus prospectivity. With respect to judicial lawmaking, our legal system has a strong norm in favor of retroactivity. A judicial decision, even when "ground breaking," not only adjudicates the rights of the parties to the case but also becomes precedent, affecting similarly situated persons in the future. There are exceptional cases announcing a new rule that the court applies only prospectively, but they are rare.

With respect to legislation and regulations, our system also has a norm favoring retroactivity, but it is not a strong norm. Many statutes and regulations "grandfather" existing activities or persons with an exemption from new legal

[4] This part of Comment 1 is contained in UCIOA's original adoption (1982) and has not changed with subsequent amendments to UCIOA. Its source is the Uniform Condominium Act (1977), which has precisely the same language, except for non-substantive edits in the UCIOA version to take account of the UCIOA's application to "common interest communities" and not only condominiums.

requirements of a new legal regime. The "grandfathering" approach is not exceptional.

Although not a strong norm, there is still a norm favoring the retroactive application of legislation. Our legal system considers grandfathering to be special treatment that needs to be justified by the particular characteristics of the new law as they relate to reliance interests of affected persons. There are two reasons for the norm in favor of retroactivity – why grandfathering should not be routine and why it has to be justified. First, as the UCOIA Section 1-201 Comment quoted above notes, "reasons of uniformity" counsel in favor of retroactivity. Grandfathering creates the cost of two different legal regimes governing activities and persons, which creates the prospect of "confusion" for affected persons. Multiple laws covering the same subject matter always create complexity, increase transactions costs, and create the risk that persons will make erroneous judgments about their legal rights and obligations.

Second, "grandfathering" inevitably reduces the positive impacts that are expected to result from the new legislation. This point is obvious. The new rules are likely superior to the old rules being replaced; if they are not, why should the legislature or agency adopt them?

B. Why Reliance Interests Fade over Time

A common interest community has no permanent residents. Eventually, every old community in every UCOIA jurisdiction will be populated only by residents who moved there after the effective date of the UCOIA act.[5] Long before that point in time, the majority of the residents of an old community will have moved there after the effective date. According to U.S. Census data, the median duration of homeownership is 13.3 years.[6] Many of the new residents who are not first-time homebuyers will have moved there from a different common interest community that is subject to UCOIA. For at least some of these new transplants, the change in legal status will surprise them. Rather than protect their expectations, it will tend to frustrate their expectations.

For this reason, grandfathering old communities with a perpetual exemption from UCOIA makes no sense if its only purpose is protection of the reliance interests of owners who bought before the legislature enacted UCOIA and announced its effective date for new communities. A coherent grandfather provision would have a sunset provision, although it might continue for a very long time, such as two or three decades after enactment.

Only persons living in an old community before the effective date of the act plausibly may assert a substantial reliance interest. In principle, one might suppose that a

[5] Note, for enthusiasts of traditional real estate law, this happens long before expiration of the period for the Rule against Perpetuities (21 years plus a life in being).
[6] How Long do Homeowners Stay in their Homes?, https://www.valuepenguin.com/how-long-homeowners-stay-in-their-homes (2018 American Community Survey study).

post-effective-date buyer of a unit in an old community could have a reliance interest on pre-UCOIA laws. The post-effective-date buyer might have investigated the legal status of the community and may have preferred buying in that community because it was not subject to UCOIA. But this is highly unlikely for several reasons. First, it supposes an investigation into a matter that a normal homebuyer is not likely to be interested in or even aware of. It is highly unlikely that a real estate broker or the seller's description of the unit and the seller's disclosure documents will inform the buyer that the jurisdiction has both UCOIA common interest communities and non-UCOIA common interest communities, explain which type the buyer is buying into, and attempt to explain the significance of the distinction. Note that UCOIA in its resale certificate requirements does not require a seller to disclose to the buyer that the buyer's new home is in a UCOIA community, subject to the terms and provisions of UCOIA.[7]

C. Section 1-204: The Selective Incorporation Doctrine

The general rule is that UCOIA applies only prospectively, to common interest communities created after the effective date of the enacting legislation.[8] Then Section 1-204 provides an exception to the general rule, mandating the retroactive application of certain specified UCOIA sections to pre-existing communities. Section 1-204 lists a total of 19 section or parts of sections that apply automatically to preexisting communities (hereinafter called "looking-back sections").

The original version of UCIOA (1982) borrowed this selective incorporation approach from the Uniform Condominium Act (1977)[9] and listed 13 looking-back sections. The 2008 amendments to UCOIA added 6 additional looking-back sections. Collectively, these 19 sections amount to approximately 20 percent of UCOIA's content.[10] One of the first things a reader would expect is to find an explanation of why UCOIA has chosen these 19 looking-back sections and not others. The Comments, however, shed surprisingly little light on the matter. Only two brief remarks in the Comments are relevant. The first states:

> . . . Section 1-204 provides that the enumerated provisions automatically apply to common interest communities created under pre-existing law, even though no action is taken by the unit owners. Many of the sections which do apply should measurably increase the ability of the unit owners to effectively manage the

[7] See Section 4-109.
[8] Section 1-201.
[9] Uniform Condominium Act § 1-102(a).
[10] UCOIA presently has 94 sections. Some of the incorporated sections are only partially incorporated, including Section 1-103, *Definitions*, to the extent necessary to construe the other sections.

> association, and should help to encourage the marketability of common interest communities created under early condominium statutes, or under common law.[11]

Second, as noted previously by the Study Committee, "constitutional considerations caused the original Drafting Committee to be conservative in determining which provisions of UCIOA might be applied retroactively to pre-existing communities,"[12] a point mentioned in a new comment added along with the 2008 amendments to UCOIA:

> In considering which sections of the Act might be applied automatically to projects created under other law, the drafters remain concerned to avoid constitutional infirmity . . . .
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> [A]side from the issue of possible constitutional infirmity, at least one practical reason - that being the "law of the project", which is known to all residents of a common interest community from the time they first became residents - is often raised to justify a refusal to apply new real estate laws retroactively to older projects. . . .[13]

The 2008 comment (quoted directly above) by its reference to the "law of the project" alludes to an objective of protecting the reliance interests or "legitimate expectations"[14] of unit owners and the declarant. These reliance interests constitute the basis underlying any possible "constitutional infirmity," but the comment hints at a policy objective of protecting reliance interests more expansively than is necessary to comply with constitutional doctrines.

So do the two principles derived from the comments – promoting effective unit-owner management of the association and protecting reliance interests – actually explain why UCOIA selectively incorporates 19 looking-back provisions and refuses to incorporate other UCOIA provisions? Consider only several examples of "what's in" and "what's out"? First, although some of the looking-back sections relate to management of the association (e.g., powers and duties of unit owners association, association records), most do not (e.g, separate titles and taxation, applicability of local ordinances, eminent domain, unit boundaries, tort and contract liability). Second, some of the looking-back sections may be criticized as a substantial interference with unit owners' reliance interests. Perhaps the most striking example is Section 2-104's incorporation of Section 3-116, *Lien for sums due association*. This section creates a statutory lien for a unit owner's assessments, plus attorneys' fees and costs, whether or not the obligations were secured by a lien under preexisting law. This turns unsecured debt into secured debt. In addition, Section 2-104 incorporates Section 4-109, *Resales of Units*, requiring a unit owner who sells her unit to pay for and deliver to the buyer a resale certificate. This has

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[11] Section 1-204, Comment 3. This Comment in the present version of UCOIA is unchanged from UCIOA (1982) and, like many UCOIA comments, reproduces verbatim the language of a comment in the Uniform Condominium Act s. 1-102 comment 4 (1977).
[12] Study Committee Report 11 (May 30, 2019).
[13] Section 1-204, Comment 5.
[14] See Part III.A. *supra*.

nothing to do with management of the association, and it arguably interferes with the owner's reliance interest (when the owner bought, she did not get a resale certificate and did not expect to shoulder this substantial obligation).

As for the UCOIA sections *not* incorporated by Section 2-104, several stand out as tools that would enhance the unit owners' effective management of the association (e.g., Section 3-108, *Meetings*; Section 3-113; *Insurance*, Section 3-123, *Adoption of budgets*).

The point is not that Section 1-204 made poor selective incorporation decisions; only that the two articulated guiding principles are not able to explain why most of the included sections are in, and why the very-many-omitted UCOIA sections are not in. The two principles are general in nature and highly flexible, which is a value, but one that unavoidably carries with it a measure of vagueness. Undoubtedly, the UCOIA drafters were motivated by many more considerations, legitimately, in picking the 19 looking-back sections, but the work product suffers from a lack of transparency.

Putting aside for the moment the *ex ante* question of workable standards for the selection process, UCOIA's elaborate scheme of selective incorporation of sections for old communities generally functions with clear guidance, but it does give rise to some interpretational problems. The problems mainly result because UCOIA is a complicated statute, with many integrated pieces that are intended to work together. This renders Section 1-204's elaborate piecemeal approach of selective incorporation inherently unstable.

One aspect of this problem stems from UCIOA's drafting style, which frequently uses cross references to other sections. What should happen when a selectively incorporated section explicitly cross references an unincorporated section? An example involves UCOIA's process for the approval of budgets. Two UCIOA looking-back sections listed in Section 1-204 address the budget. Section 3-102(a)(2) calls for the association to adopt "budgets under Section 3-123," and Section 3-103(c) calls for the executive board to "adopt budgets as provided in Section 3-123." Section 3-123 follows up on this by calling for the executive board to adopt a budget and send it to the unit owners for ratification or rejection.

Yet curiously, Section 1-204 fails to list Section 3-123 as one of the "looking back" sections.[15] Section 3-123 makes an important change to pre-UCOIA law by allowing the board's adoption of a budget to stand unless the unit owners affirmatively vote to reject the board's budget. Before UCIOA, existing law and almost all declarations required the unit owners' affirmative approval of the budget.

[15] Washington's adoption of UCOIA cures this problem by including its basic budget provision in its short list of looking-back sections. Wash. Rev. Code § 64.90.080.

So what budget procedures actually apply to an old community, given UCOIA's selective incorporation of Sections 3-102 and 3-103, but not 3-123? There are two possible answers. First, under a literal approach, one simply cannot read Section 3-123 because it is unincorporated. Section 3-123 must be ignored; it cannot apply so prior law controls. The second answer follows the common statutory interpretation technique of looking to the purpose of a statute to overcome a problem of ambiguity, lack of clarity, or internal inconsistency. A plausible argument can be made that the legislative intent is to apply all subsections of 3-102 and 3-103 to old communities. UCOIA expressly incorporates only parts of a few of the Sections listed in 1-204, and it did not do this for Sections 3-102 and 3-103. Thus, because there are no express exceptions for 3-102(a)(2) and 3-103(c)), this means that Section 3-123 is incorporated for old communities by implication. The legislature "forgot" to include Section 3-123 in the list of looking-back sections, and a court may cure its forgetfulness.

D. May Preexisting Communities Opt-in to UCOIA?

UCOIA allows existing preexisting communities to opt-in to the act at least to some extent. It is not clear whether a preexisting community may simply amend its declaration to adopt UCOIA in its entirety. Section 1-206, *Amendments to Governing Instruments*, authorizes the amendment of a declaration "to achieve any result permitted by this act, regardless of what applicable law provided before this act was adopted."[16]

The drafters of the original act, UCIOIA (1982), did not intend that Section 1-206 authorize a complete adoption of the act. Comment 6 to Section 1-206 provides:

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

The Section 1-206 phrase "any result permitted by this act" is new, added by the 1994 UCOIA amendments, replacing two usages of an older phrase "the result accomplished by the amendment" used in UCIOA (1982). A new comment added with the 1994 amendments states the "1994 changes are not intended to alter the substantive rules contained in the original section."[17]

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[16] Section 1-206(a). The amendment "must be adopted in conformity with any procedures and requirements for amending the instruments specified" by the original declaration of the preexisting community. Id. § 1-206(b).

[17] Section 1-206, Comment 7.

Another original UCIOA comment, still in the present act, for Section 1-204, explains the purpose of Section 1-206 as follows:

> Third, the Act seeks to alleviate any undesirable consequences of "old" law, by a limited "opt-in" provision, as provided in Section 1-206. More specifically, Section 1-206 permits the owners of a pre-existing common interest community to take advantage of the salutary provisions of this statute to the extent that can be accomplished consistent with the procedures for amending the project instruments as specified in those instruments and in the pre-existing statute or common law.[18]

The comments to Sections 1-206 and 1-204 might be thought to give a definitive answer to the question: No, a preexisting community may not adopt UCOIA in its entirety. This answer may be supported by distinctively different language used elsewhere in UCOIA to allow new communities that are entitled to a UCIOA exemption to relinquish the exemption if its "declaration provides that this entire act is applicable."[19] This language suggests the drafters know how to use simple language referring to a community adopting the entire act, and therefore the phrase allowing amendments to achieve "results" means something other than partial or total adoption.

Yet the matter is not free from doubt. First, Section 1-206 allows a preexisting community to amend its declaration "to achieve ***any result*** permitted by this act" (emphasis added). Why can't the preexisting community amend its declaration to achieve ***all results*** related to UCIOA? Section 1-206 does not have a numerical limit on how many "results" may be sought. This line of argument suggests that the Comments are not supported by the statutory text; indeed, they may be inconsistent with the text.[20]

Second, the Comments assert only that *Section 2-106* is "a limited 'opt-in' provision" and that *Section 2-106* does not permit the adoption of UCOIA. A preexisting community might be able to adopt UCOIA without relying on Section 2-106. The 1994 amendments to UCOIA added a new sentence to Section 1-201 recognizing that a

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[18] Section 1-204, Comment 3.

[19] Sections 1-202 and 1-203.

[20] In addition, a different new comment added with the 1994 UCOIA supports an interpretation of Section 1-206 that allows a preexisting community to adopt UCIOA and seems at cross-purposes with the Comments discussed *supra* in text. Section 1-201, Comment 2 (emphasis added) provides:

> 2. The 1994 amendment makes clear that if an amendment to the Act is adopted after the Act is initially adopted in any State, the same body of law will thereafter apply to all common interest communities created under the Act or subjected to it. This is the corporate model, and avoids perpetuating the retroactivity issue which this Act addressed initially in Sections 1-204, 1-205, and 1-206. Note that the amendment would not automatically apply to common interest communities created before the original effective date of the Act even though limited provisions of the Act do apply retroactively. ***Instead, an "old" project would have to be "subjected" to the Act by vote of its unit owners under Section 1-206***.

common interest community may be "made subject to this act by amendment of the declaration of the common interest community."[21] So it may be that a preexisting community may adopt UCOIA in its entirety under Section 1-201.

Third, it is possible that a preexisting common interest community may adopt UCIOA without relying on Section 1-206 or Section 1-201. UCOIA nowhere contains an express prohibition on preexisting communities adopting all of its provisions, and general choice-of-law principles allow persons (including entities) substantial freedom in selecting the body of law that govern their activities.

In addition, Comment 6 to Section 1-206 (quoted in text *supra*) recommends another avenue, advising that "the owners of a pre-existing common interest community may elect to terminate the community under preexisting law and create a new community which would be subject to all the provisions of this Act." The advice seems formalistic. From the advice, we gather that (1) an amendment to the declaration of a preexisting community that expresses the intent to adopt the entire act is invalid if it assumed to operate directly; but (2) it is valid if the amendment is reconceptualized as a termination and a re-creation of the community. If so, why shouldn't a declaration amendment simply adopting the act be treated as a de facto termination and re-creation?

E. UCOIA's Special Applicability Rules for Amendments to UCOIA

Significantly, the 1994 UCOIA amendments departed from the general rule of prospective-application-only when it added a new sentence to Section 1-201 dealing with amendments to UCOIA: "Amendments to this act apply to all 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." This is a bright-line rule that makes common interest communities already subject to UCOIA automatically subject to all statutory amendments, whether those amendments are minor or major changes.

A comment added along with the 1994 UCOIA amendments explains:

> 2. The 1994 amendment makes clear that if an amendment to the Act is adopted after the Act is initially adopted in any State, the same body of law will thereafter apply to all common interest communities created under the Act or subjected to it. This is the corporate model, and avoids

[21] The new sentence provides: "Amendments to this act apply to all 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."

perpetuating the retroactivity issue which this Act addressed initially in Sections 1-204, 1-205, and 1-206. . . .

This decision in favor of retroactivity, although limited to a state's adoption of UCIOA amendments after its original adoption of UCIOA, reflects a significant change in policy. As the Comment states, it explicitly rejects the grandfathering approach of Section 1-201 in favor of "the corporate model," which assumes that unit owners are able to adapt to new rules and do not merit special treatment to protect their supposed reliance interests.

IV. Retroactivity Provisions in States that have Adopted UCOIA

Nine states have adopted UCOIA: Alaska, Colorado, Connecticut, Delaware, Minnesota, Nevada, Vermont, Washington, and West Virginia. The ULC has promulgated three official versions of UCOIA: the 1982 act, the 1994 act, and the 2008 act (the latter with a set of amendments adopted in 2014). The adopting states do not all have the same version. Some have adopted the 1982 act and some have adopted the 2008 act, with or without the 2014 amendments.

Two states, New Jersey and Oklahoma, presently have bills pending to adopt UCOIA. 2020 N.J. Senate Bill No. 2261 (introduced Mar. 16, 2020); 2019 Okla. House Bill No. 4112 (introduced Feb. 3, 2020).

Below is a summary of some of the more important non-uniform changes made by the adopting jurisdictions to the scope provisions. Appendix 1 to this Memorandum contains additional information on these states' nonuniform provisions.

Scope concerning Preexisting Communities. All nine UCOIA states in their initial adoptions of UCOIA retained the general plan of Section 1-201 to apply the act to common interest communities created after the act's effective date and not to preexisting communities.

Minnesota, however, made a significant change by making all pre-existing condominiums subject to UCOIA. Thus, Minnesota is fully retroactive for condominium communities, preserving the grandfathering provision of Section 1-201 only for planned communities and cooperatives.

Nevada originally adopted UCOIA with the uniform scope provisions and an effective date of 1992. Seven years later the Nevada legislature changed course, amending its UCOIA to make it applicable to all common interest communities, regardless of their creation date, with several minor exceptions. Nev. Laws 1999, c. 572, § 16, 1. "Except as otherwise provided in this section and NRS 116.1203, this chapter applies to all common-interest communities created within this State." Nev. Rev. Stat. Ann. § 116.1201. Only one scope exception is based on the creation of a common interest community before an

effective date; it states: "A common-interest community that was created before January 1, 1992, is located in a county whose population is less than 55,000, and has less than 50 percent of the units within the community put to residential use, unless a majority of the units' owners otherwise elect in writing." Id. § 116.1201(c). The Nevada act has special provisions excusing preexisting common interest communities from several of the act's requirements. Id. § 116.1201(d).

New Jersey's pending bill to adopt UCOIA would change course by making UCOIA generally applicable to all common interest communities, regardless of creation date. 2020 N.J. Senate Bill No. 2261 (introduced Mar. 16, 2020).

Washington, the newest UCOIA jurisdiction, adopted UCOIA in 2018 with an effective date of July 1, 2018. The Washington act includes all of 1-203, except it omits the amendment provision from 1-201. In 2019, Washington amended its act to add a nonuniform provision to 1-201 excluding a new common interest community that is made part of a pre-effective-date common interest community under "a right expressly set forth in the declaration of the preexisting common interest community." Wash. Rev. Code § 64.90.075(4).

Exemptions for small common interest communities and other common interest communities. Several states have modified the UCOIA exemptions for small common interest communities, usually to make more small communities exempt.

Delaware alters 1-202 to expand the exception from cooperatives also to include condominiums and increases the number of units from 12 to 20. Del. Code Ann. tit. 25, § 81-117. The Vermont amendment provision in 1-201 is non-uniform, excepting more communities with a size requirement (12 or more units) and with a later creation date for amendments. Vermont has a special exception (1-201(b)) preventing old mobile home parks (existing before 1990) from converting into a UCIOA common interest community. West Virginia modifies 1-203 to exempt limited expense planned communities whether or not they are subject to development rights.

Selective incorporation of UCOIA for preexisting common interest communities; the looking-back sections. There is very little uniformity with respect to the states' treatment of 1-204, which lists 19 looking-back sections. The marked lack of uniformity is perhaps due to UCOIA's lack of express guiding principles to justify its selection of looking-back sections. See Part III.C. *supra*. Many states have modified the looking-back sections, usually by adding more but sometimes by subtracting from the list. Connecticut has the longest list. The list in Connecticut's version of UCOIA is substantially different from the uniform provision. It incorporates 14 additional sections, deletes 5 sections, and for sections that are only partially incorporated, modifies which sections are partially incorporated. Conn. Gen. Stat. § 47-216. Colorado and Delaware also

substantially expand the list of looking-back sections. In Minnesota, legislation adopted in 2020 makes a number of changes to Minnesota's UCOIA, including the addition of two looking-back provisions. Vermont follows the uniform list and adds one additional "looking-back" section, 3-110, *Voting; Proxies; Ballots*. Washington passed a nonuniform version of 1-204 that applies a much shorter list of UCOIA provisions to preexisting communities. Wash. Rev. Code § 64.90.080.

Opt-in provisions for preexisting common interest communities. Three states, perceiving that UCOIA has no express opt-in provision and seeks to discourage preexisting communities from adopting UCOIA,[22] have added express opt-in procedures to their versions of UCOIA.

Colorado added an opt-in provision to its adoption of UCOIA. Its opt-in allows a preexisting community (created prior to July 1, 1992) to opt-in with a vote of 67 percent of the members or stockholders. The board of directors may recommend adoption and submit the matter to a meeting of the members or stockholders. Alternatively, members or stockholders may request a vote. "The question shall also be submitted whenever one-twentieth, or, in the case of an association with over one thousand members, one-fortieth, of the members or stockholders entitled to vote thereon so request." Colo. Rev. Stat. Ann. § 38-33.3-118.

Minnesota added an express opt-in provision. An opt-in requires an amendment of the declaration and other governing instruments or the preparation and a new declaration and governing instruments. An opt-in requires the unanimous written consent of the unit owners. Minn. Stat. § 515B.1-102(d).

Washington, the newest UCOIA jurisdiction, added a nonuniform provision for preexisting communities to opt-in to UCOIA, Wash. Rev. Code § 64.90.095, *Election of preexisting common interest communities*. The board may propose an amendment to opt-in to the unit owners, or unit owners holding at least 20 percent of the votes may request a meeting to consider an opt-in amendment. The opt-in amendment passes with a supermajority vote of 67 percent, with a quorum requirement equal to 30 percent of the votes in the association. Notably, this voting procedure supersedes all procedures and requirements in the declaration and other governing documents for the preexisting community. Washington's version of 1-204 underscores the supersession, stating the purpose being to "protect the public interest." Wash. Rev. Code § 64.90.080. This is in direct contrast to the uniform version of Section 1-206, which requires conformity to procedures and requirements of the old declaration.

V. Approaches to Scope Taken in Other ULC Acts

All statutes must deal with issues of scope, both temporal scope and non-temporal scope. No act can govern all things at all points in time. Every act governs some things over some period of time.

[22] See Part III.D. *supra*.

The ULC has used different approaches for scope issues in its many uniform acts. This Part describes the approaches taken by the ULC in four of its uniform acts with respect to prospectivity and retroactivity – the temporal function of scope. The acts selected for description are several acts that, like UCOIA, have substantial impacts on property rights. They may provide a better comparison than uniform acts that have little to do with property rights. People who become subject to any new law, including those that have nothing to do with property, may always assert a reliance interest – a claim that they relied on prior law and did anticipate or agree to a change in the law. Nevertheless, the protection of reliance interests is often considered to be more important in the context of a person's ownership of property.

Home Foreclosure Procedures Act. The Home Foreclosure Procedures Act (2015) (UHFPA) reforms many aspects of foreclosures of mortgages on single-family homes and other types of residential properties. Some of its provisions are designed to make foreclosure function more efficiently with better outcomes for mortgage lenders and other persons who own home mortgage loans, but many of the UHFPA provisions impose significant costs on lenders and investors, compared to costs they bear under the existing foreclosure laws of many states. Its temporal scope provision, Section 804, *Transition*, provides: "This act applies to foreclosure of a mortgage created before, on, or after the effective date of this act, unless the creditor commenced a foreclosure before the effective date of this act." Thus, the ULC made the decision not to make UHFPA purely prospective in application. UHFPA applies to a huge inventory of mortgage loans owned by lenders and investors who purchase interests in mortgage loan in the secondary mortgage market. In many states, the "lender friendly" provisions of UHFPA would have negatively impacted homeowners who defaulted and were faced with foreclosure proceedings.

Uniform Business Organizations Code. The Uniform Business Organizations Code (2013) (UBOC) revises eight previous unincorporated business entity acts, including several governing partnerships and unincorporated associations, and integrates them into a single new product. UBOC has a series of transitions provisions tailor made for various types of entities, all of them following the same basic blueprint. The transition provision for partnerships is a good example. UBOC § 3-110, *Application to Existing Relationships*, phases in applicability with the adopting state specifying an "effective date" for the act and a future date called the "all-inclusive date." Upon adoption by a state legislature, the act governs all partnerships formed after the effective date. After the effective date and before the all-inclusive date, a preexisting partnership may elect to adopt UBOC, rather than wait for the all-inclusive date. Then after the all-inclusive date, UBOC governs all partnerships, not matter how long before the effective date they were created. UBOC's transition provisions make the act fully retroactive, applying to all partnerships within the state, after the all-inclusive date. In doing so, UBOC follows the corporate model widely used in entity organizational laws.

Revised Uniform Fiduciary Access to Digital Assets Act. The Revised Uniform Fiduciary Access to Digital Assets Act (2015) (Revised UFADAA) reforms fiduciary law

to allow a fiduciary to manage and distribute the digital assets owned by a person who dies or becomes incapacitated. The scope provision of Revised UFADAA, Section 3, *Applicability*, is fully retroactive. Section 3(a) provides: "This act applies to: (1) a fiduciary acting under a will or power of attorney executed before, on, or after the effective date of this act; (2) a personal representative acting for a decedent who died before, on, or after [he effective date of this act; (3) a conservatorship proceeding commenced before, on, or after the effective date of this act; and (4) a trustee acting under a trust created before, on, or after the effective date of this act." Also, note in particular that Revised UFADAA does not distinguish between digital assets created before and after the effective date of Revised UFADAA. The act has no "grandfather" provision to protect a digital owner's possible reliance interest in having prior law govern the owner's "old" digital assets.

Uniform Commercial Code Revised Article 9. Revised Article 9 (2001) necessarily includes a complicated Part 7 governing Transition, with 9 sections. The basic temporal scope provision, Section 9-702, *Savings Clause*, provides: "§ 9-702(a): "*Pre-effective-date transactions or liens*. Except as otherwise provided in this part, this Act applies to a transaction or lien within its scope, even if the transaction or lien was entered into or created before this Act takes effect." Instead of this approach, Revised Article 9 might have applied only to security interests created after the effective date of its adoption. This would have protected possible reliance interests of parties to pre-effective-date secured transactions. But instead, Revised Article 9 is retroactive, with limited exceptions in the Part 7 transition rules to handle discrete problems.

A review of the four ULC uniform acts described in this part, although a limited sample, suggests that the ULC in its recent work frequently seeks to make its uniform acts retroactive to govern transactions entered into before the act's effective date.

VI. Three Possible Approaches for Amendments to the UCOIA Scope Provisions

There are many approaches that the ULC could take with respect to the UCOIA scope provisions. This Memorandum discusses three possibilities in this section: applying UCOIA generally to preexisting communities (Approach 1); applying UCOIA generally to new communities (the existing regime) with the addition of an opt-in procedure for preexisting communities (Approach 2); and applying UCOIA generally to preexisting communities with the addition of an opt-out procedure for preexisting communities (Approach 3)**.**

Obviously, there are many more possibilities, including (1) making no changes to the current scope provisions; (2) making relatively minor changes to the current scope provisions, including analysis of and possible changes to the list of looking-back sections in 1-206; and (3) making UCOIA purely prospective only by eliminating its cumbersome attempt to make a limited number of sections applicable to preexisting communities. Although the latter choice would simplify and add clarity to the UCOIA scope provisions, it would move UCOIA in the opposite direction from that recommended by

the Study committee, and it would create a necessity for legislatures already having adopted UCOIA to review their old condominium statutes and other governing laws to integrate UCOIA rules in those statutes and laws that they want to continue to apply to preexisting communities.

A. Approach 1. Make UCOIA Generally Applicable to Preexisting Communities

This approach reverses the current general principle that UCOIA applies to common interest communities created after the act's effective date replaces it with a new general principle: the act applies to all common interest communities, regardless of their date of creation.

Approach 1 adopts the model that legislation generally follows when it applies to institutions with a long life span. For example, this is what typically happens when state legislatures revise their laws governing corporations and other organizations. The act designates an effective date several years in the future. E.g., Tex. Bus. Orgs. Code § 402.005, Applicability to Existing Entities (new business organizations code, enacted in 2003 with an effective date of January 1, 2006, provides: "On or after January 1, 2010 . . . this code applies to [entities formed before 2006] and all actions taken by the managerial officials, owners, or members of the entity, except as otherwise expressly provided by this title"). The new Texas Business Organizations Code also allowed early adoption of the new code by entities before the mandatory date of January 1, 2010. Id. §§ 402.003, 402.004.

This approach would simplify and reorganize the UCOIA scope sections. The starting point, 1-201 (applicability to new common interest communities), would be expanded to cover all common interest communities "except as otherwise provided in this part." Both 1-204 (*applicability to preexisting common interest communities*) and 1-205 (*applicability to small preexisting cooperative and planned communities*) would become redundant and would be deleted. Section 1-206 (*amendments to governing instruments*) permits a preexisting community to amend its declaration and other governing documents "to achieve any result permitted by this act, regardless of what applicable law provided before this act was adopted." Section 1-206 also would become redundant, as preexisting communities would automatically become subject to UCOIA, with no action to be taken by the association or unit owners.

Under Approach 1 there are several important subsidiary points that must be considered. First, a transition date has to be specified. The effective date for the act's application to preexisting communities almost certainly should be substantially later than the act's general effective date for new communities. Although in principle the same date could work for both purposes on the theory

that persons in the process of creating a new community and persons who are responsible for running a preexisting community are likewise charged with knowledge of the new law and should promptly inform themselves as to the law's contents and requirements, realistically they are in different positions. Officers of associations, especially those governing smaller communities, may need extra time to adapt. For example, the Texas Business Organizations Code adopted a mandatory transition date for preexisting entities of 2010, four years later than 2006, the date the code generally became effective for new entities.

Second, an essential step is to decide what exceptions should apply to the general principle of applicability to preexisting common interest communities. The exceptions to UCOIA's scope must be reviewed. The UCOIA scope provisions presently contain a series of exceptions that apply to all common interest communities, whether new or preexisting communities. They are:

Section 1-202, *Exception for Small Cooperatives*
Section 1-203, *Exception for Small and Limited Expense Liability Planned Communities*
Section 1-207, *Applicability to Nonresidential and Mixed-use Common Interest Communities*
Section 1-208, *Applicability to Out-of-state Common Interest Communities*
Section 1-209, *Other Exempt Real Estate Arrangements*
Section 1-210, *Other Exempt Covenants*

All of these sections as presently written do not discriminate between preexisting and new communities. Thus, after a change in scope to sweep in preexisting communities, they will provide preexisting communities who fit within their terms with exemptions or exceptions from some or all UCOIA requirements. It may be that none of these sections ought to be revised to take account of possible special circumstances for preexisting communities, but this is a matter that will merit study if Approach 1 is adopted.

In this connection, it may be that a uniform set of exceptions and exemptions should apply to all communities, regardless of creation date. But it may be plausible to provide additional exceptions or exemptions for preexisting communities. One situation where this might be merited has to do with UCOIA's definition of "smallness" in this context: a community with not more than 12 units. The act could specify a larger number for exceptions for preexisting communities that have more than 12 units, but are still relatively small

Third, under Approach 1, transition provisions are needed that carefully state the consequences of the transition date for events and circumstances preceding the date. The existing language of 1-204(b) with respect to the effect of the looking-back sections on preexisting communities is a useful starting point and may be adequate, but this should be reviewed further. Section 1-204(b)

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

B. Approach 2. Keep UCOIA Generally Applicable Only to New Communities and Add an Opt-in Procedure for Preexisting Communities

This approach would retain the current general principle that UCOIA applies only to common interest communities created after the act's effective date, and would add a new express opt-in provision authorizing preexisting common interest communities to adopt all of UCOIA. This would replace the present "soft" opt-in provision in Section 1-206 and related UCOIA provisions and comments (discussed in Part III.D *supra*), which depending upon interpretation may or may not allow a direct opt-in for preexisting communities, and at best raise questions about how a preexisting community ought to accomplish an opt-in.

A new express opt-in provision might retain the existing requirement of 1-206(b) that "an amendment to the declaration, bylaws, or plats and plans authorized by this section must be adopted in conformity with any procedures and requirements for amending the instruments specified by those instruments or, if there are none, in conformity with the amendment procedures of this act." This deferral to the content of the declaration regarding amendment procedure is consistent with UCOIA's general section on declaration amendments, which provides a default rule allowing an amendment "only by vote or agreement of unit owners of units to which at least [67] percent of the votes in the association are allocated, unless the declaration specifies a different percentage for all amendments or for specific subjects of amendment." Section 2-117(a).[23]

A new opt-in provision with a baseline approval requirement by 67 percent of the unit owner votes may be an improvement over the existing "soft" provision. However, many declarations for preexisting communities are likely to require a higher percentage vote or even unanimous approval. In addition, when a supermajority vote is required for various actions requiring unit-owner approval, communities often find it difficult to get a supermajority vote. The problem is often exacerbated by a high quorum requirement. Large common interest communities sometimes are particularly vulnerable to low voting rates.

Under these circumstances, it is unlikely that an opt-in provision that defers to the contents of the original declaration of a preexisting community will have significant impact in the numbers of preexisting communities that elect to adopt UCOIA.

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[23] Before UCOIA's 2008 amendments, UCOIA required a minimum 67% unit owner vote to approve an amendment. The 2008 amendment removed the 67 percent floor and allows the declaration to provide a smaller or greater percentage.

A more robust opt-in provision may be worth considering. The provision could (1) specify the required percentage vote, without allowing the declaration or other governing instruments to increase the percentage; (2) specify a quorum requirement that is not overly demanding; (3) allow the matter of adopting UCOIA to come to a vote either at the initiative of the executive board or by petition from a relatively small percentage of the unit owners. Two UCOIA states – Colorado and Washington – have nonuniform opt-in provisions for preexisting common interest communities that have a combination of these features.[24] Their laws could serve as starting point for drafting.

C. Approach 3. Make UCOIA Generally Applicable to Preexisting Communities, but with an Opt-out Procedure for Preexisting Communities

This approach, like Approach 1, reverses the current general principle that UCOIA applies to common interest communities created after the act's effective date and substitutes a new principle: the act generally applies to all common interest communities, regardless of their date of creation. The main difference from Approach 1 is that Approach 3 adds an option for preexisting communities that are to be made subject to UCOIA. Those preexisting communities have an opt-out choice they may exercise. If they do not opt out within a stated window period of time, they become subject to UCOIA.

For discussion of how this approach would implement the major change to make preexisting common interest communities subject to UCIOA, see Approach 1 *supra* – that discussion is not repeated here. The focus here is how the opt-out provision might work.

There are a number of different ways an opt-out procedure could work. An opt-out provision could require the preexisting common interest community to amend its declaration to state the association's decision to exercise its opt-out election. In this event, the opt-out provision could specify a percentage of the votes in the association as a default percentage and defer to different amendment requirements in the declaration of the pre-existing community, like existing UCOIA declaration amendment provisions in 1-206(b) and 2-117(a).

But for the reasons stated in the analysis under Approach 2 *supra*, this may as a practical matter make it highly difficult for many preexisting communities to exercise their opt-out right, even though a substantial number of unit owners want to opt out. Therefore, an opt-out provision that specifies a process and vote requirements that cannot be changed may be preferable.

An opt-out provision also should address the respective roles of the executive board and the unit owners. An opt-out provision (like the opt-in

[24] Both Colorado and Washington require a 67 percent vote and allow either board action to call for a vote or a unit owner initiative. Washington has a special quorum requirement, 30 percent of the votes in the association.

provision described in Approach 2) probably should not leave the final decision in the hands of the executive board. The provision might allow the executive board to recommend an opt-out to the unit owners for their ratification by vote; or the executive board's opt-out recommendation could become final unless disapproved by a specified percentage of unit owners by a given date.

It is worth noting that use of an opt-out procedure may have an influence on the question of what exceptions and exemptions UCOIA should provide when its scope expands to include preexisting communities. Under Approach 1, the content of the exceptions and exemptions for preexisting communities is highly important because it is unalterable. But under Approach 3, the content of exceptions and exemptions may be less important – any preexisting community that is not eligible for a statutory exception or exemption can simply exempt itself by exercising its opt-out election. Thus, the autonomy conferred by an opt-out procedure may function as a substitute for statutory exceptions and exemptions.

D. A Brief Comparison of the Three Approaches

The three approaches sketched out above all seek to make UCOIA applicable to more preexisting common interest communities, but they have markedly different elements and reflect different balances of what may be perceived as competing interests and competing policies. Approach 1 (make UCOIA widely applicable to preexisting communities) is the simplest approach and undoubtedly would make UCOIA applicable to more preexisting communities than either of the approaches with options granted to preexisting communities. Approach 1, therefore, reflects the strongest belief that UCIOA is a significant improvement on preexisting common interest community laws, with substantial benefits for unit owners, other stakeholders, and perhaps the general public.

Approaches 2 and 3, both having options for preexisting communities, give those communities a measure of freedom of choice and autonomy that is lacking under Approach 1. That may have value, but it adds complexity, and raises questions about how valuable the options in fact will be for a number of reasons. One possible reason for questioning the value of opt-in and opt-out options involves the possible difficulties of associations and unit owners in obtaining sufficient information about the relative merits of both bodies of law (UCOIA compared to the relevant preexisting common interest community laws) and in making informed decisions about how both bodies of law would impact their communities and themselves in the near term and in the distant future.

Approach 2 is the least significant change from existing UCOIA law, and it will certainly result in fewer preexisting communities becoming subject to UCOIA, no matter how robust the opt-in procedure happens to be. Approach 2, if adopted, probably reflects a belief that UCIOA may be better in some respects than preexisting common interest community laws, but there are many tradeoffs in the comparison, especially regarding the treatment of unit owners, and it cannot be said that UCOIA is substantially better.

Approach 3 in some respects may be perceived as a middle ground between Approach 1 and 2. Making UCIOA generally applicable to preexisting communities reflects a presumption that UCOIA is a substantially better body of law than preexisting common interest community laws for unit owners and other persons in most states. Approach 3, by requiring an affirmative opt-out, presumes that relatively few preexisting communities will perceive that their community has special characteristics or special needs, not widely shared by other communities, that indicates the desirability of opting out.

In closing the sketch of these three approaches, it is worth noting again that many other approaches to the scope of UCIOA are possible. Also, hybrids of the three approaches above are possible. For example, Approaches 1 and 3 could be combined, with mandatory applicability of UCOIA to most preexisting common interest communities and an opt-out procedure granted only to a class of preexisting common interest communities that are thought most likely to have special circumstances making retention of pre-UCOIA law desirable (e.g., planned communities with no more than 30 units).

Appendix 1:
Details on Retroactivity Provisions in States that have Adopted UCOIA

Nine states have adopted UCOIA: Alaska, Colorado, Connecticut, Delaware, Minnesota, Nevada, Vermont, Washington, and West Virginia. The ULC has promulgated three official versions of UCOIA: the 1982 act, the 1994 act, and the 2008 act (the latter with a set of amendments adopted in 2014). The adopting states do not all have the same version. Some have adopted the 1982 act, and some have adopted the 2008 act, with or without the 2014 amendments.

Two states, New Jersey and Oklahoma, presently have bills pending to adopt UCOIA. 2020 N.J. Senate Bill No. 2261 (introduced Mar. 16, 2020); 2019 Okla. House Bill No. 4112 (introduced Feb. 3, 2020).

Alaska

Alaska adopted UCOIA in 1986. Alaska adopted the uniform text of the UCOIA scope provisions with no variations: "Except as provided in AS 34.08.030, this chapter applies to each common interest community created within the state after January 1, 1986. The provisions of AS 10.15 and AS 34.07 do not apply to common interest communities created after January 1, 1986." Alaska Stat. § 34.08.010.

Colorado

Colorado adopted UCIOA in 1992. Colorado's adoption of 1-201 provides: "Except as provided in section 38-33.3-116, this article applies to all common interest communities created within this state on or after July 1, 1992. The provisions of sections 38-33-101 to 38-33-109 do not apply to common interest communities created on or after July 1, 1992. The provisions of sections 38-33-110 to 38-33-113 shall remain in effect for all common interest communities." Colo. Rev. Stat. § 38-33.3-115.

Colorado's adoption of UCOIA has three substantial variations from the official text. First, Colorado expands the list of looking-back provisions that apply to common interest communities created before the 1992 effective date of Colorado's act. Colorado adopted 1-204 with nonuniform variations. Colo. Rev. Stat. § 38-33.3-117, *Applicability to preexisting common interest communities*. The net effect is to apply to preexisting communities a much longer list than the 19 sections selectively incorporated by UCOIA's official text.

Second, Colorado adds an opt-in provision to its adoption of UCOIA. Its opt-in allows a preexisting community to opt-in with a vote of 67 percent of the members or stockholders. The board of directors may recommend adoption and submit the matter to a meeting of the members or stockholders. Alternatively, members or stockholders may request a vote. The provision states:

> (1) Any organization created prior to July 1, 1992, may elect to have the common interest community be treated as if it were created after June 30, 1992, and

thereby subject the common interest community to all of the provisions contained in this article, in the following manner:
(a) If there are members or stockholders entitled to vote thereon, the board of directors may adopt a resolution recommending that such association accept this article and directing that the question of acceptance be submitted to a vote at a meeting of the members or stockholders entitled to vote thereon, which may be either an annual or special meeting. The question shall also be submitted whenever one-twentieth, or, in the case of an association with over one thousand members, one-fortieth, of the members or stockholders entitled to vote thereon so request. Written notice stating that the purpose, or one of the purposes, of the meeting is to consider electing to be treated as a common interest community organized after June 30, 1992, and thereby accepting the provisions of this article, together with a copy of this article, shall be given to each person entitled to vote at the meeting within the time and in the manner provided in the articles of incorporation, declaration, bylaws, or other governing documents for such association for the giving of notice of meetings to members. Such election to accept the provisions of this article shall require for adoption at least sixty-seven percent of the votes that the persons present at such meeting in person or by proxy are entitled to cast. . . ."

Colo. Rev. Stat. § 38-33.3-118, *Procedure to elect treatment under the "Colorado Common Interest Ownership Act"*.

Third, Colorado's UCIOA act treatment of condominiums is much simpler than the uniform act. The Colorado act fully applies to all new condominium communities created on or after the effective date, July 1, 1992. See Colo. Rev. Stat. § 38-33.3-116. Unlike UCIOA's official text, Colorado condominiums cannot be excluded from application of CCIOA by small size of the community, by small annual expenses, by restriction of units to nonresidential uses, or by a combination of residential and commercial uses in a mixed-use community.

Colorado's act combines UCOIA 1-202 and 1-203 into a single section covering new small cooperatives and new small and limited expense planned communities, with several minor nonuniform variations. Colo. Rev. Stat. § 38-33.3-116. Colorado has a special nonuniform section for large planned communities (at least 200 acres and at least 500 residential units), which provides an exemption from 10 of Colorado's UCOIA sections. Colo. Rev. Stat. § 38-33.3-116.3.

Connecticut

Connecticut adopted UCIOA in 1983 effective January 1, 1984. The Connecticut act adopts the official text of 1-201 with one variation. Conn. Gen. Stat. § 47-214 provides:

Applicability of chapter and amendments thereto to common interest communities. Except as provided in section 47-216, the provisions of this chapter apply to all common interest communities created within this state on or after

> January 1, 1984. The provisions of chapter 825 do not apply to condominiums created on or after January 1, 1984. Amendments to this chapter apply to all common interest communities created after January 1, 1984, or subjected to this chapter by amendment of the declaration of the common interest community, regardless of when the amendment to this chapter is adopted, except that an amendment to this chapter applies only to events and circumstances occurring on or after the effective date of such amendment to this chapter.

This Connecticut section adds to the official text the following phrase at the end of the last sentence: ", except that an amendment to this chapter applies only to events and circumstances occurring on or after the effective date of such amendment to this chapter."

The Connecticut act combines 1-202, 1-203, and 1-207 into a single section. Conn. Gen. Stat. § 47-215(a)(1) and (2) contain the uniform provisions of 1-207, with one substantive variation. The uniform act allows a planned community or a cooperative to have a declaration making only Sections 1-105, 1-106, and 1-107 apply to the community, but Connecticut allows all communities (i.e., including condominiums) to make this choice.

The Connecticut act contains the uniform text of 1-203 dealing with limited expense communities, with one substantive variation. Conn. Gen. Stat. § 47-215(a)(3). The uniform act allows the exemption only if the declaration requires the consent of all unit owners to raise the assessment above $300 during the period of declarant control, but Connecticut allows the exemption only if the declaration requires the consent of unit owners entitled to cast at least 80 percent of the votes, including 80 percent of the votes allocated to units not owned by the declarant.

The Connecticut act substantially modifies the uniform provisions of 1-202 (small cooperatives) and 1-203 (small and limited expense communities). Conn. Gen. Stat. § 47-215(c). [25]right from all of UCOIA except Sections 1-106 and 1-107 (cooperatives) or Sections 1-105, 1-106, and 1-107 (planned communities). Connecticut generally subjects all small communities to UCOIA, with a much more limited exemption if the small community also does not use a master association. The qualifying small community is exempt only from delivering public offering statements and resale certificates and from maintaining records related to UCOIA's resale certificate requirements.[26]

The Connecticut act follows the general scheme of UCOIA 1-204 by providing a list of looking-back UCOIA sections that apply to preexisting communities. Conn. Gen. Stat. § 47-216. The list is substantially different from the uniform provision. The

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[26] If a common interest community contains no more than twelve units and (1) is not subject to any development rights and (2) does not utilize a master association, the declarant is not required to deliver a public offering statement pursuant to section 47-263 or 47-264; resale certificates are not required, as provided in section 47-270, and the association is not required to maintain records necessary to comply with section 47-270. A declarant shall not divide real property into two or more common interest communities to avoid the public offering statement requirements of sections 47-263 and 47-264.

Connecticut list is much longer, incorporating 14 additional sections, deleting 5 sections, and for sections that are only partially incorporated, modifying which sections are partially incorporated.

Delaware

Delaware adopted UCIOA in 2008. The Delaware act adopted the uniform text of the UCOIA 1-201 scope provision, but in an amendment enacted in 2010 added a nonuniform subsection providing: "(e) Any amendment or amendment and restatement of the declaration of a preexisting common interest community does not affect the status of that preexisting common interest community as excepted from some or all of this chapter as provided in this chapter." Del. Code tit. 25, § 81-116.

The Delaware act adopted 1-202, but varied from the UCOIA official text to expand the exception from cooperatives to condominiums and to increase the maximum number of units from 12 to 20: "If a condominium or cooperative contains no more than 20 units and is not subject to any development rights expanding it to include more than 20 units, it is subject only to §§ 81-106 (Applicability of local ordinances, regulations, and building codes) and 81-107 of this title (Eminent domain), but to no other sections of this chapter unless the declaration provides that the entire chapter is applicable. The bylaws of any such condominium or cooperative, and any amendments thereto, shall be recorded." Del. Code tit. 25, § 81-117.

The Delaware act modified 1-203 for the exemption for planned communities to increase the size maximum from 12 to 20 units. For the small expense planned communities, the act departs from the UCOIA official text by allowing the exemption whether or not the community is subject to development rights and by increasing the annual expense cap from $300 to $500. Del. Code tit. 25, § 81-118.

The Delaware act modified 1-204 to add more looking-back provisions and to add many details on what preexisting communities are subject to and are not subject to Delaware's UCOIA act. Del. Code Ann. tit. 25, § 81-119.

A 2015 amendment to the Delaware act also added an express opt-in provision for preexisting communities: "Any preexisting common interest community or approved common interest community has the right to amend its declaration, code of regulations, bylaws, declaration plans, or plats or plans or other governing documents, including, but not limited to certificates or articles of incorporation, formation or otherwise to comply with any or all of the requirements of this chapter, or a preexisting common interest community or approved common interest community may select particular additional sections of this chapter to apply to that community without adopting the entire chapter. Del. Code Ann. tit. 25, § 81-119.

Minnesota

Minnesota adopted UCIOA in 1994. The Minnesota act follows many of UCOIA's uniform scope provisions, but consolidates them into a single section and

makes several substantial changes. The section begins: "(a) Except as provided in this section, this chapter, and not chapters 515 and 515A, applies to all common interest communities created within this state on and after June 1, 1994." Minn. Stat. § 515B.1-102.

For condominiums the Minnesota act makes a significant change from the UCOIA official text. UCOIA grandfathers preexisting condominiums, but Minnesota generally subjects all preexisting condominiums to UCOIA: "This chapter shall apply to condominiums created under chapter 515A with respect to events and circumstances occurring on and after June 1, 1994; provided (i) that this chapter shall not invalidate the declarations, bylaws or condominium plats of those condominiums, and (ii) that chapter 515A, and not this chapter, shall govern all rights and obligations of a declarant of a condominium created under chapter 515A, and the rights and claims of unit owners against that declarant." Minn. Stat. § 515B.1-102(b)(1).

The Minnesota act does not use any of UCOIA exemptions in 1-202 and 1-203 for small cooperatives, small planned communities, and limited expense planned communities. Instead the Minnesota act has a nonuniform provision with different exemptions for all types of communities. Minn. Stat. § 515B.1-102(e). The most important provision exempts subdivisions with detached single-family homes if the association has no obligation to maintain any building containing a home:

> . . . this chapter shall not apply, except by election pursuant to subsection (d), to the following: . . .
> (2) a common interest community that consists solely of platted lots or other separate parcels of real estate designed or utilized for detached single family dwellings or agricultural purposes, with or without common property, where no association or master association has an obligation to maintain any building containing a dwelling or any agricultural building located or to be located on such platted lots or parcels; except that section 515B.4-101(e) shall apply to the sale of such platted lots or parcels of real estate if the common interest community is or will be subject to a master declaration . . . .

Minn. Stat. § 515B.1-102(e)(2).

The Minnesota act uses the selective incorporation approach of UCOIA 1-204, but with a different, shorter list of looking-back sections. Minn. Stat. § 515B.1-102(g), (h).

Minnesota amended its act in 2020 to revise its "amendment of declaration" section. Minn. Stat. § 515B.2-118. The 2020 law adds two new clauses. First, when there is a vote of unit owners to approve an amendment to the declaration, owners who do not reply to a notice of the proposed action sent by certified mail are deemed to consent. Second, a new clause authorizes an association to petition a court to reduce the percentage of votes needed to amend the declaration and other governing documents. 2020 Minn. Sess. Law Serv. Ch. 86 (S.F. 3357), codified at Minn. Stat. § 515B.2-

118(a)(7), (d). The 2020 law also added these two provisions, along with an existing provision for the deemed consent of a secured party to a proposed declaration amendment, to the list of looking-back sections that apply to preexisting communities. 2020 Minn. Sess. Law Serv. Ch. 86 (S.F. 3357), codified at Minn. Stat. § 515B.1-102(g).

The Minnesota act added an express opt-in provision for preexisting communities; the opt-in is limited to planned communities and communities because preexisting condominiums are automatically subject to Minnesota's UCOIA). The opt-in provision states:

> (d) Any condominium created under chapter 515, any planned community or cooperative which would be exempt from this chapter under subsection (e), or any planned community or cooperative created prior to June 1, 1994, or any planned community that was created on or after June 1, 1994, and prior to August 1, 2006, and that consists of more than two but fewer than 13 units, may elect to be subject to this chapter, as follows:
> (1) The election shall be accomplished by recording a declaration or amended declaration, and a new or amended CIC plat where required, and by approving bylaws or amended bylaws, which conform to the requirements of this chapter, and which, in the case of amendments, are adopted in conformity with the procedures and requirements specified by the existing declaration and bylaws of the common interest community, and by any applicable statutes.
> (2) In a condominium, the preexisting condominium plat shall be the CIC plat and an amended CIC plat shall be required only if the amended declaration or bylaws contain provisions inconsistent with the preexisting condominium plat. The condominium's CIC number shall be the apartment ownership number or condominium number originally assigned to it by the recording officer. In a cooperative in which the unit owners' interests are characterized as real estate, a CIC plat shall be required. In a planned community, the preexisting plat or registered land survey recorded pursuant to chapter 505, 508, or 508A, or the part of the plat or registered land survey upon which the common interest community is located, shall be the CIC plat.
> (3) The amendment shall comply with section 515B.2-118(a)(3) and (c); except that the unanimous consent of the unit owners shall not be required for (i) a clarification of the unit boundary description if the clarified boundary description is substantially consistent with the preexisting CIC plat, or (ii) changes from common elements to limited common elements that occur by operation of section 515B.2-109(c) and (d).
> (4) Except as permitted by paragraph (3), no declarant, affiliate of declarant, association, master association nor unit owner may acquire, increase, waive, reduce or revoke any previously existing warranty rights or causes of action that one of said persons has against any other of said persons by reason of exercising the right of election under this subsection.
> (5) A common interest community which elects to be subject to this chapter may, as a part of the election process, change its form of ownership by complying with section 515B.2-123.

Minn. Stat. § 515B.1-102(d).

Nevada

Nevada adopted UCIOA in 1992 with the uniform text of the UCOIA scope provisions with no variations. Seven years later the Nevada legislature changed course, amending its UCOIA to make it applicable to all common interest communities, regardless of their creation date, with several minor exceptions. Nev. Laws 1999, c. 572, § 16, 1. The Nevada scope provisions state: "Except as otherwise provided in this section and NRS 116.1203, this chapter applies to all common-interest communities created within this State." Nev. Rev. Stat. § 116.1201(1).

The Nevada act contains the content of the official UCOIA text for 1-206, but adds a nonuniform subsection to deal with preexisting communities that automatically became subject to the Nevada UCOIA. The old community does not have to amend its declaration or other governing documents to comply with the new law. The existing documents are "deemed" to conform to the new law:

> 116.1206. *Provisions of governing documents in violation of chapter deemed to conform with chapter by operation of law; procedure for certain amendments to governing documents*.
>
> 1. Any provision contained in a declaration, bylaw or other governing document of a common-interest community that violates the provisions of this chapter:
>
> (a) Shall be deemed to conform with those provisions by operation of law, and any such declaration, bylaw or other governing document is not required to be amended to conform to those provisions.
>
> (b) Is superseded by the provisions of this chapter, regardless of whether the provision contained in the declaration, bylaw or other governing document became effective before the enactment of the provision of this chapter that is being violated.

Nev. Rev. Stat. Ann. § 116.1206(1).

The Nevada act has one exception to its new retroactive scope provision: "A common-interest community that was created before January 1, 1992, is located in a county whose population is less than 55,000, and has less than 50 percent of the units within the community put to residential use, unless a majority of the units' owners otherwise elect in writing." Nev. Rev. Stat. § 116.1201(2)(c).

The Nevada act has a special nonuniform provision allowing preexisting communities to use a representative form of government for most purposes: "The provisions of this chapter do not: . . . (d) Except as otherwise provided in subsection 8 of NRS 116.31105, prohibit a common-interest community created before January 1, 1992, or a common-interest community described in NRS 116.31105 from providing for a representative form of government, except that, in the election or removal of a member of

the executive board, the voting rights of the units' owners may not be exercised by delegates or representatives; . . . .” Nev. Rev. Stat. § 116.1201(3)(d).

Nevada’s act includes UCOIA 1-203 with provisions substantially different from the uniform provisions. Nev. Rev. Stat. § 116.1203. Nevada’s provision covers only small planned communities (not limited expense communities) and follows the uniform legislation by providing an exception for planned communities with not more than 12 units and no development rights; these communities are subject to only 1-106 and 1-107 (omitting 1-105 from the uniform provisions). A residential planned community with more than 6 units has special treatment; it is generally exempt from Nevada’s UCOIA except for a short-list of provisions that apply, including 3-104 governing the transfer of special declarant rights. Id. This special provision only has significance for planned communities having between 7 and 12 units (with more than 12 units, the Nevada UCIOA is fully applicable.

Vermont

Vermont adopted UCIOA, effective on January 1, 1999, with one change from the substance of the UCOIA official text of 1-201. The Vermont act adds a provision prohibiting old mobile home parks (existing before 1990) from converting into a UCIOA common interest community communities:

> (b) A mobile home park, as defined in 10 V.S.A. chapter 153, existing before June 30, 1990, shall not be converted through the use of any device, directly or indirectly, into a common interest community pursuant to this title. Any person who offers for transfer ownership interests in a residential condominium unit in a mobile home park shall be subject to the provisions of 27 V.S.A. chapter 15, subchapter 3 and other applicable laws.

27A Vt. Stat. § 1-201.

When Vermont adopted the 2008 UCOIA amendments, the act amended the 1-201 scope provision by adding additional nonuniform provisions:

> (a) Except as otherwise provided in subsection (b) of this section and sections 1-203 and 1-204 of this title, this title applies to all condominiums in this state after the effective date of this title that may be used for residential purposes and to all other common interest communities that contain 12 or more units that may be used for residential purposes and are created within this state after the effective date of this title. The provisions of 27 V.S.A. chapter 15, subchapter 1 shall not apply to common interest communities created after December 31, 1998. Amendments to this title apply to all common interest communities that contain 12 or more units that may be used for residential purposes and are created after January 1, 2011, or are subject to this title by amendment of their declaration, regardless of when the amendment to this title is adopted in this state.

27A Vt. Stat. § 1-201. The first sentence of amended subsection (a) might appear to make all residential condominiums, both pre- and post-effective date, subject to Vermont's UCOIA. But this is not the case; Vermont's version of Section 1-204 treats residential condominiums the same as the other common interest communities with respect to effective date. See *Watson v. Village at Northshore I Association* (discussed *infra*) (indicating a condominium project created in 1986 is not fully subject to UCOIA).

The Vermont act included language from the official UCOIA text in 1-201 dealing with amendments to UCOIA, but modified the official text in two respects. The Vermont provision does not apply statutory amendments retroactively to small communities (less than 12 units) or to any communities created before 2011. 27A Vt. Stat. § 1-201.

The Vermont act does not include UCOIA 1-202, which exempts small cooperatives from UCOIA except for Sections 1-106, *Applicability of Local Ordinances, Regulations, and Building Codes*, and 1-107, *Eminent Domain*. The effect is to broaden the Vermont exemption. Because such cooperatives are not included in Vermont's 1-201, *supra*, they are not subject to these two UCOIA sections.

The Vermont act does not include 1-205, *Applicability to small preexisting cooperatives and planned communities*. This broadens the exemption for these communities. In Vermont they are not subject to Sections 1-105, 1-106, and 1-107, which the official text applies to these communities or to the official text's proviso regarding a declaration amendment that takes advantage of 1-206, *Amendments to governing documents*.

The Vermont act include 1-203, but departs from the official text by changing some of the requirements for the exceptions for small and limited expense planned communities. 27A Vt. Stat. § 1-203. (1) Vermont increases the size limit from 12 units to 24 units. (2) The uniform act overrides both exceptions for a community with development rights; Vermont limits the override to small communities. In other word, Vermont limited expense communities are exempt from the Vermont UCOIA, even if they have developments rights). (3) The uniform act applies 1-105 1-106, and 1-107 to both types of exempted communities; Vermont applies these sections only to limited expense communities.

The Vermont act includes 2-104's selective incorporation of UCOIA sections to preexisting communities, with two variations. 27A Vt. Stat. § 1-204. The Vermont act adds one additional looking-back section, 3-110, *Voting; Proxies; Ballots*, which applies to old communities. Second, Vermont uses different dates for applying the set of looking-back provisions to older common interest communities. Following the official text, common interest communities created before 1999 are not subject to the full UCOIA; they are subject to only the looking-back sections. But the Vermont act divides the looking-back sections into two tiers for application to "events and circumstances." Thirteen looking-back sections "apply only to events and circumstances occurring after

December 31, 1998"; eight looking-back sections "apply only to events and circumstances occurring after December 31, 2011." 27A Vt. Stat. § 1-204(a)(1), (2).

In *Watson v. Village at Northshore I Association*, 184 A3d 1133 (Vt. 2018), the court considered a condominium project created in 1986 under the state's 1968 condominium statute. Vermont adopted UCOIA effective in 1999. The court applied Vermont's 1-204(a) to hold that Section 2-106(a) did not apply retroactively. In 2008 Plaintiff obtained the association's permission to install a satellite dish on the chimney above his unit, which was his limited common element. But in 2010 the association amended the declaration to remove "roof structures immediately above a Unit" from its list of limited common elements. Plaintiff objected, wishing to keep the satellite dish in place. He relied upon UCOIA 2-108(a), which provides: "An allocation [of a limited common element] may not be altered without the consent of the unit owners whose units are affected." The court held in favor of the association because 2-108 is not on Vermont's list of "looking backward" sections that apply retroactively. ***Watson*** illustrates that grandfathering old common interest communities does not always protect the property rights of unit owners. Here the grandfather clause diluted Watson's property rights, preventing him from asserting a new UCIOA protection of his private property.

The Vermont act adopted 1-206 and 1-207 without changes from the official UCOIA text.

Washington

Washington, the newest UCOIA jurisdiction, adopted UCOIA in 2018 with an effective date of July 1, 2018. The Washington act adopted the official text of the UCOIA 1-201 scope provision, except it omits the amendment provision from 1-201. Wash. Rev. Code § 64.90.075.

In 2019, Washington amended its new act to add a nonuniform provision to 1-201 excluding a new common interest community that joins an old common interest community. is made part of a pre-effective-date common interest community under "a right expressly set forth in the declaration of the preexisting common interest community." The nonuniform provisions states:

> Except as otherwise provided in RCW 64.90.080, this chapter does not apply to any common interest community created within this state on or after July 1, 2018, if:
>
> (a) That common interest community is made part of a common interest community created in this state prior to July 1, 2018, pursuant to a right expressly set forth in the declaration of the preexisting common interest community; and
>
> (b) The declaration creating that common interest community expressly subjects that common interest community to the declaration of the preexisting common interest community pursuant to such right described in (a) of this subsection.

Wash. Rev. Code § 64.90.075(4).

The Washington act includes the all of the official text of 1-203, *Exception for small and limited expense liability planned communities*, integrated as part of Washington's version of 1-201. Wash. Rev. Code § 64.90.075(2), (3).

The Washington act has a nonuniform version of 1-204 that applies a very short list of looking-back sections to preexisting communities. Wash. Rev. Code § 64.90.080. Washington has only 4 looking-back sections. It kept only part of one of the 19 looking-back sections listed in the official text, 3-102(a), *powers and duties of unit owners association* – keeping the subsections dealing adoption of budgets and assessments. Wash. Rev. Code §64.90.405(1) (b), (c). The Washington act adds 3 looking-back sections not contained in the UCOIA official text: Washington's version of 3-123 on the adoption of budgets' a Washington nonuniform section, Wash. Rev. Code § 64.90.525, *reserve study*, requiring that associations prepare and update a reserve study, Wash. Rev. Code § 64.90.545; and Washington's opt-in procedure for preexisting communities, Wash. Rev. Code § 64.90.095, *Election of preexisting common interest communities*.

The Washington act added a nonuniform provision for preexisting communities to opt-in to UCOIA. Wash. Rev. Code § 64.90.095, *Election of preexisting common interest communities*. This provision incorporates all of the uniform provisions of Section 1-206, *Amendments to Governing Instruments*, and makes some minor variations in the uniform language in subsections (1) and (2). Subsection (3) specifies a new procedure for associations to opt-in to UCOIA. The board may propose an amendment to opt-in to the unit owners, or owners holding at least 20 percent of the votes may request a meeting to consider an opt-in amendment. The opt-in amendment passes with a supermajority vote of 67 percent, with a quorum requirement equal to 30 percent of the votes in the association. Notably, this voting procedure supersedes all procedures and requirements in the declaration and other governing documents for the preexisting community. Washington's version of 1-204 underscores the supersession, stating the purpose being to "protect the public interest." Wash. Rev. Code Ann. § 64.90.080: "To protect the public interest, RCW 64.90.095 and 64.90.525 supersede existing provisions of the governing documents of all plat communities and miscellaneous communities previously subject to chapter 64.38 RCW." This is in direct contrast to Section 1-206, which requires conformity to procedures and requirements of the old declaration.

The Washington opt-in procedure states in full:

> (3) Notwithstanding any provision in the governing documents of a common interest community that govern the procedures and requirements for amending the governing documents, an amendment under subsection (1) of this section may be made as follows:
> (a) The board shall propose such amendment to the owners if the board deems it appropriate or if owners holding twenty percent or more of the votes in the association request such an amendment in writing to the board;

(b) Upon satisfaction of the foregoing requirements, the board shall prepare a proposed amendment and shall provide the owners with a notice in a record containing the proposed amendment and at least thirty days' advance notice of a meeting to discuss the proposed amendment;
(c) Following such meeting, the board shall provide the owners with a notice in a record containing the proposed amendment and a ballot to approve or reject the amendment;
(d) The amendment shall be deemed approved if owners holding at least thirty percent of the votes in the association participate in the voting process, and at least sixty-seven percent of the votes cast by participating owners are in favor of the proposed amendment.

Wash. Rev. Code Ann. § 64.90.095(3).

West Virginia

West Virginia adopted UCIOA in 1986 and has retained the UCOIA (1982) version without adopting subsequent UCIOA amendments. The West Virginia act adopts the official text of 1-201, 1-202, and 1-203 with no variations. W. Va. Code §§ 36B-1-201, 36B-1-202, 36B-1-203 (West Virginia amended 1-203 in 1994 to increase the annual maximum for limited expense communities from $100 to $300 to conform to UCOIA (1994).

The West Virginia act adopts the official text of 1-204 with no variations. W. Va. Code § 36B-1-204(a). The West Virginia version of 1-204 includes the official text of 1-208, *Applicability to out-of-state common interest communities*, and two nonuniform provisions dealing with the relationship between West Virginia's UCOIA and other statutes governing common interest communities. W. Va. Code Ann. § 36B-1-203(b), (c), (d).

The West Virginia act adopts the official text of 1-205, 1-206, and 1-207 with no variations. W. Va. Code §§ 36B-1-205, 36B-1-206, 36B-1-207.

STATES WITH BILLS PENDING TO ADOPT UCOIA

Oklahoma

2019 Oklahoma House Bill No. 4112, Oklahoma Second Regular Session of the Fifty-Seventh Legislature (introduced Feb. 3, 2020), makes no changes to the official text of the UCOIA scope provisions.

New Jersey

New Jersey's pending bill to adopt UCOIA would change course by making UCOIA generally applicable to all common interest communities,

regardless of creation date. 2020 N.J. Senate Bill No. 2261 (introduced Mar. 16, 2020). The bill provides in its version of 1-201"

> a. Except as otherwise provided in this section, this chapter shall apply to all common interest communities within the State.
>
> b. This chapter shall not make any action taken before the effective date of this chapter invalid or illegal.
>
> c. If a common interest community was validly established before the effective date of this chapter, this chapter shall not require the community to file a declaration.
>
> d. This chapter shall not alter the rights and responsibilities of declarants of common interest communities established before the effective date of this chapter.
>
> e. "The Planned Real Estate Development Full Disclosure Act," P.L.1977, c.419 (C.45:22A-21 et seq.) shall continue to apply to the respective associations and developers except to the extent that this chapter contains provisions that conflict with that act, in which case the terms of this chapter shall be controlling.
>
> f. Unless the reference indicates otherwise, a statutory reference to a condominium, cooperative, or other type of common interest community formed under, or subject to, the "Condominium Act," P.L.1969, c.257 (C.46:8B-1 et seq.), "The Cooperative Recording Act of New Jersey," P.L.1987, c.381 (C.46:8D-1 et al.), the "Horizontal Property Act," P.L.1963, c.168 (C.46:8A-1 et seq.), or "The Planned Real Estate Development Full Disclosure Act," P.L.1977, c.419 (C.45:22A-21 et seq.), shall be construed to include an equivalent type of common interest community, if formed under, or subject to, this chapter.

Appendix 2:
Text of UCOIA (2014) Scope Provisions (Sections 1-201 to 1-210)

SECTION 1-201. APPLICABILITY TO NEW COMMON INTEREST COMMUNITIES. Except as otherwise provided in this [part], this [act] applies to all common interest communities created within this state after [the effective date of this act]. The provisions of [insert reference to all present statutes expressly applicable to planned communities, condominiums, cooperatives, or horizontal property regimes] do not apply to common interest communities created after [the effective date of this act]. Amendments to this [act] apply to all 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 1-202. EXCEPTION FOR SMALL COOPERATIVES. If a cooperative contains no more than 12 units and is not subject to any development rights, it is subject only to Sections 1-106 (Applicability of Local Ordinances, Regulations, and Building Codes) and 1-107 (Eminent Domain) of this [act] unless the declaration provides that the entire [act] is applicable.

SECTION 1-203. EXCEPTION FOR SMALL AND LIMITED EXPENSE LIABILITY PLANNED COMMUNITIES. (a) Unless the declaration provides that this entire [act] is applicable, a planned community that is not subject to any development right is subject only to Sections 1-105, 1-106, and 1-107, if the community:

(1) contains no more than 12 units; or

(2) provides in its declaration that the annual average common expense liability of all units restricted to residential purposes, exclusive of optional user fees and

any insurance premiums paid by the association, may not exceed $300, as adjusted pursuant to Section 1-115.

(b) The exemption provided in subsection (a)(2) applies only if:

(1) the declarant reasonably believes in good faith that the maximum stated assessment will be sufficient to pay the expenses of the planned community; and

(2) the declaration provides that the assessment may not be increased above the limitation in subsection (a)(2) during the period of declarant control without the consent of all unit owners.

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;

(16) Section 3-124;

(17) Section 4-109;

(18) Section 4-117; and

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

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

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

SECTION 1-206. AMENDMENTS TO GOVERNING INSTRUMENTS.

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

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

SECTION 1-207. APPLICABILITY TO NONRESIDENTIAL AND MIXED-USE COMMON INTEREST COMMUNITIES.

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

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

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

(2) [Articles] 1 and 2 apply to the community; or

(3) in the case of a planned community or a cooperative, only Sections 1-105, 1-106, and 1-107apply to the community.

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

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

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

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

SECTION 1-208. APPLICABILITY TO OUT-OF-STATE COMMON INTEREST COMMUNITIES. This [act] does not apply to a common interest community located outside this state, but Sections 4-102 and 4-103 and, to the extent applicable, Sections 4-104 through 4-106**,** apply to a contract for the disposition of a unit in that common interest community signed in this state by any party unless exempt under Section 4-101(b) [and the agency regulation provisions under [Article] 5 apply to any offering thereof in this state].

SECTION 1-209. OTHER EXEMPT REAL ESTATE ARRANGEMENTS.

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

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

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