

D R A F T  
FOR DISCUSSION ONLY

# **Amendments to the Uniform Common Interest Ownership Act**

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Uniform Law Commission

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*June 9, 2021 Informal Session*



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May 28, 2021

## **Amendments to the Uniform Common Interest Ownership Act**

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1           **AMENDMENTS TO THE UNIFORM COMMON INTEREST OWNERSHIP ACT**

2   **[ARTICLE] 1**

3   **GENERAL PROVISIONS**

4   **[PART] 1**

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

6   \* \* \*

7   (17A) “Electronic” means relating to technology having electrical, digital, magnetic,  
8 wireless, optical, electromagnetic, or similar capabilities.

9   **Reporter’s Note (1/29/2021)**

10   This proposed new definition is taken from the Uniform Electronic Wills Act (the  
11 E-Wills Act) § 2(1) (2019) and the Revised Uniform Law on Notarial Acts  
12 (RULONA) § 2(2) (2018), which use identical language. Existing UCIOA uses  
13 “electronic” in a number of provisions without definition. Adding a definition  
14 coordinates with proposed revisions to Section 3-108, *Meetings*, and Section 3-  
15 110, *Voting; Proxies; Ballots*, which facilitate electronic meetings and electronic  
16 voting, including use of the term “electronic ballot,” which is not presently  
17 defined.  
18

19   \* \* \*  
20

21   ~~(22) “Master association” means an organization described in Section 2-120, whether or~~  
22 ~~not it is also an association described in Section 3-101.~~ means:

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

25   (B) an organization holding a power delegated under Section 2-120(a).

26   **Reporter’s Note (5/25/2021)**

27  
28   1. The proposed new definition of “Master Association” moves some of  
29 the language from existing Section 2-120(a) (below) and is designed to achieve  
30 consistency of usage throughout Section 2-120. The proposed definition also  
31 seeks to draw a sharper definitional line between the unit owners association and  
32 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 the act 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 removes the limitation simply by referring to “an organization.”

\* \* \*

(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.

### Reporter's Note (5/25/2021)

The phrase “which governs the conduct of persons or the use or appearance of property” is deleted from the definition of “rule” to clarify the scope of the association’s power to enact rules. A rule governing conduct, use, or appearance must comply with other provisions of the act, including Section 3-120, *Rules*.

\* \* \*

(33) “Special declarant rights” means rights reserved for the benefit of a declarant to:

(A) complete improvements the declarant is not obligated to make that are  
indicated on plats and plans filed with the declaration or, ~~in a cooperative, to complete~~  
improvements described in the public offering statement pursuant to Section 4-103(a)(2);

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

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

3 (D) under Section 2-116, use easements through the common elements for the  
4 purpose of making improvements within the common interest community or within real estate  
5 which may be added to the common interest community;

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

8 (F) under Section 2-121, merge or consolidate a common interest community with  
9 another common interest community of the same form of ownership;

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

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

14 (I) under Section 3-108, attend meetings of the unit owners and, except during an  
15 executive session, the executive board; and

16 (J) under Section 3-118, have access to the records of the association to the same  
17 extent as a unit owner.

18 **Reporter's Note (5/25/2021)**  
19

20 The revision to the definition of “special declarant rights” has two changes. First,  
21 paragraph (A) is revised to limit the special declarant right to the completion of  
22 improvements that the declarant is not obligated to make. The declarant has an  
23 obligation under the act to make most of the improvements shown on plats and  
24 plans and the public offering statement. Improvements that the declarant are  
25 obligated to make (See Section 4-119) are no longer covered by this special  
26 declarant right. The declarant has a statutory easement under Section 2-116,  
27 *Easement and Use Rights*, which is sufficient for obligatory improvements and  
28 should exist whether or not the declarant has reserved this special declarant right.  
29 Second, cross references are added to most of the descriptions of special declarant

1 rights to make it clear that the right is limited and defined by the relevant section,  
2 and is not a freestanding right that may have other characteristics.

3  
4 (34) “Time share” ~~means a right to occupy a unit or any of several units during [five] or~~  
5 ~~more separated time periods over a period of at least [five] years, including renewal options,~~  
6 ~~whether or not coupled with an estate or interest in a common interest community or a specified~~  
7 ~~portion thereof.~~ [has the meaning in [cite to definition of “time share” in appropriate state  
8 statute]] [means any ownership right in, or the right to use, a unit for less than a full year during  
9 any year, and, on a recurring basis for more than one year, even if the years are not consecutive].

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

#### 13 14 **Reporter’s Note (5/25/2021)**

15  
16 Forty-one states have enacted statutes that regulate time shares, sometimes as a  
17 freestanding act and sometimes as part of their brokerage act, deceptive trade  
18 practices act, or other act. Most states have designated a state agency that is  
19 responsible for time-share regulation. It is preferable that this Act and the state’s  
20 time-share statute define “time share” the same way. This definition of “time  
21 share” may incorporate the time-share statute’s definition by cross reference. Of  
22 the states that have adopted UCIOA, Nevada has the most time-shares. Its version  
23 of UCIOA exactly reproduces verbatim the definition contained in the Nevada  
24 time-share statute. Nev. Rev. Stat. Ann. §§ 116.091, 119A.140.

25  
26 For states that do not have a suitable statutory definition, the revision to the  
27 definition of “time share” modernizes the definition by tracking closely the key  
28 elements of the current definitions of “time share” in the California, Hawaii,  
29 Florida, and Nevada statutes, all states with large numbers of time-share  
30 developments. The proposed definition also is compatible with the Bankruptcy  
31 Code’s long and complicated definition of “timeshare plan.” 11 U.S.C. §  
32 101(53D).

#### 33 34 **Comment**

35 \* \* \*

36 26. Definition (35), “Unit,” describes a tangible, physical part of the project rather than a  
37 right in, or claim to, a tangible physical part of the property. Therefore, for example, a “time-  
38 share” arrangement in which a unit is sold to 12 different persons, each of whom has the right to



1 ~~occupy the unit for one month~~ the sale of a unit to 5 persons as tenants in common does not  
2 create ~~12~~ 5 new units – there are, rather, ~~12~~ 5 owners of the unit. (Under the section on voting  
3 (Section ~~2-110~~ 3-110), a majority of the ~~time-share owners of a unit~~ tenants in common are  
4 entitled to cast the vote assigned to that unit.)  
5

6 \* \* \*  
7

8 27. Definition (36), “Unit owner,” contemplates that a seller under a land installment  
9 contract would remain the unit owner until the contract is fulfilled. As between the seller and the  
10 buyer, various rights and responsibilities must be assigned to the buyer by the contract itself, but  
11 the association would continue to look to the seller (for payment of any arrears in common  
12 expense assessments, for example,) as long as the seller holds title.  
13

14 The definition makes it clear that a declarant, so long as he owns units in a common  
15 interest community, is the unit owner of any unit created by the declaration, and is therefore  
16 subject to all of the obligations imposed on other unit owners, including the obligation to pay  
17 common expense assessments. This provision is designed to resolve ambiguities on this point  
18 which have arisen under several existing state statutes.  
19

20 In the special case of a cooperative, the declarant is treated as the owner of a unit or  
21 “potential unit” to which allocated interests have been allocated, until that unit is conveyed to  
22 another.  
23

24 The definition includes the buyers of time shares only if they directly hold an estate or  
25 long-term leasehold in the unit. Then they own the unit as real property and are treated the same  
26 as other multiple owners of a single unit under the [act]. Time-share unit owners may exist in a  
27 condominium, a planned community, or in a cooperative.  
28

29 **Example 1:** A fee simple owner of a condominium unit records a time-share  
30 declaration for her unit and conveys fee simple time-share estates to 12 different persons,  
31 each receiving the right to occupy the unit for one month each year. The deeds of  
32 conveyance are recorded. The 12 owners have time shares “coupled with an estate” as  
33 defined in Section 1-103(34) and they are “unit owners” under Section 1-103(36).  
34 Collectively the 12 owners hold the single allocation of votes allocated to their unit.  
35 Section 2-107(a). A majority in interest of the 12 owners determines how to cast their  
36 unit’s vote unless the declaration for the condominium community or the time-share  
37 declaration expressly provides otherwise. Section 3-110(b)(2).  
38

39 **Example 2:** A cooperative has 10 members, each holding the right to possess one  
40 unit under a proprietary lease. The member of the association who owns Unit 6 records a  
41 time-share declaration for her unit. The member agrees to sell time-share leaseholds to 6  
42 different persons, each of whom will receive the right to occupy the unit for two months  
43 each year. The sales close, with the member turning in her proprietary lease to the  
44 association. The association then cancels this proprietary lease and issues 6 new  
45 proprietary leases to the time-share buyers. The 6 buyers have time shares coupled with a  
46 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.

### Proposed New Comment

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.

**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.

**SECTION 1-117. MANDATORY AND DEFAULT RULES.**

(a) Except as provided in subsection (b), a declaration or bylaws may not vary the provisions of this [act] that give a right to, or impose an obligation or liability on, a unit owner.

1 declarant, association, or executive board.

2 (b) The declaration or bylaws may vary the following provisions:

3 (1) Section 1-105(a), concerning the classification of a cooperative unit as real  
4 estate or personal property.

5 (2) Section 1-107(b) and (c), concerning the reallocation of allocated interests and  
6 the allocation of proceeds after a taking in eminent domain.

7 (3) Article 1, Part 2, and Article 5, concerning elections with respect to  
8 applicability of this [act].

9 (4) Section 2-102, concerning boundary lines between units and common  
10 elements.

11 (5) Section 2-108(b), concerning the reallocation of limited common elements.

12 (6) Section 2-109(e), concerning the horizontal boundaries of units.

13 (7) Section 2-111, concerning alterations of units and common elements made by  
14 unit owners.

15 (8) Section 2-112(a) and (b), concerning the relocation of boundaries of units.

16 (9) Section 2-113(a), concerning the subdivision of units.

17 (10) Section 2-115, concerning signs maintained by a declarant.

18 (11) Section 2-116(a) and (c), concerning easements through, and rights to use,  
19 common elements.

20 (12) Section 2-117(a), concerning the percentage of votes required to amend the  
21 declaration.

22 (13) Section 2-118, concerning the percentage of votes required to terminate a  
23 common interest community.

1                   (14) Section 2-119, concerning lender approval of actions of unit owners and the  
2 association.

3                   (15) Section 2-120(a), concerning an executive board's delegation of powers by  
4 the executive board to a master association.

5                   (16) Section 2-122, concerning a declarant's addition of real estate to a planned  
6 community.

7                   (17) Section 3-102(a)(14), concerning an association's assignment of future  
8 income.

9                   (18) Section 3-103(a), concerning the extent to which the executive board acts on  
10 behalf of the association.

11                   (19) Section 3-107(a), concerning responsibility for maintenance, repair, and  
12 replacement of units and common elements.

13                   (20) Section 3-108(a)(2), concerning the percentage of unit owners who may  
14 request a special meeting.

15                   (21) Section 3-109, concerning quorum requirements for meetings and rules for  
16 conducting meetings.

17                   (22) Section 3-110, concerning voting by proxies, voting by ballots, voting  
18 without a meeting, and voting by lessees.

19                   (23) Section 3-112 (a), (b), and (g), concerning the percentage of votes required to  
20 convey or encumber common elements.

21                   (24) Section 3-113(k), concerning a nonresidential common interest community's  
22 waiver or variance of insurance requirements.

23                   (25) Section 3-114, concerning the payment of surplus funds of the association.

1                   (26) Section 3-115, concerning changes in assessments of common expenses.

2                   (27) Section 3-116(a), concerning the treatment of fees, costs, charges, and other  
3 sums as assessments for lien purposes.

4                                   **[PART] 2**

5                                   **APPLICABILITY**

6                   **SECTION 1-201. GENERAL APPLICABILITY TO NEW COMMON**  
7 **INTEREST COMMUNITIES.** Except as otherwise provided in this [part and in article 5], this  
8 [act] applies to all common interest communities ~~created within this state after [the effective date~~  
9 ~~of this act] [act]]. The provisions of [insert reference to all present statutes expressly applicable~~  
10 ~~to planned communities, condominiums, cooperatives, or horizontal property regimes] do not~~  
11 ~~apply to common interest communities created after [the effective date of this act].~~ Amendments  
12 to this [act] apply to all common interest communities ~~created after [the effective date of this act]~~  
13 ~~or made~~ subject to this [act] ~~by amendment of the declaration of the common interest~~  
14 ~~community~~, regardless of when the amendment ~~to this [act]~~ becomes effective.

15                                   **Reporter's Note (5/25/2021)**

16  
17                   The revision to this section is a major change in policy, making the act generally  
18 applicable to all common interest communities in the State, including those  
19 created before the effective date of the act. In the first sentence, the phrase  
20 “created in this state” is deleted to achieve consistency in usage in the act and  
21 because it is redundant. Section 1-208, *Applicability to Out-of-state Common*  
22 *Interest Communities*, fully addresses because all issues concerning common  
23 interest communities located outside the enacting state.  
24

25                   **SECTION 1-204. APPLICABILITY TO PRE-EXISTING COMMON INTEREST**  
26 **COMMUNITIES. [RESERVED].**

27                   ~~(a) Except for a cooperative or planned community described Section 1-205 or a~~  
28 ~~nonresidential common interest community described in Section 1-207, the following sections~~

1 ~~apply to a common interest community created in this state before [the effective date of this act]:~~

2 ~~(1) Section 1-105;~~

3 ~~(2) Section 1-106;~~

4 ~~(3) Section 1-107;~~

5 ~~(4) Section 1-206;~~

6 ~~(5) Section 2-102;~~

7 ~~(6) Section 2-103;~~

8 ~~(7) Section 2-104;~~

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

10 ~~(9) Section 2-121;~~

11 ~~(10) Section 2-124;~~

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

13 ~~(12) Section 3-103;~~

14 ~~(13) Section 3-111;~~

15 ~~(14) Section 3-116;~~

16 ~~(15) Section 3-118;~~

17 ~~(16) Section 3-124;~~

18 ~~(17) Section 4-109;~~

19 ~~(18) Section 4-117; and~~

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

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

1 **Reporter's Note (5/25/2021)**

2  
3 This section is deleted from this Article because it applies to preexisting common  
4 interest communities, and the revision to Section 1-201 makes the act generally  
5 applicable to preexisting common interest communities. With minor edits the text  
6 of this Section 1-204 is moved to Section 5-104 in new Article 5, *Transition*.  
7

8 **SECTION 1-205. ~~APPLICABILITY TO SMALL PREEXISTING~~**

9 **~~COOPERATIVES AND PLANNED COMMUNITIES. [RESERVED].~~**

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

16 **Reporter's Note (5/25/2021)**

17  
18 This section is deleted from this Article because it applies to preexisting common  
19 interest communities, and the revision to Section 1-201 makes the act generally  
20 applicable to preexisting common interest communities. Its content is not needed  
21 in new Article 5, *Transition*. Article 1, Part 2, has two sections with rules for  
22 small cooperatives and planned communities, which apply to both preexisting and  
23 new communities: Section 1-202, *Exception for Small Cooperatives*, and Section  
24 1-203, *Exception for Small and Limited Expense Liability Planned Communities*.  
25 These amendments are not making changes to Section 1-202 or Section 1-203.  
26

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

28 (a) The declaration, or bylaws, or plats and plans of any common interest community  
29 created before [the effective date of this act] of a cooperative described in Section 1-202 or a  
30 planned community described in Section 1-203 may be amended to:

31 (1) state that all the sections enumerated in Section 5-104(a) apply to that  
32 cooperative or planned community; or

(2) achieve any other result permitted by this [act], regardless of what applicable law provided before this [act] was adopted.

(b) Except as otherwise provided in Section 2-117(i) and (j), an amendment under this section to the declaration, ~~or bylaws, or plats and plans authorized by this section~~ of a common interest community created before the effective date of this [act] 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.

### Reporter's Note (5/25/2021)

Section 1-206 is amended to provide elections for all small cooperatives and planned communities, whether created before or after the effective date of this act, to achieve any act permitted by this act or to elect to be subject to the 19 sections of the act listed in existing Section 1-204, which these amendments move to Section 5-104 in the new transition article. In addition to the two elections in this section, the small cooperatives and planned communities may elect under Sections 1-202 and 1-203, respectively, to be subject to the entire act.

**[ARTICLE] 2**

## CREATION, ALTERATION, AND

## TERMINATION OF COMMON INTEREST COMMUNITIES

\* \* \*

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

(a) The declaration must contain:

\* \* \*

(8) a description of any development right and any other special declarant rights reserved by the declarant, together with a legally sufficient description of the real estate to which



1 ~~each of those rights applies, and a time limit within which each of those rights must be exercised,~~  
2 and a legally sufficient description of the real estate to which each development right applies;

3 **Reporter's Note (5/25/2021)**

4  
5 Existing paragraph (8) requires a legal description of a parcel to which each  
6 special declarant right is appurtenant, including the intangible rights to control  
7 architectural review committees and to appoint and remove officers and board  
8 members. Under revised Section 3-104(b) below, special declarant rights are  
9 automatically appurtenant to all real estate owned by the declarant in the common  
10 interest community. Accordingly, the revision to this paragraph deletes the  
11 requirement that the declaration describe parcels of real estate to which special  
12 declarant rights are connected, except for a development right (which allows the  
13 declarant to add or withdraw real estate from the community or create or alter  
14 units).

15 \* \* \*

16  
17 **SECTION 2-108. LIMITED COMMON ELEMENTS.**

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

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

26 (c) A common element not previously allocated as a limited common element may be so  
27 allocated only ~~pursuant to provisions in the declaration made in accordance with Section 2-~~  
28 ~~105(a)(7). The allocations must be made by amendment~~ by an amendment to the declaration. A  
29 unit owner may request the executive board to amend the declaration to allocate all or part of a  
30 common element as a limited common element for the exclusive use of the owner's unit. The

1 board may prescribe in the amendment a condition or obligation, including an obligation to  
2 maintain the new limited common element or to pay a fee or charge to the association. If the  
3 board approves the proposed amendment, the board shall give notice to the unit owners of its  
4 action and include a statement that unit owners may object in a record to the proposed  
5 amendment not later than 30 days after delivery of the notice. The amendment becomes effective  
6 if the board does not receive a timely objection. If a timely objection is received, the amendment  
7 becomes effective only if the unit owners vote under Section 3-110, whether or not a quorum is  
8 present, to approve the amendment by a vote of at least 67 percent of the votes cast, including at  
9 least 67 percent of the votes cast and allocated to units not owned by the declarant. If the  
10 amendment becomes effective, the association and the owner of the benefitted unit shall execute  
11 the amendment.

12 (d) The association shall record an amendment to the declaration made under this section  
13 in the manner provided in Section 2-117. If an amendment changes any information shown in a  
14 plat or plan concerning a common element or limited common element other than a common  
15 wall between units, the association shall prepare and record a revised plat or plan.

16 **Reporter's Note (5/25/2021)**

17  
18 The revision to subsection (c) makes it easier to reallocate a common element as a  
19 limited common element. The existing provision requires an amendment to the  
20 declaration under Section 2-117, *Amendment of Declaration*," which requires an  
21 affirmative 67% vote of all unit owners and allows the declaration to require a  
22 higher percentage or unanimity. Often a unit owner's request for reallocation  
23 results in a minor change and is not important to other unit owners. The revision  
24 allows action by the executive board, with a procedure for notice to the unit  
25 owners, who may object and require a vote on the matter.

26  
27 **SECTION 2-112. RELOCATION OF UNIT BOUNDARIES.**

28 (a) Subject to the provisions of the declaration and other provisions of law, the  
29 boundaries between adjoining units may be relocated by an amendment to the declaration upon

1 application to the association by the owners of those units. If the owners of the adjoining units  
2 have specified a reallocation between their units of their allocated interests, the application must  
3 state the proposed reallocations. Unless the executive board determines, within 30 days, that the  
4 reallocations are unreasonable, the association shall prepare an amendment that identifies the  
5 units involved and states the reallocations. ~~The amendment must be executed by those unit~~  
6 ~~owners, contain words of conveyance between them, and, on recordation, be indexed in the name~~  
7 ~~of the grantor and the grantee, and [in the grantee's index] in the name of the association.~~

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

20 (b) The boundary of a unit may be relocated only by an amendment to the declaration. A  
21 unit owner may request the executive board to amend the declaration to include all or part of a  
22 common element within the owner's unit. The board may prescribe in the amendment a fee or  
23 charge payable by the unit owner to the association in connection with the relocation. The board

1 may approve the amendment only if the unit owners vote under Section 3-110, whether or not a  
2 quorum is present, to approve the amendment by a vote of at least 67 percent of the votes cast,  
3 including at least 67 percent of the votes cast and allocated to units not owned by the declarant.

4 (c) The association and the owners of the units whose boundaries are relocated shall  
5 execute an amendment made under this section to the declaration. The amendment must contain  
6 words of conveyance between the parties. The association shall record an amendment made  
7 under this section in the manner provided in Section 2-117. The association (i) in a condominium  
8 or planned community shall prepare and record plats or plans necessary to show the altered  
9 boundaries of affected units, and their dimensions and identifying numbers, and (ii) in a  
10 cooperative shall prepare and record amendments to the declaration, including any plans  
11 necessary to show or describe the altered boundaries of affected units, and their dimensions and  
12 identifying numbers.

#### 13 **Reporter's Notes (5/25/2021)**

14  
15 The revision to subsection (b) retains the substance of existing subsection  
16 (b), which allows a unit owner to request that part of a common element be added  
17 to the owner's unit. Changes are made to conform the language and procedure in  
18 many respects to the new procedure under Section 2-108(c) above for changing a  
19 common element to a limited common element. The revision resolves a possible  
20 ambiguity as to whether the executive board's approval of the unit owner's  
21 application is necessary. This revision also deletes the requirement of a quorum  
22 for the unit owners' vote on the basis that often the requested boundary relocation  
23 will be minor and not of significant interest to other unit owners. Subsection (b)  
24 expressly allows the association to require that the unit owner pay a fee or charge,  
25 which might be one-time or periodic. Depending on the nature of the relocation,  
26 the association may also decide that it is necessary or advisable to require an  
27 increase in the allocated interest of the unit under Section 2-107, which would  
28 necessarily entail decreasing the allocated interests of other unit owners.

#### 29 **Comment**

30  
31 1. This section changes the effect of most current declarations, under which the  
32 boundaries between units may not be altered without unanimous or nearly unanimous consent of  
33 the unit owners. As the section makes clear, ~~this result may be varied by~~ the relocation of

1 boundaries is allowed notwithstanding restrictions in the declaration. The declaration, however,  
2 may specify different procedures for the association's approval of boundary relocations.

3  
4 \* \* \*

5  
6 **Alternative A**

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

12 **Alternative B**

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

22 **End of Alternatives**

23 **SECTION 2-114. BUILDING ENCROACHMENT.**

24 **Alternative A**

25 (a) Except as provided in subsection (b), if the construction, reconstruction, or alteration  
26 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 (4/2/2021)**

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

1 areas. The revision limits the scope of this section to *building* encroachments;  
2 i.e. encroachments between adjoining units in a building and between the  
3 building part of a unit and an adjoining common element. These  
4 encroachments stem from the construction of and subsequent changes to  
5 buildings and their component parts. The section as revised does not address  
6 other encroachments and boundary problems, such as misplaced fences and  
7 misplaced monuments, which the original text apparently covers.  
8

9 2. The original Alternative B applies only when a unit is constructed in  
10 “substantial accordance with the description” in the declaration. The revision  
11 replaces it with a five-foot limit and applies the limit to both Alternatives.  
12

13 3. The original text preserves or creates liability for an owner’s willful  
14 misconduct or the failure of a declarant or another person to adhere to plats and  
15 plans. The revision limits the liability provision to the declarant’s conduct and  
16 handles the owner’s misconduct differently by preventing the owner from  
17 obtaining the benefit of this section.  
18

19 4. The original text is possibly unclear as to whether a unit owner who gains  
20 space has to pay compensation to an owner who loses space. The revision  
21 makes it clearer that there is no payment requirement by narrowing of the  
22 scope of the “liability rule”.  
23

24 5. The original Alternative B is not clear as to whether it matters if the  
25 encroachment is due to original construction or a subsequent change or a  
26 “reconstruction.” The revision applies the same rule to original construction  
27 and subsequent changes for both Alternatives.  
28

29 6. The original Alternative A applies when any “common element encroaches  
30 on any other . . . common element.” The revision narrows the scope for both  
31 Alternatives, applying only when a unit encroaches on another unit or a  
32 common area.  
33

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

35 \* \* \*

36 (c) Every amendment to the declaration must be recorded in every [county] in which any  
37 portion of the common interest community is located and is effective only upon recordation. An  
38 amendment, ~~except an amendment pursuant to Section 2-112(a),~~ must be indexed [in the  
39 grantee’s index] in the name of the common interest community and the association and [in the  
40 grantor’s index] in the name of the parties executing the amendment.

1           \* \* \*

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

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

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

19          (c) ~~In the case of a condominium or planned community containing only units having~~  
20 ~~horizontal boundaries described in the declaration, a~~ A termination agreement may provide ~~that~~  
21 for the sale of some or all of the common elements and units of the common interest community  
22 ~~must be sold~~ following termination. If, pursuant to the agreement, any real estate in the common  
23 interest community is to be sold following termination, the termination agreement must set forth



1 the minimum terms of the sale.

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

7 [(d) Reserved.]

8 (e) The association, on behalf of the unit owners, may contract for the sale of real estate  
9 in a common interest community, but the contract is not binding on the unit owners until  
10 approved pursuant to subsections (a) and (b). If any real estate is to be sold following  
11 termination, title to that real estate, ~~upon termination,~~ not already owned by the association vests  
12 on termination in the association as trustee for the holders of all interests in the units. Thereafter,  
13 the association has all powers necessary and appropriate to effect the sale. Until the sale has been  
14 concluded and the proceeds thereof distributed, the association continues in existence with all  
15 powers it had before termination. Proceeds of the sale must be distributed to unit owners and lien  
16 holders as their interests may appear, in accordance with subsections (h), (i), ~~and (j),~~ and (m).  
17 Unless otherwise specified in the termination agreement, as long as the association holds title to  
18 the real estate, each unit owner and the unit owner's successors in interest have an exclusive  
19 right to occupancy of the portion of the real estate that formerly constituted the unit. During the  
20 period of that occupancy, each unit owner and the unit owner's successors in interest remain  
21 liable for all assessments and other obligations imposed on unit owners by this [act] or the  
22 declaration.

23 ~~(f) In a condominium or planned community, if the real estate constituting the common~~

~~interest community is not to be sold following termination, title to the common elements and, in a common interest community containing only units having horizontal boundaries described in the declaration, title to all the real estate in the common interest community, vests in the unit owners upon termination as tenants in common in proportion to their respective interests as provided in subsection (j), and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit. Termination does not change title to a unit or common element not to be sold following termination unless the termination agreement otherwise provides.~~

(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:

(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), ~~and~~ (i), and (m) are as follows:

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

1 appraisers must be distributed to the unit owners and becomes final unless:

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

4 (B) a unit owner objects in a record to the determination of value of the  
5 owner's unit not later than 30 days after distribution.

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

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

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

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

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

23 (k) In a condominium or planned community, except as otherwise provided in subsection

1 ~~(H)~~(I), foreclosure or enforcement of a lien or encumbrance against the entire common interest  
2 community does not terminate, of itself, the common interest community, and foreclosure or  
3 enforcement of a lien or encumbrance against a portion of the common interest community, other  
4 than withdrawable real estate, does not withdraw that portion from the common interest  
5 community. Foreclosure or enforcement of a lien or encumbrance against withdrawable real  
6 estate, or against common elements that have been subjected to a security interest by the  
7 association under Section 3-112, does not withdraw, of itself, that real estate from the common  
8 interest community, but the person taking title thereto may require from the association, upon  
9 request, an amendment excluding the real estate from the common interest community.

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

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

17 (1) In addition to the approval required by subsection (a), the termination  
18 agreement must be approved by at least 80 percent of the votes allocated to the units being  
19 terminated.

20 (2) The termination agreement must reallocate under Section 2-107 the allocated  
21 interests for the units that remain in the common interest community after termination.

22 (3) The aggregate values of the units and common elements being terminated  
23 must be determined under subsection (j). The termination agreement must specify the allocation

1 of the proceeds of sale for the units and common elements being terminated and sold.

2 (4) Security interests and liens on remaining units and remaining common  
3 elements continue, and security interests and liens on units being terminated no longer extend to  
4 any remaining common elements.

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

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

9 **Reporter's Note (5/25/2021)**

10  
11 The revisions to Section 2-118 make the following changes of substance:

12  
13 1. The revision to subsection (a) retains the requirement that 80% of the unit  
14 owners agree to termination of the common interest community, but adds the  
15 requirement of agreement by 80% of the unit owners other than the declarant.  
16 This prevents a declarant who has sold relatively few units from accomplishing  
17 a termination over the objection of most or all of the unit buyers.

18  
19 2. Subsection (c) deals with a sale of units and common elements following  
20 termination. There are three substantive changes to this subsection. First, the  
21 scope is expanded to include cooperatives. Second, the existing language  
22 authorizes a sale of "all of the common elements and units"; the revision  
23 allows for the sale of some but not all common elements and units. Third, the  
24 scope of this subsection is expanded by removing the limitation of the rule to  
25 communities with "only units having horizontal boundaries" and consolidating  
26 its content with original subsection (d) infra. This consolidation is a major  
27 change in policy. In a community with some or all "non-stacked units,"  
28 subsection (d) required unanimous consent of unit owners for sale after  
29 termination. Revised subsection (c) simplifies by allowing the sale of units  
30 after termination, regardless of whether units have horizontal boundaries, with  
31 an 89% vote.

32  
33 3. Existing subsection (f) handles title to real estate not being sold pursuant to  
34 the termination agreement. The existing subsection shifts title to all common  
35 elements to the unit owners in tenancy in common (note in the condominium  
36 the unit owners already hold title in this form), shifts title to the units to a  
37 tenancy in common in communities having only horizontal-boundary units,  
38 with no shifting for communities having other units. The revision to subsection

(f) simplifies by ending shifting by statutory rule. Instead, new 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.

4. Subsection (j)(1) requires the association to obtain an appraisal of all of the units in order to allocate the sales proceeds after termination. The revision to paragraph (1) provides protection for unit owners who believe that the association's appraisal understates the fair market value of their unit. A unit owner who objects to the association's appraisal may obtain a separate appraisal, and in the absence of agreement on value a panel of three appraisers (the association's appraiser, the unit owner's appraiser, and a third appraiser selected by the first two) determine the value of the owner's unit. This new procedure is based on a provision in the Illinois Condominium Act, 765 ILCS 605/15.

5. New subsection (m) adds rules to govern partial terminations. The source for the new subsection is the partial-termination provisions in the Florida condominium statute. For discussion, see Proposed New Comment *infra*.

### ***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 pursuant to this section or pursuant to the 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.

Subsections (b) and (g), the parallel provisions to Section 2-117(b) and (d) of MRECA, contemplate the same possibility in the case of cooperatives. Termination without sale is not likely to be the usual case, but might occur if the unit owners plan conversion to another form of a new common interest community, for example, conversion from a cooperative to a condominium. In the case of a cooperative, title to the real estate upon termination would remain in the name of the association as trustee for the unit owners; *see* subsection (g). 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; *see* subsection (f), but until a sale occurs vests in the association if the real estate is to be sold; *see* subsection (e). In the case of a condominium or planned community which contains only units with horizontal boundaries, these title rules also apply to all the units. (*See* subsection (f).) In the remaining case, *i.e.*, the case where there are some units with horizontal boundaries and some without horizontal boundaries, the Act provides, in subsection (f), that unit owners become tenants in common of the common elements, but The unit owners continue to hold individual titles to their units. Therefore, in a condominium or planned community with units located in both a high-rise in a high-rise building, and in single-story structures, the unit owners in the high-rise building will hold individual title to their unit upon termination, and either the declaration or the termination agreement should address the needs for easements of support and access for the high-rise 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) ~~If the declaration provides that any of the powers described in Section 3-102 are to be exercised by or may be delegated to a profit or nonprofit corporation [or unincorporated association] that exercises those or other powers on behalf of one or more common interest communities or for the benefit of the unit owners of one or more common interest communities,~~



1 ~~all~~ A declaration may:

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

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

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

9 (b) All provisions of this [act] applicable to unit owners associations apply to any such  
10 corporation [or unincorporated the master association], except as modified by this section.

11 (c) A unit owners association may delegate a power described in Section 3-102(a) to a  
12 master association without amending the declaration. The executive board of the unit owners  
13 association shall give notice to the unit owners of a proposed delegation and include a statement  
14 that unit owners may object in a record to the delegation not later than 30 days after delivery of  
15 the notice. The delegation becomes effective if the board does not receive timely objections from  
16 unit owners of units to which at least 10 percent of the votes in the association are allocated. If  
17 the board receives timely objections, the delegation becomes effective only if the unit owners  
18 vote under Section 3-110 to approve the delegation by a majority vote. The delegation is not  
19 effective until the board of the master association accepts the delegation.

20 (d) Revocation of a delegation set forth in the declaration may be made only by an  
21 amendment to the declaration.

22 (e) At a meeting of the unit owners for which the subject of delegation of powers from  
23 the executive board to a master association is listed in the notice of the meeting, the unit owners

1 by a majority of the votes cast at the meeting may revoke the delegation. The effect of revocation  
2 on the rights and obligations of parties under a contract between a unit owners association and a  
3 master association is determined by law of this state other than this [act].

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

9 ~~(e)~~ (g) ~~If the declaration of any common interest community provides that the executive~~  
10 ~~board may delegate certain powers to a master association, the members of the executive board~~  
11 ~~have no liability for the acts or omissions of the master association with respect to those powers~~  
12 ~~following delegation. After a unit owners association delegates a power to a master association,~~  
13 ~~the unit owners association and its executive board members and its officers have no liability for~~  
14 ~~an act or omission of the master association with respect to the delegated power.~~

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

20 ~~(e)~~ (i) ~~Even if a master association is also an association described in Section 3-101, the~~  
21 ~~certificate of incorporation or other instrument creating the master association and the~~  
22 ~~declaration of each common interest community, the powers of which are assigned by the~~  
23 ~~declaration or delegated to the master association, may provide that~~ Not later than 90 days after

1 termination of a period of declarant control of the master association, the executive board of the  
2 master association must be elected ~~after the period of declarant control in any~~ in one of the  
3 following ways:

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

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

9 ~~(3)~~ (2) All unit owners in, or the executive board of, each common interest  
10 community subject to the master association ~~may~~ elect ~~specified~~ one or more members of the  
11 master association's executive board if the instruments governing the master association  
12 apportion the seats on the board to each common interest community in a manner roughly  
13 proportional to the number of units in each common interest community.

14 ~~(4) All members of the executive board of each common interest community~~  
15 ~~subject to the master association may elect specified members of the master association's~~  
16 ~~executive board.~~

17 (j) A period of declarant control of the master association under subsection (i) terminates  
18 no later than the earlier of:

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

21 (2) [60] days after conveyance to unit owners other than a declarant of [three-  
22 fourths] of the units that may be created in all common interest communities subject to the  
23 master association.

1 **Reporter's Note (5/25/2021)**

2  
3 The revisions to Section 2-120 make the following changes of substance:

4  
5 1. The content of subsection (a) is reorganized without major changes.  
6 Language in subsection (a) that served as part of the definition of "master  
7 association" is moved to Section 1-103(22). The revision clarifies the language  
8 used in the existing subsection, which (i) uses the term "delegate" only when a  
9 unit owners association transfers a power to a separate master association (ii)  
10 uses the term "exercise" when a master association serving multiple common  
11 interest communities is also the unit owners association. See the definition of  
12 "master association" that describes both types of master associations. Section  
13 1-103(22). Revised subsection (a) also recognizes the special declarant right to  
14 make the common interest community subject to a master association.  
15

16 2. The existing section requires that all delegations to a master association be  
17 set forth in the declaration. New subsection (c) adds flexibility by allowing the  
18 executive board of the common interest community to delegate powers to a  
19 master association, subject to review by the unit owners. A decision to delegate  
20 powers to a master association often has a substantial impact on unit owners. If  
21 after notice more than 10% of the unit owners object to a board delegation, the  
22 delegation is effective only if approved by the unit owners at a meeting or by  
23 ballot without a meeting under Section 3-110.  
24

25 3. Subsection (d) allows revocation of a delegation to a master association by  
26 deferring to the normal procedures for amending the declaration for  
27 delegations contained in the declaration. See Section 2-117, *Amendment of*  
28 *Declaration*.  
29

30 4. New subsection (e) has a special rule for revocation by the unit owners of a  
31 board-approved delegation of powers to a master association. By a majority  
32 vote at any meeting in which the subject of revocation is listed in the meeting  
33 notice, the unit owners may revoke a delegation by majority vote. As the last  
34 sentence of subsection (e) indicates, the statutory right to revoke does not  
35 override any contract rights a master association may have under an existing  
36 contract. For example, other law determines whether the association is  
37 obligated to pay damages if revocation terminates a contract before its  
38 scheduled expiration date.  
39

40 5. New subsection (i) (a revision of subsection (e) in the existing Section) deals  
41 with the election of the executive board of the master association. The existing  
42 subsection authorizes four "ways" to elect the executive board, apparently  
43 allowing other methods of election. New subsection (i) is a mandatory rule,  
44 which requires an election of the master association board by alternative (1) or  
45 (2). The objective is to ensure that all unit owners through their individual sub-  
46 associations have the ability to elect a fair number of the members of the

1 master association's executive board. New subsection (i) preserves the existing  
2 flexibility in this provision by allowing an "at-large" election of the master  
3 board (paragraph 1) or the designation of particular seats on the board to each  
4 common interest community (paragraph 2), as explained in existing Comment  
5 7 to this section. The "four ways" of the old subsection are collapsed into two  
6 ways. For "at-large" voting under paragraph (1), only unit owners – not the  
7 executive boards of the sub-associations – vote for members of the master  
8 association board. If "seats" are allocated to the communities under paragraph  
9 (2), the governing documents for each individual common interest community  
10 will determine whether the owners or their board cast the master-association  
11 votes allocated to their community. Between alternatives (1) and (2), "at large"  
12 voting by all unit owners under (1) is the default rule; seats or districts under  
13 (2) are allowed only if the governing instruments for the master association  
14 apportion the board seats and do so fairly, i.e., "in a manner roughly  
15 proportional to the number of units in each common interest community."  
16 Subsection (j) defines "period of declarant control of the master association"  
17 for purposes of subsection (i), drawing on Section 3-103  
18

19 **Example:** A master association serves two condominium communities, which  
20 each has their own sub-association. Community A has 20 units and a 5-member  
21 board. Community B has 40 units and a 3-member board. Under paragraph (1),  
22 the master association may have a 6-member board with at-large seats, allocating  
23 20 master-association votes to Community A and 40 master-association votes to  
24 Community B. Alternatively, under paragraph (2) each community may have its  
25 own seats on the master association board, with Community A having 2 seats and  
26 Community B having 4 seats. Under existing subsection (e), the size of the sub-  
27 association boards determines how many votes each sub-association holds under  
28 existing paragraphs ("ways") (2) and (4). New subsection (i)(2) makes size of the  
29 sub-association boards irrelevant – in this example, it does not matter that smaller  
30 Community A has a bigger board than Community B. Under paragraph (2), either  
31 association may provide for the election of its members by unit owners or by  
32 executive boards.  
33

## 34 **SECTION 2-121. MERGER OR CONSOLIDATION OF COMMON INTEREST** 35 **COMMUNITIES.**

36 (a) Any two or more common interest communities ~~of the same form of ownership, by~~  
37 ~~agreement of the unit owners as provided in subsection (b),~~ may be merged or consolidated into  
38 a single common interest community under subsection (b) by agreement of the unit owners or by  
39 the exercise of a special declarant right. In the event of a merger or consolidation, unless the  
40 agreement otherwise provides, the resultant common interest community is the legal successor,

1 for all purposes, of all of the pre-existing common interest communities, and the operations and  
2 activities of all associations of the pre-existing common interest communities are merged or  
3 consolidated into a single association that holds all powers, rights, obligations, assets, and  
4 liabilities of all pre-existing associations.

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

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

23 **Reporter's Note (5/25/2021)**  
24

1 What it means for a declarant to hold a special declarant right to merge or  
2 consolidate common interest communities is not addressed in existing provisions  
3 of the act. The revision to Section 2-121 provides a procedure for the exercise of a  
4 special declarant right to merge or consolidate common interest communities. An  
5 agreement of unit owners is not required when the declarant has a special  
6 declarant right. When two communities are merged, the same declarant may have  
7 a special declarant right in both communities, but this is not necessary.  
8

9 **SECTION 2-125. ADVERSE POSSESSION; PRESCRIPTIVE EASEMENT.**

10 A unit owner or person claiming through a unit owner may not acquire title by adverse  
11 possession to, or an easement by prescription in, a common element in derogation of the title of  
12 another unit owner or the association.

13 **Reporter's Note (5/25/2021)**  
14

15 1. New Section 2-125 protects all the common elements from loss of title  
16 by claims of adverse possession or prescriptive easement by a limited immunity.  
17 This immunity is limited to real estate defined as “common elements” in the act.  
18 This Section precludes only a claim made by a unit owner “or a person claiming  
19 through a unit owner” (this phrase protects common elements from claims made  
20 by tenants of unit owners or similar persons). When the unit owners own the  
21 common elements in tenancy in common, this provision modifies existing law by  
22 not allowing a unit owner to acquire adverse possession by proving an “ouster” of  
23 the other cotenants. When the association owns the common elements, this  
24 provision modifies existing law, which in most states lacks reported law clearly  
25 delineating the requirements for a person to acquire adverse possession title to  
26 property owned by an association of which the person is a member.  
27

28 2. The new section leaves intact the enacting State’s substantive law of  
29 adverse possession to govern claims made by the association or the unit owners  
30 collectively as tenants in common. Claims of this type may be asserted when the  
31 common elements are subject to a title defect: a person other than association or  
32 the unit owners owns or has a potential claim to a common element. An adverse  
33 possession claim of this type protects the unit owners’ interest in the common  
34 elements, rather than jeopardizing the unit owners’ expectations of ownership and  
35 use of the common elements.  
36

37 3. The language in this section is based on Minn. Stat. § 508.02, which  
38 provides: “No title to registered land in derogation of that of the registered owner  
39 shall be acquired by prescription or by adverse possession, but the common law  
40 doctrine of practical location of boundaries applies to registered land whenever  
41 registered.” Like the Minnesota statute, this section refers to both “adverse  
42 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.

4. 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 pursuant to 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.



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

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

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

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

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

11 (5) may make contracts and incur liabilities;

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

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

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

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

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

22 (9) may grant easements, leases, and licenses, ~~and concessions~~ through or over the  
23 common elements, but a grant to a unit owner that benefits the owner's unit is allowed only by

1 reallocation of the common element to a limited common element pursuant to Section 2-108;

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

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

5 (B) services provided to unit owners;

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

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

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

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

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

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

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

21 (18) may require that disputes between the association and unit owners or  
22 between two or more unit owners regarding the common interest community be submitted to  
23 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.

\* \* \*

#### **Reporter's Note (5/25/2021)**

The revision to Section 3-102(a)(9) addresses a potential abuse of the association's power to "grant easements, leases, licenses, and concessions through or over the common elements." Most of these grants are for temporary and limited purposes and do not significantly interfere with unit owners' rights to use and enjoy the common elements. The executive board, however, might decide to make a long-term grant to a unit owner that has the practical effect of increasing the size or value of the owner's unit; for example, allowing an owner to extend a deck into a common-element lawn. The revision to paragraph (9) prohibits such a grant by requiring use of the procedure of Section 2-108 to reallocate the common element as a limited common element. The revision deletes the term "concessions" because the term rarely applies to grant of an interest in real estate.

#### **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 the owner's unit." 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;

1 (3) terminate the common interest community;

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

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

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

8 (d) Subject to subsection (e), the declaration may provide for a period of declarant control  
9 of the association, during which a declarant, or persons designated by the declarant, may appoint  
10 and remove the officers and members of the executive board. A declarant may voluntarily  
11 surrender the right to appoint and remove officers and members of the executive board before the  
12 period ends. In that event, the declarant may require during the remainder of the period that  
13 specified actions of the association or executive board, as described in a recorded instrument  
14 executed by the declarant, be approved by the declarant before they become effective.

15 Regardless of the period provided in the declaration, and except as provided in Section 2-123(g),  
16 a period of declarant control terminates no later than the earliest of:

17 (1) [60] days after conveyance of [three-fourths] of the units that may be created  
18 to unit owners other than a declarant;

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

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

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

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

(f) Except as otherwise provided in Section ~~2-120(e)~~ 2-120(i), 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.

(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.

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

7  
8       For both declarant-appointed and elected officers and members, subsection (a) looks to  
9       other state law to measure the standard of care and the basis of liability. For declarant-appointed  
10      persons, the law of trusts determines the precise content of the fiduciary duties, as well as other  
11      duties including conflict-of-interest rules, owed to the unit owners. For elected officers and  
12      members, the standards of conduct and the standards of liability are determined by the content of  
13      the state nonprofit corporation statute. This applies regardless of the organizational type of the  
14      association. Thus, if an association is a limited liability company (LLC), the standards for its  
15      officers and board members are not affected by the content to of the state LLC statute.

16  
17      A majority of states have adopted a version of the ABA’s Model Nonprofit Corporation  
18      Act (MNCA) (3d ed. 1987; the ABA is presently working on a 4th edition). MNCA Section 8.30  
19      sets forth standards of conduct, and section 8.31 sets forth standards of liability for directors.  
20      Executive board members are treated as “directors” whether or not they have the formal title of  
21      “director” as a member of the association’s governing board. MNCA Section 8.42 prescribes  
22      standards of conduct for officers; they include a duty to act with the care of “an ordinarily  
23      prudent person.” States without the model act may apply different rules for director conduct,  
24      such as a trust rule or the rules applicable to directors of standard, for-profit corporations, as well  
25      as different rules for officers.

26  
27      2. Executive board members frequently will obtain the benefits of the business judgment  
28      rule under subsection (a). The business judgment rule is a standard of liability, not a standard of  
29      conduct. The rule curtails judicial review of board decisions by creating a presumption of sound  
30      business judgment. As long as the board decision might serve a rational business purpose, courts  
31      do not interfere by substituting their own ideas of what is or is not a correct or reasonable  
32      decision. The rule also presumes that the directors act in good faith, on an informed basis, and  
33      with the honest belief that their action furthers the best interests of the corporation. The business  
34      judgment rule began as common-law rule for evaluating the conduct of directors of for-profit  
35      corporations. Now many courts apply the rule in the non-profit context generally and as the  
36      basis for evaluating the activities of boards of unit owners associations. See, e.g., *Reiner v.*  
37      *Ehrlich*, 66 A.3d 1132 (Md. Ct. Spec. App. 2013); *Committee for a Better Twin Rivers v. Twin*  
38      *Rivers Homeowners Association*, 929 A.2d 1060 (N.J. 2007); *40 West 67th Street v. Pullman*,  
39      790 N.W.2d 1174 (N.Y. 2003).

40  
41      Subsection (a) does not codify the business judgment rule. Its application to executive  
42      boards depends on judicial adoption and on other state statutes. Nor does MNCA Section 8.31  
43      codify the business judgment rule, but it has several components, one of which reflects some of  
44      the principal elements of the common-law business judgment rule.

45  
46      [RENUMBER SUBSEQUENT COMMENTS 3 and 4]

1                   \* \* \*

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

9  
10                  Comment 5 was expanded in 2008, because of the importance of this issue. The Act  
11 continues to rely on the Business Judgment Rule as the basis for evaluating the actions of the  
12 Board. “As long as directors of a corporation decide matters rationally, honestly, and without a  
13 disabling conflict of interest, the decision will not be reviewed by the courts.” *Atkins v. Hibernia*  
14 *Corp.*, 182 F.3d 320, 324, (5th cir. 1999) quoted in *Block, Barton & Radin, The Business*  
15 *Judgment Rule*, (5th ed. 1998) in 2002 Supp. Page 6.

16  
17                  The business judgment rule is a tool of judicial review, not a standard of conduct.  
18 The rule (1) shields directors from liability and protects decisions made by directors  
19 when—The rule’s elements—a business decision, disinterestedness, and independence,  
20 due care, good faith and no abuse of discretion—are present and a challenged decision  
21 does not constitute fraud, illegality, ultra vires conduct or waste, and (2) creates a  
22 presumption that directors have acted in accordance with each of the elements of the rule.

23  
24                  [Block et al at page 110.] In its 2007 decision, the Supreme Court of New Jersey  
25 confirmed the continuing vitality of the business judgment rule as the basis for evaluating the  
26 activities of the executive board of a unit owners association. See *Committee for a Better Twin*  
27 *Rivers v. Twin Rivers Homeowners Association*, 192 N.J. 344; 929 A.2d 1060 (2007); the  
28 decision is expected to be widely followed.

29  
30                  The change from “fiduciary” to “trustee” as the standard of care for declarant appointed  
31 directors makes the standard of care more precise. The law contemplates many forms of  
32 fiduciary relationships; among them, the trustee’s duty is the highest.

33                   \* \* \*

34  
35                  **SECTION 3-104. ~~TRANSFER OF SPECIAL DECLARANT RIGHTS.~~**

36                  (a) A special declarant right (Section 1-103(29)) created or reserved under this [act] may  
37 be transferred only by an instrument evidencing the transfer recorded in every [county] in which  
38 any portion of the common interest community is located. The instrument is not effective unless  
39 executed by the transferee.



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

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

7                   ~~(2) If a successor to any special declarant right is an affiliate of a declarant~~  
8   ~~(Section 1-103(1)), the transferor is jointly and severally liable with the successor for any~~  
9   ~~obligations or liabilities of the successor relating to the common interest community.~~

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

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

17           ~~(c) Unless otherwise provided in a mortgage instrument, deed of trust, or other agreement~~  
18   ~~creating a security interest, in case of foreclosure of a security interest, sale by a trustee under an~~  
19   ~~agreement creating a security interest, tax sale, judicial sale, or sale under Bankruptcy Code or~~  
20   ~~receivership proceedings, of any units owned by a declarant or real estate in a common interest~~  
21   ~~community subject to development rights, a person acquiring title to all the property being~~  
22   ~~foreclosed or sold, but only upon his request, succeeds to all special declarant rights related to~~  
23   ~~that property held by that declarant, or only to any rights reserved in the declaration pursuant to~~

1     ~~Section 2-115 and held by that declarant to maintain models, sales offices, and signs. The~~  
2     ~~judgment or instrument conveying title must provide for transfer of only the special declarant~~  
3     ~~rights requested.~~

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

7                     ~~(1) the declarant ceases to have any special declarant rights, an~~

8                     ~~(2) the period of declarant control (Section 3-103(d)) terminates unless the~~  
9     ~~judgment or instrument conveying title provides for transfer of all special declarant rights held~~  
10    ~~by that declarant to a successor declarant.~~

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

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

16                    ~~(2) A successor to any special declarant right, other than a successor described in~~  
17    ~~paragraph (3) or (4) or a successor who is an affiliate of a declarant, is subject to the obligations~~  
18    ~~and liabilities imposed by this [act] or the declaration:~~

19                            ~~(i) on a declarant which relate to the successor's exercise or nonexercise of~~  
20    ~~special declarant rights; or~~

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

22                                    ~~(A) misrepresentations by any previous declarant;~~

23                                    ~~(B) warranty obligations on improvements made by any previous~~

1    ~~declarant, or made before the common interest community was created;~~

2                                    ~~(C) breach of any fiduciary obligation by any previous declarant or~~  
3    ~~his appointees to the executive board; or~~

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

6                    ~~(3) A successor to only a right reserved in the declaration to maintain models,~~  
7    ~~sales offices, and signs (Section 2-115), may not exercise any other special declarant right, and is~~  
8    ~~not subject to any liability or obligation as a declarant, except the obligation to provide a public~~  
9    ~~offering statement [.] and any liability arising as a result thereof [, and obligations under [Article]~~  
10    ~~5].~~

11                    ~~(4) A successor to all special declarant rights held by a transferor who succeeded~~  
12    ~~to those rights pursuant to a deed or other instrument of conveyance in lieu of foreclosure or a~~  
13    ~~judgment or instrument conveying title under subsection (c), may declare in a recorded~~  
14    ~~instrument the intention to hold those rights solely for transfer to another person. Thereafter,~~  
15    ~~until transferring all special declarant rights to any person acquiring title to any unit or real estate~~  
16    ~~subject to development rights owned by the successor, or until recording an instrument~~  
17    ~~permitting exercise of all those rights, that successor may not exercise any of those rights other~~  
18    ~~than any right held by his transferor to control the executive board in accordance with Section~~  
19    ~~3-103(d) for the duration of any period of declarant control, and any attempted exercise of those~~  
20    ~~rights is void. So long as a successor declarant may not exercise special declarant rights under~~  
21    ~~this subsection, the successor declarant is not subject to any liability or obligation as a declarant~~  
22    ~~other than liability for his acts and omissions under Section 3-103(d).~~

23                    (a) In this section:

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

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

7           (b) A special declarant right is an interest in real estate, which is appurtenant to all units  
8 owned by the declarant and to real estate subject to a development right to create additional  
9 units.

10          (c) A declarant that no longer owns a unit or a development right to create additional  
11 units ceases to have any special declarant rights.

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

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

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

23          (g) A declarant that transfers a special declarant right to a non-affiliate successor:

1           (1) remains liable for any obligation or liability arising before the transfer  
2 imposed by this [act] or the declaration, including a warranty obligation; and

3           (2) is not liable for an obligation or liability arising after the transfer imposed on  
4 the successor by this [act] or the declaration.

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

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

10           (1) a misrepresentation by a previous declarant;

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

13           (3) breach of a fiduciary obligation by a previous declarant or its appointees to the  
14 executive board; or

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

17           (j) If an involuntary transfer includes a special declarant right, the transferee may elect to  
18 acquire or reject the special declarant right. A transferee that elects to acquire a special declarant  
19 right is a successor declarant. The election is effective only if the judgment or instrument  
20 conveying title describes the special declarant right.

21           (k) A successor to a special declarant right by an involuntary transfer may declare its  
22 intention in a recorded instrument to hold the right solely for transfer to another person. After  
23 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 subsection is void. As long as the successor complies with this subsection, the successor is not subject to an obligation or liability imposed by this [act] or the declaration other than liability for its act or omission under Section 3-103(d).

(f) (l) 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.

### Reporter's Note (5/25/2021)

Extensive revisions are made to Section 3-104, including reorganization, in an attempt to make the section easier to comprehend. The major changes of substance are the following:

1. Subsection (b) makes all special declarant rights interests in real property and automatically makes every special declarant right appurtenant to all units owned by the declarant in the common interest community, including potential additional units that the declarant may add in the future by exercise of a development right. 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 units to the common interest community. A related revision to Section § 2-105(a)(8), *Contents of Declaration*, drops the requirement that the declaration sufficiently describe “the real estate to which each [special declarant right] applies” except for a development right.

2. Subsection (c) is a mandatory rule that terminates all special declarant rights when the declarant owns no units in the common interest community or the right to create additional units pursuant to a development right, which describes the relevant real estate in the declaration.

3. Subsection (d) allows all types of voluntary transfers of special declarant rights. 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 section 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. The last sentence of existing Section 3-104(a) states: “The instrument is not effective unless executed by the transferee.” This sentence is not retained in subsection (d), and it is a change of

1 substance. Most deeds and mortgages are signed only by the grantor, not by the  
2 “transferee.” A grantee’s acceptance of the instrument is considered agreement to  
3 its contents. Requiring execution by the transferee might result in inadvertent  
4 failures to transfer a special declarant right if parties fail to study the act carefully.  
5

6 4. Subsection (i) protects successor declarants from certain obligations and  
7 liabilities of the transferor declarant who granted a special declarant right to the  
8 successor. This subsection relieves the successor only from obligations and  
9 liabilities “imposed by this [act] or the declaration.” This limitation means that a  
10 successor who uses improvements made by a previous declarant in the  
11 successor’s project is not necessarily relieved of an obligation to repair defects or  
12 make upgrades to the improvements. Other law, including contract and tort  
13 principles, will determine whether the successor who uses the transferor’s old  
14 improvements undertakes an obligation or liability.  
15

16 5. Subsections (j) and (k) provide special rules for transfers of special declarant  
17 rights by foreclosure sales and other “involuntary transfers” defined in Section 3-  
18 104(a)(1). Under existing Section 3-104(c), (d), and (e)(4), a foreclosure  
19 purchaser must elect to take all of the declarant’s special declarant rights, none of  
20 them, or only the right to maintain models, sales offices, and signs. New  
21 subsections (j) and (k) add flexibility by allowing a foreclosure purchaser or other  
22 grantee in an involuntary transfer to elect any of all of the rights. New subsections  
23 (j) and (k) preserve the existing “deep freeze” procedure that allows the transferee  
24 to hold the special declarant rights for resale to a new developer, and thereby  
25 avoid liability by not exercising them before resale.  
26

## 27 **SECTION 3-108. MEETINGS.**

28 (a) The following requirements apply to unit owner meetings:

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

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

1 directly notify all the unit owners of the meeting. ~~Only matters described in the meeting notice~~  
2 ~~required by paragraph (3) may be considered at a special meeting.~~ The unit owners may discuss  
3 at a special meeting matters not described in the notice under paragraph (3), but may not take  
4 action on a matter not described in the notice without the consent of all unit owners.

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

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

12 (B) any budget changes; and

13 (C) any proposal to remove an officer or member of the executive board.

14 ~~(4) The minimum time to give notice required by paragraph (3) may be reduced or~~  
15 ~~waived for a meeting called to deal with an emergency.~~

16 ~~(5)~~ (4) Unit owners must be given a reasonable opportunity at any meeting to  
17 comment regarding any matter affecting the common interest community or the association.

18 ~~(6)~~ (5) ~~The declaration or bylaws may allow for meetings of unit owners to be~~  
19 ~~conducted by telephonic, video, or other conferencing process, if the alternative process is~~  
20 ~~consistent with subsection (b)(7).~~ A meeting of unit owners is not required to be held at a  
21 physical location if the meeting:

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



1 present in the same location; and

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

3 (6) In the notice for a meeting held at a physical location, the executive board may  
4 notify all unit owners that they may participate remotely in the meeting by a means of  
5 communication consistent with paragraph (5).

6 ~~(7) Except as otherwise provided in the bylaws, meetings of the association must~~  
7 ~~be conducted in accordance with the most recent edition of Roberts' Rules of Order Newly~~  
8 ~~Revised.~~

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

11 (1) Meetings must be open to the unit owners except during executive sessions.

12 The executive board and those committees may hold an executive session only during a regular  
13 or special meeting of the board or a committee. No final vote or action may be taken during an  
14 executive session. An executive session may be held only to:

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

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

18 (C) discuss labor or personnel matters;

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

23 (E) prevent public knowledge of the matter to be discussed if the executive

1 board or committee determines that public knowledge would violate the privacy of any person.

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

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

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

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

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

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

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

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

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

10 (9) ~~Instead of meeting,~~ During the period of declarant control, the executive board  
11 may act, without a meeting, by unanimous consent as documented in a record authenticated by  
12 all its members. The secretary promptly shall give notice to all unit owners of any action taken  
13 by unanimous consent. After termination of the period of declarant control, the executive board  
14 may act by unanimous consent only to undertake ministerial actions or to implement actions  
15 previously taken at a meeting of the executive board.

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

22 **Reporter's Note (5/25/2021)**  
23

24 1. The revision to Section 3-108(a)(2) clears up an ambiguity about what matters  
25 may be "considered" at a special meeting. The revision clarifies that, subject to

1 the normal rules governing meetings, unit owners may raise and discuss any  
2 issues of their choosing, including the taking of nonbinding (straw) votes, which  
3 do not take or implement action. The revision also allows unit owners to avoid the  
4 rule against taking action on a matter not described in the meeting notice with the  
5 consent of all unit owners.

6  
7 2. Section 3-108(a)(4) and 3-108(b)(5) are deleted because the subject of notice  
8 for emergency meetings is now addressed by new Section 3-125(c), *Emergency*  
9 *Powers*, infra, which applies notwithstanding other sections of the act.

10  
11 3. Revised 3-108(a)(5) and (6) authorize electronic unit owner meetings, in which  
12 everyone attends remotely, and hybrid meetings in which some attend at a  
13 physical location and some attend remotely. The existing paragraph authorizes an  
14 electronic meeting only if authorized by the declaration or bylaws. Revised  
15 paragraph (5) changes the default rule, allowing electronic meetings unless  
16 prohibited by the declaration or bylaws. This allows the executive board to decide  
17 whether live or electronic meetings are preferable. Second, this revision follows  
18 the language of the Uniform Electronic Wills Act (E-Wills Act) (2019), approved  
19 by the ULC in 2019, which defines “Electronic presence” as “the relationship of  
20 two or more individuals in different locations communicating in real time to the  
21 same extent as if the individuals were physically present in the same location.” Id.  
22 § 2(2). As the Comment to the E-Wills Act notes, the “to the same extent” phrase  
23 accommodates access for persons with disabilities. See also Revised Uniform  
24 Law on Notarial Acts (RULONA) § 14A(a)(1) (2018), which defines  
25 “communication technology” as “an electronic device or process that: (A) allows  
26 a notary public and a remotely located individual to communicate with each other  
27 simultaneously by sight and sound; and (B) when necessary and consistent with  
28 other applicable law, facilitates communication with a remotely located individual  
29 who has a vision, hearing, or speech impairment.”

30  
31 4. Revised 3-108(a)(6) allows a hybrid unit owners meeting, with some unit  
32 owners attending remotely, a topic not addressed in the existing section. The  
33 paragraph permits the executive board to allow remote participation, without the  
34 need for authority in the declaration or the bylaws, and regardless of the content  
35 of those documents. It is not, however, mandatory; owners have no right to  
36 remote participation.

37  
38 5. Section 3-108(a)(7), adopting Roberts’ Rules of Order for the conduct of  
39 meetings as a default rule, is deleted on the basis that each association may  
40 determine its own procedures.

#### 41 **SECTION 3-109. QUORUM.**

42  
43 (a) Unless the bylaws otherwise provide, a quorum is present throughout any meeting of  
44 the unit owners if at the beginning of the meeting persons entitled to cast [20] percent of the

1 votes in the association:

2 (1) ~~are present~~ attend in person, or by proxy, or by means of communication  
3 under Section 3-108(a)(6) or (7) at the beginning of the meeting;

4 (2) ~~have cast absentee ballots solicited in accordance with Section 3-110 (c)(4)~~  
5 ~~which have been delivered to the secretary in a timely manner; or~~

6 (3) ~~are present by any combination of paragraphs (1) and (2).~~

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

13 (c) ~~Except as otherwise provided in the bylaws, meetings of the association must be~~  
14 ~~conducted in accordance with the most recent edition of Roberts' Rules of Order Newly Revised.~~

15 **Reporter's Note (5/25/2021)**

16  
17 1. The proposed revision to subsection (a) is not a change of substance. It reflects  
18 the proposed revisions to Sections 3-108 and 3-110 that (i) eliminate the use of  
19 the term "absentee ballot" for votes cast at meetings by unit owners who are not  
20 present (under revised Section 3-110 they vote only by proxy) and (ii) allow unit  
21 owners to attend meetings remotely by electronic means.

22  
23 2. Section 3-109(c), adopting Roberts' Rules of Order for the conduct of meetings  
24 as a default rule, is deleted on the basis that each association may determine its  
25 own procedures.

26  
27 **SECTION 3-110. VOTING; PROXIES; BALLOTS.**

28 (a) ~~Unless prohibited or limited by the declaration or bylaws, unit owners may vote at a~~  
29 ~~meeting in person, by absentee ballot pursuant to subsection (b)(4), by a proxy pursuant to~~

1 subsection (c) or, when a vote is conducted without a meeting, by electronic or paper ballot  
2 pursuant to subsection (d). Unit owners may vote at a meeting under subsection (b) or (c) or,  
3 when a vote is conducted without a meeting, by ballot under subsection (d).

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

5 (1) ~~Unit owners who are present in person~~ Unless the declaration or bylaws  
6 otherwise provide, unit owners may vote by voice vote, show of hands, standing, or any other  
7 method for determining the votes of unit owners, as designated by the person presiding  
8 authorized at the meeting.

9 ~~(2) If only one of several owners of a unit is present, that owner is entitled to cast~~  
10 ~~all the votes allocated to that unit. If more than one of the owners are present, the votes allocated~~  
11 ~~to that unit may be cast only in accordance with the agreement of a majority in interest of the~~  
12 ~~owners, unless the declaration expressly provides otherwise. There is majority agreement if any~~  
13 ~~one of the owners casts the votes allocated to the unit without protest being made promptly to the~~  
14 ~~person presiding over the meeting by any of the other owners of the unit.~~

15 (2) If unit owners attend the meeting by a means of communication under Section  
16 3-108(a)(5) or (6), the association must implement reasonable measures to verify the identity of  
17 each unit owner attending remotely.

18 ~~(3) Unless a greater number or fraction of the votes in the association is required~~  
19 ~~by this [act] or the declaration, a majority of the votes cast determines the outcome of any action~~  
20 ~~of the association.~~

21 ~~(4) Subject to subsection (a), a unit owner may vote by absentee ballot without~~  
22 ~~being present at the meeting. The association promptly shall deliver an absentee ballot to an~~  
23 ~~owner that requests it if the request is made at least [three] days before the scheduled meeting.~~

1 ~~Votes cast by absentee ballot must be included in the tally of a vote taken at that meeting.~~

2 ~~(5) When a unit owner votes by absentee ballot, the association must be able to~~  
3 ~~verify that the ballot is cast by the unit owner having the right to do so.~~

4 (c) Except as otherwise provided in the declaration or bylaws, unit owners may vote by  
5 proxy subject to the following requirements ~~apply with respect to proxy voting:~~

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

8 ~~(2) If a unit is owned by more than one person, each owner of the unit may vote~~  
9 ~~or register protest to the casting of votes by the other owners of the unit through a duly executed~~  
10 ~~proxy. When a unit owner votes by proxy, the association must be able to verify the identity of~~  
11 ~~the unit owner and the proxy holder.~~

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

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

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

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

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

21 (1) The association shall notify the unit owners that the vote will be taken by  
22 ballot without a meeting.

23 ~~(2) The association shall deliver a paper or electronic ballot to every unit owner~~

1 ~~entitled to vote on the matter.~~ With the notice the association shall deliver instructions for casting  
2 a ballot and:

3 (A) a paper ballot to every unit owner except a unit owner that has  
4 consented in a record to electronic voting; and

5 (B) if the association allows electronic voting, instructions for electronic  
6 voting. A unit owner's casting an electronic ballot is consent.

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

9 (4) ~~When~~ In the notice the association delivers the ballots, it shall also:

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

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

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

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

19 (5) A unit owner may revoke a ballot before the time and date by which the ballot  
20 must be delivered to the association under paragraph (4). Except as otherwise provided in the  
21 declaration or bylaws, a ballot is not revoked by death or disability after delivery to the  
22 association ~~by death or disability or attempted revocation by the person that cast that vote.~~

23 (6) Approval by ballot pursuant to this subsection is valid only if the number of



1 votes cast by ballot equals or exceeds the quorum required to be present at a meeting authorizing  
2 the action.

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

5 (8) If the association allows electronic ballots, the association shall create a  
6 record of electronic votes that is capable of retention, retrieval, and review.

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

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

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

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

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

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

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

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

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

1                   (2) if more than one of the owners casts a vote, unless the declaration otherwise  
2 provides, the votes allocated to that unit may be cast only in accordance with the agreement of a  
3 majority in interest of the owners.

4                   **Reporter's Note (5/25/2021)**  
5

6           1. The revision to Section 3-110(b)(1) makes it clear that unit owners may select  
7 the method of voting, subject to the declaration or bylaws, by using normal  
8 parliamentary procedures, regardless of the preference of the person presiding at  
9 the meeting. The revised language "authorized at the meeting" allows this  
10 outcome by removing the reference to the presiding officer.

11  
12           2. The content in existing Section 3-110(b)(2) dealing with voting at meetings  
13 when multiple persons own a unit, and the content in existing Section 3-110(c)(2)  
14 dealing with proxy voting when multiple persons own a unit, is combined and  
15 integrated in a new subsection (i).

16  
17           3. New Section 3-110(b)(2) requires that for electronic meetings and hybrid  
18 electronic meetings, the association must implement reasonable measures to  
19 verify the identity of each unit owner attending remotely. Those unit owners have  
20 the right to vote by a method determined under Section 3-110(b)(1).

21  
22           4. The content in existing Section 3-110(b)(3) dealing with the number of votes  
23 required to pass an action is moved to new subsection (h), with some changes in  
24 its language including extending its scope from voting at meetings to votes taken  
25 without a meeting.

26  
27           5. The existing Section allows a unit owner to vote at a meeting without being  
28 physically present either by "absentee ballot" under existing Section 3-110(b)(4)  
29 or by proxy under Section 3-110(c). The revision eliminates the alternatives,  
30 allowing an absent unit owner to vote at a meeting only by using a proxy (which  
31 may be directed or undirected). Section 3-110(b)(4) is deleted, and the revised  
32 section uses "ballot" only for a vote without a meeting. This better conforms to  
33 how the terms are generally used in corporate practice.

34  
35           6. New Section 3-110(c)(2) adds a requirement that, for proxy voting, the  
36 association must be able to verify the identity of the unit owner and the proxy  
37 holder.

38  
39           7. The revisions to Section 3-110(d) dealing with voting without a meeting  
40 include rules for electronic ballots, the right of a unit owner to revoke a ballot,  
41 and requirements that the association verify the identity of unit owners casting  
42 ballots and create a record of electronic votes that is capable of retention,  
43 retrieval, and review.

1           **SECTION 3-115. ASSESSMENTS.**

2           (a) Until the association makes a common expense assessment, the declarant shall pay all  
3 common expenses. After an assessment has been made by the association, assessments must be  
4 made at least annually, based on a budget adopted at least annually by the association.

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

10          (c) ~~To the extent required by the declaration:~~ The declaration may provide that:

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

14               (2) a common expense ~~benefiting~~ identified in the declaration benefitting fewer  
15 than all of the units or their owners ~~may~~ must be assessed exclusively against the units or unit  
16 owners benefitted, but if the common expense is for the maintenance, repair, or replacement of a  
17 common element other than a limited common elements, the expense may be assessed  
18 exclusively against them only if the declaration reasonably identifies the common expense by  
19 specific listing or category; and

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

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

1 their common expense liabilities.

2 (e) ~~If damage to a unit or other part of the common interest community, or if any other~~  
3 ~~common expense is caused by the willful misconduct or gross negligence of any unit owner or a~~  
4 ~~guest or invitee of a unit owner, the association may assess that expense exclusively against that~~  
5 ~~owner's unit, even if the association maintains insurance with respect to that damage or common~~  
6 ~~expense.~~ The association may assess either or both of the following common expenses, including  
7 expenses relating to damage to or loss of property, exclusively against an owner's unit:

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

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

13 (f) Before the association makes an assessment under subsection (e), the association shall  
14 give notice to the unit owner and an opportunity for a hearing. The assessment is limited to the  
15 expenses of the association incurred under subsection (e) less any insurance proceeds received  
16 by the association, whether the difference results from the application of a deductible or  
17 otherwise.

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

21 (h) The association may adopt a rule that allows unit owners to prepay assessments at a  
22 reasonable discount.

23 **Reporter's Note (5/25/2021)**  
24

1 1. Section 3-115(c) is revised to make it clear that for all three paragraphs (1)-(3),  
2 the declaration may change the default rule of Section 3-115(b) that unit owners  
3 pay common expenses according to their allocated interests only if the declaration  
4 has a provision that common expenses “must be assessed” differently. The  
5 provision in the declaration may not confer discretion on the executive board with  
6 respect to making an assessment.  
7

8 2. The revision to Section 3-115(c)(2) allows the association to assess a common  
9 expense for the maintenance, repair, or replacement of a common element  
10 exclusively against a benefitted unit only if the declaration “reasonably identifies  
11 the common expense by specific listing or category.” The purpose of this  
12 condition is to provide notice to unit owners of when they may expect to bear  
13 more than a proportionate share of common expenses based on the “benefit rule.”  
14 The source for this condition is UCC Article 9. UCC § 9-108(b), *Sufficiency of*  
15 *Description*, which provides: “. . . a description of collateral reasonably identifies  
16 the collateral if it identifies the collateral by: (1) specific listing; (2) category; . . .  
17 .” The UCC rules for describing collateral in security agreements and financing  
18 statements have proven to be generally successful in striking a balance between  
19 flexibility and notice to debtors and third parties. The term “categories” in  
20 paragraph (2) include heating and air conditioning equipment, elevators, and  
21 recreational facilities.  
22

23 3. Section 3-115(c)(3) is revised to make clear that assessing utilities “in  
24 proportion to usage” does not require separate metering if usage is reasonably  
25 estimated.  
26

27 4. Section 3-115(e) deals with the ability of the association to assess expenses  
28 exclusively against a unit owner whose “bad behavior” causes loss, damage, or  
29 expense. The revision to this subsection requires “wilfull misconduct,”  
30 eliminating the ability to assess due to “gross negligence” on the ground that it is  
31 too difficult for executive boards and other persons to distinguish gross  
32 negligence from ordinary negligence. The revision adds liability for a unit  
33 owner’s failure to meet maintenance standards for their equipment for which they  
34 are responsible causes damage outside their unit. For example, an association rule  
35 may require replacement of hot water heaters every 10 years, and a failure to  
36 replace may result in water damage to property outside of the owner’s unit. New  
37 subsection (f) adds procedural protections for unit owners charged with “bad  
38 behavior” and provides that the owner is liable only for loss not covered by the  
39 association’s master insurance policy. The source for revised subsection (e) and  
40 new subsection (f) is Conn. Gen. Stat. Ann. § 47-257(e), which Connecticut  
41 adopted as a non-uniform provision in an amendment to its enactment of UCIOA.  
42

43 5. New subsection (h) allows the association to adopt a rule allowing unit owners  
44 to prepay their assessments at a reasonable discount.  
45

#### 46 **Comment**

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

12  
13           2. Common expenses are by their nature recurring, and the association must collect what  
14 the act calls the "periodic common expense assessment." Subsection (a) requires assessment "at  
15 least annually" and allows any shorter period. Monthly assessments are most commonly used.  
16 The association may choose to change its periodic common expense assessment if it determines a  
17 shorter or longer period is appropriate.

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

19  
20           (a) The executive board, at least annually, shall adopt a proposed budget for the common  
21 interest community for consideration by the unit owners. Not later than [30] days after adoption  
22 of a proposed budget, the executive board shall provide to all the unit owners a summary of the  
23 budget, including any reserves, and a statement of the basis on which any reserves are calculated  
24 and funded. Simultaneously, the board shall set a date not less than 10 days or more than 60 days  
25 after providing the summary for a meeting of the unit owners to consider ratification of the  
26 budget. Unless at that meeting a majority of all unit owners or any larger number specified in the  
27 declaration reject the budget, the budget is ratified, whether or not a quorum is present. If a  
28 proposed budget is rejected, the budget last ratified by the unit owners continues until unit  
29 owners ratify a subsequent budget.

30           (b) The executive board, at any time, may propose a special assessment. Except as  
31 otherwise provided in subsection (c), the assessment is effective only if the executive board  
32 follows the procedures for ratification of a budget described in subsection (a) and the unit owners

do not reject the proposed assessment.

~~(c) If the executive board determines by a two-thirds vote that a special assessment is necessary to respond to an emergency:~~

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

~~(2) notice of the emergency assessment must be provided promptly to all unit owners; and~~

~~(3) the executive board may spend the funds paid on account of the emergency assessment only for the purposes described in the vote.~~

#### 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 ~~monthly~~ 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

1                   (2) an event or condition that constitutes an imminent:

2                   (A) threat to public health or safety, health or safety of residents of the  
3 common interest community;

4                   (B) threat to the habitability of units;

5                   (C) risk of substantial economic loss to the association.

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

7           (c) The executive board may call a unit owners meeting to respond to an emergency by  
8 giving notice only to the unit owners whom it is practicable to reach. The notice shall be given in  
9 any practicable manner.

10           (d) The executive board may call a board meeting to respond to an emergency by giving  
11 notice only to the unit owners and board members whom it is practicable to reach. The notice  
12 shall be given in any practicable manner. No quorum is required for a meeting under this  
13 subsection. Instead of meeting, after giving notice under this subsection, the board may take  
14 action by vote without a meeting.

15           (e) In an emergency, the executive board may take action it considers necessary to protect  
16 the interests of the unit owners and other persons holding interests in the common interest  
17 community, acting in a manner reasonable under the circumstances and without consideration of  
18 limitations contained in the declaration, bylaws, or rules. If the board determines by a two-thirds  
19 vote that a special assessment is necessary:

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

22                   (2) the board may spend funds paid on account of the emergency assessment only  
23 for the purposes described in the vote.



(f) The executive board may use funds of the association, including reserves, to pay the reasonable costs of an action under subsection (e).

(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

1 brief narrative description of any contracts or leases that will or may be subject to cancellation by  
2 the association under Section 3-105;

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

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

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

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

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

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

16 (11) a statement that:

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

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

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

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

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

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

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

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

16 (15) a description of the insurance coverage provided for the benefit of unit  
17 owners;

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

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

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

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

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

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

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

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

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

22 (B) a statement of any other reserves;

23 (C) the projected common expense assessment by category of expenditures for the

1 association; and

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

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

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

#### 12 **Reporter's Note (5/25/2021)**

13  
14 1. New Section 4-103(a)(22) requires the public offering statement to disclose  
15 whether units may be sold without the consent of all the unit owners after  
16 termination under Section 2-118 if the common interest community contains a  
17 unit without horizontal boundaries (i.e., if there are units not in multi-story  
18 buildings). This added disclosure is a companion to the revision to Section 2-  
19 118(c) and (d), which allows termination of a common interest community and  
20 the sale of all real estate, including all units, with a supermajority vote of 80%,  
21 regardless of whether the units have horizontal boundaries. This is a significant  
22 change in rights of units owners, who should be informed of the possibility.

23  
24 2. Section 4-103(b) requires that the public offering statement contain a projected  
25 budget, including "the projected monthly common expense assessment for each  
26 type of unit." Although monthly assessments are the common practice, UCOIA  
27 allows any period up to annual assessments. See Section 3-115(a) ("assessments  
28 must be made at least annually"). The amendment corrects this subsection by  
29 replacing "monthly common expense assessment" with "periodic common  
30 expense assessment," the term presently used in Section 4-109(a)(2) to describe  
31 content in the certificate to be provided to the purchaser of a resale unit.

#### 32 **Comment**

33  
34 \* \* \*

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

12                    \* \* \*

13  
14  
15        10. In addition to the information required to be disclosed by paragraphs (1) through  
16 (18), paragraph (19) requires that the declarant disclose all other "unusual and material  
17 circumstances, features, and characteristics" of the common interest community and all units  
18 therein. This requires only information which is both "unusual **and** material." Thus, the  
19 provision does not require the disclosure of "material" factors which are commonly understood  
20 to be part of the common interest community, *e.g.*, the fact that buildings have a roof, walls,  
21 doors, and windows. Similarly, the provision does not require the disclosure of "unusual"  
22 information about the common interest community which is not also "material;" (*e.g.*, the fact  
23 that a common interest community is the first development of its type in a particular locality).  
24 Information which would normally be required to be disclosed pursuant to paragraph (19) might  
25 include, to the extent that they are unusual and material, environmental conditions affecting the  
26 use or enjoyment of the common interest community, features of the location of the common  
27 interest community; (*e.g.*, near the end of an airport runway or a planned rendering plant), a plan  
28 to convert any units to time-share ownership, and the like.

### 30                    **Reporter's Notes**

31  
32                    1. The proposed amendment to Comment 7 makes explicit what was  
33 already implicit: requiring the disclosure of restrictions on sale means a provision  
34 in the declaration that prohibits the creation of time-share arrangements should be  
35 disclosed. The amendment also cleans up the language and includes restrictions  
36 on rentals, including restrictions on short-term rentals.

37  
38                    2. The proposed amendment to Comment 10 requires the disclosure of any  
39 plan to allow some or all of the units to be devoted to time-share arrangements.  
40 Such a provision would be unusual in many communities. If the plan is set forth  
41 in the declaration, Section 4-105 also requires inclusion in the public offering  
42 statement.

43  
44                    **SECTION 4-105. SAME; TIME SHARES.** If the declaration provides that ownership  
45 or occupancy of any units, is or may be in time shares, the public offering statement shall

disclose, in addition to the information required by Section 4-103:

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

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

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

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

#### Comment

1. Time sharing has become increasingly ~~important in recent~~ years frequent since the 1960s, particularly ~~with respect to~~ 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. ~~Virtually all~~ Some existing state statutes dealing with condominiums, planned communities, or cooperatives are silent with respect to time-share ownership. The inclusion of disclosure provisions for certain forms of time sharing in this Act, however, does not imply that other law regulating time sharing is affected in any way in a State merely because that State enacts this Act.

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

#### Reporter's Note

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

**SECTION 4-107. SAME; COMMON INTEREST COMMUNITY SECURITIES**  
**REGISTERED WITH GOVERNMENT AGENCY.** If an interest in a common interest community is currently registered with the Securities and Exchange Commission of the United States [or with the state pursuant to [cite to appropriate state time-share statute or other state

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

7 **Legislative Note:** *A state that has an agency that regulates time-share developments or*  
8 *other types of common interest communities and requires the preparation of a public offering*  
9 *statement should refer to statute and provide the name of the state agency in the brackets in the*  
10 *first sentence.*  
11

#### 12 **Reporter's Note**

13  
14 The proposed amendment provides optional language for an exemption from the  
15 public offering statement provisions of this article when the state has enacted a  
16 time-share statute that requires the developer or seller of time shares to prepare a  
17 public offering statement to be filed with a state agency and given to purchasers.  
18 The amendment follows the language of Nev. Rev. Stat. § 116.4107, which  
19 provides an exemption for a common interest community registered to sell time-  
20 shares with the Real Estate Division of the Department of Business and Industry.  
21

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

23 (a) Except in the case of a sale in which delivery of a public offering statement is  
24 required, or unless exempt under Section 4-101(b), a unit owner shall furnish to a purchaser  
25 before the earlier of conveyance or transfer of the right to possession of a unit, a copy of ~~the~~  
26 ~~declaration, other than any plats and plans,~~ the bylaws, the rules ~~or regulations~~ of the association,  
27 and the declaration other than plats and plans. The unit owner shall also furnish a certificate  
28 containing:

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



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

1 common interest community and the provisions governing any extension or renewal thereof;

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

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

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

10 (16) a statement disclosing the effect on the unit to be conveyed of any  
11 ~~restrictions~~ restriction on the ~~owner's~~ right to use or occupy the unit ~~or to~~, including a restriction  
12 on a lease or other rental of the unit to another person.

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

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

23 **Reporter's Note (5/25/2021)**  
24

1 1. The revision to Section 4-109(a) removes a possible ambiguity concerning the  
2 location of the phrase “other than.” The “other than” phrase means the unit owner  
3 need not furnish “plats and plans” to the purchaser; the owner must furnish the  
4 bylaws and rules.

5  
6 2. The revision to Section 4-109(a)(16) expands the scope of the disclosure in to  
7 include not only standard leases, but also time-share arrangements, short-term  
8 rentals, and sharing platforms that sell licenses to guests, such as Airbnb. The  
9 revision matches the scope of what the declaration must and may disclose in  
10 Section 2-105(a)(12) and (b). Recently many common interest communities have  
11 placed restrictions on short-term rentals in declarations and rules, and this  
12 information is important for many buyers.

## 13 14 [ARTICLE] 5

### 15 TRANSITION

#### 16 SECTION 5-101. EFFECTIVE DATE.

17 (a) This [act] takes effect ...

18 (b) Before [all-inclusive date], this [act] applies to only:

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

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

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

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

### 28 29 **Reporter’s Note (5/25/2021)**

30  
31 1. Subsections (a) and (b) provide effective-date rules using the technique of an  
32 “all-inclusive date” found in many ULC acts dealing with corporations and other  
33 business organizations. The all-inclusive date should be at least 1 year and no  
34 more than 3 years after the effective date of the act. The length should depend on  
35 how long it should take for people who are responsible for running the affairs of  
36 associations (e.g., executive boards and in many cases management companies) to

1 become aware of and familiar with the new act.

2  
3 2. The existing act contains an Optional Article 5, titled “Administration and  
4 Registration of Common Interest Communities, which contains procedures and  
5 rules for a state agency to regulate the development and sale of units. None of the  
6 states that have adopted UCIOA have included Article 5. The Drafting Committee  
7 recommends the withdrawal of Article 5, with this new transition article in its  
8 place.

9  
10 ***Proposed new Comment***

11  
12 If a state decides that full applicability of the act to preexisting common interest  
13 communities is not appropriate, the state may decide to include an opt-out  
14 procedure in this section reading as follows: “This [act] does not apply to a  
15 common interest community created before [the effective date of this [act]] which  
16 approves an amendment under this subsection before [all-inclusive date]. An  
17 amendment authorized by this subsection must be adopted in conformity with the  
18 requirements of this subsection, which supersede any provisions in the declaration  
19 or bylaws of the common interest community. The executive board may in its  
20 discretion propose an amendment to the unit owners. In this event, the board shall  
21 submit the proposed amendment for a vote by the unit owners under Section 3-  
22 110. Approval requires a vote of more than 50 percent of the votes in the  
23 association.”

24  
25 **SECTION 5-102. PRIOR STATUTES.** The provisions of [insert reference to all present  
26 statutes expressly applicable to planned communities, condominiums, cooperatives, or horizontal  
27 property regimes]:

28 (1) do not apply to common interest communities that are subject to this [act]; and  
29 (2) apply to common interest communities created before [the effective date of this [act]]  
30 only until the community becomes subject to this [act].

31 ***Legislative Note:*** *For a state that previously adopted UCIOA (2014) or an earlier*  
32 *version of UCIOA, the effective date in this section should be the effective date stated in the*  
33 *earlier adoption. After the all-inclusive date, a state should repeal any previous condominium*  
34 *statute identified in this section because this act will then apply to all condominiums within the*  
35 *state.*

36 **Reporter’s Note (5/25/2021)**

37  
38 This section moves the existing second sentence from Section 1-201 and keeps it  
39 without change as paragraph (1). The existing text in Section 1-201 does not  
40 expressly address retention of the statutes for preexisting communities, although

1 obviously that is implied. New paragraph (2) says this directly. A preexisting  
2 common interest community remains subject to the old statutes until the “all-  
3 inclusive date” or until it makes an election to adopt the act under Section 1-202,  
4 1-203, or 5-101(b)(2).

5  
6 **SECTION 5-103. RETROACTIVE APPLICATION.**

7 (a) Except as provided in subsection (b), if a common interest community created before  
8 [the effective date of this [act]] becomes subject to this [act] on [all-inclusive date] or earlier, a  
9 provision of its declaration or bylaws that is inconsistent with this [act] is invalid unless:

10 (1) the provision is expressly permitted under Section 1-117; or

11 (2) the common interest community is a cooperative described in Section 1-202, a  
12 planned community described in Section 1-203, or a nonresidential or mixed-use common  
13 interest community described in Section 1-207.

14 (b) This [act] does not require a common interest community validly created before [the  
15 effective date of this [act]] to prepare or amend plats and plans.

16 (c) This [act] does not invalidate an action validly taken, or transaction validly entered  
17 into, before a common interest community becomes subject to this [act].

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

21  
22 **Reporter’s Note (5/25/2021)**

23  
24 1. Subsection (a) invalidates the provisions in the declaration or bylaws of a  
25 preexisting common interest community that do not comply with the act’s  
26 mandatory rules when the community becomes subject to the act. Common  
27 interest communities created before the effective date of this act become fully  
28 subject to this act under Section 5-101(c) at the all-inclusive date or by an earlier  
29 election under Section 5-101(b)(2).

30  
31 2. A common interest community that becomes subject to the act should study  
32 their governing documents and amend or restate them to comply with this act, but  
33 this section does not require amendment; invalidation of provisions that are not  
34 permitted takes place automatically.

1  
2 3. The reference in subsection (a) to newly drafted Section 1-117, *Mandatory and*  
3 *Default Rules*, means that existing provisions of the declaration and bylaws that  
4 are inconsistent with the rules and procedures of this act remain effective if the act  
5 allows their variation by content in the declaration or bylaws. For example, if the  
6 preexisting declaration provides that termination of the common interest  
7 community requires the unanimous approval of unit owners, this provision  
8 supersedes the rule in Section 2-118 that authorizes termination by a vote of 80  
9 percent of unit owners. The preexisting community does not have to amend its  
10 declaration to restate its unanimity provision.

11  
12 4. Plats and plans are part of the declaration. Under subsection (b), a preexisting  
13 common interest community does not have to prepare plats and plans if it was  
14 validly created without them; or amend any existing plats and plans that do not  
15 comply with Section 2-109.

16  
17 **SECTION 5-104. APPLICABILITY TO PRE-EXISTING COMMON INTEREST**

18 **COMMUNITIES.**

19 (a) Except for a cooperative described in Section 1-202, a planned community described  
20 in Section 1-203, or a nonresidential or mixed-use common interest community described in  
21 Section 1-207, the following sections apply to a common interest community created before [the  
22 effective date of this [act]]:

23 (1) Section 1-105;

24 (2) Section 1-106;

25 (3) Section 1-107;

26 (4) Section 1-206;

27 (5) Section 2-102;

28 (6) Section 2-103;

29 (7) Section 2-104;

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

31 (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) apply only to events and circumstances occurring after [the effective date of this [act]] and do not invalidate existing provisions of the declaration or bylaws of the common interest community.

(c) This section does not apply to a common interest community that becomes subject to this entire [act] under Section 5-101 or by election under Section 1-202, 1-203, or 1-207.

**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 (5/25/2021)

Section 5-104(a) and (b) continues the content of existing Section 1-204, which is moved with minor edits. Subsection (c) makes Section 5-104 inapplicable to a common interest community created before the effective date of this act that becomes fully subject to this act at the all-inclusive date or by election. For such a community, the validity of the existing provisions of its declaration and bylaws are subject to Section 5-103(a).