

## MEMORANDUM

TO: Commissioners of the Uniform Law Commission

FROM: Jim Smith, Reporter

DATE: June 28, 2021

RE: Proposed Amendments to Text and Comments of the Uniform Common Interest Ownership Act (UCIOA)

Below are brief descriptions of the major changes in the proposed amendments to UCIOA. Revisions that are only stylistic or are intended only to clarify the meaning of the existing statutory text are not included in this memo. This memo does not discuss the Drafting Committee's proposed amendments to Comments. Additional information and explanation of the proposed amendments and comments are included in Reporter's Notes in the draft.

**1. Scope of the act.** The scope provisions for the act are in Part 2, titled "Applicability," Sections 1-201 through 1-210. The act since its inception in 1982 has generally applied only to common interest communities created after the act's effective date. Older communities are grandfathered, regulated by preexisting state law, whatever that may be. This draft makes a major change in policy, making the act generally applicable to all common interest communities, regardless of time of creation. This draft preserves the existing exemptions for small cooperatives, small planned communities ("small" means 12 or fewer units), and planned communities with small assessments (presently approximately \$1050 annually, indexed for inflation); these exemptions apply both to old and new communities. In this draft, transition provisions are in a new Article 5.

The Drafting Committee extensively discussed the policy issues involved in applying the act to old common interest communities. The Committee's consensus is that grandfathering old communities, thus creating two sets of law based on the age of communities, has created complex issues for the legal community and for residents. The administration of law and practice within a state is considerably improved by uniformity, i.e., by making *all communities* subject to the same law to the maximum extent feasible. At the same time, the Committee realized that in some states, objections may be raised to this draft's new uniform scope. Accordingly, this draft includes an optional bracketed provision, in Section 5-101, for old communities to opt-out of the act, and thus remain regulated by preexisting state law, whether statutory (for condominiums) or largely common law (for planned communities and cooperatives in many states). For further discussion of policy issues, see Reporter's *Memorandum on the Scope the Uniform Common Interest Ownership Act* (Aug. 4, 2020), available on the ULC website.

The history of UCIOA shows that the original drafters in 1982 were highly concerned about constitutional challenges if they applied the act to old communities. The Drafting Committee considered these concerns and decided that they no longer justify the grandfathering of old communities. The Reporter prepared an extensive memo, Reporter's *Memorandum on*

*Constitutional Issues Raised by the Retroactive Application of the Uniform Common Interest Ownership Act* (Aug. 4, 2020), available on the ULC website. The memo concludes that: (1) the full application of UCIOA to preexisting communities would not violate any provisions of the federal constitution; and (2) in a large majority of states, the outcome is the same under their state constitutions (in a few states, there is some risk of invalidation of certain UCIOA provisions as applied to particular facts).

**2. Section 2-108. Limited Common Elements.** Sometimes it's useful for an association to convert a common element into a limited common element, such as a parking space to be used by a particular unit owner or ground space next to a patio door. The act allows this only if authorized by the declaration. The draft adds flexibility by allowing a conversion by approval of the executive board of the association, subject to review by the unit owners. If the board approves a request to convert a common element to a limited common element, the board must notify the unit owners. If a unit owner objects, conversion requires approval of the unit owners by a vote of 67 percent of the votes cast, with no quorum required.

**3. Section 2-114. Building Encroachment.** This section has two alternatives to deal with shifting unit boundaries, which result from the encroachments of improvements on boundaries of units and common areas, and discrepancies between record boundary lines and buildings as constructed. The basic idea is that encroachments and discrepancies are tolerated by the creation of an easement or the adjustment of legal boundaries, if they are not extreme or the consequence of willful misconduct or fault. The draft rewrites this section to clear up ambiguities, vagueness, and possible conflicting interpretations in the existing language.

**4. Section 2-118. Termination of Common Interest Community.** During the past decade, terminations of common interest communities have become more frequent, triggered by older buildings becoming obsolescent and by casualty destruction. Many condominium "deconversions" have taken place, especially in expensive urban markets. Termination is usually followed by the sale of all of the properties for redevelopment. The draft has a number of revisions, four of particular importance.

First, the existing text generally allows termination by a supermajority vote: 80 percent of the units. This rule sometimes works to the prejudice of unit buyers when a developer has sold less than 20 percent of the units and wishes to terminate the project. The developer then has enough votes to terminate without the approval of any buyers. The proposed revision protects buyers by requiring the approval of 80 percent of the sold units in addition to 80 percent of all units.

Second, the existing text applies the 80-percent rule only to communities with multi-story dwelling units (stacked-units, like a typical condominium building). The existing text requires unanimity (100 percent vote) when any non-stacked units are present. The draft alters this, allowing termination and sale by 80-percent vote for all communities, regardless of building type. This is an important issue of policy. The draft creates a default rule allowing the sale of a neighborhood with detached single-family houses by a supermajority 80-percent vote.

Third, the existing text divides the sales proceeds among the owners based on an appraisal obtained by the association's executive board. A proposed revision protects an owner from a low appraisal by allowing the owner to obtain an independent appraisal. If an agreement on fair market value is not reached, an arbitral panel of three appraisers determines the value.

Fourth, the draft adds a new procedure for a “partial termination,” which allows the removal of some but less than all of the units from a common interest community.

**5. Section 2-120. Master Associations.** The act requires that delegations of powers to master associations be set forth in the declaration. The draft adds flexibility by allowing the executive board to delegate powers to a master association, subject to review by the unit owners. Delegations to master associations often have substantial impacts on unit owners and their community. The board must notify unit owners of a proposed delegation. If a unit owner objects, the delegation becomes effective only if approved by the unit owners by majority vote. The amendment includes a procedure for unit owners to revoke a delegation previously made by the board at any time in the future by majority vote.

A second major change to this section revises the rules governing the election of the executive board of a master association. After the period of declarant control ends, the master association executive board must be elected by the unit owners of the common interest communities that are subject to the master association, or by the executive boards of those communities.

**6. Section 2-125. Adverse Possession and Prescriptive Easements.** UCIOA does not presently address the law of adverse possession. Claims of adverse possession and prescription arise frequently in common interest communities. This new section fills the gap by addressing one important type of claim. Sometimes a unit owner makes long-term unauthorized use of a common element, and when the association or neighboring owners object to the use, the unit owner raises adverse possession as a defense. The draft immunizes common elements from loss by adverse possession or prescriptive easement by claims of unit owners.

**7. Section 3-102. Powers and Duties of Unit Owners Association.** The act allows an executive board to grant an easement or lease on a common element to a unit owner. This may serve as a loophole, bypassing the proper procedure under the act of relocating a unit boundary or converting a common element to limited common element, both of which generally require a vote of unit owners to protect the community. The draft closes this loophole.

**8. Section 3-104. Transfer of Special Declarant Rights.** The act regulates “special declarant rights,” which include rights of the declarant (developer) to make changes to the community and to control the executive board. The draft reorganizes the existing section to add clarity and resolve ambiguities and gaps. The most significant policy issues concern the nature of special declarant rights, the rules for their transfer, and their treatment in foreclosure and other involuntary transfers. Regarding the nature of special declarant rights, the existing text is unclear as to whether some or all of them are personal property or real property. The draft defines special declarant rights as interests in real estate, appurtenant to all units owned by the declarant and any real estate subject to a development right to create additional units.

**9. Section 3-108, Meetings; Section 3-109, Quorum; and Section 3-110, Voting; Proxies; Ballots.** The draft has revisions to these sections to permit and facilitate electronic meetings of unit owners, a topic that has become especially timely since the coronavirus pandemic. The draft authorizes unit owners to participate remotely at a meeting held at a

geographic location and authorizes “all-electronic” meetings where there is no geographic location for in-person attendees. The draft also includes new rules for proxy voting, electronic ballots, the duration of ballots, and the revocation of ballots.

**10. Section 3-115. Assessments.** This section has two major changes. First, the draft responds to the practice of executive boards, which appears to happen with increasing frequency, of assessing common expenses against some but not all units in a common interest community. The existing section gives the board discretion to assess a common expense to one or a few unit owners who are “benefitted” by the expense (usually a replacement or repair of a common element, such as a door, porch deck, or skylight). The “benefitted” standard appears vague and fails to give owners advance notice of the circumstances in which they must pay all or a higher share of certain common expenses. The act retains the standard, but removes board discretion by requiring that the declaration specify which common expenses (if any) are to be assessed to fewer than all the unit owners. The declaration must identify the common expense by specific listing or category.

Second, existing subsection (e) allows the assessment of an expense caused by the willful misconduct or gross negligence of a unit owner or the owner’s guest or invitee exclusively against the owner’s unit. The draft removes the gross negligence prong, extends liability for a unit owner’s failure to comply with maintenance standards, and protects unit owners by requiring that the association cover the loss by available insurance proceeds before making an assessment against the unit owner.

**11. Section 3-125. Emergency Powers.** The draft adds a new section on emergency powers, which consolidates and expands upon three existing provisions scattered in other parts of the act. The new section is prompted in part by challenges faced by common interest communities and their associations during the coronavirus pandemic. The most significant changes are: (1) adding a definition of “emergency,” (2) relaxing the normal notice rules to allow meetings and actions when notifying only persons “whom it is practicable to reach” with notices given “in any practicable manner,” and (3) authorizing the executive board to take any action it considers reasonably necessary to protect the unit owners and other persons during an emergency.

**12. Section 4-107 and Section 1-103(34). Time Shares.** Common interest communities sometimes contain time-share units, especially within communities located in popular resort and vacation destinations. The existing act contains only one substantive provision regulating time shares; Section 4-105 requires that the public offering statement contain certain information when “the declaration provides that ownership or occupancy of any units, is or may be in time shares.” The draft continues the general approach of deferring to other law to handle special problems associated with time-share development and ownership. The draft makes two substantive changes concerning time shares. First, in Section 1-103(34) the definition of “time share” is modernized to conform to present practice in states with time-share regulatory regimes. Second, Section 4-107 is amended to provide an exemption from the act’s public offering statement rules when a state agency regulates time-share developments.