D R A F T

FOR DISCUSSION ONLY

AMENDMENTS TO THE UNIFORM COMMON INTEREST OWNERSHIP ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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CLEAN DRAFT

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April 30, 2021

AMENDMENTS TO THE UNIFORM COMMON INTEREST OWNERSHIP ACT

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AMENDMENTS TO THE UNIFORM COMMON INTEREST OWNERSHIP ACT

[ARTICLE] 1

GENERAL PROVISIONS

[PART] 1

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

* * *

(17A) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

Reporter's Note (1/29)

This proposed new definition is taken from the Uniform Electronic Wills Act (the E-Wills Act) § 2(1) (2019) and the Revised Uniform Law on Notarial Acts (RULONA) § 2(2) (2018), which use identical language. Existing UCIOA uses "electronic" in a number of provisions without definition. Adding a definition coordinates with proposed revisions to Section 3-108, *Meetings*, and Section 3-110, *Voting; Proxies; Ballots*, which facilitate electronic meetings and electronic voting, including use of the term "electronic ballot," which is not presently defined.

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

Reporter's Note (4/2)

Recommendation: No Change from Existing UCIOA. The February 2021 draft proposed the above revision to the definition of "executive board" to reflect the fact that the board might be created by a variety of documents, including articles of incorporation or articles of organization. Upon further review, the Reporter and Chair believe that an edit to the existing language is not necessary. The definition functions adequately for the executive board of a unit owners association. UCIOA does not require a designation of the executive board in the declaration, *see* UCIOA § 2-105, *Contents of Declaration*, but the association must have bylaws that "provide the number of members of the executive board . . . ." UCIOA § 3-106(a)(1), *Bylaws*. In addition, the definition of "executive board" functions adequately for the executive board of a master association. A master association does not have a "declaration" as defined in the Act, but it is subject to the § 3-106(a)(1) requirement of bylaws stating the number of board members.

* * *

(22) "Master association" means:

(A) a unit owners association that serves more than one common interest community; or

(B) an organization that holds a power delegated from a unit owners association.

Reporter's Note (4/26)

1. The prior drafts of the proposed revision to the definition of "Master Association" have two prongs in Paragraph (A) for unit owners associations that are at the same time "master associations" under the Act. This draft proposes to delete the second prong, a unit owners association that "has entered into an arrangement described in Section 1-209(b)." Section 1-209(b) provides: "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." When this type of arrangement exists, it does not seem necessary for the protection of unit owners to make their unit owners association also a "master association" thereby importing the substantive rules of Section 2-120.

2. The new edit to Paragraph (b) simplifies the language and is not a change of substance. If we want to retain a cross reference to 2-120 with pinpoints, delegations are now allowed under 2-120(a)(2) (delegations in the declaration) and 2-120(b) (delegations from executive boards). The prong "and is not a unit owners association" is deleted on the ground of redundancy -- the phrase "a power delegated from a unit owners association" makes it clear that there are two parties to the delegation and the recipient is not a unit owners association.

Reporter's Notes

1. The proposed new definition of "Master Association" moves some of the language from existing Section 2-120(a) (below) and is designed to achieve consistency of usage throughout section 2-120. The proposed definition also seeks to draw a sharper definitional line between the unit owners association and a master association.

2. Existing Section 2-120(a) defines a master association as the recipient of "powers described in Section 3-102 . . . or other powers." The proposed new definition deletes the "other powers" prong because it is not necessary. Section 3-102 defines "powers" to include all possible powers. See 3-102(a)(15)-(17) ("any

other powers conferred by the declaration or bylaws . . . all other powers that may be exercised in this state by organizations of the same type as the association . . . any other powers necessary and proper for the governance and operation of the association").

3. Existing Section 2-120(a) requires a master association to be "a profit or nonprofit corporation [or unincorporated association]." Yet UCIOA allows a unit owners association to be any type of organization authorized by state law. Section 3-101 provides: "The association must be organized as a profit or nonprofit corporation, trust, limited liability company, partnership, [unincorporated association,] or any other form of organization authorized by the law of this state." There does not appear to be a reason to impose greater limits to a master association's choice of entity. The proposed new definition matches the substance of Section 3-101 simply by referring to "an organization." The bracketed term in existing Section 2-120(a) and in Section 3-101− [or unincorporated association] – is not included. It is unnecessary because all states authorize unincorporated associations ("any other form of organization authorized by the law of this state").

4. The existing definition of "master association" by its reference to Section 3-101 allows a master association also to serve as a unit owners association. Part (A) of the proposed new definition preserves this ability. A master association may be a unit owners association when a common interest community is linked to a geographical area larger than its boundaries. For example, (1) a master association may serve two neighboring common interest communities, neither of which has a separate unit owners association of its own; or (2) a master association for a large retail center may serve as the only association for a neighboring common interest community. The Part (A) reference to Section 1-209(b) includes this latter type of arrangement. Section 1-209(b) refers to 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 . . . ."

Reporter's Note (4/2)

Recommendation: No Change from Existing UCIOA. The February 2021 draft included a new definition of "mortgage" that could be useful in connection with the revisions to the material dealing with special declarant rights, which uses the term "mortgage." The term is sufficiently understandable without a statutory definition.

Reporter's Note (1/29)

A definition of "mortgage" may be useful due to the revisions proposed by the subcommittee on special declarant rights, which treat all SDRs as real property. This act's definition of "security interest" below is not adequate for this purpose

because it includes both mortgages and UCC Article 9 security interests on personal property. This addition uses the definition of "mortgage" from the Uniform Home Foreclosure Procedures Act, slightly modified to fit the language of this act.

* * *

(31) "Rule" means a policy, guideline, restriction, procedure, or regulation of an association, however denominated, which is not set forth in the declaration or bylaws.

Reporter's Note (4/2)

1. The Drafting Committee at its Feb. 12, 2021, meeting discussed the retitling of this definition proposed in the February draft and decided that it is not necessary. Accordingly, this draft reverses edits in the February draft throughout the act that changed "rule" to "association rule."

2. The Committee also discussed David Ramsey's concern with the substance of the definition (see Reporter's Note 1/29 infra) and agreed upon the above edit. Deletion of the phrase "which governs the conduct of persons or the use or appearance of property" means that the definition no longer indicates the scope of what the association through its executive board may regulate by rulemaking. Other provisions of the act now determine that scope. See Section 3-120, *Rules*.

Reporter's Note (1/29)

1. This proposed retitling of this definition fixes a problem of usage in the existing UCIOA text and conforms to Style. ULC Drafting Rules 302(d) (2012) ("Do not use a defined term in the act in a sense that is inconsistent with the definition."). UCIOA uses the words "rule" and "rules" in many sections. Sometimes it is clear from context that the intent is to point to the defined term; sometimes it is clear from context that this cannot be intended (e.g., § 1-114: "consequential, special, or punitive damages may not be awarded except as specifically provided in this [act] or by other rule of law"); and sometimes there is ambiguity. The Comments also frequently use the words "rule" and "rules."

2. David Ramsey writes:

Recently, I received an email concerning the difference between a "rule" and a negative covenant under UCIOA. It involves the following two sections:

> (31) "Rule" means a policy, guideline, restriction, procedure, or regulation of an association, however denominated, which is not set forth in the declaration or bylaws and which governs the conduct of persons or the use or appearance

of property.

Section 2-117(f). An amendment to the declaration may prohibit or materially restrict the permitted uses of or behavior in a unit or the number or other qualifications of persons who may occupy units only by vote or agreement of unit owners of units to which at least 80 percent of the votes in the association are allocated, unless the declaration specifies that a larger percentage of unit owners must vote or agree to that amendment or that such an amendment may be approved by unit owners of units having at least 80 percent of the votes of a specified group of units that would be affected by the amendment . An amendment approved under this subsection must provide reasonable protection for a use or occupancy permitted at the time the amendment was adopted.

I think intuitively educated practitioners would say that the use of a unit is a matter that must be set forth in the declaration to be enforceable. But the definition of "rule" in UCIOA seems to define rule as something that a board could adopt that concerns the use of property. While it is clear that a rule in furtherance of a negative covenant ("no resident of a unit shall create noise that is an annoyance or nuisance to another owner") by defining what that means (i.e. "no playing of musical instruments that can be heard in another unit between the hours of 10:00 p.m. and 8:00 a.m."), but the language in the definition of "rule" is so broad that it could be argued that it includes new restrictions on the use of a unit.

I note that in the comments there is nothing about the definition of "rule," so perhaps a comment is in order on this subject. As you know, though, not all states include the comments in the legislative history, so it's not clear that the comments are sufficient to offset the plain language or the rule definition in terms of whether a board may actually adopt a rule that changes the permitted use or a unit (i.e. no person may smoke tobacco or other products in a unit"). . . .

The real issue is what does "use or appearance of property" mean? If we were talking about the appearance of a lot of the exterior of a home in the homeowners association context I think there would be general agreement that rules dealing with appearance of property are necessary to respond to architectural guidelines. But "use" of property should never have been in the definition unless it was the use of "common elements." It's a very easy fix, which would be something like the following:

"Rule" means a policy, guideline, ~~restriction~~, procedure, or regulation of an association, ~~however denominated,~~ which is not set forth in the declaration or bylaws and ~~which~~ ***that covers the conduct of persons on the common elements, or that further clarifies or regulates restrictions in the declaration or bylaws, or that*** ~~which governs the conduct of persons or the use or~~ appearance of property.

Reporter's Note (4/2)

Recommendation: No Change from Existing UCIOA; the existing definition remains in UCIOA with no edits. The February 2021 draft included a revision of the definition of "security interest" in connection with the work on special declarant rights. It is not necessary because it is not a change in substance.

Reporter's Note (1/29)

This proposed revision conforms the "security interest" definition to the addition of the new definition of "mortgage" above and simplifies to follow the UCC Article 9 definition of security interest for personal property.

(33) "Special declarant rights" means rights appurtenant to real estate owned by the declarant and described in the declaration, which are reserved for the benefit of a declarant to:

Reporter's Note (4/26)

The above edit follows the recommendation of the Style Committee to move the above language from Section 3-104(b) on the ground that it is definitional.

(A) complete improvements the declarant is not obligated to make that are indicated on plats and plans filed with the declaration or described in the public offering statement;

Reporter's Note (4/2)

The subcommittee recommends modifying paragraph (A) to limit this special declarant right to the completion of improvements that the declarant is not obligated to make but are shown on plats and plans or the public offering statement. Improvements that the declarant are obligated to make (See Section 4-119) are no longer covered by this special declarant right. The declarant has a statutory easement under Section 2-116, *Easement and Use Rights*, which is sufficient for obligatory improvements. The change is scope to this paragraph makes the cross reference to Section 4-103(a)(2) inappropriate; the declarant is generally obligated to makes improvements described in the public offering statement; only if the public offering statement somewhere describes improvements that "NEED NOT BE BUILT" are they within the scope of this revised paragraph (A).

Reporter's Note (3/2)

The Drafting Committee at its Feb. 19 meeting discussed all 10 of the special

declarant rights listed in the paragraphs to this definition. Regarding special declarant right (A), the right to complete improvements shown on plats and plans and the public offering statement, the committee decided that this is an ***obligation*** of the declarant, who should have easement rights to enter the common interest community to complete improvements in all cases, regardless of any reservation of a special declarant right to do so. This is provided for already in Section 2-116, *Easement and Use Rights* below. The proposed new content in paragraph (A) authorizes a declarant to make improvements in the common interest community it is not obligated to make by plats and plans or for other reasons. ***Note:*** The same issues as to when the declarant may make optional improvements is also raised by special declarant right [D] below, which grants easements "for the purpose of making improvements within the common interest community or within real estate which may be added to the common interest community."

Reporter's Note (1/29)

The proposed revisions to the definition of "special declarant rights" reflect the work of the subcommittee on special declarant rights. The proposed revision to paragraph (A) allows the declarant to complete improvements shown in the public offering statement for all types of common interest communities. Section 4-103(a)(2) is not limited to cooperatives. It requires that the public offering statement contain "a general description of the common interest community, including to the extent possible, the types, number, and declarant's schedule of commencement and completion of construction of buildings, and amenities that the declarant anticipates including in the common interest community."

(B) under Section 2-110, exercise any development right;

(C) under Section 2-115, maintain sales offices, management offices, signs advertising the common interest community, and models;

Reporter's Note (4/2)

Recommendation: No Change from Existing UCIOA except addition of cross reference. The February 2021 draft revised the wording of paragraph (C) to shorten and to conform to the sequence of words in Section 2-115. This draft returns to the existing text except for the cross reference, which is substantive.

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

Reporter's Note (4/2)

Recommendation: No Change from Existing UCIOA. The February 2021 draft proposed deletion of paragraph (D) on the ground of redundancy with the SDR in paragraph (A) and the declarant's statutory easement under Section 2-116, *Easement and Use Rights*. The subcommittee recommends retention of paragraph (D) with no change to the existing language. Although there may be overlap between the special declarants right to use easements through the common elements in paragraph (D) with the SDR to "complete improvements" set forth in original paragraph (A) above and the easement rights created by Section 2-116, *Easement and Use Rights* (below), the overlap should not cause a problem.

Reporter's Note (1/29)

The declarant's right to easements through the common elements is created by Section 2-116, *Easement and Use Rights* (see below), whether or not the declarant reserves easement rights in the declaration. In contrast, special declarant rights exist only if they are described in the declaration. Section 2-105(a)(8), *Contents of Declaration.* This proposed deletion makes it clear that the declarant's easement rights arise by operation of law under Section 2-116 and do not depend on express language in the declaration.

(E) under Section 2-120, make the common interest community subject to a master association;

(F) under Section 2-12, merge or consolidate a common interest community with another common interest community of the same form of ownership;

Reporter's Note (4/2)

Recommendation: No Change from Existing UCIOA except addition of cross reference. The February 2021 draft revised the wording of paragraph (F) to shorten. This draft returns to the existing text except for the cross reference, which is substantive.

Reporter's Note (1/29)

Discussion by the subcommittee on special declarant rights indicated that special declarant rights are intended as pointers to the relevant sections of the act that govern the subject matter. They are not freestanding rights independent of those sections. Accordingly, the proposed revisions add cross references where appropriate.

The Reporter wonders whether this is sufficient, or whether in some cases (including this merger paragraph) ambiguity remains. Section 2-121 has nice rules, the thrust of which is to allow merger when the unit owners of each

community being merged approve the merger by supermajority votes. Good enough. Nothing in Section 2-121 refers to the declarant(s), the content of the declaration(s), or any special declarant right. The 2-121 Comments don't add anything relevant. Consider two situations.

Situation 1. The declarant has formed two neighboring communities and has not reserved the SDR to merge the communities in the declarations. But the declarant still holds enough votes in both associations by raw number of unsold units. May the declarant hold votes in both associations and merge them under 2-121, so that the declarant's failure to reserve the SDRs is irrelevant? The answer appears to be "yes." Or somehow is the declarant's failure to reserve the SDR supposed to disenfranchise the declarant from doing this when minority unit purchasers object?

Situation 2. Same facts as Situation 1, but here the declarant reserves the SDR to merge communities in both declarations, using the words of this paragraph with no further explanation. Obviously, the declarant now has greater rights to merge the two communities than in Situation 1. If not, the SDR for merger adds nothing and is superfluous - completely meaningless. But what are those greater rights, and how can they operate without the prospect of causing unfairness for unit purchasers? Can the declarant use his SDR to merge the two communities, overriding the vote percentages in 2-121, when he has sold 80 percent of the units in Community 1 and 40 percent of the units in Community 2?

(G) under Section 3-103(d), appoint or remove any officer of the association or any master association or any executive board member during any period of declarant control;

Reporter's Note (4/2)

Recommendation: No Change from Existing UCIOA except addition of cross reference. The February 2021 draft revised the wording of paragraph (G) to shorten. This draft returns to the existing text except for the cross reference, which is substantive.

(H) under Section 3-120(c), control any construction, design review, or aesthetic standards committee or process;

Reporter's Note (4/2)

The Drafting Committee at its Feb. 19 meeting discussed the entire list of special declarant rights regarding to consider which SDRs should expire when the declarant no longer owns units or an unexpired development right to add real estate to the community. The consensus was that all SDRs should expire, with the possible exception of the above right to control construction and design standards.

When the declarant has controlled these matters, unit owners might expect that control will continue after the declarant has exited. Section 3-120(c) allows the association to assume control by adopting rules only "if the declaration so provides." Query whether a declarant SDR should automatically transfer to the association?

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

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

(34) "Time share" [has the meaning in [cite to definition of "time share" in appropriate state statute]] [means any ownership right in or the right to use a unit for less than a full year during any year, and, on a recurring basis for more than one year, even if the years are not consecutive].

Legislative Note: *A state that defines "time share" or a similar term such as "timeshare plan" or "time-share interest" in another statute should cross-reference the definition in the first bracketed option. A state that does not define the term should use the second bracketed option.*

Reporter's Note (1/29)

Another way to do this, maybe cleaner, is to use the new definition with no brackets or choices in text, and add a legislative note or comment suggesting a cross reference as an alternative.

The proposed amendment to the definition of "time share" responds to Jack Burton's comment below and offers two choices. Forty-one states have enacted statutes that regulate time shares, sometimes as a freestanding act and sometimes as part of their brokerage act, deceptive trade practices act, or other act. Most states have designated a state agency that is responsible for time-share regulation. It is preferable that this Act and the state's time-share statute define "time share" the same way. This definition of "time share" may incorporate the time-share statute's definition by cross reference. Of the states that have adopted UCIOA, Nevada has the most time-shares. Its version of UCIOA exactly reproduces verbatim the definition contained in the Nevada time-share statute. Nev. Rev. Stat. Ann. §§ 116.091, 119A.140.

For states that do not have a suitable statutory definition, the proposed amendment includes a definition that tracks closely the key elements of the

current definitions of "time share" in the Florida and California statutes. Florida and California have more time shares than other states: 31% and 10% of the US total number of time-share units, respectively. The proposed amendment's definition also closely resembles the time-share definitions in Hawaii (7%) and Nevada (6%). The proposed definition also is compatible with the Bankruptcy Code's long and complicated definition of "timeshare plan." 11 U.S.C. § 101(53D).

Reporter's Note (10/23)

Jack Burton writes:

1-103(43). The act defines time share by borrowing a definition of "time share estate" from the Model Real Estate Time-Share Act. This act was last revised almost 40 years ago, in 1982. According to the ULC Reference Book the model act has been adopted by only 5 states, Louisiana, Massachusetts, Michigan, Rhode Island, Wisconsin, and Wisconsin. According to the ULC website, the last enactments occurred in 1988. As far as I am aware the ULC does not keep track of how many of those states have retained the borrowed definition. The question is whether we can't find a more widely accepted, and more modern definition of time share to borrow for our act.

Comment

* * *

26. Definition (35), "Unit," describes a tangible, physical part of the project rather than a right in, or claim to, a tangible physical part of the property. Therefore, for example, the sale of a unit to 5 persons as tenants in common does not create 5 new units – there are, rather, 5 owners of the unit. (Under the section on voting (Section 3-110), a majority of the tenants in common are entitled to cast the vote assigned to that unit.)

* * *

27. Definition (36), "Unit owner," contemplates that a seller under a land installment contract would remain the unit owner until the contract is fulfilled. As between the seller and the buyer, various rights and responsibilities must be assigned to the buyer by the contract itself, but the association would continue to look to the seller (for payment of any arrears in common expense assessments, for example,) as long as the seller holds title.

The definition makes it clear that a declarant, so long as he owns units in a common interest community, is the unit owner of any unit created by the declaration, and is therefore subject to all of the obligations imposed on other unit owners, including the obligation to pay common expense assessments. This provision is designed to resolve ambiguities on this point which have arisen under several existing state statutes.

In the special case of a cooperative, the declarant is treated as the owner of a unit or "potential unit" to which allocated interests have been allocated, until that unit is conveyed to another.

The definition includes the buyers of time shares only if they directly hold an estate or long-term leasehold in the unit. Then they own the unit as real property and are treated the same as other multiple owners of a single unit under the [act]. Time-share unit owners may exist in a condominium, a planned community, or in a cooperative.

> **Example 1:** A fee simple owner of a condominium unit records a time-share declaration for her unit and conveys fee simple time-share estates to 12 different persons, each receiving the right to occupy the unit for one month each year. The deeds of conveyance are recorded. The 12 owners have time shares "coupled with an estate" as defined in Section 1-103(34) and they are "unit owners" under Section 1-103(36). Collectively the 12 owners hold the single allocation of votes allocated to their unit. Section 2-107(a). A majority in interest of the 12 owners determines how to cast their unit's vote unless the declaration for the condominium community or the time-share declaration expressly otherwise provides. Section 3-110(b)(2).

> **Example 2:** A cooperative has 10 members, each holding the right to possess one unit under a proprietary lease. The member of the association who owns Unit 6 records a time-share declaration for her unit. The member agrees to sell time-share leaseholds to 6 different persons, each of whom will receive the right to occupy the unit for two months each year. The sales close, with the member turning in her proprietary lease to the association. The association then cancels this proprietary lease and issues 6 new proprietary leases to the time-share buyers. The 6 buyers have time shares coupled with a leasehold as defined in Section 1-103(34) and they are "unit owners" under Section 1-103(36).

When a unit is devoted to time shares that are classified as personal property (e.g., a license, a membership, or contract rights), then the time-share owners are not unit owners. In this situation, someone else necessarily holds title to the unit. It may be the developer, a trustee, a corporation, an association, or another entity. That person is the unit owner, holding title for the benefit of the time-share owners, and its obligations and rights, including voting rights, are the same as an entity who owns a regular unit for the benefit of shareholders, members, or other individuals.

SECTION 1-104. NO VARIATION BY AGREEMENT. Except as expressly provided in this [act], the effect of its provisions may not be varied by agreement, and rights conferred by it may not be waived. Except as otherwise provided in Section 1-207, a declarant may not act under a power of attorney, or use any other device, to evade the limitations or prohibitions of this [act] or the declaration.

Reporter's Note (4/2)

Recommendation: No Change from Existing UCIOA; the title and existing language of Section 1-104) should remain with no edits. The February 2021 draft revised Section 1-104 to coordinate its scope with a proposed new Section 1-204, *Mandatory and Default Rules*, infra.

Reporter's Note (1/29 rev. 4/2)

[All or part of the following may go into the Comments] The second sentence of this section invalidates any device of a declarant that has the intent or effect of evading the limitations or prohibitions of this Act. The revision to the proposed comment *infra* conforms to the recommended revision to the definition of "master association" *supra* to delete the prong that creates a master association when a unit owners association has entered into a cost-sharing arrangement under Section 1-201(9).

Example: A declarant establishes a common interest community, retaining title to the road system providing access to the community from a nearby highway and to all of the units. The road system is not part of the common elements described in the declaration, and persons other than unit owners are allowed to use the road system. Instead, the declarant grants right-of-way easements to use the roads to the association and the unit owners. The easement instrument obligates the declarant or its assignee to repair and maintain the roads and obligates the unit owners to pay substantial fees to use the roads that far exceed the declarant's reasonable and projected repair and maintenance costs. This device is invalid because the road easements are in fact common elements, even though not described as such in the declaration. See Section 1-103(6), *Definition of common elements*, and Comment 6 (access easement that benefits common interest community "is and should be a common element"). In addition, the obligation to pay for use of the roads is in substance a maintenance contract that the association may terminate unilaterally after the period of declarant control ends.

Reporter's Note (4/2)

The Drafting Committee at its Feb. 12, 2021, meeting discussed a proposed new section on mandatory and rules, placed in the February 2021 draft of the amended act, in Section 1-204 (see below). That proposed new section stated the act's provisions generally are mandatory and listed 23 provisions (default rules) that the parties were allowed to change. The committee requested a revision of this approach to provide that the act's provisions generally are default (changeable) rules with a list of mandatory provisions. Below in new proposed Section 1-104A, *Mandatory and Default Rules*, is the Reporter's effort; note the list is much longer. UCIOA is more of a consumer protection statute than it is an enabling act that allows parties to do whatever they want, subject to disclosure duties. ***The Reporter and the Chair think this new section cannot possibly be a good idea.***

Our recommendation at this point in time is to make no change to existing UCIOA -- keep 1-104 supra as-is, despite its shortness and arguable shortcomings, and not attempt a better explanation of which UCIOA rules are mandatory and which ones are default rules.

SECTION 1-104A. DEFAULT AND MANDATORY RULES. The declaration may not waive or vary the provisions of this [act] that give a right to a unit owner or impose an obligation or liability on a declarant, association, or executive board, and concern:

(1) definitions of terms.

(2) assessment and taxation of property under Section 1-105.

(3) consequences of eminent domain under Section 1-107.

(4) unconscionability under Section 1-112.

(5) good faith under Section 1-113.

(6) applicability to common interest communities under part 2 of this article.

(7) recordation of the declaration under Section 2-101.

(8) contents of the declaration under Section 2-105.

(9) leases under Section 2-106.

(10) allocated interests under Section 2-107.

(11) limited common elements under Section 2-108.

(12) plats and plans under Section 2-109.

(13) development rights under Section 2-110.

(14) unit boundaries under Section 2-112.

(15) amendments to the declaration under Sections 2-113 and 2-117.

(16) building encroachments under Section 2-114.

(17) declarant's use of property under Section 2-115.

(18) termination of the common interest community under Section 2-118.

(19) master associations under Section 2-120.

(20) merger or consolidation under Section 2-121.

(21) addition of real estate under Section 2-122.

(22) master planned communities under Section 2-123.

(23) unit owners associations under Sections 3-101 and 3-102.

(24) executive boards under Section 3-103.

(25) special declarant rights under Sections 3-104.

(26) termination of contracts and leases under Section 3-105.

(27) contents of bylaws under Section 3-106.

(28) declarant's liability for expenses under Section 3-107.

(29) meetings under Section 3-108.

(30) voting under Section 3-110.

(31) liability under Section 3-111.

(32) conveyance and encumbrance of common elements under Section 3-112.

(33) insurance under Section 3-113.

(34) assessments under Section 3-115.

(35) liens under Sections 3-116 and 3-117.

(36) association records under Section 3-118.

(37) rules under Section 3-120.

(38) notice in Section 3-121.

(39) removal of officers and directors under Section 3-122.

(40) budgets and assessments under Section 3-123.

(41) public offering statements under Sections 4-102 through 4-108 and Section 4-120.

(42) resales of units under Section 4-109.

(43) escrow of deposits under Section 4-110.

(44) releases of liens under Section 4-111.

(45) conversion buildings under Section 4-112.

(46) warranties under Sections 4-113 through 4-116.

(47) declarant's obligation to complete improvements under Section 4-119.

[(48) obligations with respect to registration under [Article] 5.]

[PART] 2

APPLICABILITY

SECTION 1-201. GENERAL APPLICABILITY TO COMMON INTEREST COMMUNITIES.

Reporter's Note (4/2)

This draft drastically shortens Section 1-201 from its content in the Feb. 2021 draft, which contained subsections (a) through (h), by moving all materials that are transitional to a new Part 3 for Article 1 infra, as well as materials from Sections 1-204, 1-205, and 1-206 infra that appear to be useful for transitional purposes. Many ULC acts, especially those approved recently, include a part or article titled "Transition." This approach shortens the scope sections, removes clutter, and makes this entire Part 2 cleaner and much easier to follow. Within a few years after enactment, the transition rules for this Act will have no impact on persons subject to the legislation. The transition provisions could go to a new Article 6 at the very end of this Act, but because the preceding Article 5 is denominated "Optional" and has not been adopted by any state, the location at the end of this Article 1 seems preferable.

Except as otherwise provided in this [article], this [act] applies to all common interest communities.

Reporter's Note (4/26)

The Style Committee noted inconsistency throughout this Part and in the new Part 3, *Transition*, as to where the phrase "created within this state" is used following the term "common interest communities" and "common interest community" and

where this phrase is often omitted. Often the current text only says, "common interest community created before [date]" or "created after [date]". ***The Style Committee requests consistency throughout,*** unless a substantive difference is intended with respect where the words "created within this state" are present and where they are not. Note UCIOA's only application to out-of-state common interest communities is in Section 1-208, *Applicability to Out-of-State Common Interest Communities*, is to require a declarant to comply with the public offering statement provisions when a contract of sale is "signed in this state" by any party. The easiest solution is simply to delete the phrase "created in this state" in the 4 places where it occurs (here and new 1-301, 1-304 and 1-305 infra); Section 1-208 as it presently stands fully handles the issue by itself.

Reporter's Note (1/29)

1. This redraft of Article 1, Part 2 of the act implements the decision made by the Drafting Committee at its November 2020 meeting to make the act generally applicable to all common interest communities in the State, including those created before the effective date of the act.

2. With respect to state condominium acts, making UCIOA generally applicable to old condominium communities conforms the act to the practice of most states. Benjamin Orzeske, ULC Chief Counsel, had a student prepare a 50-state chart. I reviewed and made a few corrections to this highly useful product. There presently are 14 Uniform Condominium Act (UCA) states and 9 UCIOA states. Thus, 23 states have adopted the ULC product to govern condominiums. Of these 23 states, 18 have followed the UCOIA/UCA scope approach, generally applying the act prospectively and grandfathering preexisting condominiums. Five of the 23 states (Arizona, Louisiana, Minnesota, Nevada, and Virginia) have enacted non-uniform provisions that make apply their act to all condominiums, whenever created.

The other 27 states with condominium acts that are not UCA or UCIOA are divided in their approach to scope. A large majority (23 states) apply their condominium act to all condominiums, regardless of the time of creation. A minority of 4 states (Georgia, Indiana, Michigan, Utah) have acts that apply prospectively, grandfathering old condominiums.

Most of the states with the largest numbers of condominiums and condominium residents in the US have condominiums acts that apply to all condominiums, regardless of time of creation. E.g., Arizona, California, Florida, Hawaii, Illinois, New York, Nevada.

Amendments to this [act] apply to all common interest communities subject to this [act], regardless of when the amendment becomes effective.

Reporter's Note (4/2)

The Drafting Committee at its Feb. 12, 2021, meeting discussed the proposed deletion from existing UCIOA § 1-201 of the last sentence supra dealing with amendments. Instead of deletion, in this draft the sentence is edited to fit with the new scope provisions of this part. Its substance is the same as provisions sometimes included in other ULC acts to recognize that entities do not have contractual or vested rights in existing statutes, which inhibit amendment or repeal. E.g., Uniform Limited Cooperative Association Act § 114, *Reservation of Power to Amend or Repeal,* which provides: "The [legislature of this state] has the power to amend or repeal all or part of this [act] at any time, and all limited cooperative associations and foreign cooperatives subject to this [act] are governed by the amendment or repeal of this [act]."

Reporter's Note (10/23)

At the September 2020 Zoom annual meeting first reading of the act, a concern from the floor was raised that the last sentence of this sentence may result in an old common interest community inadvertently becoming subject to UCIOA when it makes an amendment to its declaration.

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. [RESERVED].

Reporter's Note (1/29)

1. Section 1-204 of existing UCIOA becomes obsolete if UCIOA is amended to make the act generally applicable to all common interest communities, regardless of their date of formation. At the November 2020 meeting of the Drafting Committee, there was substantial support for replacing Section 1-204 with a new section that details which provisions of UCIOA are mandatory and which are permissive (default rules). New Section 1-204 below provides a list. This new section would overlap with, and supersede, an existing much shorter UCIOA provision in Article 1, Part 1, which states: "Section 1-104. *No Variation by Agreement*. Except as expressly provided in this [act], the effect of its provisions may not be varied by agreement, and rights conferred by it may not be waived. Except as otherwise provided in Section 1-207, a declarant may not act under a power of attorney, or use any other device, to evade the limitations or prohibitions of this [act] or the declaration."

2. Statutory provisions that draw the line between mandatory and default rules can be drafted in one of two ways. Some acts start from the premise that most rules ought to be "changeable" default rules and provide a list of mandatory (non-changeable) rules. Examples are UCC Article 9, § 9-602, *Waiver and Variance of rights and Duties*; Uniform Trust Code § 105, Default and Mandatory rules. Other acts, often those thought to be more directed to consumer protection, start from the opposite premise: most rules are mandatory, and a limited number are changeable default rules. The proposed new Section 1-204 below follows the second way, which is consistent with UCIOA existing Section 1-207 and the drafting style generally used in existing ULC acts.

SECTION 1-205. [RESERVED].

SECTION 1-206. [RESERVED].

Reporter's Note (1/29)

Section 1-206 becomes obsolete if UCIOA is amended to make the act generally applicable to all common interest communities, regardless of their date of formation. Note that certain common interest communities that are not otherwise made subject to UCIOA have opt-in rights under Section 1-202, *Exception for Small Cooperatives*; Section 1-203, *Exception for Small and Limited Expense Liability Planned Communities*; and Section 1-207, *Applicability to Nonresidential and Mixed-use Common Interest Communities.*

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.

[PART] 3

TRANSITION

SECTION 1-301. EFFECTIVE DATE.

(a) This [act] takes effect …

(b) Before [all-inclusive date], this [act] governs only:

(1) a common interest community created on or after [the effective date of this [act]]; and

(2) a common interest community created before [the effective date of this [act]] that amends its declaration to elect to be subject to this [act].

(c) On and after [all-inclusive date] this [act] governs all common interest communities.

Legislative Note: *The "all-inclusive" date should be at least one year after the effective date of the act, but no more than three years. For a state that previously adopted UCIOA (2014) or an earlier version of UCIOA, the effective date in subsection (b) should be the effective date stated in the earlier adoption.*

Reporter's Note (1/29 rev. 4/2)

1. Subsections (a) and (b) provide effective-date rules using the technique of an "all-inclusive date" found in many ULC acts dealing with corporations and other business organizations. A legislature note should be added to offer advice on selection of the all-inclusive date. Probably it should be at least 1 year and no more than 3 years after the effective date of the act. The length should depend on how long it should take for people who are responsible for running the affairs of associations (e.g., executive boards and in many cases management companies) to become aware of and familiar with the new act.

2. The Drafting Committee at its Feb. 12, 2021, meeting discussed subsection (b) dealing with the all-inclusive date with the consensus that the recommended range

should be 1-3 years rather than 2-5 years.

Reporter's Note (4/2)

The Drafting Committee at its Feb. 12, 2021, meeting discussed the opt-out provision supra (shown as Section 1-201(e) in the Feb. draft) and agreed to delete it from the statute. Instead, a comment will offer proposed language for any state that decides an opt-out is desirable due to particular local circumstances.

Reporter's Note (1/29)

Subsection (e) contains an opt-out provision for preexisting common interest communities. At the November 2020 meeting of the Drafting Committee, there appeared to be support for including an opt-out provision. At the meeting there also was brief discussion as to whether the opt-out ought to be perpetual or limited to a time period. The two choices shown for paragraph (3) of subsection (e) contain alternatives dealing with this issue of time.

Proposed new Comment

If a state decides that full applicability of the act to preexisting common interest communities is not appropriate, the state may decide to include an opt-out procedure in this section reading as follows: "This [act] does not apply to a common interest community created before [the effective date of this [act]] which approves an amendment under this subsection before [all-inclusive date]. An amendment authorized by this subsection must be adopted in conformity with the requirements of this subsection, which supersede any provisions in the declaration or bylaws of the common interest community. The executive board may in its discretion propose an amendment to the unit owners. In this event, the board shall submit the proposed amendment for a vote by the unit owners under Section 3-110. Approval requires a vote of more than 50 percent of the votes in the association."

SECTION 1-302. PRIOR STATUTES. The provisions of [insert reference to all present statutes expressly applicable to planned communities, condominiums, cooperatives, or horizontal property regimes]:

(1) do not apply to common interest communities ~~after [the effective date of this act]~~ that are subject to this [act]; and

(2) apply to common interest communities created before [the effective date of this [act]] until the community becomes subject to this [act].

Legislative Note: *For a state that previously adopted UCIOA (2014) or an earlier version of*

UCIOA, the effective date in this section should be the effective date stated in the earlier adoption.

Reporter's Note (4/26)

This section moves the existing second sentence from Section 1-201 and keeps it without change as paragraph (1). The existing text in Section 1-201 does not expressly address retention of the statutes for preexisting communities, although obviously that is implied. New paragraph (2) says this directly. A preexisting common interest community remains subject to the old statutes until the "all-inclusive date" or until it makes an election to adopt UCIOA under Section 1-202, 1-203, or 1-301(a)(2).

Question: Should we add a Legislative Note with advice about repeal (or not) of prior statutes? Under the new proposed scope provisions, all condominiums regardless of size will become subject to UCIOA no later than the all-inclusive date. Thus, repeal of present older condominium statutes seems justified.

SECTION 1-303. RETROACTIVE APPLICATION.

(a) Subject to subsection (b), a provision of a declaration or bylaws adopted before [the effective date of this [act]] that is inconsistent with a mandatory provision of this [act] is invalid. unless the provision is expressly permitted under Section 1-104 ***[or better to say "expressly permitted under this [act]?]***.

(b) This [act] does not require a common interest community created before [the effective date of this [act]] with a declaration that was valid when recorded to prepare or amend plats and plans.

Reporter's Note (4/2)

1. The Drafting Committee at its Feb. 12, 2021, meeting discussed subsection (a) (shown as Section 1-201(f) in the Feb. draft) at its Feb. 12, 2021, meeting, with the consensus that (i) the text should not directly state that an amendment to the declaration or bylaws is not required and (ii) the text should expressly invalidate provisions that do not comply with UCIOA's mandatory rules.

2. Plats and plans are part of the declaration. The Drafting Committee also decided that a pre-existing common interest community should not have to amend plats and plans that were valid when recorded.

Reporter's Note (1/29)

1. Subsection (f) deals with the declaration, including plats and plans, and bylaws of preexisting common interest communities. Many preexisting common interest communities that become subject to the act may want to study their governing documents and amend or restate them to comply with UCIOA, but the first sentence of subsection (f) makes this unnecessary.

2. As subsection (f) states, any provisions of the declaration and bylaws that are rendered unenforceable by the act are – actually – unenforceable. This follows the pattern of obsolete statutes and regulations well-understood by lawyers. Often legislatures and agencies do not revise statutes and regulations to take account of legal developments, such as judicial decisions and other changes in law, that make certain provisions obsolete or unenforceable. Lawyers and other persons need to understand which provisions are still active and relevant, and which are not.

3. The reference in subsection (f) to newly drafted Section 1-204, *Mandatory and Default Rules*, means that existing provisions of the declaration and bylaws that are inconsistent with the rules and procedures of UCIOA remain effective if UCIOA allows their variation by content in the declaration or bylaws. For example, if the preexisting declaration provides that termination of the common interest community requires the unanimous approval of unit owners, this provision supersedes the rule in Section 2-118 that authorizes termination by a vote of 80 percent of unit owners. The preexisting community does not have to amend its declaration to restate its unanimity provision.

(c) This [act] does not invalidate an action validly taken, or transaction validly entered into, before [the effective date of this [act]].

Legislative Note: *For a state that previously adopted UCIOA (2014) or an earlier version of UCIOA, the effective date in this section should be the effective date stated in the earlier adoption.*

Reporter's Note (4/2)

The Drafting Committee discussed subsection (h) at its Feb. 12, 2021, meeting, and decided that is not necessary.

SECTION 1-304. APPLICABILITY TO PRE-EXISTING COMMON INTEREST COMMUNITIES.

Reporter's Note (4/2)

The February 2021 draft deleted Section 1-204 in its entirety and substituted a

new Section 1-204, *Mandatory and Default Rules*. The Drafting Committee discussed this change at its Feb. 12, 2021, meeting, with the consensus that Section 1-204 should be retained for the transitional purpose of preserving its rules for pre-existing common interest communities before they become fully subject to the Act at the all-inclusive date stated in Section 1-201. Below is the re-insertion of Section 1-204 with proposed edits.

(a) Except for a cooperative or planned community described in Section 1-305 or a nonresidential common interest community described in Section 1-207, the following sections apply until [all-inclusive date] to a common interest community created 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 to the extent necessary to construe those sections.

(b) The sections listed in subsection (a):

(1) apply only to events and circumstances occurring after [the effective date of this [act]]; and

(2) before [insert all-inclusive date], do not invalidate existing provisions of the declaration, bylaws, or plats or plans of those common interest communities.

SECTION 1-305. APPLICABILITY TO SMALL PREEXISTING COOPERATIVES AND PLANNED COMMUNITIES.

Reporter's Note (4/2)

The February 2021 draft deleted Section 1-205 in its entirety. The Drafting Committee discussed this change at its Feb. 12, 2021, meeting, with the consensus that Section 1-205 should be retained for the transitional purpose of preserving its rules for pre-existing common interest communities before they become fully subject to the Act at the all-inclusive date stated in Section 1-201. Below is the re-insertion of Section 1-205 with a proposed edit.

If a cooperative or planned community created 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 until [all-inclusive date] unless the declaration is amended in conformity with applicable law and with the procedures and requirements of the declaration to take advantage of Section 1-306, in which case, all the sections enumerated in Section 1-304(a) apply to that cooperative or planned community.

SECTION 1-306. 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 until [all-inclusive date] to

achieve any result permitted by this [act], regardless of what applicable law provided before [the effective date of this [act]].

(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.

Legislative Note: *For a state that previously adopted UCIOA (2014) or an earlier version of UCIOA, the effective date in this section should be the effective date stated in the earlier adoption.*

[ARTICLE] 2

CREATION, ALTERATION, AND

TERMINATION OF COMMON INTEREST COMMUNITIES

* * *

SECTION 2-105. CONTENTS OF DECLARATION.

(a) The declaration must contain:

* * *

(6) a description of any limited common elements, other than those specified in Section 2-102(2) and (4), as provided in Section 2-109(b)(10) and, in a planned community, any real estate that is or must become common elements;

Reporter's Note (4/2)

Recommendation: No Change from Existing UCIOA; the existing language in paragraph (6) remains in UCIOA with no edits. The February 2021 draft revised paragraph (6) to consolidate content from Section 2-108(a). The consensus of the Drafting Committee at its Feb. 12, 2021, meeting is that the change is not

necessary.

Reporter's Note (1/29)

This proposed revision consolidates paragraph (6) with related content from the first sentence of Section 2-108(a), *Limited Common Elements*. Should we keep or delete the reference to Section 2-109(b)(10)? It's not clear to me how paragraph (6) and Section 2-109(b)(10) are intended to fit together. Section 2-109(b)(10) requires the plat to show "the approximate location and dimensions of any porches, decks, balconies, garages, or patios allocated as limited common elements, and show or contain a narrative description of any other limited common elements." Comment 9 to Section 2-109, *Plats and Plans*, states: "The 1994 amendments to subsections (6), (7), and (10) seek to balance the need for disclosure and certainty in understanding what a unit owner 'owns,' with the practical limitations of the surveying profession. The balance struck in the 1994 amendments to this section requires that the plat or survey – as a minimum – actually show only the kinds of limited common elements that most people would understand to be an important appurtenance to their units. All other kinds of limited common elements – parking spaces, window boxes, etc., – may be either shown on the survey or simply described in words." Note, the plat is part of the declaration. Section 2-109(a). If a limited common element is described in the plat, is another description in the text part of declaration required? May the declarant choose to describe some limited common elements only in the text part of the declaration, and others only in the plat?

* * *

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

Reporter's Note (4/2)

The subcommittee recommends the proposed edit above, which changes a few words as possible while making the substantive change to require a legal description only for real estate subject to development rights. The final clause from the February 2021 draft, beginning with "and any other conditions", is not in original paragraph (8); these words were moved in the February 2021 draft from paragraph (10) infra.

Reporter's Note (3/2)

Existing paragraph (8) requires a legal description of a parcel to which each special declarant right is appurtenant, including the intangible rights to control

architectural review committees and to appoint and remove officers and board members. Under revised Section 3-104(a) below, special declarant rights are automatically appurtenant to all real estate owned by the declarant in the common interest community. Accordingly, the proposed revision to this paragraph (8) deletes the requirement that the declaration describe parcels of real estate to which special declarant rights are connected. The Drafting Committee discussed the issue at its Feb. 2021 drafting committee meeting, with the consensus that a legal description should be required for any parcels that are subject to development rights.

* * *

Reporter's Note (4/2)

Recommendation: No Change from Existing UCIOA for paragraphs (9) and (10). In paragraph (9) the words "portions" are not replaced with "parcel" to achieve consistency of usage, and the content from paragraph (10) is not moved to paragraph (8).

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.

Reporter's Note (4/2)

Recommendation: No Change from Existing UCIOA; the existing language in subsection (a) remains in UCIOA with no edits. The February 2021 draft edited subsection (a) and moved some of its content to Section 2-105(a)(6). The consensus of the Drafting Committee at its Feb. 12, 2021, meeting is that the change is not necessary.

Reporter's Note (1/29)

At the November 2020 Drafting Committee meeting, a revision was recommended to the first sentence of subsection (a) to indicate that the limited common element must be allocated to "fewer than all" the units. Instead of this change, this draft recommends deletion of the sentence. The sentence is redundant with (and possibly not fully consistent with) Section 2-105, *Contents of Declaration*, which states: "The declaration must contain: . . . (6) a description of any limited common elements, other than those specified in Section 2-102(2) and (4), as provided in Section 2-109(b)(10) and, in a planned community, any real estate that is or must become common elements." A revision is also proposed to

Section 2-105(a)(6) (see above) that combines and reconciles the two provisions.

(b) Except as the declaration otherwise provides, a limited common element may be reallocated by an amendment to the declaration executed by the unit owners between or among whose units the reallocation is made.

Reporter's Note (4/2)

Style edits were made to the first sentence of subsection (b) in the 2020 annual meeting draft and by the Style Committee. The consensus of the Drafting Committee at its Feb. 12 meeting is to minimize Style edits to the draft. Thus, this draft restores the first sentence to its original. The content from the next 2 sentences is moved to subsection (d) infra where with additional language it applies to amendments made under both this subsection (b) (reallocation of limited common element) and subsection (c) (change from common element to limited common element); this move avoids having to say the same thing twice.

Reporter's Note (1/29)

The subcommittee on limited common elements recommends that the Drafting Committee consider 3 choices for subsection (c), which are laid out below:

1. Make no major change to this section and allow the declaration to establish a reasonable process. The declaration may provide a process for converting general common elements to limited common elements; if not, the general rules for amending the declaration apply.

2. Revise this section along the lines proposed in the November 2020 draft to make it easier to reallocate a common element as a limited common element. A unit owner requests that the executive board approve a reallocation. The board puts the request on its meeting agenda. Unit owners receive notice of all executive board meeting agendas. If the board approves the request, the reallocation is effective only after the board notifies all unit owners of its action. If a unit owner objects, the reallocation is effective only if the board submits the request to the unit owners for approval. Approval requires an affirmative vote of 67 percent with no quorum requirement.

3. This choice follows Choice 2 above but limits the process to less than all common elements. The subcommittee thinks the limitations or variables likely to work best are common elements that are: (a) contiguous to the unit of the requesting owner; (b) inside a building; and (c) of no practical use to other unit owners. Different combinations of the above and other variations are of course possible.

(c) A common element not previously allocated as a limited common element may be so allocated only by an amendment to the declaration. A unit owner may request the executive board to amend the declaration to allocate all or part or a common element as a limited common element for the exclusive use of the owner's unit. The board may prescribe in the amendment a condition or obligation, including an obligation to maintain the new limited common element or to pay a fee or charge to the association. If the board approves the amendment, the board shall give notice to the unit owners of its action and include a statement that unit owners may object in a record to the proposed amendment not later than 30 days after delivery of the notice. The amendment becomes effective if the board does not receive a timely objection. If a timely objection is received, the amendment becomes effective 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 at least 67 percent of the votes cast and allocated to units not owned by the declarant. If the amendment becomes effective, the association and the owner of the benefitted unit shall execute the amendment.

Reporter's Note (4/2)

The Drafting Committee discussed subsection (c) at its Feb. 12, 2021, meeting and the 3 choices recommended for consideration by the subcommittee (see Reporter's Note 1/29 supra). The Drafting Committee decided that Choice 2 is preferable; the revision to subsection (c) selects Choice 2 with word edits.

(d) The association shall record an amendment to the declaration made under this section in the manner provided in Section 2-117(e). The amendment must be indexed in the names of the parties and the association as grantor or grantee, as appropriate. If the amendment changes information shown in plats or plans concerning a limited common element other than a common wall between units, the association shall prepare and record revised plats or plans.

Reporter's Note (4/2)

1. At the Feb. 12, 2021, meeting of the Drafting Committee the suggestion was made to add a cross reference to Section 2-117(e), *Amendment of Declaration*, in subsection (d). Section 2-117(e) states: "Amendments to the declaration required by this [act] to be recorded by the association must be prepared, executed, recorded, and certified on behalf of the association by any officer of the association designated for that purpose or, in the absence of designation, by the president of the association." Is the cross reference necessary? Without it, subsection (b) might be read to authorize an amendment signed only by the unit owners, with no signature by an officer.

2. The cross reference to Section 2-109(b)(10) is deleted because it is not substantive. Section 2-109(b)(10) states that "each plat must show or project . . . the approximate location and dimensions of any porches, decks, balconies, garages, or patios allocated as limited common elements, and show or contain a narrative description of any other limited common elements."

Reporter's Note (1/29)

The subcommittee on limited common elements recommends that the Drafting Committee consider 3 choices for subsection (c), which are laid out below:

1. Make no major change to this section and allow the declaration to establish a reasonable process. The declaration may provide a process for converting general common elements to limited common elements; if not, the general rules for amending the declaration apply.

2. Revise this section along the lines proposed in the November 2020 draft to make it easier to reallocate a common element as a limited common element. A unit owner requests that the executive board approve a reallocation. The board puts the request on its meeting agenda. Unit owners receive notice of all executive board meeting agendas. If the board approves the request, the reallocation is effective only after the board notifies all unit owners of its action. If a unit owner objects, the reallocation is effective only if the board submits the request to the unit owners for approval. Approval requires an affirmative vote of 67 percent with no quorum requirement.

3. This choice follows Choice 2 above but limits the process to less than all common elements. The subcommittee thinks the limitations or variables likely to work best are common elements that are: (a) contiguous to the unit of the requesting owner; (b) inside a building; and (c) of no practical use to other unit owners. Different combinations of the above and other variations are of course possible.

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.

SECTION 2-112. RELOCATION OF UNIT BOUNDARIES.

(a) Subject to the provisions of the declaration and other provisions of law, the boundaries between adjoining units may be relocated by an amendment to the declaration upon application to the association by the owners of those units. If the owners of the adjoining units have specified a reallocation between their units of their allocated interests, the application must state the proposed reallocations. Unless the executive board determines, within 30 days, that the reallocations are unreasonable, the association shall prepare an amendment that identifies the units involved and states the reallocations.

Reporter's Note (4/2)

The proposed edits to subsection (a) in prior drafts were all Style edits, made before the 2020 annual meeting draft, with one exception. The proposed deletion of the introductory words "Subject to the provisions of the declaration and other provisions of law" is substantive. This issue is whether the rule of this section is a mandatory rule or a default rule. For discussion of the issues, see Reporter's note 2 dated 7/31/2020 infra.

The consensus of the Drafting Committee at its Feb. 12, 2021, meeting is to minimize Style edits to the draft. Thus, this draft restores the original language of

the first 3 sentences of subsection (a) and also proposes reinsertion of the introductory words "Subject to the provisions of the declaration and other provisions of law" on the ground that the change is not sufficiently important. The last sentence of this subsection dealing with preparation and recording of the amendment is moved to subsection (c) infra where it applies to amendments made under both this subsection (a) (relocation by agreement of unit owners) and subsection (b) (relocation by executive board); this move avoids having to say the same thing twice.

(b) The boundary of a unit may be relocated only by an amendment to the declaration. A unit owner may request the executive board to amend the declaration to include all or part of a common element within the owner's unit.

Reporter's Note (4/2)

The Drafting Committee discussed subsection (b) at its Feb. 12, 2021, meeting and decided not to add the restrictive language limiting what types of common elements may be added to an owner's unit. This is consistent with the policy change made for changing common elements to limited common elements in Section 2-108(c) supra.

Reporter's Note (1/29)

At the November 2020 meeting of the Drafting Committee, the question was raised whether this subsection (b) allows a unit boundary relocation to add space outside a building, such as a parking space. The new bracketed choices would limit the types of common elements eligible for the executive board process. They are the same as those presented for consideration in this draft for converting common elements to limited common elements under Section 2-108 above.

The board may prescribe in the amendment a fee or charge payable by the unit owner to the association in connection with the relocation. [***Unless the declaration otherwise provides,***] the board may 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 at least 67 percent of the votes cast and allocated to units not owned by the declarant.

Reporter's Note (4/26)

1. The Drafting Committee at its Feb. 12, 2021, meeting discussed the proposed language authorizing the executive board to increase the allocated interest of the unit, with the consensus that an increase, which necessarily entails decreasing the allocated interests of other unit owners, presents complications. The consensus is not to add this provision, letting existing UCIOA provisions dealing with allocated interests including Section 2-107 determine when an increase in the allocated interest is allowed or desirable.

2. Note that existing subsection (b) allows unit owners "to agree to the action" without a meeting, but 67% of the votes in the association must agree. The revision requires a vote at a meeting if a unit owner objects, with no quorum requirement, and drops the alternative of unit owner agreement with no meeting.

3. The phrase "Unless the declaration provides otherwise" is highlighted and bracketed to flag it for discussion by the Drafting Committee. It is not contained in the parallel provision (Section 2-108(c)) supra that we are adding to allow the reallocation of a common element as a limited common element. The issue is whether we want a default rule, which the declaration may change by making it easier or harder to reallocate or relocate; or instead do we want a mandatory, uniform rule for all CICs?

(c) The association and the owners of the units whose boundaries are relocated must execute an amendment made under this section to the declaration. The amendment must contain words of conveyance between the parties. The association shall record an amendment made under this section in the manner provided in Section 2-117(e). The amendment must be indexed in the name of the parties and the association as grantor or grantee, as appropriate. In a condominium or planned community, the association shall prepare and record plats or plans necessary to show the altered boundaries of affected units, and their dimensions and identifying numbers. In a cooperative, the association shall prepare and record amendments to the declaration, including any plans necessary to show or describe the altered boundaries of affected units, and their dimensions and identifying numbers.

Reporter's Note (4/2)

At the Feb. 12, 2021, meeting of the Drafting Committee the suggestion was made to add a cross reference to Section 2-117(e), *Amendment of Declaration*, in subsection (c). Section 2-117(e) states: "Amendments to the declaration required

by this [act] to be recorded by the association must be prepared, executed, recorded, and certified on behalf of the association by any officer of the association designated for that purpose or, in the absence of designation, by the president of the association." Is the cross reference necessary? Without it, subsection (c) might be read to authorize an amendment signed only by the unit owners, with no signature by an officer.

Reporter's Notes (7/31/2020)

1. The proposed revisions to this section are prompted by the Drafting Committee's work on a related provision, Section 2-108, dealing with allocations and reallocations of limited common elements (see Section 2-108 above). The Drafting Committee at its April 2020 meeting discussed the proposed addition to Section 2-108 above and its source, Section 2-112(b), and discerned possible ambiguity as to whether the executive board's approval of the unit owner's application is necessary. This proposed amendment resolves the ambiguity by requiring the executive board's approval, regardless of a vote of the unit owners. Other proposed amendments conform all subsections of this Section to the style and organization of Section 2-108.

2. Existing subsections (a) and (b) of Section 2-112 both qualify the procedures for relocating boundaries with the introductory phrase "Subject to the provisions of the declaration and other provisions of law". The phrase raises several questions. (1) It seems odd to say that provisions of the declaration may prevent amending the declaration. But this is apparently the intent, according to existing Comment 1 (quoted below). Why shouldn't unit owners always be allowed to amend the declaration to get rid of any content they don't like? Suppose the declaration simply says, "Boundaries between units cannot be relocated." Why can't the unit owners just vote to amend the declaration under section 2-117 both to delete this sentence and simultaneously to relocate certain boundaries? (2) What "other provisions of law" limit use of these relocation procedures? Why shouldn't this section override other provisions of state law?

The proposed revisions to this section replace the phrase "Subject to the provisions of the declaration and other provisions of law" with the phrase "Unless the declaration otherwise provides" (a phrase used more frequently in this act), inserted in places to indicate which of this section's rules are default rules capable of overriding in the declaration.

Comment

1. This section changes the effect of most current declarations, under which the boundaries between units may not be altered without unanimous or nearly unanimous consent of the unit owners. As the section makes clear, ~~this result may be varied by~~ the relocation of boundaries is allowed notwithstanding restrictions in the declaration. The declaration, however, may specify different procedures for the association's approval of boundary relocations.

* * *

SECTION 2-114. BUILDING ENCROACHMENT.

Alternative A

(a) Except as provided in subsection (b) or (c), if the construction, reconstruction, or alteration of a building or the vertical or lateral movement of a building results in an encroachment due to a divergence between the existing physical boundaries of a unit and the boundaries described in the declaration under Section 2-105(a)(5), an easement for the encroachment exists between adjacent units and between units and adjacent common areas.

Alternative B

(a) Except as provided in subsection (b), if the construction, reconstruction, or alteration of a building or the vertical or lateral movement of a building results in an encroachment due to a divergence between the existing physical boundaries of a unit and the boundaries described in the declaration under Section 2-105(a)(5), the existing physical boundaries of the unit are its legal boundaries, rather than the boundaries described in the declaration.

End of Alternatives

(b) Subsection (a) does not apply if the encroachment:

(1) extends beyond five feet as measured from any point on the common boundary along a line perpendicular to the boundary; or

(2) results from willful misconduct of the unit owner that claims a benefit under subsection (a).

(c) This section does not relieve a declarant of liability for failure to adhere to plats or plans or a representation in the public offering statement.

Legislative Note: *Two approaches are presented as alternatives because a number of states have previously adopted the "easement solution" of Alternative A or the "adjustment of boundary"*

solution of Alternative B. A state may choose to continue its existing law on the topic.

Reporter's Note (4/2)

The revisions to Section 2-114 retain the basic idea from the existing text: Many encroachments are cleared up by the creation of an easement (Alternative A) or by an adjustment of the legal boundary to conform to the space occupied by the encroachment (Alternative B). There are six significant changes of substance:

1. The original scope covers all encroachments involving units and common areas. The revision limits the scope of this section to ***building*** encroachments; i.e. encroachments between adjoining units in a building and between the building part of a unit and an adjoining common element. These encroachments stem from the construction of and subsequent changes to buildings and their component parts. The section as revised does not address other encroachments and boundary problems, such as misplaced fences and misplaced monuments, which the original text apparently covers.

2. The original Alternative B applies only when a unit is constructed in "substantial accordance with the description" in the declaration. The revision replaces it with a five-foot limit and applies the limit to both Alternatives.

3. The original text preserves or creates liability for an owner's willful misconduct or the failure of a declarant or another person to adhere to plats and plans. The revision limits the liability provision to the declarant's conduct and handles the owner's misconduct differently by preventing the owner from obtaining the benefit of this section.

4. The original text is possibly unclear as to whether a unit owner who gains space has to pay compensation to an owner who loses space. The revision makes it clearer that there is no payment requirement by narrowing of the scope of the "liability rule".

5. The original Alternative B is not clear as to whether it matters if the encroachment if due to original construction or a subsequent change or a "reconstruction." The revision applies the same rule to original construction and subsequent changes for both Alternatives.

6. The original Alternative A applies when any "common element encroaches on any other . . . common element." The revision narrows the scope for both Alternatives, applying only when a unit encroaches on another unit or a common area.

Reporter's Note (1/29)

When this section applies, an easement is created, or the boundary is relocated, by

operation of law. There is no need for an amendment to a declaration or a deed or another type of conveyance.

SECTION 2-116. EASEMENT AND USE RIGHTS.

(a) A declarant has easements through the common elements as may be reasonably necessary for the purposes of discharging the declarant's obligations, exercising special declarant rights, or making improvements within the common interest community or within real estate that may be added to the common interest community.

Reporter's Note (4/2)

The subcommittee recommends no changes to the existing text of Section 2-116(a), including retention of the introductory words "Subject to the declaration".

Reporter's Note (3/2)

Recommendation: No Change from Existing UCIOA for subsection (a), except consider the first words reading "Subject to the declaration." Should these words be deleted or modified?

The Drafting Committee at its Feb. 19 meeting discussed the special declarant right set forth in Section 1-103(33)(A) above, which allows the declarant to complete improvements required by the plats and plans and public offering statement. The committee decided that the declarant should have the right to complete those improvements it is obligated to complete, regardless of the reservation of a special declarant right. The statutory easement in Section 2-116(a) appears adequate for the declarant to complete required improvements, with no amendment needed to add language from Section 1-103(33)(A) to refer to plats and plans and the public offering statement.

Reporter's Note (1/29)

This proposed language incorporates language deleted from the definition of "special declarant rights" in Section 1-103(33)(D) (see above). The qualifier "subject to the declaration" is deleted because the declarant should not be allowed to expand its easement rights beyond those stated in this section. The unit owners own the common elements.

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

(c) Subject to the declaration and rules, the unit owners have a right to use the common elements that are not limited common elements and all real estate that must become common elements for the purposes for which they were intended.

SECTION 2-118. TERMINATION OF COMMON INTEREST COMMUNITY.

(a) Except for a taking of all the units by eminent domain, foreclosure against an entire cooperative of a security interest that has priority over the declaration, or in the circumstances described in Section 2-124, a common interest community may be terminated only by agreement of unit owners of units to which at least 80 percent of the votes in the association are allocated, including at least 80 percent of the votes allocated to units not owned by the declarant, and with any other approvals required by the declaration. The declaration may require a larger percentage of total votes in the association for approval, but termination requires approval by at least 80 percent of the votes allocated to units not owned by the declarant. The declaration may specify a smaller percentage of total votes in the association only if all of the units are restricted exclusively to nonresidential uses.

Reporter's Note (4/2)

Most of the proposed edits to this subsection in prior drafts were Style edits. This draft reverses Style edits and returns to the original language that does not require a vote of unit owners. The owners may vote to terminate at a meeting, but without a meeting an agreement by owners holding at least 80 percent of the votes suffices. The clause in the original allowing a larger percentage than 80 percent is moved to a separate sentence to make it completely clear that a higher percentage does not replace the new requirement of 80 percent of the non-declarant units (e.g., if the declaration requires 90 percent and the declarant has sold 10 percent and has retained 90 percent, termination requires approval of 8/10 of the sold units plus 90 percent overall).

Reporter's Note (10/23)

At our August 2020 informal Zoom session on the act, the comment was made that if we retain this sentence, we mean approvals by persons other than unit owners and changes to the required vote percentages are not allowed.

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

Reporter's Note (4/2)

All of the proposed edits to subsection (b) in prior drafts were Style edits. This draft reverses Style edits and returns to the original language.

Reporter's Note (10/23)

At the September 2020 Zoom annual meeting first reading of the act, a concern was raised that subsection (b) requires recording in county offices, but Rhode Island and several other states have municipal recording offices. This is why "county" is in brackets.

Reporter's Note (1/29)

Proposed revisions below beginning with subsection (c) reflect the work of the subcommittee on partial terminations. Two choices are given with respect to the definition of "partial termination." Choice 1 allows partial termination for all types of common interest communities. Choice 2 limits it to condominiums. Florida applies its partial termination rules only to condominiums, and it's possible that a statutory rule is not necessary, or should be markedly different, for planned communities or cooperatives. When a traditional planned community is fully built-out, the problem of economic obsolescence years after development may not need a "solution" by partial termination accomplished by a supermajority vote of owners. In addition, planned communities are not susceptible to the problem of certain condominium buildings becoming less valuable as owner-occupied units, with the prospect of creating market value by converting a building to rental real estate.

(c) A termination agreement may provide for the sale of some or all of the common elements and units of the common interest community following termination. If, pursuant to the agreement, any real estate in the common interest community is to be sold following termination,

the termination agreement must set forth the minimum terms of the sale.

Reporter's Note (4/26)

Some of the edits to subsection (c) in prior drafts were Style edits. This draft reverses some Style edits to return to the original language. The new definition of partial termination in the February 2021 draft is moved to subsection (m) infra where the substantive partial-termination rules are located. The substantive changes to subsection (c) are:

1. Expanding its scope to include cooperatives (see discussion of material in existing Comments in Reporter's Note infra).
2. Removing the limitation of the rule to communities with "only units having horizontal boundaries" and consolidating its content with original subsection (d) infra.
3. Allowing for the sale of some but not all common elements and units.

Reporter's Note (10/23)

At the September 2020 Zoom annual meeting first reading of the act, Howard Swibel suggested changing "must be sold" to "is to be sold" in the first sentence of this subsection.

[(d) Reserved.]

(e) The association, on behalf of the unit owners, may contract for the sale of real estate in a common interest community, but the contract is not binding on the unit owners until approved under subsections (a) and (b). If any real estate is to be sold following termination, title to that real estate not already owned by the association, upon termination, vests in the association as trustee for the holders of all interests in the units being terminated.

Reporter's Note (4/2)

Some of the edits in prior drafts were Style edits. This draft reverses Style edits and returns to the original language. The changes of substance limit the "vesting" to real estate not already owned by the association (a point raised by the Study Committee) and recognize that some but not all of the real estate may be sold.

Thereafter, the association has all powers necessary and appropriate to effect the sale. Until the sale has been concluded and the proceeds thereof distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale must be distributed to

unit owners and lien holders as their interests may appear, in accordance with subsections (h), (i), (j), and (m). Unless otherwise specified in the termination agreement, as long as the association holds title to the real estate, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit. During the period of that occupancy, each unit owner and the unit owner's successors in interest remain liable for all assessments and other obligations imposed on unit owners by this [act] or the declaration.

Reporter's Note (4/2)

The edits in prior drafts were Style edits, except for the added cross reference to the new partial termination subsection. This draft reverses Style edits and returns to the original language and also combines the content with the previous subsection to preserve the subsection numbering in original UCIOA.

(f) Termination does not change title to a unit or common element not sold following termination unless the termination agreement otherwise provides.

Reporter's Note (4/2)

Existing subsection (f) handles title to real estate not being sold under the termination agreement. The existing text shifts title to all common elements to the unit owners in tenancy in common (note in the condominium the unit owners already hold title in this form). Under the existing text, title to the units shifts to a tenancy in common in communities having only horizontal-boundary units, with no shifting for communities having other units. A major change to this subsection is necessary because the revision to this Section is eliminating the distinction between horizontal-boundary units and non-horizontal boundary units. Existing subsection (f) appears to be a mandatory rule.

The proposed revision to subsection (f) defers to the termination agreement. Title to real estate that is not to be sold remains in place, but the unit owners may provide for a different outcome, including a conversion of some or all of their real estate to tenancy in common, in their termination agreement.

Reporter's Note (1/29)

The Drafting Committee at its November 2020 recognized that unsold real estate would become a new common interest community under the act if unit owners

remain obligated to pay taxes or other expenses related to the units or other real estate. See the definition of "common interest community," Section 1-103(9). The new sentence added at the end of subsection (f) responds to this concern. If unit owners remain obligated to pay common expenses, a new CIC is formed. This prevent use of the termination procedure as a loophole — otherwise a community that wants to opt out of UCIOA can just terminate under 2-118 without selling. If owners do not remain obligated for common expenses, law other than this act, including the law of tenancy in common, determines the unit owners' rights and obligations.

Reporter's Note (10/23)

At the September 2020 Zoom annual meeting first reading of the act, Howard Swibel suggested changing "is not to be sold" to "is not sold" in the first sentence of this subsection.

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

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

(i) In a cooperative, the declaration may provide that all creditors of the association have priority over any interests of unit owners and creditors of unit owners. In that event, following termination, creditors of the association holding liens on the cooperative which were [recorded] [docketed] [insert other procedures required under state law to perfect a lien on real estate as a result of a judgment] before termination may enforce their liens in the same manner as any lien holder~~,~~, and any other creditor of the association is to be treated as if the creditor had perfected a

lien against the cooperative immediately before termination. Unless the declaration provides that all creditors of the association have that priority:

Reporter's Note (4/2)

The edits in prior drafts were Style edits. This draft reverses Style edits and returns to the original language.

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

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

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

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

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

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

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

Reporter's Note (4/2)

The edits in prior drafts were Style edits, except for the added cross reference to the new partial termination subsection. This draft reverses Style edits and returns to the original language.

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

(A) disapproved not later than 30 days after distribution by unit owners of units to which at least 25 percent of the votes in the association are allocated~~.~~ or

(B) a unit owner objects in a record to the appraisal not later than 20 days after receipt of the appraisal.

A unit owner that objects may select an appraiser to represent the owner and make an appraisal of the owner's unit. If the association's appraisal and the unit owner's appraisal differ as to the fair market value of the owner's interest, a panel consisting of an appraiser selected by the association, the unit owner's appraiser, and a third appraiser mutually selected by the first two appraisers shall determine, by majority vote, the value of the unit owner's interest. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the fair market value of that unit owner's unit and its allocated interests by the total fair market values of all the units and their allocated interests.

Reporter's Note (4/2)

Some of the edits in prior drafts for paragraph (1) were Style edits. This draft reverses Style edits and returns to the original language.

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

(A) in a condominium, their respective common element interests

immediately before the termination;

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

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

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

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

Reporter's Note (10/23)

1. At our August 2020 informal Zoom session on the act, the suggestion was made that the Drafting Committee might consider adding language to authorize partial terminations of communities and that Florida's condominium act might provide a useful starting point. Fla. Stat. § 718.117. After this Note are

provisions based on the Florida act, modified to take account of the scope and terminology of UCIOA. If we add a partial termination provision, some of the existing subsections (a)-(*l*) above may require modification; but for the sake of our initial discussion, none are included in this draft.

2. Section 718.117 of the Florida condominium act, like UCIOA § 2-118, originally addressed only total (regular) terminations. In 2011, the Florida legislature amended § 718.117 to add partial termination provisions, which were further amended in 2015. Florida applies the same voting and approval rules to total and partial terminations; unit owners have the same voting rights whether their unit is designated for termination or continuation. For useful background, see Peter M. Dunbar, et al., *Partial Termination, Good Things Can Happen to Bad Projects*, 87 Fla. B.J. 47 (2013).

(m) A termination agreement complying with this section may provide for a termination of fewer than all of the units in a common interest community subject to the following:

(1) The termination agreement must be approved by at least 80 percent of the votes allocated to the units being terminated.

(2) The termination agreement must identify the units and common elements that survive the partial termination, provide that the surviving units and common elements remain in the common interest community, and reallocate the allocated interests for the surviving units under Section 2-107.

[(3) Title to the surviving units and common elements must remain vested in the ownership shown in the public records and does not vest in the association.]

Reporter's Note (4/2)

Paragraph (3) may be unnecessary. Subsection (f) supra governs what happens to title for real estate not to be sold after termination. The proposed edits in this draft to subsection (f) do not shift title to units or common elements. If the Committee follows this approach for subsection (f), then we can delete paragraph (3).

(4) The aggregate values of the units and common elements being terminated must be determined under subsection (j). The termination agreement must specify the allocation of the proceeds of sale for the units and common elements being terminated and sold.

(5) Security interests and liens on surviving units and surviving common elements continue, and security interests and liens on units being terminated no longer extend to any surviving common elements.

(6) The unit owners association continues as the association for the surviving units.

(7) The association shall record an amendment to the declaration or an amended and restated declaration with the termination agreement under subsection (b).

Reporter's Note (4/2)

The last sentence of paragraph (7), which states a rule from the Florida partial-termination provision, is deleted on the ground that it is unnecessary. Section 2-117(d) requires the unanimous consent of unit owners to change the allocated interests of units. Paragraph (2) supra as edited requires the termination agreement to reallocate the allocated interests. Usually a partial termination may simply reallocate "in the same proportion" among the surviving units "as it was before the partial termination." But if the termination agreement changes the formula or method of allocation, conforming to the substantive rules of Section 2-107, unanimous consent should not be required.

(n) The termination of a common interest community does not bar the creation of another common interest community by the execution of a new declaration covering all or part of the real estate being terminated. A termination in which real estate is not sold following termination is a new common interest community under this [act] only if the unit owners have agreed to pay shares of expenses so that the unsold real estate is a common interest community under Section 1-103(9).

Reporter's Note (4/2)

The Drafting Committee at its Feb. 12, 2021, Drafting Committee discussed the first sentence of subsection (n) with the consensus that it is accurate but may not be necessary because the point is obvious. The sentence is retained in this draft for the purpose of discussion, placed alongside the second sentence, which with an edit is moved from subsection (f) in the Feb. draft. Either or both sentences might go into a Comment rather than into statutory text.

Reporter's Note (1/29)

The new proposed subsection (n) makes it clear that termination under this Section does not bar the creation of a new common interest community, either under the plan of termination or otherwise, and supplements the new sentence added to subsection (f), which states that real estate that is not sold after termination does not automatically become a new common interest community. This proposed subsection (n) is based on Fla. Stat. § 718.117(19), which provides: "*Creation of another condominium*. The termination or partial termination of a condominium does not bar the filing of a new declaration of condominium by the termination trustee, or the trustee's successor in interest, for the terminated property or any portion thereof. The partial termination of a condominium may provide for the simultaneous filing of an amendment to the declaration of condominium or an amended and restated declaration of condominium by the condominium association for any portion of the property not terminated from the condominium form of ownership."

Reporter's Note (10/23)

1. At our August 2020 informal Zoom session on the act, a question from the floor asked whether any of this section applies or should apply to a governmental condemnation of a common interest community.

2. UCIOA § 1-107, *Eminent Domain*, provides some rules, but appears to focus only on the taking of a single unit or part of a unit. Possibly § 1-107 does not apply to a taking of all or substantially all of a community.

Proposed new Comment

10. The 2021 amendments to this section authorize a partial termination of the common interest community. A partial termination may serve the best interests of a community in a number of different circumstances. A natural disaster or other casualty may destroy one building while leaving other buildings intact. A partial termination of the destroyed building and its adjacent real estate may be preferable to reconstruction. A developer may declare multiple phases, construct buildings for only the first one, and when a subsequent unbuilt phase becomes infeasible, a partial termination may remove the unbuilt developer-owned units. Changes in the neighborhood may make one part of a community unsuitable for continued residential use; for example, the government may replace a two-lane road adjoining the community with a high-speed six-lane highway. In most states, partial terminations of common interest communities take place from time to time without the aid of a statutory mechanism. Florida added a partial-termination provision to its condominium act in 2011. Fla. Stat. § 718.117. This section sets forth procedures and furnishes guidance for partial termination. It authorizes partial termination with a vote of 80 percent of the unit owners, including 80 percent of the owners of units being terminated. Partial termination

is the same concept as the withdrawal of real estate from the common interest community when the withdrawn real estate includes declared units. Partial termination under this act may be accomplished only under this section or by a development right of a declarant to withdraw real estate. See Section 2-110(d). A mere amendment to the declaration to reduce the size of the community by withdrawing units is not effective. See Section 2-117(d).

Comment

* * *

8. Subsection (f) contemplates the possibility that a planned community or condominium might be terminated but the real estate not sold.

Termination without sale is not likely to be the usual case, but might occur if the unit owners plan to form a new common interest community. In a condominium or planned community, title to the common elements following termination vests in the unit owners as tenants in common if that real estate is not to be sold. The unit owners continue to hold individual titles to their units. Therefore, in a condominium or planned community with units located in a high-rise building, either the declaration or the termination agreement should address the needs for easements of support and access for the high-rise units over the real estate which all the unit owners will own as tenants in common. Undoubtedly, the unit owners will immediately reconstitute themselves as some form of common interest community.

9. Subsection (f) does not cover the possibility that a cooperative might be terminated but the real estate not sold. While this is not likely to be the usual case, termination without sale might occur if the cooperative unit owners plan conversion to another form of common interest community, such as a condominium. Since, after termination of a cooperative title to the real estate remains in the association, it could record a new declaration corresponding to the new form of common interest community adopted, convey the units to the former unit holders, and then itself continue as the new common interest community's association.

SECTION 2-120. MASTER ASSOCIATIONS.

(a) A declaration may:

(1) delegate a power described in Section 3-102(a) from the unit owners association to a master association;

(2) provide for the exercise of the powers described in Section 3-102(a) by a master association that also serves as the unit owners association for the common interest community; or

(3) reserve a special declarant right to make the common interest community subject to a master association.

All provisions of this [act] applicable to a unit owners' associations apply to a master association, except as modified by this section.

Reporter's Note (4/28)

1. The proposed revisions to subsection (a) recognize that the declaration may provide for a master association serving multiple common interest communities to serve as the unit owners association for the common interest community, tracking the language of the existing UCIOA language that treats this as an "exercise" of powers rather than a "delegation." This section uses the term "delegation" only when there are two entities: a unit owners association and a separate master association that holds one or more powers. See the definition of "master association" that describes both types of master associations. UCIOA Section 1-103(22). The revision also recognizes the special declarant right to make the common interest community subject to a master association.

2. This draft moves the content from subsection (a) dealing with a delegation by the executive board to subsection (b) infra.

3. The organization of this section might be improved by putting the final sentence into a subsection of its own ("All provisions of this [act] applicable to a unit owners association apply to a master association, except as modified by this section."). The Style Committee discussed this question at its April 2021 meeting without reaching a conclusion.

Reporter's Note (3/2)

The subcommittee needs to consider the last clause of subsection (a). The Drafting Committee at its Feb. 19, 2021, meeting had an extensive discussion of this clause with the consensus that we should attempt to make a revision to provide guidance as to the intended meaning. The primary focus was on the notice provisions of the act, the thinking being that if we solve notice (to whom must the master association give notice before acting?) the other duties and rights would follow. The committee thought that we might have a default rule that notices must go to the sub-associations that are subject to the master association or their executive boards. The governing instruments for the master association may change the default rule. Under the default rule, individual unit owners of the sub-associations get notices only if they are members of the master association. Also, the subcommittee needs to consider the fit between this clause and subsection (h) below; perhaps this clause and subsection (h) may be combined.

Reporter's Note (1/29)

During its January 2021 meeting the subcommittee on master associations discussed the last sentence of subsection (a), which on its face imposes limits what master associations are allowed to do and imposes many obligations on master associations and their executive boards. Section 2-120 Comment 3 explains: "Subsection (a) makes it clear that, if any of the powers of the unit owners' association may be exercised by, or delegated to, a master association, all other provisions of this Act, which apply to a unit owners' association apply to that master association except as modified by this section. Accordingly, provisions on notice, voting, quorums, records, meetings, and other matters which apply to the unit owners' association would apply with equal validity to such a master association." ***Query whether further guidance should be given, either in statutory text or the Comments.***

Example. Consider, for example, how this sentence and the Comment apply to the budget process regulated by Section 3-123, *Adoption of Budgets; Special Assessments*. I think the master association (before and after the period of declarant control ends) must send its proposed budget to the unit owners of all common interest communities subject to the master association, and then schedule a meeting for its consideration, etc. Is this right? If there is ambiguity, the problem may be that for a regular unit owners association, all unit owners are members of the association; but for a master association, the unit owners seldom will be members or shareholders in the master association. Our act says nothing about who are or may be members or shareholders in a master association.

(b) A unit owners association may delegate a power described in Section 3-102(a) to a master association without amending the declaration. The executive board of the unit owners association shall give notice to the unit owners of a proposed delegation and include a statement that unit owners may object in a record to the delegation not later than 30 days after delivery of the notice. The delegation becomes effective if the board does not receive a timely objection. If the board receives a timely objection, the delegation becomes effective only if the unit owners vote under Section 3-110, whether or not a quorum is present, to approve the delegation by a majority vote. The delegation is not effective until the board of the master association accepts the delegation.

Reporter's Note (4/2)

The Drafting Committee at its Feb. 19, 2021, meeting discussed an issue that it has also come up in prior meetings: whether an executive board's delegation of powers to a master association should be effective immediately, subject to revocation by the unit owners; or (2) whether a board's decision to delegate should require unit owner approval before it becomes effective. See Choices 1 and 2 supra. The Committee decided to import the objection procedure being added to Section 2-108, *Limited Common Elements*, which allows the board to approve the reallocation of a common element to a limited common element if no unit owner objects.

(c) Revocation of a delegation set forth in the declaration may be made only by an amendment to the declaration. At a meeting of the unit owners for which the subject of delegation of powers from the executive board to a master association is listed in the notice of the meeting, the unit owners by a majority of the votes cast at the meeting may revoke the delegation. The effect of revocation on the rights and obligations of parties under a contract between a unit owners association and a master association is determined by law of this state other than this [act].

Reporter's Note (4/2)

The Drafting Committee at its Feb. 19, 2021, meeting discussed the unit owners' right to revoke delegations to the master association, a topic also previously discussed. This draft edits subsection (c) supra to make it apply only to revocation. For delegations made by the executive board (i.e., not in the declaration), unit owner approval or disapproval is handled only by the "objection" procedure in subsection (b), not under subsection (c). The committee discussed, without reaching a decision, whether revocation by the unit owners should proceed differently when the delegation is in the declaration rather than merely from the board. Subsection (e) allows revocation of a delegations made by the board by a majority vote of unit owners and defers to the normal procedures for amending the declaration for delegations contained in the declaration. See Section 2-117, *Amendment of Declaration*.

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

master association.

(e) After a unit owners association delegates a power to a master association, the unit owners association and its executive board members and its officers have no liability for an act or omission of the master association with respect to the delegated power.

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

Reporter's Note (3/2)

The subcommittee needs to consider subsection (h) (subsection (d) of existing UCIOA). The Drafting Committee at its Feb. 19 meeting recognized that this subsection may not be consistent with possible modifications to the last clause of subsection (a) above, which generally applies provisions of the Act governing unit owners associations to master associations. The Sections referenced in subsection (h) deal with:

Section 3-103 – executive board members and officers
Section 3-108 – meetings
Section 3-109 – quorum
Section 3-110 – voting at meetings
Section 3-112 – conveyance or encumbrance of common elements.

Subsection (h) is also impacted by the proposed changes to the rules for electing the board of a master association in subsection (i) below. Perhaps subsection (h) should be deleted with part of its content, if appropriate, integrated with subsection (a) above and subsection (i) below.

(g) Not later than **[60]** days ***[Drafting Committee should discuss this time period]*** after termination of a period of declarant control of the master association, the instruments governing the master association must provide for the election of the executive board of the master association in one of the following ways:

(1) All unit owners of all common interest communities subject to the master

association elect all members of the master association's executive board.

(2) All unit owners in, or the executive board of, each common interest community subject to the master association elect one or more members of the master association's executive board if the instruments equitably apportion the seats on the board to each common interest community.

(h) A period of declarant control of the master association under subsection (g) terminates no later than the earlier of:

(1) the termination under Section 3-103 of all periods of declarant control of all common interest communities subject to the master association under Section 3-103; or

(2) [60] days after conveyance to unit owners other than a declarant of [three-fourths] of the units that may be created in all common interest communities subject to the master association.

Reporter's Note (4/2)

The proposed revisions to subsection (g) (originally subsection (e)) from the February 2021 draft include: (1) limiting the scope of the subsection to the election of the executive board of the master association; it no longer addresses actions taken by other means, e.g., votes by members or shareholders of the master association; (2) dropping the requirement that each common interest community hold "an equitable portion of the votes in the master association"; and (3) defining the period of declarant control for a master association. The Drafting Committee should consider whether the language works well both when (i) there are multiple common interest communities served by one master association and (ii) when a single common interest community has delegated powers to a master association.

Reporter's Note (1/29)

1. The proposed revision to subsection (f) and the new subsection (g) below reflect the work of the subcommittee on master associations. The revision shortens and simplifies this subsection but makes several important changes:

First, the revision requires an equitable allocation of the votes in the master

association among all the common interest communities served by the master association. The allocation should be contained in the articles of organization or other governing documents of the master association.

Second, the revision provides mandatory rules designed to ensure that all unit owners through their individual sub-associations have the ability to elect a fair number of the members of the master association's executive board. The existing statutory language authorizes four "ways" to elect the executive board, apparently allowing other methods of election. New subsection (f) requires that the governing instruments of the master association select alternative (1) or (2).

Third, new subsection (f) preserves the existing flexibility in this provision by allowing an "at-large" election of the master board or the designation of particular seats on the board to each common interest community, as explained in Comment 7 to this section. The "four ways" of the old subsection are collapsed into two ways. New subparagraph (1) provides for at-large seats, and new subparagraph (2) provides for designated (i.e., "district") seats.

The new subsection still allows voting either by unit owners or their boards. The governing documents for each individual common interest community will determine whether the owners or their board cast the master-association votes allocated to their community.

Example: A master association serves two condominium communities, which each has their own sub-association. Community A has 20 units and a 5-member board. Community B has 40 units and a 3-member board. Under new subsection (f), the master association may have a 6-member board with at-large seats, allocating 20 master-association votes to Community A and 40 master-association votes to Community B. Alternatively, each community may be a separate voting class, with Community A having 2 seats and Community B having 4 seats. Under the existing subsection, the size of the sub-association boards determines how many votes each sub-association holds under paragraphs ("ways") (2) and (4). The new subsection makes size of the sub-association boards irrelevant – in this example, it should not matter that smaller Community A has a bigger board than Community B. Also note, Community A may exercise its master-association votes by all its members voting individually at a sub-association meeting, while Community B may exercise its master-association votes by the vote of its executive board.

2. Existing subsection (f) specifies voting rules only "after the period of declarant control" without explaining what this means. Section 3-103(d) defines declarant control, when the declarant may appoint and remove board officers and members of sub-associations, with no express reference to master associations. Two choices are (1) develop the concept of "period of declarant control" of the master association or (2) drop the declarant-control condition, i.e, make the voting rules apply at the outset. The condition seems unnecessary to protect a declarant's

legitimate interests because the declarant will have de facto control under the subsection (f) voting rules when it still controls all or a majority of the CICs that are subject to the master association. In effect, declarant control of the sub-associations gives it automatic control over electing the master association board. In case the committee prefers the first choice, here is a new subsection that deals with the period of declarant control over a master association and generally parallels Section 3-103(d):

(g) A period of declarant control of the master association terminates no later than the earliest of:

(1) [60] days after conveyance of [three-fourths] of the units all common interest communities subject to the master association that may be created to unit owners other than a declarant;

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

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

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

SECTION 2-121. MERGER OR CONSOLIDATION OF COMMON INTEREST COMMUNITIES.

Reporter's Note (4/2)

The subcommittee recommends a revision to Section 2-121 infra to provide a procedure for the exercise of a special declarant right to merge or consolidate common interest communities. An agreement of unit owners is not required when the declarant has a special declarant right. When two communities are merged, the same declarant may have a special declarant right in both communities, but this is not necessary.

Reporter's Note (3/2)

This section is included for consideration of what it means to reserve a special declarant right to merge common interest communities. See Reporter's Note (1/29) at Section 1-103(33)(F) supra. To assist in starting discussion by the subcommittee, inserted below are 2 choices of language that might be added: (i) language in subsections (a) and (b) allowing the declarant to execute a merger agreement without unit-owner approval, or (ii) new subsection (d) allowing the declarant to reduce the percentage of unit-owner votes required for approval.

(a) Any two or more common interest communities of the same form of ownership, by agreement of the unit owners under subsection (b) or by the exercise of a special declarant right

reserved in the declaration, may be merged or consolidated into a single common interest community. In the event of a merger or consolidation, unless the agreement otherwise provides, the resultant common interest community is the legal successor, for all purposes, of all of the pre-existing common interest communities, and the operations and activities of all associations of the pre-existing common interest communities are merged or consolidated into a single association that holds all powers, rights, obligations, assets, and liabilities of all pre-existing associations.

(b) An agreement of two or more common interest communities to merge or consolidate pursuant to subsection (a) must be evidenced by an agreement prepared, executed, recorded, and certified by the president of the association of each of the pre-existing common interest communities following approval by owners of units to which are allocated the percentage of votes in each common interest community required to terminate that common interest community. Approval by unit owners in a common interest community is not required if a special declarant right is exercised, and the declarant shall execute the agreement on behalf of the common interest community. The agreement must be recorded in every [county] in which a portion of the common interest community is located and is not effective until recorded.

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

percentages of allocated interests allocated to that unit by the declaration of the pre-existing common interest community.

[(d) A special declarant right may reduce the percentage of votes of unit owners required for approval of the merger or consolidation agreement but may not change other requirements of this section.]

SECTION 2-125. ADVERSE POSSESSION; PRESCRIPTIVE EASEMENT. A unit owner or person claiming through a unit owner may not acquire title by adverse possession to, or an easement by prescription in, a common element in derogation of the title of another unit owner or the association.

Reporter's Note (10/23)

At the August 2020 informal Zoom session and the September 2020 Zoom annual meeting first reading of the act, questions were raised as to whether we need the "in derogation of the title of any other unit owner or the association" qualification; and if so, whether other language might be better? At the August meeting, an observation was made that this section may propose a good rule, but it is not highly important because unit owners who raise adverse possession claims to common elements rarely win their cases.

Reporter's Notes

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

The Drafting Committee at its April 2020 meeting discussed this new section and decided to add the phrase "or a person claiming through a unit owner" to protect common elements from claims made by tenants of unit owners or similar persons.

2. The proposed new Section 2-125 protects all the common elements from loss of title by claims of adverse possession or prescription by a limited immunity. This immunity is limited to real estate defined as "common elements" in UCOIA. This Section precludes only a claim made by a unit owner. When the unit owners own the common elements in tenancy in common, this provision modifies existing law by not allowing a unit owner to acquire adverse possession by proving an "ouster" of the other cotenants. When the association owns the common elements, this provision modifies existing law, which in most states lacks reported law clearly delineating the requirements for a person to acquire adverse possession title to property owned by an association of which the person is a member.

This section adopts Approach 2 described in the Reporter's Memorandum on Adverse Possession (Jan. 24, 2020). This section provides a more limited immunity than Approach 1 described in the Reporter's Memorandum, which would have provided immunity from claims against the common elements made by any person, including unit owners and neighboring property owners.

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

4. The language in this section is based on Minn. Stat. § 508.02, which provides: "No title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession, but the common law doctrine of practical location of boundaries applies to registered land whenever registered." Like the Minnesota statute, this section refers to both "adverse possession" and "prescription." A Minnesota court has interpreted the statutory reference to "prescription" to preclude the creation of a prescriptive easement against registered land. Moore v. Henricksen, 165 N.W.2d 209 (Minn. 1968). Accordingly, this provision is drafted to immunize the common elements from claims of prescriptive easements made by unit owners.

5. The last phrase in this section, "in derogation of the title of the other unit owners or the association," limits the scope of immunity to claims that impair the community's title to and use of the common elements. The state's normal rules of adverse possession determine when the unit owners may use the doctrine of adverse possession to obtain or perfect title to a common element.

Example 1: A condominium community has a recreational field (a common element) situated between a building with units and the northern boundary of the

community's real estate. A unit owner on the ground floor extends her patio by eight feet into the recreational field. The state has a ten-year statute of limitations for the recovery of possession of real property. Even if the unit owner maintains her extended patio in place for more than 10 years and satisfies all the other elements of adverse possession (actual possession that is open, notorious, continuous, and exclusive), this section prevents her from acquiring title by adverse possession to the area occupied by the patio encroachment. Her acquisition would be "in derogation of the title of the other unit owners," who (along with her) own the area as tenants in common.

Example 2: A condominium community has a recreational field (a common element) situated between a building with units and the northern boundary of the community's real estate. Due to a surveying error, the description of the northern boundary contained in the original declaration under section 2-105(a)(3) lies 10 feet too far to the north. The entire recreational field, including the 10-foot strip, is a common element. The neighbor who owns the adjacent parcel to the north has paramount title to the 10-foot strip. The state has a ten-year statute of limitations for the recovery of possession of real property. More than ten years after installation of the recreational field, the neighbor brings a cause of action against the association to recover possession of the 10-foot strip. The answer to the litigation filed by the association raises the affirmative defense that the unit owners (and the association as their agent) have acquired title to the strip by adverse possession. This section does not apply because their claim is not "in derogation of the title of the other unit owners or the association." It is in derogation of the neighbor's title. Thus, the state's normal rules of adverse possession will determine whether the neighbor or the unit owners prevail.

[ARTICLE] 3

MANAGEMENT OF THE COMMON INTEREST COMMUNITY

* * *

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

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

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

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

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

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

(5) may make contracts and incur liabilities;

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

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

(8) may acquire, hold, encumber, and convey in its own name any right, title, or interest to real estate or personal property, but:

(A) common elements in a condominium or planned community may be conveyed or subjected to a security interest only pursuant to Section 3-112; and

(B) part of a cooperative may be conveyed, or all or part of a cooperative may be subjected to a security interest, only pursuant to Section 3-112;

(9) may grant easements, leases, licenses, and concessions through or over the common elements, but a grant to a unit owner that benefits the owner's unit is allowed only by reallocation of the common element to a limited common element pursuant to Section 2-108;

Reporter's Note (4/2)

The Drafting Committee at its Feb. 19, 2021, meeting discussed the proposed change to paragraph (9), a topic that has triggered discussion and different points of view at all committee meetings since April 2020. The suggestion was made that the limitation might be better expressed by a cross reference to Section 2-108, which contains the new procedure for reallocation of a common element as a limited common element. A grant to a unit owner that benefits the owner personally (i.e., not in connection with ownership of the unit) is allowed under paragraph (9). The edit in the first line of this paragraph, changing singular to plural nouns, reverses an earlier Style edit.

Reporter's Note (10/23)

Style rewrote this section, which previously stated: "(9) may grant easements, leases, licenses, and concessions through or over the common elements; *provided, the association shall not grant an easement, lease, license, or concession to a unit owner for the benefit of the unit owner's unit;*".

Concerning this paragraph as revised by Style, David Biklen writes:

New 3-102(a)(9)
"(9) may grant an easement, lease, license, or concession through or over the common elements, [unless the grant is to a unit owner for the benefit of the owner's unit] **except that the board may not make a grant under this paragraph to a unit owner that benefits only the unit of the owner.**

It seems to me the proposed rewrite by the drafting committee - in brackets - might not clearly say that the board cannot do this. "unless" what then? Why not simply prohibit it? How about something like the new [bold] language above?

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

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

(B) services provided to unit owners;

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

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

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

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

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

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

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

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

(19) may suspend any right or privilege of a unit owner that fails to pay an assessment, but may not:

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

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

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

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

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

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

(2) institute litigation or an arbitration, mediation, or administrative proceeding

against any person, subject to the following:

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

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

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

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

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

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

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

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

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

(2) permit the association to enforce a lease to which it is not a party in the

absence of a violation of the declaration, bylaws, or rules.

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

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

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

(3) although a violation may exist or may have occurred, it is not so material as to be objectionable to a reasonable person or to justify expending the association's resources; or

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

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

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

Reporter's Note (10/23)

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

(1) Does the restriction of grants to unit owners in 3-102(a)(9) extend (and should it extend) to temporary construction easements?

(2) Should this restriction prevent the existing practice in some states to transfer outside spaces to unit owners who agree to undertake maintenance of the areas, described in the Reporter's Note to 2-108?

Comment

* * *

4. Paragraph (8) refers to the power granted by Section 3-112, upon a vote of the requisite number of unit owners, to sell or encumber common elements in a condominium or planned community or to sell part or encumber all or part of a cooperative without a termination of the common interest community. Paragraph (9) permits the association to grant easements, leases, licenses, and concessions with respect to the common elements without a vote of the unit owners. Paragraph (9) allows the executive board to grant rights to use common elements only for transactions that do not have a significant impact on the unit owners' rights to use and enjoy the common elements. Examples include a license for a non-profit organization to use a lawn or clubhouse for one or several days, a one-year lease of building space to an entity that provides services expected to be of value to residents, and a non-exclusive revocable easement allowing a neighboring community to use a roadway or trail. Most grants under Paragraph (9) are temporary or revocable by the association, do not grant exclusive rights to the holder, and are donative in nature or granted for a small fee paid by the holder. The board may not use Paragraph (9) as an alternative to a conveyance of common elements, which requires a vote of the unit owners under Paragraph (8) and Section 3-112. Examples of transactions not authorized under Paragraph (9) include the grant of a ten-year lease of a significant part of the common elements or a long-term parking easement that allows the holder to install and use parking spaces. The prohibition in Paragraph (9) applies only when the grant to a unit owner "benefits only the unit of the owner." If the grant benefits the owner for a different reason, the prohibition does not apply. For example, a unit owner who operates a restaurant or who does landscaping may properly obtain a grant that allows the owner to sell food or perform landscaping work on the common elements.

SECTION 3-103. EXECUTIVE BOARD MEMBERS AND OFFICERS.

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

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

(b) The executive board may not:

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

(2) amend the bylaws;

(3) terminate the common interest community;

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

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

(c) The executive board shall adopt budgets as provided in Section 3-123.

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

(1) [60] days after conveyance of [three-fourths] of the units that may be created to unit owners other than a declarant;

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

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

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

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

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

Reporter's Note (4/2)

A revision is needed to subsection (f) either to update the cross reference to point to 2-120(g) or to delete the "exception" clause. Section 2-120(g) (renumbered from existing 2-120(e)) deals with election of the executive board of a master association. The "exception" clause might not be useful because Section 2-120(f) (with no change in language from existing Section 2-120(d)) states: "The rights and responsibilities of unit owners with respect to the unit owners' association set forth in Sections 3-103, 3-108, 3-109, 3-110, and 3-112 apply in the conduct of the affairs of a master association only to persons who elect the board of a master

association, whether or not those persons are otherwise unit owners within the meaning of this [act].” This latter provision may provide a better explanation of how the provisions fit together than retaining the “exception” clause here.

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

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

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

Comment

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

Originally subsection (a) specified that officers and members elected by the unit owners have a duty of “ordinary and reasonable care.” The 1994 amendment conforms the Act to expectations of owners, officers, members of executive boards, and courts. The duties owed by an elected officer or board member ought to parallel the standards imposed on persons holding equivalent positions in non-profit corporations in the state where the common interest community is located.

For both declarant-appointed and elected officers and members, subsection (a) looks to other state law to measure the standard of care and the basis of liability. For declarant-appointed persons, the law of trusts determines the precise content of the fiduciary duties, as well as other duties including conflict-of-interest rules, owed to the unit owners. For elected officers and members, the standards of conduct and the standards of liability are determined by the content of the state nonprofit corporation statute. This applies regardless of the organizational type of the association. Thus, if an association is a limited liability company (LLC), the standards for its officers and board members are not affected by the content to of the state LLC statute.

A majority of states have adopted a version of the ABA's Model Nonprofit Corporation Act (MNCA) (3d ed. 1987; the ABA is presently working on a 4th edition). MNCA Section 8.30 sets forth standards of conduct, and section 8.31 sets forth standards of liability for directors.

Executive board members are treated as "directors" whether or not they have the formal title of "director" as a member of the association's governing board. MNCA Section 8.42 prescribes standards of conduct for officers; they include a duty to act with the care of "an ordinarily prudent person." States without the model act may apply different rules for director conduct, such as a trust rule or the rules applicable to directors of standard, for-profit corporations, as well as different rules for officers.

2. Executive board members frequently will obtain the benefits of the business judgment rule under subsection (a). The business judgment rule is a standard of liability, not a standard of conduct. The rule curtails judicial review of board decisions by creating a presumption of sound business judgment. As long as the board decision might serve a rational business purpose, courts do not interfere by substituting their own ideas of what is or is not a correct or reasonable decision. The rule also presumes that the directors act in good faith, on an informed basis, and with the honest belief that their action furthers the best interests of the corporation. The business judgment rule began as common-law rule for evaluating the conduct of directors of for-profit corporations. Now many courts apply the rule in the non-profit context generally and as the basis for evaluating the activities of boards of unit owners associations. See, e.g., Reiner v. Ehrlich, 66 A.3d 1132 (Md. Ct. Spec. App. 2013); Committee for a Better Twin Rivers v. Twin Rivers Homeowners Association, 929 A.2d 1060 (N.J. 2007); 40 West 67th Street v. Pullman, 790 N.WE.2d 1174 (N.Y. 2003).

Subsection (a) does not codify the business judgment rule. Its application to executive boards depends on judicial adoption and on other state statutes. Nor does MNCA Section 8.31 codify the business judgment rule, but it has several components, one of which reflects some of the principal elements of the common-law business judgment rule.

[RENUMBER SUBSEQUENT COMMENTS 3 and 4]

* * *

SECTION 3-104. SPECIAL DECLARANT RIGHTS.

Reporter's Note (4/2)

Beginning early in 2020, drafts reorganized existing Section 3-104 into a series of related sections in an effort to delineate the various topics. The February 2021 draft contained 3 sections: Section 3-104, Section 3-104A, and Section 3-104B. Following a suggestion made by the subcommittee, this draft recombines the revised material into a single section. How does this look? The advantage is avoiding the introduction of new sections in the Act; the cost is having one long, complicated section.

Reporter's Note (1/29)

The proposed revisions in this Section and in Sections 3-104A and 3-104B reflect the work of the subcommittee on special declarant rights. At the November 2020

meeting of the Drafting Committee, a consensus emerged to define all special declarant rights as real property while implementing the simplicity and flexibility of Alternative 1, which drops many of the restrictions on transfer in existing Section 3-104.

(a) In this section:

(1) "Involuntary transfer" means a transfer of real estate owned by a declarant pursuant to a foreclosure of a mortgage, deed in lieu of foreclosure, tax sale, judicial sale, or sale in a bankruptcy or receivership proceeding.

(2) "Non-affiliate successor" means a person that succeeds to a special declarant right and is not an affiliate of the declarant that transferred the special declarant right to the person.

Reporter's Note (4/26)

The subcommittee recommends the phase "described in the declaration" to handle both real estate presently within the common interest community and real estate that may be added later pursuant to a development right. A development right reserved in the declaration must include a legal description for real estate to be added to the community. Per an instruction from the Style Committee, the substance of this sentence is moved to the definition of "Special Declarant Rights" in Section 1-103(33). With this move, we may change the title of this section from "Special Declarant Rights" back to its existing title, "Transfer of Special Declarant Rights."

Reporter's Note (3/2)

The Drafting Committee at its Feb. 19, 2021, meeting preferred to replace the word "servitude" with something else; "real estate" works because Section 1-103(28) defines the term broadly to mean "any leasehold or other estate or interest in, over, or under land . . . ." The subcommittee should consider whether SDRs should be appurtenant to all declarant-owned real estate or to "units" owned by the declarant. The distinction might not be very important. A declarant will usually not own or have title to any common elements when it no longer owns any units or has a right to add units.

Reporter's Note (1/29)

Proposed new subsection (a) makes all special declarant rights interests in real property and automatically makes every special declarant right appurtenant to all

real estate owned by the declarant in the common interest community. Except for mortgages, a declarant's voluntary transfer of real estate in a common interest community does not transfer any interest in a special declarant right unless an instrument describes the special declarant right as a subject of the transfer. In effect, a special declarant right is a "floating" servitude; it is appurtenant to the declarant's real estate in the common interest community as it changes over time – reduced when the declarant sells units and makes other transfers and increased when the declarant adds real estate to the common interest community. A related revision to Section UCIOA § 2-105, *Contents of Declaration* (above), drops the requirement that the declaration sufficiently describe "the real estate to which each [special declarant right] applies."

(b) A declarant that no longer owns real estate described in the declaration other than a special declarant right ceases to have any special declarant rights.

Reporter's Note (4/2)

The objective of subsection (b) is to terminate special declarant rights when the declarant owns no real estate in the common interest community other than special declarant rights. The Drafting Committee at its Feb. 19, 2021, meeting decided that a declarant who has sold all of its units should retain special development rights when the declarant has an unexercised development right to add units. As in subsection (a), an issue is whether the trigger should be not owning "real estate," or not owning "units."

(c) A declarant may voluntarily transfer part or all of a special declarant right only by an instrument that describes the special declarant right being transferred. The transfer becomes effective when recorded in every [county] in which any portion of the common interest community is located.

Reporter's Note (4/2)

1. The first sentence to new subsection (c) (combined in this draft with preceding material) is deleted as unnecessary. This subsection allows all types of voluntary transfers, and because a transfer of "part or all of a special declarant right" is allowed, a special declarant right is divisible. A declarant may transfer a special declarant right on an exclusive or non-exclusive basis. This subsection states no rules for involuntary transfers of special declarant rights (e.g., sales to satisfy judgment liens, tax sales) but they are allowed; the law generally recognizes that rights that may be voluntarily transferred are transferable involuntarily.

2. The second sentence deletes the phrase from the Feb. 2021 draft "to a person

that owns real estate in the common interest community" on the ground that subsection (b) covers the point. A deed purporting to transfer an SDR to someone who owns no other real estate is the community is not valid unless the SDR is a development right to add real estate. See subsection (b) supra.

3. The Drafting Committee at its Feb. 19, 2021, meeting thought this subsection does not need an exception for mortgages, so the phrase excepting a mortgage is deleted. This subsection states no special rule for transfers by mortgage. Because a mortgage is a voluntary transfer, this subsection requires that the mortgage instrument describe the special declarant rights being mortgaged.

4. The last sentence of existing UCIOA Section 3-104(a) states: "The instrument is not effective unless executed by the transferee." See supra. This sentence is not retained in this revised section, and it is a change of substance. Most deeds and mortgages are signed only by the grantor, not by the "transferee." A grantee's acceptance of the instrument is considered agreement to its contents. Requiring execution by the transferee might result in inadvertent failures to transfer SDRs for parties who fail to study the Act carefully.

(d) Except as otherwise provided in this section, a successor to a special declarant right is subject to all obligations and liabilities imposed on the transferor by this [act] or the declaration.

Reporter's Note (1/29)

This subsection (b) is moved up from subsection (d) in the last draft with no change in language except insertion of the reference to Section 3-104B(e). This subsection states the most basic rule of this section and seems better positioned here.

(e) If a declarant transfers a special declarant right to an affiliate of the declarant, the transferor and the successor are jointly and severally liable for all obligations and liabilities imposed on either person by this [act] or the declaration. Lack of privity does not deprive a unit owner of standing to maintain an action to enforce an obligation or liability of the transferor or successor.

(f) A declarant that transfers a special declarant right to a non-affiliate successor remains liable for any obligation or liability arising before the transfer imposed by this [act] or the

declaration, including a warranty obligation. The transferor is not liable for an obligation or liability arising after the transfer imposed on the successor by this [act] or the declaration.

(g) A non-affiliate successor that succeeds to fewer than all special declarant rights held by the transferor is not subject to an obligation or liability that relates to a special declarant right not transferred to the successor.

(h) A non-affiliate successor is not subject to an obligation or liability imposed by this [act] or the declaration that relates to:

(1) a misrepresentation by a previous declarant;

(2) a warranty obligation on an improvement made by a previous declarant or made before the common interest community was created;

(3) breach of a fiduciary obligation by a previous declarant or the previous declarant's appointees to the executive board; or

(4) an obligation or liability imposed on the transferor as a result of the transferor's ~~act~~s or omission~~s~~ after the transfer.

Reporter's Note (4/2)

The Drafting Committee at its Feb. 19, 2021, meeting agreed to reinsert the words "imposed by this [act] or the declaration," which appear in existing Section 3-104(e)(2), into subsection (g) to make it clear that a successor who uses improvements made by a previous declarant in the successor's project is not necessarily relieved of an obligation to repair defects or make upgrades to the improvements. Other law, including contract and tort principles, will determine whether the successor who uses the transferor's old improvements undertakes an obligation or liability.

Reporter's Note (4/2)

The subcommittee recommends "involuntary transfer" to replace "foreclosure sale" as for the title of Section 3-104B and operative term for this section.

Reporter's Note (3/2)

Is "involuntary transfer" or "involuntary sale" a better title for this section and the defined term in subsection (a)? Foreclosure refers to the main purpose of this section - providing rules for mortgage lenders and mortgage foreclosures - but it fails to capture some of the transfers within the scope. Tax sales are foreclosures; some but not all judicial sales are foreclosures; sales in bankruptcy and receivership are not foreclosures. On the other hand, the scope includes some transfers that are not "involuntary"- deeds in lieu of foreclosure, and some bankruptcy and receivership sales are consented to by debtors and property owners. And a definition can be anything a statute says it is, regardless of standard usage. E.g., UCIOA's definition of "real estate."

(i) If an involuntary transfer includes a special declarant right, the transferee may elect to acquire or reject the special declarant right. A transferee that elects to acquire to a special declarant right is a successor declarant. The judgment or instrument conveying title must provide for transfer of the special declarant rights elected by the transferee.

(j) A successor to a special declarant right by an involuntary transfer may declare its intention in a recorded instrument to hold those rights solely for transfer to another person. After recording the instrument, the successor may not exercise a special declarant right, other than a right to control the executive board under Section 3-103(d), and an attempt to exercise a special declarant right in violation of this section is void.

Reporter's Note (4/26)

The immediately previous sentence is deleted because it is not necessary. Section 3-104(c) supra authorizes voluntary transfers of special declarant rights.

As long as a successor complies with this section, the successor is not subject to an obligation or liability under this [act] other than liability for ~~hi~~ acts and omissions under Section 3-103(d).

Reporter's Note (4/26)

The subcommittee recommends retention of existing subsection (f) (renumbered as subsection (k) infra) to minimize changes to existing UCIOA.

Reporter's Note (3/2)

Subsection (f) immediately above is the final subsection to existing UCIOA Section 3-104, which contains all the content now in proposed Sections 3-104, 3-104A, and 3-104B. Its proposed deletion as a separate subsection in the amendments is not a change in substance. The provisions of Sections 3-104A and 3-104B dealing with successors make it clear that successor liability under these sections only extends to obligations and liabilities arising under this act or the declaration. If the transferor declarant has obligations and liabilities arising outside of the act or the declaration, other law determines whether they transfer to a successor. This subsection is a long-winded way of saying, "This section does not cover what it does not cover."

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

SECTION 3-108. MEETINGS.

(a) The following apply to unit owner meetings:

(1) An association shall hold a meeting of unit owners annually at a time, date, and place stated in or fixed in accordance with the bylaws.

(2) An association shall hold a special meeting of unit owners to address any matter affecting the common interest community or the association if its president, a majority of the executive board, or unit owners having at least 20 percent, or any lower percentage specified in the bylaws, of the votes in the association request that the secretary call the meeting. If the association does not notify unit owners of a special meeting within 30 days after the requisite number or percentage of unit owners request the secretary to do so, the requesting members may directly notify all the unit owners of the meeting.

(3) An association shall notify unit owners of the time, date, and place of each annual and special unit owners meeting not less than 10 days or more than 60 days before the meeting date. Notice may be by any means described in Section 3-121. The notice of any meeting must state the time, date and place of the meeting and the items on the agenda,

including:

(A) a statement of the general nature of any proposed amendment to the declaration or bylaws;

(B) any budget changes;

(C) any proposal to remove an officer or member of the executive board; and

(D) all other matters on which a vote of the unit owners is required for action to be taken.

(4) The unit owners may discuss at a meeting matters not described in the notice under paragraph (3), but may not take action on the matter not described in the notice without the consent of all unit owners.

Reporter's Note (4/2)

At the Feb. 19, 2021, meeting of the Drafting Committee, the point was made that if all unit owners appear at a meeting, they should be able to take action regardless of the contents of the notice and agenda for the meeting. The proposed edit to the final sentence of this subsection allows this outcome with the requirement of consent of all owners. Some acts accomplish this using waiver rules, which is one type of consent. Compare the Uniform Limited Cooperative Association Act (2014), which provides in Section 509, *Waiver of Members Meeting Notice*: "(a) A member may waive notice of a members meeting before, during, or after the meeting. (b) A member's participation in a members meeting is a waiver of notice of that meeting unless the member objects to the meeting at the beginning of the meeting or promptly upon the member's arrival at the meeting and does not thereafter vote for or assent to action taken at the meeting."

Reporter's Note (1/29)

At the November 2020 meeting, the Drafting Committee had a long discussion of paragraphs (3) and (4). The consensus was that unit owners should not be allowed to vote to take action on any matters that are not disclosed to the unit owners in the notice sent out before the meeting, whether a regular or special meeting. An agenda item that says only "New Business" is not a sufficient description to allow a vote on a new subject brought up for the first time. This limitation follows the general practice in the corporate world. For meetings of community associations, many unit owners decided not to attend

meetings personally if the notice discloses no issue that they consider to be important to them. The proposed revision to paragraphs (3) and (4) responds to the Drafting Committee's discussion. The proposed revision replaces the list of three subjects in subparagraphs (A), (B), and (C) that the notice "must state" with the generic phrase "all matters on which a vote of the unit owners is required for action to be taken." The list of three subjects probably is not be complete under existing UCIOA, and particular associations may expand the list with special provisions in their governing documents. The last sentence of the proposed revision responds to a concern expressed that the term in paragraph 2 "may be considered" is ambiguous. At any meeting, subject to the normal rules governing meeting, unit owners should be allowed to raise and discuss any issues of their choosing, including the taking of nonbinding (straw) votes, which do not take or implement action.

Reporter's Note (4/2)

Paragraph (4) is deleted because the subject is now addressed by new proposed Section 3-125(c), *Emergency Powers*, infra, which applies notwithstanding other sections of the act.

(5) Unit owners must be given a reasonable opportunity at any meeting to comment regarding any matter affecting the common interest community or the association.

(6) A meeting of unit owners is not required to be held at a physical location if the meeting:

(A) is conducted by a means of communication that enables owners in different locations to communicate in real time to the same extent as if they were physically present in the same location; and

(B) is not prohibited by the declaration or bylaws.

Reporter's Note (1/29)

Two revisions to this paragraph (6) come from discussion at the November 2020 meeting of the Drafting Committee. First, the declaration or bylaws do not have to authorize electronic meetings. They are allowed unless prohibited by the declaration or bylaws. This allows the executive board to decide whether live or electronic meetings are preferable. Second, this revision follows the language of the Uniform Electronic Wills Act (E-Wills Act) (2019), approved by the ULC in 2019, which defines "Electronic presence" as "the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location." Id. § 2(2). As the

Comment to the E-Wills Act notes, the "to the same extent" phrase accommodates access for persons with disabilities. See also Revised Uniform Law on Notarial Acts (RULONA) § 14A(a)(1) (2018), which defines "communication technology" as "an electronic device or process that: (A) allows a notary public and a remotely located individual to communicate with each other simultaneously by sight and sound; and (B) when necessary and consistent with other applicable law, facilitates communication with a remotely located individual who has a vision, hearing, or speech impairment."

(7) In the notice for a meeting held at a physical location, the executive board may notify all unit owners that they may participate remotely in the meeting by a means of communication consistent with paragraph (6).

Reporter's Note (4/26)

Paragraph (7) is edited from the version in prior drafts to make clear that the executive board may not authorize one or several unit owners to participate remotely on an ad hoc basis. It must notify all owners of the opportunity in the notice of the meeting given under paragraph (3). Note that this paragraph as presently drafted allows remote participation, when authorized by the board, without the need for authority in the declaration or the bylaws, and regardless of the content of those documents. ***It is not, however, mandatory***; owners have no right to remote participation. Given practices regarding meetings since the beginning of the pandemic in 2020, this is an important issue of policy that the Drafting Committee may want to consider.

Reporter's Note (4/2)

Paragraph (7) as numbered in existing UCIOA is deleted because the Drafting Committee decided at its Feb. 19, 2021, meeting that it is not useful for the act to specify that meetings must be conducted in accordance with Roberts' Rules of Order.

(b) The following apply to meetings of the executive board and committees of the association authorized to act for the association:

(1) Meetings must be open to the unit owners except during executive sessions. The executive board and those committees may hold an executive session only during a regular or special meeting of the board or a committee. No final vote or action may be taken during an executive session. An executive session may be held only to:

(A) consult with the association's attorney concerning legal matters;

(B) discuss existing or potential litigation or mediation, arbitration, or administrative proceedings;

(C) discuss labor or personnel matters;

(D) discuss contracts, leases, and other commercial transactions to purchase or provide goods or services currently being negotiated, including the review of bids or proposals, if premature general knowledge of those matters would place the association at a disadvantage; or

(E) prevent public knowledge of the matter to be discussed if the executive board or committee determines that public knowledge would violate the privacy of any person.

(2) For purposes of this section, a gathering of board members at which the board members do not conduct association business is not a meeting of the executive board. The executive board and its members may not use incidental or social gatherings of board members or any other method to evade the open meeting requirements of this section.

(3) During the period of declarant control, the executive board shall meet at least four times a year. At least one of those meetings must be held at the common interest community or at a place convenient to the community. After termination of the period of declarant control, all executive board meetings must be at the common interest community or at a place convenient to the community unless the unit owners amend the bylaws to vary the location of those meetings.

(4) At each executive board meeting, the executive board shall provide a reasonable opportunity for unit owners to comment regarding any matter affecting the common interest community and the association.

(5) Unless the meeting is included in a schedule given to the unit owners, the secretary or other officer specified in the bylaws shall give notice of each executive board meeting to each board member and to the unit owners. The notice must be given at least 10 days before the meeting and must state the time, date, place, and agenda of the meeting.

Reporter's Note (4/2)

Paragraph (5) is edited because the subject of notice for emergency meetings is now addressed by new proposed Section 3-125(c), *Emergency Powers*, infra, which applies notwithstanding other sections of the act.

(6) If any materials are distributed to the executive board before the meeting, the executive board at the same time shall make copies of those materials reasonably available to unit owners, except that the board need not make available copies of unapproved minutes or materials that are to be considered in executive session.

(7) Unless the declaration or bylaws otherwise provide, the executive board may meet by telephonic, video, or other conferencing process if:

(A) the meeting notice states the conferencing process to be used and provides information explaining how unit owners may participate in the conference directly or by meeting at a central location or conference connection; and

(B) the process provides all unit owners the opportunity to hear or perceive the discussion and to comment as provided in paragraph (4).

(8) After termination of the period of declarant control, unit owners may amend the bylaws to vary the procedures for meetings described in paragraph (7).

(9) During the period of declarant control, the executive board, instead of meeting, may act by unanimous consent as documented in a record authenticated by all its members. The secretary promptly shall give notice to all unit owners of any action taken by

unanimous consent. After termination of the period of declarant control, the executive board may act by unanimous consent only to undertake ministerial actions or to implement actions previously taken at a meeting of the executive board.

Reporter's Note (1/29 rev. 4/2)

The Drafting Committee discussed paragraph (9) at its November 2020 meeting. The primary concern is transparency, with frequent reforms in some areas of law that prefer that decision-making occurs in "open meetings," which interested persons may attend. The counterargument is that declarant-controlled boards are able to enact measures without the consent of unit owners, and it's efficient to do so by unanimous consent without a live meeting. The Committee looked at this provision during its February 19, 2021 meeting and did not recommend a change. The proposed edit to the first sentence is a clarification, not a change to how the original text should be interpreted.

Reporter's Note (10/23)

David Biklen writes:

I believe this says that the board may take any action it wishes without notice and an open meeting so long as the board decision is unanimous. Do we really mean that? And if so, how is that good policy? It completely guts the open meeting rules of the act.

(10) Even if an action by the executive board is not in compliance with this section, it is valid unless set aside by a court. An action seeking relief for the failure of the executive board to comply with this section may not be brought more than [60] days after the minutes of the executive board of the meeting at which the action was taken are approved or the record of that action is distributed to unit owners**,** whichever is later.

Reporter's Note (4/2)

The Drafting Committee briefly discussed the proposed revisions to paragraph (10) at its February 19, 2021, meeting and concurred that the new language makes useful clarification to the intended meaning of the paragraph. The first sentence, deleted in the Feb. draft, is reinserted to minimize changes from the original text; and Style changes to the last part of the subsection are reversed to return to the original text.

Reporter's Note (1/29)

At its November 2020 meeting, the Drafting Committee concluded that the first sentence of paragraph (10) is redundant and merits deletion. The Committee also thought the key terms in the second sentence – challenge, validity, and action – would benefit from more precision. There may be further questions remaining with respect to the scope of paragraph (10), both under the existing version and the proposed revision. E.g.:

(1) Does the 60-day limit apply only to conduct taken by the executive board without a unit owners' meeting, or does it include board misconduct in calling or holding a unit owner's meeting (e.g., failure to give at least 10 days' notice of the meeting under paragraph (3))?

(2) Does the 60-day limit apply if the plaintiff names the *association* as defendant rather than the executive board (the executive board always acts on behalf of the association, whether or not the board's conduct is rightful, so a court could grant relief against the association for the improper conduct of its board).

(3) How does the 60-day time limit work if the board conduct complained of does not involve a meeting (e.g., improper action taken by unanimous consent under paragraph (9))? There will be no minutes, only a record of the unanimous consent. Apparently the 60-day limit never expires due to the phrase "latter to occur" (or "whichever is later").

Reporter's Note (10/23)

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

(1) The section should use the defined term "record" in appropriate places so as to include electronic documents and electronic communications.
(2) We should make sure that the statutory language works correctly for hybrid meetings, when some owners are present in person and some participate remotely.
(3) Consider expanding Section 3-108(a)(6) to allow remote attendees to make motions and amend motions.
(4) Consider changing Section 3-108(b)(6), which allows the executive board to withhold "unapproved minutes" from the unit owners. Discussion included the following points:

(i) unapproved minutes frequently contain inaccuracies;
(ii) owners should be informed about actions taken at board meetings within a reasonable period of time after the meeting;
(iii) board actions are effective when taken, regardless of whether or when minutes are prepared and approved; and
(iv) the Act has no express time limit on how long the board may take before approving minutes from a prior meeting.

2. At the September 2020 Zoom annual meeting first reading of the act, a floor comment suggested that we make sure that the rules in this section on how many days before meetings notices must be sent work with electronic communications and with the voting procedures in § 3-110: Note: § 3-121 provides rules for notices and authorizes e-mail notices, but does not indicate whether notices are effective when sent or when received for any of the types of notices (i.e., does a mailbox rule apply?).

3. David Biklen has concerns about Unit Owner Communication with Other Unit Owners, which relates to meetings and voting but extends further. David writes:

My condo board says they can communicate with other unit owners by email, but I must deliver by hand or by US mail. The board will not share email addresses. It seems to me the proper rule ought to be that a unit owner may communicate with other unit owners in the same means as does the board or management company.

The situation. My condo complex has three brick towers with 20 units in each. Two years ago, a nighttime fire in the unit below mine destroyed the unit and drove most residents of the other 19 units from the building - some actually never woke up or left the building. My unit was too dangerous to return to until firefighters removed the dangerous levels of carbon monoxide.

The board and management company did not notify all 60 association members of the fire (many had slept thru it or were away) and, despite my request, did not call an emergency board meeting - even tho the fire had started in an electric baseboard unit common to all units. (Why scare residents was the statement - much like T's recent statement re covid.)

I then hand delivered a memo to all unit owners describing the fire and asking for an emergency board meeting- which was then held - to address the fire damage and find and remediate the cause.

The board then emailed a memo to all unit owners criticizing my "alarmist" memo and calling into question its accuracy. I prepared a brief response to the board memo because my veracity had been called into question. I asked the board to distribute my memo in the same manner that the board distributed its memo - by email. The board refused to distribute my memo by email even tho it related to the board's email that criticized me.

That ought not be the case. It would be great if the drafting committee could devise a way to avoid this result.

SECTION 3-109. QUORUM.

(a) Unless the bylaws otherwise provide, a quorum is present throughout any meeting of

the unit owners if at the beginning of the meeting persons entitled to cast [20] percent of the votes in the association participate in person, by proxy, or by a means of communication under Section 3-108(a)(6) or (7).

Reporter's Note (4/2)

The proposed revision to subsection (a) is not a change of substance. It reflects the proposed revisions to Section 3-110 that (i) eliminate the use of the term "absentee ballot" for votes cast at meetings by unit owners who are not present (they vote only by proxy) and (ii) allow unit owners to participate in meetings remotely by electronic means.

(b) Unless the bylaws specify a larger number, a quorum of the executive board is present for purposes of determining the validity of any action taken at a meeting of the executive board only if individuals entitled to cast a majority of the votes on that board are present at the time a vote regarding that action is taken. If a quorum is present when a vote is taken, the affirmative vote of a majority of the board members present is the act of the executive board unless a greater vote is required by the declaration or bylaws.

Reporter's Note (4/2)

Subsection (c) is deleted because the Drafting Committee decided at its Feb. 19, 2021, meeting that it is not useful for the act to specify that meetings must be conducted in accordance with Roberts' Rules of Order.

SECTION 3-110. VOTING; PROXIES; BALLOTS.

Reporter's Note (1/29)

At its November 2020 meeting, the Drafting Committee extensively discussed Section 3-110, requesting a number of revisions and leaving a number of points open for further work. The Reporter has reorganized this section extensively, including moving some paragraphs to places where they seem a better fit.

(a) Unit owners may vote at a meeting under subsection (b) or (c) or, when a vote is conducted without a meeting, by ballot under subsection (d).

Reporter's Note (4/2)

Subsection (a) of the original text serves as a roadmap for the remainder of this Section. The Feb. 2021 draft deleted subsection (a) on the ground that a roadmap is not necessary. The Style Committee at its April 2021 meeting expressed a strong preference for drafting so as not to renumber existing subsections. If deletion of a subsection cannot be avoided, the deletion should be shown as: "[(a) Reserved.] Accordingly, this draft reinserts subsection (a) as a roadmap with edits.

(b) At a meeting of unit owners the following requirements for voting apply:

(1) Unless the declaration or bylaws otherwise provide, unit owners may vote by voice vote, show of hands, standing, or any other method authorized at the meeting.

Reporter's Note (4/2)

At its Feb. 19, 2021, meeting, the Drafting Committee discussed paragraph (a)(1) with different points of view expressed. The consensus is that unit owners may select the method of voting, subject to the declaration or bylaws, by using normal parliamentary procedures, regardless of the preference of the person presiding at the meeting. The revised language "authorized at the meeting" allows this outcome by removing the reference to the presiding officer. The phrase "present in person" is deleted because it may lead to confusion when some or all unit owners participate remotely.

Reporter's Note (1/29)

Discussion at the November 2020 Drafting Committee meeting included the question whether this paragraph works for election of the board by acclamation. *Robert's Rules of Order* uses the term "voice vote" and indicates it is the same as acclamation. The addition of "ordered by the assembly" conforms this paragraph to *Robert's Rules*. Query whether "designated by the person presiding at the meeting" should be retained. The intent of the proposed revision is that an order of the assembly overrides the person presiding at the meeting (e.g. if the chair calls for a voice vote and a motion for a secret ballot passes, the motion prevails).

(2) If unit owners participate in the meeting by a means of communication under Section 3-108(a)(6) or (7), the association must implement reasonable measures to verify the identity as a unit owner of each person participating remotely.

Reporter's Note (1/29 rev. 4/2)

At its November 2020 meeting, the Drafting Committee recommended that

paragraph (3) above and paragraph (c)(2) below, dealing with voting, when a unit has multiple owners, at live meetings and by proxies, respectively, should be combined and integrated into a single provision. See new subsection (d) below.

Reporter's Note (10/23)

At the September 2020 Zoom annual meeting first reading of the act, a floor comment suggested that this paragraph (3) may not work when owners are voting by electronic ballots.

Reporter's Note (1/29)

Existing Section 3-110 uses the term "absentee ballot" to describe how a unit owner votes at a meeting without being physically present and uses the terms "paper ballot" and "electronic ballot" to describe the mechanism for voting without a meeting. Following suggestions made at the November 2020 Drafting Committee meeting, this redraft uses "ballot" only for a vote without a meeting and allows an absent unit owner to vote at a meeting only by using a proxy. This better conforms to how the terms are generally used in corporate practice. Note, however, *Robert's Rules of Order* 45:17 & 45:18 allows voting by ballot at meetings "when expressly ordered by the assembly or prescribed by its rules." *Robert's Rules* does not discuss the subject of voting or other decision making by an organization without holding a meeting.

(c) Except as otherwise provided in the declaration or bylaws, unit owners may vote by proxy subject to following:

(1) The association promptly shall deliver a proxy form to an owner that requests it if the request is made at least [three] days before the scheduled meeting.

(2) When a unit owner votes by proxy, the association must be able to verify the identity of the proxy holder and the unit owner giving the proxy.

Reporter's Note (4/26)

2. Subparagraph (A) in the Feb. 2021 draft (renumbered here as (1)) takes the language in the existing act applicable to absentee ballots cast at a meeting, 3-110(b)(4) supra, edited to refer to "proxy" instead of absentee ballot. Existing UCIOA requires that the association provide absentee ballots to a unit owner who requests one, but says nothing about the form for a proxy and who produces it. Query whether this subsection should say another about ***electronic proxies***, a topic not addressed by existing UCIOA.

2. Subparagraph (B) in the Feb. 2021 draft (renumbered here as (2)) takes the language in the existing act applicable to absentee ballots cast at a meeting, 3-110(b)(5) supra, edited to refer to "proxy" instead of absentee ballot. Existing UCIOA does not expressly address whether the association must "verify" anything about a proxy. The new edit to this paragraph requires verification both for the unit owner (proxy giver) and the proxy holder.

(3) Votes allocated to a unit may be cast pursuant to a directed or undirected proxy executed by a unit owner.

(4) A unit owner may revoke a proxy given pursuant to this section only by actual notice of revocation to the person presiding at a meeting.

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

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

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

(d) Unless prohibited or limited by the declaration or bylaws, an association may conduct a vote without a meeting. In that event, the following requirements apply:

Reporter's Note (4/26)

Some of the edits in subsection (d) on voting without a meeting were only reorganization and Style. This draft reverses Style edits for subsection (d). The changes of substance are new procedures for electronic voting and allowing a unit owner to revoke a ballot.

(1) The association shall notify the unit owners that the vote will be taken by ballot.

(2) With the notice the association shall deliver:

(A) a paper ballot to every unit owner entitled to vote on the matter; or

(B) if, the association allows electronic voting, instructions for casting an

electronic ballot to a unit owner that consents in a record to electronic voting.

(3) The ballot must set forth each proposed action and provide an opportunity to vote for or against the action.

(4) In the notice the association shall:

(A) indicate the number of responses needed to meet the quorum requirements;

(B) state the percent of votes necessary to approve each matter other than election of directors;

(C) specify the time and date by which a ballot must be delivered to the association to be counted, which time and date may not be fewer than [three] days after the date the association delivers the ballot; and

(D) describe the time, date, and manner by which unit owners wishing to deliver information to all unit owners regarding the subject of the vote may do so.

(5) A unit owner may revoke a ballot before the time and date by which the ballot must be delivered to the association under paragraph (4). Except as otherwise provided in the declaration or bylaws, a ballot is not revoked by death or disability after delivery to the association.

(6) Approval by ballot pursuant to this subsection is valid only if the number of votes cast by ballot equals or exceeds the quorum required to be present at a meeting authorizing the action.

(7) The association shall verify that each paper and electronic ballot is cast by the unit owner having a right to do so.

(8) If the association allows electronic ballots, the association shall create a record

of electronic votes that is capable of retention, retrieval, and review.

Reporter's Note (4/26)

Consider how paragraph (8) fits with Section 3-118(a)(11), which states, "An association must retain . . . ballots, proxies, and other records related to voting by unit owners for one year after the election, action, or vote to which they relate."

Reporter's Note (1/29)

This section does not limit the ways in which "electronic voting" may take place at a meeting or under this subsection (b) for voting without a meeting. See the proposed new definition of "electronic" above in Section 1-103(17A). Under paragraph (8), however, "electronic ballots" require the creation of a record. The association may prepare a written form or content for electronic ballots and distribute the form or content to unit owners; or the electronic ballots could be as simple as the unit owners communicating "yes" or "no" by e-mail, text message, or voice mail in response to the association's notice that explains what issue is to be decided. Existing UCIOA § 3-110(d)(2) requires the association to "deliver a paper or electronic ballot to every unit owner entitled to vote on the matter," which may imply that the association must distribute something other than just telling the unit owner to respond by email. The proposed revision to this subsection drops the "delivery" requirement.

(h) Unless a different number or fraction of the votes in an association is required by this [act] or the declaration, a majority of the votes cast determines the outcome of any vote taken at a meeting or without a meeting.

Reporter's Note (4/26)

New subsection (c) moves existing 3-110(b)(3), which is deleted supra, with some changes in its language including extending its scope from voting at meetings to votes taken without a meeting. ***This draft proposes moving this subsection, along with the next subsection immediately below, to the end of this subsection to preserve the original subsection numbering of the next two subsections.***

(i) If a unit is owned by more than one person and:

(1) if only one of the owners casts a vote, that owner may cast all the votes allocated to that unit; and

(2) if more than one of the owners casts a vote, unless the declaration provides

otherwise, the votes allocated to that unit may be cast only in accordance with the agreement of a majority in interest of the owners.

Reporter's Note (1/29)

This new subsection (d) integrates existing Section 3-110 paragraphs (b)(2) and (c)(2) above and makes a few minor changes of substance:

(1) New subsection (d) retains the "majority in interest" rule of paragraph (b)(2) for live meetings and expands it to proxies and all other types of voting.

(2) New subsection (d) deletes the "protest" language from both existing paragraphs (b)(2) and (c)(2) on the ground that it is unnecessary. If one owner votes and another owner casts a contradictory vote or protests, the "majority in interest" rule should resolve the issue.

(3) New subsection (d) preserves the language of existing paragraphs (b)(2) and (c)(2), which allows the declaration to override the "majority in interest" rule, but not the other rules stated therein. Query whether this is best. Perhaps this entire subsection should be a mandatory rule, or a default rule subject to change by the declaration.

(e) If the declaration requires that votes on specified matters affecting the common interest community be cast by lessees rather than unit owners of leased units:

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

(2) unit owners that have leased their units to other persons may not cast votes on those specified matters; and

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

(f) Unit owners are entitled to notice of all meetings at which lessees are entitled to vote.

Reporter's Note (4/2)

The above edit moved subsection (f) to the final paragraph of subsection (e) to put all rules dealing with voting by lessees in the same subsection. This is a Style edit. This draft reverses the edit and returns to the original language, despite the inexplicable (to the Reporter) oddity of putting the final requirement for lessee voting in a separate subsection (f) all by itself.

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

Reporter's Note (10/23)

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

(1) The section should use the defined term "record" in appropriate places so as to include electronic documents and electronic communications.
(2) We should consider authorizing or facilitating secret ballots for electronic voting and for remote attendees at meetings. There appears to be technology currently being used that allows secret ballots to be cast electronically and securely, with the recipients who count votes not able to identify the voters.

SECTION 3-115. ASSESSMENTS.

(a) Until the association makes a common expense assessment, the declarant shall pay all common expenses. After the association makes its first assessment, the association shall make periodic common expense assessments at least annually, based on a budget adopted at least annually by the association.

Reporter's Note (4/2)

The edit to subsection (a) clarifies that the association's obligation to make regular assessments begins after the first assessment and uses the term "periodic common expenses assessments" to use the same phrase that appears in the original text of the Sections that require disclosure in the public offering statement and the resale certificate.

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

(c) The declaration may provide that:

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

Reporter's Note (4/2)

Most of the prior edits to subsection (c)(1) are Style edits, which are reversed in this draft. The deletion of the phrase "to the extent required" is substantive; the phrase is ambiguous and may allow the declaration to confer discretion on the executive board with respect to making an assessment -- a result this draft intends to prohibit.

(2) a common expense benefitting fewer than all of the units or their owners must be assessed exclusively against the units or unit owners benefitted, but if the common expense is for the maintenance, repair, or replacement of a common element other than a limited common elements, the expense may be assessed exclusively against them only if the declaration reasonably identifies the common expense by specific listing or category.

Reporter's Note (4/2)

The Drafting Committee discussed subsection (c) at its Feb. 19, 2021, meeting, with different points of view expressed as to the merits of Choice 1 and 2 and other approaches, and the committee decided to select Choice 1. In addition, the committee agreed that the permissive language presently in the "benefit" rule ("may be assessed") should be replaced with mandatory language ("must be assessed").

Reporter's Note (1/29)

1. Proposed revisions in subsections (c) above and (g) below reflect the work of the subcommittee on common expenses. Two choices are given with respect to the scope of the benefit rule in subsection (c). Choice 1 borrows some of the language from UCC Article 9. UCC § 9-108(b), *Sufficiency of Description*, provides: ". . . a description of collateral reasonably identifies the collateral if it identifies the collateral by: (1) specific listing; (2) category; . . . ." The UCC rules for describing collateral in security agreements and financing statements have proven to be generally successful in striking a balance between flexibility and notice to debtors and third parties. Categories include heating and air conditioning equipment, elevators, and recreational facilities.

Choice 2 is more restrictive, limiting exclusive assessments to a statutory list of categories. This prevents drafting the declaration with a long list of "categories" that may include everything imaginable. For Choice 2, we could expand the statutory list of permitted exclusive-benefit categories, but if the list gets too long or ends with a catch-all phrase, the list would become meaningless. This provision is partly based on some of the language in the Texas condominium act. Texas adopted the Uniform Condominium Act (UCA), but has a non-uniform provision, Tex. Property Code § 82.107, which states:

> (b) Except as provided by the declaration, each unit owner is responsible for the cost of maintenance, repair, and replacement of any utility installation or equipment serving only the owner's unit, without regard to whether the installation or equipment is located wholly or partially outside the designated boundaries of the unit. For purposes of this subsection, utility installations and equipment include electricity, water, sewage, gas, water heaters, heating and air conditioning equipment, and television antennas.
>
> (c) Except as provided by the declaration, each unit owner is responsible for the cost of maintenance, repair, and replacement of windows and doors serving only the owner's unit.

2. Another issue the committee may consider is whether we want a different default rule. For the items in all 3 paragraphs of existing UCIOA Section 3-115(c), all common expenses must be assessed to all owners, no matter their nature, unless the declaration provides for exclusive assessments. For example, should the default rule apply to expenses for special services provided by the association to particular owners who request them (snow removal, etc.)? Note, the Texas act (quoted above) has a default rule that if the declaration is silent, the association must exclusively assess for maintenance, repair, and replacement of utility installations and equipment that serve only the owner's unit. Also, what should be the default rule for maintenance, repair, and replacement of limited common elements? Section 3-115(c) makes all unit owners pay unless the declaration requires assessing only the owners to whom the limited common element is allocated.

Reporter's Note (10/23)

Barry Hawkins writes:

After considerable thought and re-reading of subsection (d) I have come to like it better and better and do not think it needs any major surgery. As I now read it it would appear to apply primarily to ongoing maintenance and repairs or replacements. As long as there are no big surprises for the unit owner I think it makes sense to allocate financial responsibility to those unit owners whose units include features different in kind from that of other owners. Everybody would be on an even playing field since the features triggering different allocations from the standard (whether based upon value, square footage or any other measuring tool)

would be disclosed specifically and the buyer could choose to buy or not buy depending upon that factor among others. I think that works well in ongoing maintenance and perhaps less well in the event of allocating cost of repairing or replacing features harmed by some loss event because of the interplay of insurance and causation and the difficulty of advance disclosure of the many unexpected events which could have been allocated differently with perfect foresight. None the less and subject to my subsequent comments on subsection (g) I think it works and is an elegant solution to a difficult problem.

(3) the costs of insurance must be assessed in proportion to risk, and the costs of utilities must be assessed in proportion to usage whether metered or reasonably estimated.

Reporter's Note (1/29)

The subcommittee on common expenses raised the question whether the requirement in subsection (e) of assessing utilities "in proportion to usage" works, given that some utilities may not be separately metered (e.g. water) and some may not be capable of metering (e.g., cable television).

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

(e) The association may assess the following common expenses, including expenses relating to damage to or loss of property, exclusively against an owner's unit:

(1) expense caused by the willful misconduct of the unit owner or a guest or invitee of the unit owner; and

(2) expense caused by the unit owner's failure to comply with a maintenance standard prescribed by the declaration or a rule, if that standard contains a statement that an owner may be liable for damage or loss caused by failure to comply with the standard.

(f) Before the association makes an assessment under subsection (e), the association shall give notice to the unit owner and an opportunity for a hearing. The assessment may not exceed the portion of the common expense in excess of any insurance proceeds received by the

association, whether the portion results from the application of a deductible or otherwise.

Reporter's Note (4/2)

The Drafting Committee discussed subsection (g) at its Feb. 19, 2021, meeting. Discussion included the fit between the association's master insurance policy, which is addressed in this subsection, and the owner's individual insurance policy. No change was recommended from the subsection as drafted, which makes the owner liable only to the extent the loss is not covered by the master policy. The owner can usually request coverage under the master policy even if the association has not made a claim. The master policy often has a high deductible, which provides some incentive for proper behavior by owners.

Reporter's Note (1/29)

This proposed revision to the "bad behavior" rule of subsection (g) follows Barry Hawkins's recommendation (see below) to look to Connecticut's modification to this provision, which reads:

> If any common expense is caused by the willful misconduct, failure to comply with a written maintenance standard promulgated by the association or gross negligence of any unit owner or tenant or a guest or invitee of a unit owner or tenant, the association may, after notice and hearing, assess the portion of that common expense in excess of any insurance proceeds received by the association under its insurance policy, whether that portion results from the application of a deductible or otherwise, exclusively against that owner's unit.

Conn. Gen. Stat. Ann. § 47-257(e). The proposed revision deletes the "gross negligence" prong on the ground that it is too difficult for executive boards and other persons to distinguish gross negligence from ordinary negligence.

The revision allows the association to charge unit owners when their failure to meet maintenance standards for equipment for which they are responsible causes damage outside their unit. For example, the rule may require replacement of hot water heaters every 10 years. The rule should warn owners of the possible consequence of failure to follow the standard – liability for property damage caused to other persons.

Reporter's Note (10/23)

Barry Hawkins writes:

Now I turn to subsection (g) and that is a horse of different color. I think we got it wrong in 2008 and now it needs to be corrected. As I will elaborate on later, I think we saw the problem in our 2010 deliberations in Connecticut and modified what was then 3-115(e) to its present format in Conn. Gen Statutes Section 47-

257. I propose that (g) be discussed as part of your committee's agenda and have concluded that it be substantially re-written to more closely track 47-257. In hindsight I think we came closer to the solution in 2010 and now regret that we did not then tackle amending CIOA to implement that fix.

Subsection (e) as it was identified in 1982 CIOA was maintained in the original formulation from 1982 through the substantial amendments in 1994. It was apparently modified in 2008 and that is where I think we went wrong. The original formula allowed the association to directly surcharge the unit owner for misconduct resulting in a loss. The language did not deal with the issue of whether or not there was insurance coverage for the loss and the formula has no explanatory commentary.

I submit that the formulation and absence of commentary result from the fact that almost all property insurance policies exclude from coverage damages resulting from the intentional bad acts of the insured. This limitation of liability is identical between master policies covering multiple units and standalone single homes. It would not be a surprise or unfair for a unit owner to find that their policy would not pay for intentional bad acts (read "misconduct").

In a common interest community of course there is a need to reconcile the fact that unit owners are insured but they are also not individually responsible for purchasing and paying for the policy premium. To avoid an unfair result in such a community we also provided for mandatory insurance Waiver of subrogation rights to make sure that a unit owners misconduct would not defeat the claims of other unit owners for damages To their units and the association on behalf of all owners to achieve the same result for damages to common elements resulting from misconduct of a unit owner. Section 3-113 sets forth the provisions needed to reflect the unique needs of unit owners in a multi-family ownership situation and it did it quite nicely in a manner which was consistent with 3-115. These two subsections worked reasonably well from 1983-2008 when I think we left the tracks inadvertently but with good intentions.

In 2008 section 3-115(e) was amended to add the word willful as a modifier to misconduct (a change of no substance I think since willful is inherently an implied feature of misconduct and this changes the standard not at all) and much more importantly added the troubling standard of gross negligence to the conduct that would allow the association to visit the entire cost of repairing damages upon the errant unit owner and even worse added the concept that this would be done whether or not there was any insurance coverage for the conduct and the resulting damages.

The origin of these unfortunate changes was probably based upon the factors discussed in the commentary to section 3-113 of the 2008 CIOA text. The changes made to 3-115(e) are described in the accompanying commentary as being made at least in part to resolve the issues described in the 2008 commentary

to 3-113 as needing solution. Unfortunately they do not directly nor adequately address the very real problems of high deductibles, lack of incentives for unit owners to act carefully with respect to maintaining common elements, and lack of incentives for unit owners not to file numerous small claims against the master policy thus raising the costs of premiums for all as well as leading to higher deductible amounts resulting in associations effectively having to self insure many such smaller claims. The raising of insurance premium cost and higher deductibles results of course in all unit owners paying the resulting cost of such lack of incentives.

Although the 2008 commentary acknowledges the difficulty of selecting fair and adequate alternatives it appears to have been mesmerized by the prospect of passing on the costs of many tort claims by expanding upon the concept of assigning fault to unit owners having tort claims and blithely passing it on to the unit owners individual property owners insurance carriers to pay for the repair or replacement of damages which had formerly been the responsibility of the master policy Carrier.

Accordingly, 3-115(e) was modified to allow the association to decide whether the damages resulted from ordinary or gross negligence and if the latter, to allocate the total cost of repair or replacement to the unit owner. Presumably the association would not receive much resistance since that owner could then submit the claim to his unit insurance carrier paying only the much more modest deductible charged by that unit carrier. In effect and despite the existence of provisions in 3-113 making it clear that the master policy was to provide primary insurance and the unit policy only secondary, this flim flam game depended upon the unit policy carrier accepting the decision of the association that the tort was one of gross negligence and therefor the tort was not an insured event under the master policy.

It did not take unit policy insurers long to realize that this was actually a three card Monte scheme with unit owner responsibility for negligence being cleverly passed on to the unit carrier. The unit carriers have of course pushed back with higher premium costs, larger deductibles and sometimes complex litigation claims. Many association lawyers, including me, have advised their clients to encourage unit owners to obtain unit property damage insurance coverage from the same carrier that writes the master policy, making the carrier agnostic as to the characterization of the tort as gross or simple negligence. Either way the carrier must pay and there is in reality no change in the incentives to be given to change unit owner conduct. I would submit that a scheme of coverage based upon an absence of incentives and a pull the wool over the carriers eyes is not a sound policy to be promoted by the ULC.

Even in the absence of a “hiding the ball “scheme of passing liability for payment on to the unit policy insuror there are a number of sound policy reasons not to add “fault” to decide whether a unit owner should pay for the cost of repair or

replacement resulting from an accident. First, ordinary insurance policies on single family homes cover accident damage claims so that is the ordinary expectation of the property owner. In order to vary that expected and normal result there should be a sound rationale based upon some unique circumstance of common ownership that justifies a difference in result.

There are some differences of course such as the association pays the premium based upon mandatory payments from all owners and the policy prohibits any subrogation claims against the unit owners based upon their status as owners. This payment difference does lessen the incentive of an owner not to file meritless or numerous small claims since that conduct would raise the cost of premiums for all owners and no individual owner is likely to risk having their coverage threatened by non renewal or premium surcharge levied only against them. If the conduct of claims is poorly managed by one or more unit owners all owners will bear that risk jointly.

Secondly the distinctions between simple and gross negligence have been perplexing and difficult for jurists and juries alike for many decades. Saddling this distinction on multi family structures only as opposed to single family homes is a real step backwards and likely to be favored only by litigators who are paid to explore the often subtle differences.

Third , since the initial decision about whether to submit a claim to the master insurance policy or not to do so will fall to the associations board (which has a strong incentive to avoid raising the expenses of all owners either because of high deductible or future premium increases or both) the unhappy owner may or may not be able to rely upon a unit policy carrier (and least have to pay that deductible alone) or to sue the Board for using gross negligence as a reason for non submission. If the latter the unit owner would then have the burden of proving that he or she was not grossly negligent as difficult and expensive as that may be.

Finally, the incentives arguably justifying this unfair choice of not seeking payment under already available insurance coverage paid for by all owners are not the least expensive and most efficient way to provide proper incentives.

The problem of multiple small or frivolous claims can be met by applying a de minimus standard to all claims below a reasonable minimum at which if meritorious the association would self insure by paying to repair the damage with funds of all owners through the common charges. Claims could be denied as not being meritorious by the Board But only after notice and opportunity for the unit owner to be heard.

In addition to misconduct as a trigger for unit owner liability the same high standard could also be applied to a unit owner who has violated a duly publicized written standard of maintenance such as maintaining heat in temporarily unoccupied units to prevent frozen pipe damage, not exchanging water heaters or

laundry hoses beyond x years. Again, after notice and hearing such conduct would be deemed equal to misconduct triggering individual liability.

Finally, the desirable standard should probably articulate whether the Prohibited conduct of a unit owner warrants individual responsibility for all damages including deductibles or whether the standard should be all such expenditure (including deductible) after payment of all insurance proceeds. That decision may have to be made also in contemplation of the fact that damages to other units or common areas resulting from such conduct may be beyond the resources of a single unit owner and you may not want to deprive the association from access to the insuror's presumably deeper pockets.

As noted above the choices made in 2010 by the Connecticut council reviewing the 2008 act, as reflected in Section 47-257 of the Conn Gen Statutes would serve as a useful starting point in improving the policy decisions still reflected in what is now Section 3-115(g) of the Act being drafted. It is now time to correct our earlier error.

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

Reporter's Note (4/2)

The prior edits to subsection (f) are Style edits, which are reversed in this draft. Comment 4 to this section explains this subsection and lists these 4 cross references, so including the cross references in that statutory text is not necessary.

(g) The association may adopt a policy that allows all unit owners to prepay assessments at a reasonable discount specified in the policy.

Comment

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

the common expense liability.

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

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

(a) The executive board, at least annually, shall adopt a proposed budget for the common interest community for consideration by the unit owners. Not later than [30] days after adoption of a proposed budget, the executive board shall provide to all the unit owners a summary of the budget, including any reserves, and a statement of the basis on which any reserves are calculated and funded. Simultaneously, the board shall set a date not less than 10 days or more than 60 days after providing the summary for a meeting of the unit owners to consider ratification of the budget. Unless at that meeting a majority of all unit owners or any larger number specified in the declaration reject the budget, the budget is ratified, whether or not a quorum is present. If a proposed budget is rejected, the budget last ratified by the unit owners continues until unit owners ratify a subsequent budget.

(b) The executive board, at any time, may propose a special assessment. The assessment is effective only if the executive board follows the procedures for ratification of a budget described in subsection (a) and the unit owners do not reject the proposed assessment.

Reporter's Note (4/2)

Subsection (c), the final subsection of this section, is deleted because the subject is now addressed by new proposed Section 3-125(e), *Emergency Powers*, infra.

Comment

* * *

3. . . .

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

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

(B) a statement of any other reserves;

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

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

SECTION 3-125. EMERGENCY POWERS.

(a) In this section, "emergency" means:

(1) a state of emergency declared by a government for an area that includes the common interest community; or

(2) an event or condition that constitutes an imminent threat to public health or safety, health or safety of residents of the common interest community, the habitability of units, or substantial economic loss to the association.

(b) Notwithstanding any other provision of this [act], this section governs an emergency.

(c) The executive board may reduce the minimum time for notice to unit owners of a unit owners meeting called to deal with an emergency. ***[note - present UCIOA content is in Section 3-108(a)(3)].***

(d) The executive board may call a board meeting to deal with an emergency by giving notice only to the unit owners and board members whom it is practicable to reach. The notice shall be given in any practicable manner. No quorum is required for a meeting under this subsection. Instead of meeting, after giving notice under this subsection, the board may take action by vote without a meeting. ***[note - present UCIOA content is in Section 3-108(b)(5)].***

(e) In an emergency, the executive board may take action it considers necessary to protect the interests of the unit owners and other persons holding interests in the common interest community, acting in a manner reasonable under the circumstances and without consideration of

any limitations contained in the declaration, bylaws, or rules.

(f) The executive board may use funds of the association, including reserves to pay the reasonable costs of an action under subsection (e) and may propose to the unit owners any special assessment or increase in common expenses necessary to pay the costs or to restore reserves. If the board determines by a two-thirds vote that an immediate special assessment is necessary to respond to an emergency:

(1) the special assessment becomes effective immediately in accordance with the terms of the vote; and

(2) the board may spend funds paid on account of the emergency assessment only for the purposes described in the vote. ***[note - present UCIOA content is in Section 3-123(c)].***

(g) After taking an action under this section, the executive board promptly shall notify the unit owners of the action in any practicable manner.

[ARTICLE] 4

PROTECTION OF PURCHASERS

* * *

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

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

(1) the name and principal address of the declarant and of the common interest community, and a statement that the common interest community is a condominium, cooperative, or planned community;

(2) a general description of the common interest community, including to the extent possible, the types, number, and declarant's schedule of commencement and completion

of construction of buildings, and amenities that the declarant anticipates including in the common interest community;

(3) the number of units in the common interest community;

(4) copies and a brief narrative description of the significant features of the declaration, other than any plats and plans, and any other recorded covenants, conditions, restrictions, and reservations affecting the common interest community; the bylaws and any rules of the association; copies of any contracts and leases to be signed by purchasers at closing; and a brief narrative description of any contracts or leases that will or may be subject to cancellation by the association under Section 3-105;

(5) the financial information required by subsection (b);

(6) any services not reflected in the budget that the declarant provides, or expenses that the declarant pays and which the declarant expects may become at any subsequent time a common expense of the association and the projected common expense assessment attributable to each of those services or expenses for the association and for each type of unit;

(7) any initial or special fee due from the purchaser or seller at the time of sale, together with a description of the purpose and method of calculating the fee;

(8) a description of any liens, defects, or encumbrances on or affecting the title to the common interest community;

(9) a description of any financing offered or arranged by the declarant;

(10) the terms and significant limitations of any warranties provided by the declarant, including statutory warranties and limitations on the enforcement thereof or on damages;

(11) a statement that:

(A) within 15 days after receipt of a public offering statement a purchaser, before conveyance, may cancel any contract for purchase of a unit from a declarant;

(B) if a declarant fails to provide a public offering statement to a purchaser before conveying a unit, that purchaser may recover from the declarant [10] percent of the sales price of the unit plus [10] percent of the share, proportionate to the purchaser's common expense liability, of any indebtedness of the association secured by security interests encumbering the common interest community; and

(C) if a purchaser receives the public offering statement more than 15 days before signing a contract, the purchaser may not cancel the contract;

(12) a statement of any unsatisfied judgment or pending action against the association, and the status of any pending action material to the common interest community of which a declarant has actual knowledge;

(13) a statement that any deposit made in connection with the purchase of a unit will be held in an escrow account until closing and will be returned to the purchaser if the purchaser cancels the contract pursuant to Section 4-108, together with the name and address of the escrow agent;

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

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

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

(15) a description of the insurance coverage provided for the benefit of unit

owners;

(16) any current or expected fees or charges to be paid by unit owners for the use of the common elements and other facilities related to the common interest community;

(17) the extent to which financial arrangements have been provided for completion of all improvements that the declarant is obligated to build pursuant to Section 4-119;

(18) a brief narrative description of any zoning and other land use requirements affecting the common interest community;

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

(20) in a cooperative, a statement whether the unit owners will be entitled, for federal, state, and local income tax purposes, to a pass-through of deductions for payments made by the association for real estate taxes and interest paid the holder of a security interest encumbering the cooperative and a statement as to the effect on every unit owner if the association fails to pay real estate taxes or payments due the holder of a security interest encumbering the cooperative;

(21) a description of any arrangement described in Section 1-209 binding the association; and

(22) in a condominium or planned community containing a unit not having horizontal boundaries described in the declaration, a statement whether the unit may be sold without the consent of all the unit owners after termination under Section 2-118 of the common interest community.

Reporter's Note (4/2)

Paragraph (22) is added because the proposed revision to Section 2-118, *Termination of Common Interest Community*, changes existing law that requires

the unanimous consent of unit owners to terminate a community that has unstacked units (units without horizontal boundaries). This is a significant change in rights of owners.

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

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

(B) a statement of any other reserves;

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

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

(c) If a common interest community composed of not more than 12 units is not subject to any development right and no power is reserved to a declarant to make the common interest community part of a larger common interest community, group of common interest communities, or other real estate, a public offering statement may include the information otherwise required by subsection (a) (9), (10), (15), (16), (17), (18), and (19) and the narrative descriptions of documents required by subsection (a)(4).

(d) A declarant promptly shall amend the public offering statement to report any material change in the information required by this section.

Reporter's Notes

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

2. The proposed addition to the public offering statement in Section 4-103(a)(22) is a companion to the revision to Section 2-118(c) and (d), which allows termination of a common interest community and the sale of all real estate, including all units, with a supermajority vote of 80%, regardless of whether the units have horizontal boundaries.

Comment

* * *

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

* * *

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

Reporter's Notes

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

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

SECTION 4-105. SAME; TIME SHARES. If the declaration provides that ownership or occupancy of any units, is or may be in time shares, the public offering statement shall disclose, in addition to the information required by Section 4-103:

(1) the number and identity of units in which time shares may be created;

(2) the total number of time shares that may be created;

(3) the minimum duration of any time shares that may be created; and

(4) the extent to which the creation of time shares will or may affect the enforceability of the association's lien for assessments provided in Section 3-116.

Comment

1. Time sharing has become increasingly frequent since the 1960s, particularly in resort common interest communities. In recognition of this fact, this section requires the disclosure of certain information with respect to time sharing. This section does not apply to the sale of time-share units that are subject to another state statute requiring the declarant to file a public offering statement with a state agency. See Section 4-107.

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

The Uniform Law Commissioners' Model Real Estate Time-Share Act specifies more extensive disclosures for time-share properties. A "time-share property" may include part or all

of the common interest community, and Section 1-109 of the Model Act governs conflicts between this Act and time-share legislation.

Reporter's Notes

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

SECTION 4-107. SAME; COMMON INTEREST COMMUNITY REGISTERED WITH GOVERNMENT AGENCY. If an interest in a common interest community is currently registered with the Securities and Exchange Commission of the United States [or the state under [cite to appropriate state time-share statute]], a declarant satisfies all requirements of this [act] relating to the preparation of a public offering statement if the declarant delivers to the purchaser a copy of the public offering statement filed with the Securities and Exchange Commission [or [the appropriate state agency]]. [An interest in a common interest community is not a security under [cite to appropriate state securities regulation statutes].]

Legislative Note: *A state that has an agency that regulates time-share developments should refer to the time-share statute and provide the name of the state agency in the brackets in the first sentence.*

Reporter's Notes

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

SECTION 4-109. RESALES OF UNITS.

(a) Except in the case of a sale in which delivery of a public offering statement is required, or unless exempt under Section 4-101(b), a unit owner shall furnish to a purchaser

before the earlier of conveyance or transfer of the right to possession of a unit, a copy of the bylaws, the rules or regulations of the association, and the declaration other than plats and plans. The unit owner also shall furnish a certificate containing:

Reporter's Note (4/2)

Some of the Style edits to subsection (a) are reversed. The edits that remain prevent the phrase "other than" from applying to the items listed after "plats and plans."

Reporter's Note (10/23)

At the September 2020 Zoom annual meeting first reading of the act, Howard Swibel suggested an edit to the preceding clause to make it clear that "other than" applies only to "any plats and plans" and not to the bylaws and rules, which follow later in the sentence.

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

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

(3) a statement of any other fees payable by the owner of the unit being sold;

(4) a statement of any capital expenditures approved by the association for the current and succeeding fiscal years;

(5) a statement of the amount of any reserves for capital expenditures and of any portions of those reserves designated by the association for any specified projects;

(6) the most recent regularly prepared balance sheet and income and expense statement, if any, of the association;

(7) the current operating budget of the association;

(8) a statement of any unsatisfied judgments against the association and the status

of any pending suits in which the association is a defendant;

(9) a statement describing any insurance coverage provided for the benefit of unit owners;

(10) a statement as to whether the executive board has given or received notice in a record that any existing uses, occupancies, alterations, or improvements in or to the unit or to the limited common elements assigned thereto violate any provision of the declaration;

(11) a statement as to whether the executive board has received notice in a record from a governmental agency of any violation of environmental, health, or building codes with respect to the unit, the limited common elements assigned thereto, or any other portion of the common interest community which has not been cured;

(12) a statement of the remaining term of any leasehold estate affecting the common interest community and the provisions governing any extension or renewal thereof;

(13) a statement of any restrictions in the declaration affecting the amount that may be received by a unit owner upon sale, condemnation, casualty loss to the unit or the common interest community, or termination of the common interest community;

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

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

(16) a statement disclosing the effect on the unit to be conveyed of any restrictions on the right to use or occupy the unit, including a restriction on a lease or other rental of the unit.

(b) The association, within 10 days after a request by a unit owner, shall furnish a certificate containing the information necessary to enable the unit owner to comply with this section. A unit owner providing a certificate pursuant to subsection (a) is not liable to the purchaser for any erroneous information provided by the association and included in the certificate.

(c) A purchaser is not liable for any unpaid assessment or fee greater than the amount set forth in the certificate prepared by the association. A unit owner is not liable to a purchaser for the failure or delay of the association to provide the certificate in a timely manner, but the purchase contract is voidable by the purchaser until the certificate has been provided and for [five] days thereafter or until conveyance, whichever first occurs.

Reporter's Notes

The proposed amendment expands the scope of the disclosure in Section 9-106(a)(16) to include not only standard leases, but also time-share arrangements, short-term rentals, and sharing platforms that sell licenses to guests, such as Airbnb. The proposed amendment matches the scope of what the declaration must and may disclose in Section 2-105(a)(12) and (b). Recently many common interest communities have placed restrictions on short-term rentals in declarations and rules, and this information is important for many buyers.