

Memorandum on Master Associations

FROM: Jim Smith, Reporter

TO: Subcommittee to Consider the Election of Boards of Master Associations: Bill Breetz, Carl Lisman, Steve Prunty, Dave Ramsey

DATE: Dec. 28, 2020

This Subcommittee has a narrow charge: to review the last subsection of Section 2-120, *Master Associations*, to consider whether any changes are advisable. This subsection, shown as Section 2-120(f) in the November 2020 draft (renumbered from Section 2-120(e) in the existing UCIOA text), deals with the election of the executive board of the master association.

Before the November 2020 meeting of the Drafting Committee, David Ramsey raised several issues concerning this subsection. At our meeting his concerns were discussed, and a few other issues were raised. There seemed to be consensus that changes were needed to protect unit owners, but we had no agreement on what those changes might be. At the end of this memorandum, Appendix 1 contains all of the November 2020 draft of Section 2-120, including David's comments.

Section 2-120(e) as it now stands states:

(e) Even if a master association is also an association described in Section 3-101, the certificate of incorporation or other instrument creating the master association and the declaration of each common interest community, the powers of which are assigned by the declaration or delegated to the master association, may provide that the executive board of the master association must be elected after the period of declarant control in any of the following ways:

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

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

(3) All unit owners of each common interest community subject to the master association may elect specified members of the master association's executive board.

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

Comment 7 to Section 2-120 explains:

Subsection (e) recognizes that there may be reasons for a representative form of election of directors of the master association. Alternatively, there may be cases where at-large election is reasonable. For that reason, subsection (e) provides that, after the period of declarant control has terminated, there may be four ways of electing the master

association board. Those four ways are: (1) at-large election of the master board among all the common interest communities subject to the master association, (2) at-large election of the master board only among the members of the executive boards of all common interest communities subject to the master association, (3) each common interest community might have designated positions on the master board, and those spaces could be filled by an at-large election among all the members of each common interest community, or (4) the designated positions could be filled by an election only among the members of the executive board of the unit owners' association for each common interest community. It would only be in the case of an at-large election of the master board among all common interest communities that subsection (d) would have no relevance.

The language of Section 2-120(e) dates to the ULC's original adoption of UCIOA in 1982, with no revisions made to the subsection since then. UCIOA borrowed the language from its predecessor, the Uniform Condominium Act § 2-120(e) (1980), with no change except substituting "common interest community" for "condominium."

Issues that the subcommittee may want to consider, in addition to those raised in advance by David, are:

1. What does "specified members" mean in (f)(3) and (f)(4)? Can this be made clearer?

2. Are there special problems raised in mixed-use communities, which this subsection should address?

3. Does this subsection require that the governing documents choose one of the four alternatives given in paragraphs (1)-(4)? The statutory language states the documents "*may* provide that the executive board of the master association must be elected after the period of declarant control in any of the following ways: . . ." (emphasis added). It seems the intent is to authorize the four "ways" without expressing an opinion on the appropriateness of other ways. If we want the four ways to be a "closed set" a revision is advisable.

4. This subsection provides the same choices for both types of master associations: (1) a master association that is not also a unit owners association and (2) a master association that is the unit owners association for at least one common interest community. Should the election rules be the same for both types of master associations?¹ (Note: the "Even if" clause that begins this subsection is unnecessary and may be deleted if we retain the view that the same election rules should apply to all master associations.)

¹ The current November 2020 draft revises the definition to "master association" in Section 1-103(22), with no change in intended meaning from UCIOA's existing text, to provide:

"Master association" means:

(A) an organization that holds a power pursuant to a delegation described in Section 2-120(a) and is not a unit owners association; or

(B) a unit owners association that serves more than one common interest community or has entered into an arrangement described in Section 1-209(b).

Appendix 1

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,~~ The declaration may delegate any power described in Section 3-102 to a master association. Unless the declaration provides otherwise, the executive board of a unit owners association may delegate any additional power described in Section 3-102 to a master association. A delegation of the board is subject to approval by the unit owners. The executive board shall make approval of the delegation an item on the agenda at the first meeting of the unit owners association after the delegation. A delegation of powers to a master association is not effective before acceptance by the master association. All provisions of this [act] applicable to a unit owners' associations apply to any such corporation [or unincorporated a master association], except as modified by this section.

Reporter's Note (10/23)

David Ramsey writes to suggest that in addition to the declaration, the bylaws may delegate powers to a master association, and that the bylaws may restrict a board delegation.

(b) The unit owners at any meeting may approve or disapprove any delegation of powers to a master association by a majority of the votes cast at the meeting. Other law determines the effect of disapproval on the rights and obligations of parties under an existing contract between a unit owners association and a master association.

Reporter's Note (10/23)

David Ramsey writes:

Do we mean any meeting of the members? Do we mean any meeting of the board? I assume the former and, if so, perhaps we need to say that. Further, it shouldn't be subject to a vote if a motion is made at the meeting, but without prior notice that the matter will be on the agenda. Otherwise, a meeting with a bare quorum could vote to revoke a delegation, when the majority of the members would be opposed to revoking the delegation.

Note: The proposed amendment to subsection (a) and new subsection (b) allow the board to delegate powers to a master association, subject to the right of unit owners to terminate or revoke the delegation by majority vote. See Reporter's Note 1 below. Discussion at the Drafting Committee's April 2020 meeting revealed complex issues stemming from the Committee's tentative decision to allow a board-approved delegation to become effective immediately, subject to termination [revocation] by the unit owners. Before the unit owners meet, the board and the master association may have entered into a long-term agreement that does not allow prompt termination by the association. An alternative approach is to make the delegation could become effective only when and if approved by the unit owners. Also, note that subsection (b) as drafted allows termination for any delegation to a master termination, not only for board-approved delegations reviewed at the first unit owners' meeting after the delegation. We may want to consider whether to add more express limitations on power to terminate.

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

(e) ~~(d)~~ If the declaration of any common interest community provides that the executive board may delegate certain powers to a master association, ~~the~~ The members of the executive board of a unit owners association have no liability for the acts or omissions of ~~the~~ a master association with respect to ~~those powers following delegation~~ a power delegated to the master

association.

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

~~(e)~~ (f) Even if a master association is also ~~an~~ a unit owners association ~~described in~~ ~~Section 3-101~~, the certificate of incorporation or other instrument creating the master association and the declaration of each common interest community, the powers of which are assigned by the declaration or delegated to the master association, may provide that the executive board of the master association must be elected after the period of declarant control in any of the following ways:

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

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

Reporter's Note (10/23)

David Ramsey writes:

The potential problem with this is that a crafty developer could create a number of common interest communities, but if it wanted to control the master board for an extended period of time, it could have a board made up, say, of 50 members, while other CIC boards are 3 to 5 members each, and thereby control the master association longer than it should.

(3) All unit owners of each common interest community subject to the master association may elect specified members of the master association's executive board.

Reporter's Note (10/23)

David Ramsey writes:

This can and will be subject to abuse by developers. A developer could set up a master association with a 9-member board, where three members are electable by the unit owners in the first 5 CICs and 6 members are electable by the unit owners in the last CIC. There has to be some proportionality and at some point (e.g. after 75% of the units in the full project have been conveyed) only non-developer unit owners can vote for master association board members.

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

Reporter's Notes

1. The Study Committee Report (topic # 6) asks: "To what extent may the unit owners association in a common interest community delegate any of its statutory authority to a Master Association for a larger planned community of which that HOA is a part?" The Drafting Committee at its January 2020 meeting voted in favor of an amendment to allow the executive board to delegate powers to a master association, subject to the right of unit owners to disapprove of the delegation by majority vote.

The proposed amendment to subsection (a) clearly differentiates between provisions in the declaration that establish and assign powers to a master association and a subsequent decision of the executive board of the common interest community to delegate powers to a master association.

Revised subsection (a) and new subsection (b) reflect a compromise. A subsequent decision to delegate powers to a master association often has a substantial impact on unit owners. The act might allow a delegation only if authorized in the declaration or by a subsequent vote of the unit owners. Instead, subsection (a) allows the executive board to delegate powers to a master association on its own initiative, subject to the ability of the unit owners to revoke the delegation at the next unit owners meeting, whether a regular or special meeting.

2. At its January 2020 meeting the consensus of the Drafting Committee was to add a provision stating that an assignment to a master association is effective only if accepted by the master association. The new sentence added to subsection (a) makes it clear what was implicit: A transfer or delegation of powers to a master association becomes effective only if accepted by the master

association. In most cases, the master association's agreement is manifested in writing.

3. The amendment to original subsection (c) [renumbered subsection (d)] makes it clear that the board members of the common interest community are insulated from liability for the acts and omissions of the master association after the transfer of powers, regardless of how the master association acquired the powers.