

Memorandum on Changing Limited Common Elements to Common Elements

FROM: Jim Smith, Reporter

TO: Subcommittee to Consider Allocations of Limited Common Elements: Bill Breetz, Carl Lisman, Don Mielke, Dave Ramsey, Howard Swibel

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Section 2-108(c) as it now stands states: “A common element not previously allocated as a limited common element may be so allocated only pursuant to provisions in the declaration made in accordance with Section 2-105(a)(7). The allocations must be made by amendments to the declaration.”¹ The proposed revision contained in the November 2020 draft makes it easier to reallocate a common element as a limited common element. The proposed revision generally requires approval by the executive board followed by a vote of the unit owners that is less demanding than the vote normally required to amend the declaration. An affirmative vote of 67 percent suffices with no quorum requirement. An exception for “minor” reallocations allows approval by the executive board with no vote by unit owners when “the proposed limited common element does not exceed 50 square feet in area, is generally inaccessible, and is not of practical use to a unit owner other than the unit owner requesting the allocation.”

Discussion at the November 2020 meeting of the Drafting Committee considered a number of issues related to the proposed revision, which we did not resolve during the meeting. The open issues include:

1. What vote should be required and what should be the voting mechanism? Instead of requiring an affirmative vote of unit owners, executive board approval might suffice unless unit owners object after receiving notice of the reallocation.
2. Should there be an exception for “minor” reallocations that the executive board may approve without a vote by owners or the opportunity for unit owners to object?
3. If we have an exception for “minor” reallocations, how should we describe them? At our discussion there appeared to be general dissatisfaction with the 50-square-foot limit. Questions were also raised as to whether the “generally inaccessible” and “not of practical use” requirements are appropriate, or whether they should be modified or eliminated.
4. What common elements are allowed to be reallocated as limited common

¹ Section 2-105(a)(7) provides: “The declaration must contain: . . . a description of any real estate, except real estate subject to development rights, that may be allocated subsequently as limited common elements, other than limited common elements specified in Section 2-102(2) and (4), together with a statement that they may be so allocated.” Query whether a change to this language is required to take account of our new proposed Section 2-108(c), which in its present version omits the reference to Section 2-105(a)(7). The new provision is intended to operate regardless of whether the declaration contains a Section 2-105(a)(7) statement; and if so, the content of that statement.

elements? The language in the November 2020 draft limits the reallocation to “part of a common element that is immediately adjacent to the owner’s unit.” Our discussion included the possibility of limiting the provision (or the exception dispensing with a unit owner vote) to common elements inside a building. As the proposed revision now stands, “immediately adjacent” appears to include exterior common elements, such as decks, patios, grassy areas, and open space.

Set forth below are some alternatives that might address the issues described above. At the end of this memorandum, Appendix 1 contains all of the November 2020 draft of Section 2-108 with Reporter’s Notes.

1. Unit owner votes:

Unless the declaration provides otherwise, the executive board may approve any other amendment only [***Choice 1, present draft*** if the unit owners vote under Section 3-110, whether or not a quorum is present, to approve the amendment by a vote of at least [67] [51] percent of the votes cast, including [67] [51] percent of the votes cast and allocated to units not owned by the declarant] [***Choice 2, objection procedure*** if the board does not receive an objection from a unit owner within [30] days after the board sends the requested amendment to all unit owners. If any unit owner objects, the amendment may be approved only by a vote of the unit owners under Section 3-110, whether or not a quorum is present, to approve the amendment by a vote of at least [67] [51] percent of the votes cast, including [67] [51] percent of the votes cast and allocated to units not owned by the declarant].

2. Approval without owner votes or objections:

Unless the declaration provides otherwise, the executive board may in its discretion [***Choice 1, present draft*** approve the amendment without a vote of the unit owners if the proposed limited common element does not exceed 50 square feet in area, is generally inaccessible, and is not of practical use to a unit owner other than the unit owner requesting the allocation. Unless the declaration provides otherwise, the executive board may approve any other amendment only if the unit owners vote under Section 3-110, whether or not a quorum is

present, to approve the amendment by a vote of at least [67] percent of the votes cast, including [67] percent of the votes cast and allocated to units not owned by the declarant] [**Choice 2, approval solely by board not allowed** approve the amendment only if the unit owners vote under Section 3-110, whether or not a quorum is present, to approve the amendment by a vote of at least [67] percent of the votes cast, including [67] percent of the votes cast and allocated to units not owned by the declarant].²

3. Minor reallocations that do not require unit owner vote or right to object:

Unless the declaration provides otherwise, the executive board may in its discretion approve the amendment without a vote of the unit owners if the proposed limited common element [**Choice 1, present draft** does not exceed 50 square feet in area, is generally inaccessible, and is not of practical use to a unit owner other than the unit owner requesting the allocation] [**Choice 2** is not of benefit or practical use to a unit owner other than the unit owner requesting the allocation] [**Choice 3** is inaccessible to a unit owner other than the unit owner requesting the allocation].

4. Common areas that may be reallocated as limited common elements:

A unit owner may request that the executive board amend the declaration to allocate, as a limited common element for the exclusive use of the owner's unit, [**Choice 1, present draft** part of a common element that is immediately adjacent to the owner's unit] [**Choice 2, interior space only** all or part of a common element that is immediately adjacent to the owner's unit and inside a building [**Choice 2, interior and exterior space** all or part of an interior or exterior common element that is immediately adjacent to the owner's unit].

² Choice 2 simplifies the proposed revision greatly by eliminating the ability of the executive board to approve a reallocation without holding a unit owners' vote or allowing owners the opportunity to object. It would eliminate the need to decide which reallocations are so minor that involvement of the owners is not necessary.

Appendix 1

SECTION 2-108. LIMITED COMMON ELEMENTS.

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

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

(c) ~~A~~ All or part of a common element not previously allocated as a limited common element may be so allocated only pursuant to provisions in the declaration made in accordance with Section 2-105(a)(7). The allocations must be made by an amendments amendment to the declaration. A unit owner may request that the executive board amend the declaration to allocate, as a limited common element for the exclusive use of the owner's unit, part of a common element that is immediately adjacent to the owner's unit. The executive board may prescribe in the amendment fees or charges payable by the unit owner to the association in connection with the new allocation. Unless the declaration provides otherwise, the executive board may in its discretion approve the amendment without a vote of the unit owners if the proposed limited common element does not exceed 50 square feet in area, is generally inaccessible, and is not of practical use to a unit owner other than the unit owner requesting the allocation. Unless the declaration provides otherwise, the executive board may approve any

other amendment only if the unit owners vote under Section 3-110, whether or not a quorum is present, to approve the amendment by a vote of at least [67] percent of the votes cast, including [67] percent of the votes cast and allocated to units not owned by the declarant. On approval of the amendment, the association and the owner of the benefitted unit shall execute the amendment.

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

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

Reporter's Note (10/23)

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

- (1) Consider removing the size limitation. Is it necessary? If the space is not useful to anyone other than the requesting unit owner, why require a vote, whether or not the area exceeds 50 feet?
- (2) The proposed amendment to this section borrows language from a similar provision, Section 2-112, which requires that the amendment to the declaration include "words of conveyance between the parties." This requirement is not included in Section 2-108. Should it be?
- (3) All unit owners affected by conversions of space should get copies of an amendment to the declaration and other documents.
- (4) In some states (e.g., Arizona, Colorado) associations commonly transfer rights to outside spaces, including yards, to individual unit owners who agree to undertake responsibility for maintenance, and watering. This saves the association money. Should the Drafting Committee permit such transfers?

At the September 2020 Zoom annual meeting first reading of the act, a concern

was raised as to the 50-foot size limit – whether it was too small, and whether a size limit is necessary.

Reporter's Notes

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

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

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

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

3. The Drafting Committee at its April 2020 meeting made several decisions concerning revised subsection (c), including (i) adding an explicit requirement that executive board’s approval of the unit owner’s application is necessary to remove possible ambiguity and (ii) changing the vote required to convert a common element to a limited common element from 67% of all votes to 67% of the votes cast. Revised subsection (c) allows a vote by any of the

procedures authorized under Section 3-110. The board may schedule the vote at the next regular unit owners' meeting, call a special meeting, or call for a vote without a meeting.