

D R A F T

FOR ~~DISCUSSION ONLY~~ APPROVAL

# Amendments to the Uniform Common Interest Ownership Act

Uniform Law Commission

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~~May 28~~ June 29, 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           (1) “Affiliate of a declarant” means any person who controls, is controlled by, or is under  
8 common control with a declarant. For purposes of this definition:

9                           (A) a person controls a declarant if the person:

10                                   (i) is a general partner, officer, director, or employer of the declarant;

11                                   (ii) directly or indirectly or acting in concert with one or more other  
12 persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds  
13 proxies representing, more than 20 percent of the voting interest in the declarant;

14                                   (iii) controls in any manner the election of a majority of the directors of  
15 the declarant; or

16                                   (iv) has contributed more than 20 percent of the capital of the declarant.

17                           (B) a person is controlled by a declarant if the declarant:

18                                   (i) is a general partner, officer, director, or employer of the person;

19                                   (ii) directly or indirectly or acting in concert with one or more other  
20 persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds  
21 proxies representing, more than 20 percent of the voting interest in the person;

22                                   (iii) controls in any manner the election of a majority of the directors of  
23 the person; or

1                   (iv) has contributed more than 20 percent of the capital of the person; and  
2                   (C) control does not exist if the powers described in this paragraph are held solely  
3 as security for an obligation and are not exercised.

4                   (2) “Allocated interests” means the following interests allocated to each unit:

5                   (A) in a condominium, the undivided interest in the common elements, the  
6 common expense liability, and votes in the association;

7                   (B) in a cooperative, the common expense liability, the ownership interest, and  
8 votes in the association; and

9                   (C) in a planned community, the common expense liability and votes in the  
10 association.

11                   (3) “Assessment” means the sum attributable to each unit and due to the association  
12 pursuant to Section 3-115.

13                   (4) “Association” or “unit owners association” means the unit owners association  
14 organized under Section 3-101.

15                   (5) “Bylaws” means the instruments, however denominated, that contain the procedures  
16 for conduct of the affairs of the association regardless of the form in which the association is  
17 organized, including any amendments to the instruments.

18                   (6) “Common elements” means:

19                   (A) in the case of:

20                   (i) a condominium or cooperative, all portions of the common interest  
21 community other than the units; and

22                   (ii) a planned community, any real estate within a planned community  
23 which is owned or leased by the association, other than a unit; and

1                   (B) in all common interest communities, any other interests in real estate for the  
2 benefit of unit owners which are subject to the declaration.

3                   (7) “Common expense liability” means the liability for common expenses allocated to  
4 each unit pursuant to Section 2-107.

5                   (8) “Common expenses” means expenditures made by, or financial liabilities of, the  
6 association, together with any allocations to reserves.

7                   (9) “Common interest community” means real estate described in a declaration with  
8 respect to which a person, by virtue of the person’s ownership of a unit, is obligated to pay for a  
9 share of real estate taxes, insurance premiums, maintenance, or improvement of, or services or  
10 other expenses related to, common elements, other units, or other real estate described in the  
11 declaration. The term does not include an arrangement described in Section 1-209 or 1–210. For  
12 purposes of this paragraph, ownership of a unit does not include holding a leasehold interest of  
13 less than [20] years in a unit, including renewal options.

14                   (10) “Condominium” means a common interest community in which portions of the real  
15 estate are designated for separate ownership and the remainder of the real estate is designated for  
16 common ownership solely by the owners of those portions. A common interest community is  
17 not a condominium unless the undivided interests in the common elements are vested in the unit  
18 owners.

19                   (11) “Conversion building” means a building that at any time before creation of the  
20 common interest community was occupied wholly or partially by persons other than purchasers  
21 and persons that occupy with the consent of purchasers.

22                   (12) “Cooperative” means a common interest community in which the real estate is  
23 owned by an association, each of whose members is entitled by virtue of the member’s

1 ownership interest in the association to exclusive possession of a unit.

2 (13) “Dealer” means a person in the business of selling units for the person’s own  
3 account.

4 (14) “Declarant” means any person or group of persons acting in concert that:

5 (A) as part of a common promotional plan, offers to dispose of the interest of the  
6 person or group of persons in a unit not previously disposed of; [or]

7 (B) reserves or succeeds to any special declarant right [; or]

8 (C) applies for registration of a common interest community under [Article] 5].

9 (15) “Declaration” means the instrument, however denominated, that creates a common  
10 interest community, including any amendments to the instrument.

11 (16) “Development rights” means any right or combination of rights reserved by a  
12 declarant in the declaration to:

13 (A) add real estate to a common interest community;

14 (B) create units, common elements, or limited common elements within a  
15 common interest community;

16 (C) subdivide units or convert units into common elements; or

17 (D) withdraw real estate from a common interest community.

18 (17) “Dispose” or “disposition” means a voluntary transfer to a purchaser of any legal or  
19 equitable interest in a unit, but the term does not include the transfer or release of a security  
20 interest.

21 (17A) “Electronic” means relating to technology having electrical, digital, magnetic,  
22 wireless, optical, electromagnetic, or similar capabilities.

23 **Reporter’s Note (1/29/2021)**  
24



1 This proposed new definition is taken from the Uniform Electronic Wills Act (the  
2 E-Wills Act) § 2(1) (2019) and the Revised Uniform Law on Notarial Acts  
3 (RULONA) § 2(2) (2018), which use identical language. Existing UCIOA uses  
4 “electronic” in a number of provisions without definition. Adding a definition  
5 coordinates with proposed revisions to Section 3-108, *Meetings*, and Section 3-  
6 110, *Voting; Proxies; Ballots*, which facilitate electronic meetings and electronic  
7 voting, including use of the term “electronic ballot,” which is not presently  
8 defined.

9  
10 \* \* \*

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

13 (19) “Identifying number” means a symbol or address that identifies only one unit in a  
14 common interest community.

15 (20) “Leasehold common interest community” means a common interest community in  
16 which all or a portion of the real estate is subject to a lease the expiration or termination of which  
17 will terminate the common interest community or reduce its size.

18 (21) “Limited common element” means a portion of the common elements allocated by  
19 the declaration or by operation of Section 2-102(2) or (4) for the exclusive use of one or more  
20 but fewer than all of the units.

21 (22) “Master association” means:

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

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

25 **Reporter’s Note (5/25/2021)**  
26

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

1           2. Existing Section 2-120(a) defines a master association as the recipient  
2 of “powers described in Section 3-102 . . . or other powers.” The proposed new  
3 definition deletes the “other powers” prong because it is not necessary. Section 3-  
4 102 defines “powers” to include all possible powers. See 3-102(a)(15)-(17) (“any  
5 other powers conferred by the declaration or bylaws . . . all other powers that may  
6 be exercised in this state by organizations of the same type as the association . . .  
7 any other powers necessary and proper for the governance and operation of the  
8 association”).  
9

10           3. Existing Section 2-120(a) requires a master association to be “a profit or  
11 nonprofit corporation [or unincorporated association].” Yet the act allows a unit  
12 owners association to be any type of organization authorized by state law. Section  
13 3-101 provides: “The association must be organized as a profit or nonprofit  
14 corporation, trust, limited liability company, partnership, [unincorporated  
15 association,] or any other form of organization authorized by the law of this  
16 state.” There does not appear to be a reason to impose greater limits to a master  
17 association’s choice of entity. The proposed new definition removes the limitation  
18 simply by referring to “an organization.”  
19

20           \*\*\*

21           (23) “Offering” means any advertisement, inducement, solicitation, or attempt to  
22 encourage any person to acquire any interest in a unit, other than as security for an obligation.  
23 An advertisement in a newspaper or other periodical of general circulation, or in any broadcast  
24 medium to the general public, of a common interest community not located in this state, is not an  
25 offering if the advertisement states that an offering may be made only in compliance with the law  
26 of the jurisdiction in which the common interest community is located.

27           (24) “Person” means an individual, corporation, business trust, estate, trust, partnership,  
28 limited liability company, association, joint venture, public corporation, government or  
29 governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.  
30 [In the case of a land trust, the term means the beneficiary of the trust rather than the trust or the  
31 trustee.]

32           (25) “Planned community” means a common interest community that is not a  
33 condominium or a cooperative. A condominium or cooperative may be part of a planned

1 community.

2 (26) “Proprietary lease” means an agreement with the association pursuant to which a  
3 member is entitled to exclusive possession of a unit in a cooperative.

4 (27) “Purchaser” means a person, other than a declarant or a dealer, that by means of a  
5 voluntary transfer acquires a legal or equitable interest in a unit other than:

6 (A) a leasehold interest, including renewal options, of less than 20 years; or

7 (B) as security for an obligation.

8 (28) “Real estate” means any leasehold or other estate or interest in, over, or under land,  
9 including structures, fixtures, and other improvements and interests that by custom, usage, or law  
10 pass with a conveyance of land though not described in the contract of sale or instrument of  
11 conveyance. The term includes parcels with or without upper or lower boundaries and spaces  
12 that may be filled with air or water.

13 (29) “Record”, used as a noun, means information that is inscribed on a tangible medium  
14 or that is stored in an electronic or other medium and is retrievable in perceivable form.

15 (30) “Residential purposes” means use for dwelling or recreational purposes, or both.

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

18 **Reporter’s Note (5/25/2021)**

19  
20 The phrase “which governs the conduct of persons or the use or appearance of  
21 property” is deleted from the definition of “rule” to clarify the scope of the  
22 association’s power to enact rules. A rule governing conduct, use, or appearance  
23 must comply with other provisions of the act, including Section 3-120, *Rules*.

24  
25 **\* \* \***

26 (32) “Security interest” means an interest in real estate or personal property, created by  
27 contract or conveyance, which secures payment or performance of an obligation. The term

includes a lien created by a mortgage, deed of trust, trust deed, security deed, contract for deed, land sales contract, lease intended as security, assignment of lease or rents intended as security, pledge of an ownership interest in an association, and any other consensual lien or title retention contract intended as security for an obligation.

(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 described in the public offering statement;

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

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

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

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

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

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

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

(I) under Section 3-108, attend meetings of the unit owners and, except during an

1 executive session, the executive board; and

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

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

5  
6 The revision to the definition of "special declarant rights" has two changes. First,  
7 paragraph (A) is revised to limit the special declarant right to the completion of  
8 improvements that the declarant is not obligated to make. The declarant has an  
9 obligation under the act to make most of the improvements shown on plats and  
10 plans and the public offering statement. Improvements that the declarant are  
11 obligated to make (See Section 4-119) are no longer covered by this special  
12 declarant right. The declarant has a statutory easement under Section 2-116,  
13 *Easement and Use Rights*, which is sufficient for obligatory improvements and  
14 should exist whether or not the declarant has reserved this special declarant right.  
15 Second, cross references are added to most of the descriptions of special declarant  
16 rights to make it clear that the right is limited and defined by the relevant section,  
17 and is not a freestanding right that may have other characteristics.

18  
19 (34) "Time share" [has the meaning in [cite to definition of "time share" in  
20 appropriate state statute]] [means any ownership right in, or the right to use, a unit for less than a  
21 full year during any year, and, on a recurring basis for more than one year, even if the years are  
22 not consecutive].

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

26  
27 **Reporter's Note (5/25/2021)**

28  
29 1. Forty-one states have enacted statutes that regulate time shares,  
30 sometimes as a freestanding act and sometimes as part of their brokerage act,  
31 deceptive trade practices act, or other act. Most states have designated a state  
32 agency that is responsible for time-share regulation. It is preferable that this Act  
33 and the state's time-share statute define "time share" the same way. This  
34 definition of "time share" may incorporate the time-share statute's definition by  
35 cross reference. Of the states that have adopted UCIOA, Nevada has the most  
36 time-shares. Its version of UCIOA exactly reproduces verbatim the definition  
37 contained in the Nevada time-share statute. Nev. Rev. Stat. Ann. §§ 116.091,  
38 119A.140.

1 2. For states that do not have a suitable statutory definition, the revision to  
2 the definition of “time share” modernizes the definition by tracking closely the  
3 key elements of the current definitions of “time share” in the California, Hawaii,  
4 Florida, and Nevada statutes, all states with large numbers of time-share  
5 developments. The proposed definition also is compatible with the Bankruptcy  
6 Code’s long and complicated definition of “timeshare plan.” 11 U.S.C. §  
7 101(53D).  
8

9 (35) “Unit” means a physical portion of the common interest community designated for  
10 separate ownership or occupancy, the boundaries of which are described pursuant to Section  
11 2-105(a)(5). If a unit in a cooperative is owned by a unit owner or is sold, conveyed, voluntarily  
12 or involuntarily encumbered, or otherwise transferred by a unit owner, the interest in that unit  
13 which is owned, sold, conveyed, encumbered, or otherwise transferred is the right to possession  
14 of that unit under a proprietary lease, coupled with the allocated interests of that unit, and the  
15 association’s interest in that unit is not thereby affected.

16 (36) “Unit owner” means a declarant or other person that owns a unit, or a lessee of a unit  
17 in a leasehold common interest community whose lease expires simultaneously with any lease  
18 the expiration or termination of which will remove the unit from the common interest  
19 community, but does not include a person having an interest in a unit solely as security for an  
20 obligation. In a condominium or planned community, the declarant is the owner of any unit  
21 created by the declaration. In a cooperative, the declarant is treated as the owner of any unit to  
22 which allocated interests have been allocated until that unit has been conveyed to another person.

### 23 **Comment**

24 \* \* \*

25 26. Definition (35), “Unit,” describes a tangible, physical part of the project rather than a  
26 right in, or claim to, a tangible physical part of the property. Therefore, for example, the sale  
27 of a unit to 5 persons as tenants in common does not create 5 new units – there are, rather, 5  
28 owners of the unit. (Under the section on voting (Section 3-110), a majority of the tenants in  
29 common are entitled to cast the vote assigned to that unit.)  
30

1           \* \* \*

2  
3           27. Definition (36), “Unit owner,” contemplates that a seller under a land installment  
4 contract would remain the unit owner until the contract is fulfilled. As between the seller and the  
5 buyer, various rights and responsibilities must be assigned to the buyer by the contract itself, but  
6 the association would continue to look to the seller (for payment of any arrears in common  
7 expense assessments, for example,) as long as the seller holds title.  
8

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

15           In the special case of a cooperative, the declarant is treated as the owner of a unit or  
16 “potential unit” to which allocated interests have been allocated, until that unit is conveyed to  
17 another.  
18

19           The definition includes ~~the buyers~~purchasers of time shares only if they directly hold an  
20 estate or long-term leasehold in the unit. Then they own the unit as real property and are treated  
21 the same as other multiple owners of a single unit under the [act]. Time-share unit owners may  
22 exist in a condominium, a planned community, or in a cooperative.  
23

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

34           **Example 2:** A cooperative has 10 members, each holding the right to possess one  
35 unit under a proprietary lease. The member of the association who owns Unit 6 records a  
36 time-share declaration for her unit. The member agrees to sell time-share leaseholds to 6  
37 different persons, each of whom will receive the right to occupy the unit for two months  
38 each year. The sales close, with the member turning in her proprietary lease to the  
39 association. The association then cancels this proprietary lease and issues 6 new  
40 proprietary leases to the time-share ~~buyers~~purchasers. The 6 ~~buyers~~purchasers have time  
41 shares coupled with a leasehold as defined in Section 1-103(34) and they are “unit  
42 owners” under Section 1-103(36).  
43

44           When a unit is devoted to time shares that are classified as personal property (e.g., a license, a  
45 membership, or contract rights), then the time-share owners are not unit owners. In this  
46 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

1 benefit of the time-share owners, and its obligations and rights, including voting rights, are the  
2 same as an entity who owns a regular unit for the benefit of shareholders, members, or other  
3 individuals.

4  
5 **SECTION 1-104. NO VARIATION BY AGREEMENT.** Except as expressly  
6 provided in this [act], the effect of its provisions may not be varied by agreement, and rights  
7 conferred by it may not be waived. Except as otherwise provided in Section 1-207, a declarant  
8 may not act under a power of attorney, or use any other device, to evade the limitations or  
9 prohibitions of this [act] or the declaration.

#### 10 **Proposed New Comment**

11  
12 The second sentence of this section invalidates any device of a declarant that has the  
13 intent or effect of evading the limitations or prohibitions of this Act.

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

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

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

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

33 (1) Section 1-105(a), concerning the classification of a cooperative unit as real



1 estate or personal property.

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

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

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

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

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

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

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

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

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

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

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

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

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

23 (15) Section 2-120(a), concerning an executive board's delegation of powers by

1 the executive board to a master association.

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

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

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

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

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

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

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

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

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

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

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

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

**Reporter's Note (6/23/2021)**

1. Statutory provisions that draw the line between mandatory and default rules can be drafted in one of two ways. Some acts start from the premise that most rules ought to be “changeable” default rules and provide a list of mandatory (non-changeable) rules. Examples are UCC Article 9, § 9-602, *Waiver and Variance of Rights and Duties*; Uniform Trust Code § 105, *Default and Mandatory Rules*. Other acts, often those thought to be more directed to consumer protection, start from the opposite premise: most rules are mandatory, and a limited number are changeable default rules. New Section 1-117 follows the second way, which is consistent with UCIOA existing Section 1-104, *No Variation by Agreement*.

2. Subsection (a) states the general rule that provisions of this act are not subject to override in the governing instruments (the declaration and bylaws) when they confer rights or impose obligations and liabilities on unit owners, declarants, and other persons. Subsection (b) provides a list of default provisions of the act that are changeable by the governing instruments.

3. New Section 1-117 overlaps with existing Section 1-104, *No Variation by Agreement*, which provides: “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.” The list of sections in new Section 1-117(b) is based on existing Section 1-104, Comment 4, which lists 33 sections that “permit variation.” New Section 1-117(b) lists 27 sections and is shorter for two reasons. First, subsection (b) only deals with rules that may be changed in the governing instruments (declaration and bylaws) rather than “by agreement.” ULC acts with “mandatory rules” almost always list what may be changed by governing instruments, rather than what may be changed “by agreement.” This means that the following 3 sections listed in the Comment (text of Comment quoted below) are not carried over to subsection (b):

Section 4-101 (Applicability; Waiver). All of Article 4 is modifiable or waivable by agreement in a common interest community restricted to non-residential use.

Section 4-115 (Warranties). Implied warranties of quality may be excluded or modified by agreement.

Section 4-116 (Statute of Limitation on Warranties). The six-year limitation may be modified by agreement of the parties.

Three sections listed in the Comment (text of Comment quoted below) are not carried over to subsection (b) because they do not actually allow the declaration or bylaws to change the effect of provisions of the act:

Section 1-103 (Definitions). All definitions used in the declaration and bylaws may be varied in the declaration, but not in interpretation of the Act.

Section 2-105 (Contents of Declaration). A declarant may add any information he desires to the required content of the declaration.

Section 3-106 (Bylaws). Subject to the provisions of the declaration, the bylaws may contain any matter in addition to that required by the Act.

## **[PART] 2**

### **APPLICABILITY**

#### **SECTION 1-201. GENERAL APPLICABILITY TO COMMON INTEREST**

**COMMUNITIES.** Except as otherwise provided in this [part and in article 5], this [act] applies to all common interest communities. Amendments to this [act] apply to all common interest communities subject to this [act] , regardless of when the amendment becomes effective.

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

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

#### **SECTION 1-204. [RESERVED].**

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

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

#### **SECTION 1-205. [RESERVED].**

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

This section is deleted from this Article because it applies to preexisting common

1 interest communities, and the revision to Section 1-201 makes the act generally  
2 applicable to preexisting common interest communities. Its content is not needed  
3 in new Article 5, *Transition*. Article 1, Part 2, has two sections with rules for  
4 small cooperatives and planned communities, which apply to both preexisting and  
5 new communities: Section 1-202, *Exception for Small Cooperatives*, and Section  
6 1-203, *Exception for Small and Limited Expense Liability Planned Communities*.  
7 These amendments are not making changes to Section 1-202 or Section 1-203.  
8

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

10 (a) The declaration or bylaws of a cooperative described in Section 1-202 or a planned  
11 community described in Section 1-203 may be amended to:

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

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

16 (b) Except as otherwise provided in Section 2-117(i) and (j), an amendment under this  
17 section to the declaration or bylaws of a common interest community created before the effective  
18 date of this [act] must be adopted in conformity with any procedures and requirements for  
19 amending the instruments specified by those instruments or, if there are none, in conformity with  
20 the amendment procedures of this [act]. If an amendment grants to a person a right, power, or  
21 privilege permitted by this [act], any correlative obligation, liability, or restriction in this [act]  
22 also applies to the person.

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

24  
25 Section 1-206 is amended to provide elections for all small cooperatives and  
26 planned communities, whether created before or after the effective date of this act,  
27 to achieve any act permitted by this act or to elect to be subject to the 19 sections  
28 of the act listed in existing Section 1-204, which these amendments move to  
29 Section 5-104 in the new transition article. In addition to the two elections in this  
30 section, the small cooperatives and planned communities may elect under  
31 Sections 1-202 and 1-203, respectively, to be subject to the entire act.

32 **[ARTICLE] 2**

1                                   **CREATION, ALTERATION, AND**

2                                   **TERMINATION OF COMMON INTEREST COMMUNITIES**

3                                   \* \* \*

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

5                                   (a) The declaration must contain:

6                                   \* \* \*

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

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

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

22                                   \* \* \*

23  
24                                   **SECTION 2-108. LIMITED COMMON ELEMENTS.**

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

28                                   (b) Except as the declaration otherwise provides, a limited common element may be  
29 reallocated by an amendment to the declaration executed by the unit owners between or among  
30 whose units the reallocation is made. (c) A common element not previously allocated as a

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

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

19 **Reporter's Note (5/25/2021)**  
20

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

1  
2           **SECTION 2-112. RELOCATION OF UNIT BOUNDARIES.**

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

10           (b) The boundary of a unit may be relocated only by an amendment to the  
11 declaration. A unit owner may request the executive board to amend the declaration to include all  
12 or part of a common element within the owner's unit. The board may prescribe in the  
13 amendment a fee or charge payable by the unit owner to the association in connection with the  
14 relocation. The board may approve the amendment only if the unit owners vote under Section 3-  
15 110, whether or not a quorum is present, to approve the amendment by a vote of at least 67  
16 percent of the votes cast, including at least 67 percent of the votes cast and allocated to units not  
17 owned by the declarant.

18           (c) The association and the owners of the units whose boundaries are relocated shall  
19 execute an amendment made under this section to the declaration. The amendment must contain  
20 words of conveyance between the parties. The association shall record an amendment made  
21 under this section in the manner provided in Section 2-117. The association (i) in a condominium  
22 or planned community shall prepare and record plats or plans necessary to show the altered  
23 boundaries of affected units, and their dimensions and identifying numbers, and (ii) in a  
24 cooperative shall prepare and record amendments to the declaration, including any plans



1 necessary to show or describe the altered boundaries of affected units, and their dimensions and  
2 identifying numbers.

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

4  
5 The revision to subsection (b) retains the substance of existing subsection (b),  
6 which allows a unit owner to request that part of a common element be added to  
7 the owner's unit. Changes are made to conform the language and procedure in  
8 many respects to the new procedure under Section 2-108(c) above for changing a  
9 common element to a limited common element. The revision resolves a possible  
10 ambiguity as to whether the executive board's approval of the unit owner's  
11 application is necessary. This revision also deletes the requirement of a quorum  
12 for the unit owners' vote on the basis that often the requested boundary relocation  
13 will be minor and not of significant interest to other unit owners. Subsection (b)  
14 expressly allows the association to require that the unit owner pay a fee or charge,  
15 which might be one-time or periodic. Depending on the nature of the relocation,  
16 the association may also decide that it is necessary or advisable to require an  
17 increase in the allocated interest of the unit under Section 2-107, which would  
18 necessarily entail decreasing the allocated interests of other unit owners.

### 19 **Comment**

20  
21 1. This section changes the effect of most current declarations, under which the  
22 boundaries between units may not be altered without unanimous or nearly unanimous consent of  
23 the unit owners. As the section makes clear, the relocation of boundaries is allowed  
24 notwithstanding restrictions in the declaration. The declaration, however, may specify different  
25 procedures for the association's approval of boundary relocations.

26  
27 \* \* \*

### 28 **SECTION 2-114. BUILDING ENCROACHMENT.**

#### 29 **Alternative A**

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

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

- 1           2. The original Alternative B applies only when a unit is constructed in  
2           “substantial accordance with the description” in the declaration. The revision  
3           replaces it with a five-foot limit and applies the limit to both Alternatives.  
4  
5           3. The original text preserves or creates liability for an owner’s willful  
6           misconduct or the failure of a declarant or another person to adhere to plats and  
7           plans. The revision limits the liability provision to the declarant’s conduct and  
8           handles the owner’s misconduct differently by preventing the owner from  
9           obtaining the benefit of this section.  
10  
11          4. The original text is possibly unclear as to whether a unit owner who gains  
12          space has to pay compensation to an owner who loses space. The revision  
13          makes it clearer that there is no payment requirement by narrowing of the  
14          scope of the “liability rule”.  
15  
16          5. The original Alternative B is not clear as to whether it matters if the  
17          encroachment is due to original construction or a subsequent change or a  
18          “reconstruction.” The revision applies the same rule to original construction  
19          and subsequent changes for both Alternatives.  
20  
21          6. The original Alternative A applies when any “common element encroaches  
22          on any other . . . common element.” The revision narrows the scope for both  
23          Alternatives, applying only when a unit encroaches on another unit or a  
24          common area.  
25

26           **SECTION 2-117. AMENDMENT OF DECLARATION.**

27           \* \* \*

28           (c) Every amendment to the declaration must be recorded in every [county] in which any  
29          portion of the common interest community is located and is effective only upon recordation. An  
30          amendment must be indexed [in the grantee’s index] in the name of the common interest  
31          community and the association and [in the grantor’s index] in the name of the parties executing  
32          the amendment.

33           \* \* \*

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

35           (a) Except for a taking of all the units by eminent domain, foreclosure against an entire  
36          cooperative of a security interest that has priority over the declaration, or in the circumstances

1 described in Section 2-124, a common interest community may be terminated only by agreement  
2 of unit owners of units to which at least 80 percent of the votes in the association are allocated,  
3 including at least 80 percent of the votes allocated to units not owned by the declarant, and with  
4 any other approvals required by the declaration. The declaration may require a larger percentage  
5 of total votes in the association for approval, but termination requires approval by at least 80  
6 percent of the votes allocated to units not owned by the declarant. The declaration may specify a  
7 smaller percentage only if all of the units are restricted exclusively to nonresidential uses.

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

14 (c) A termination agreement may provide for the sale of some or all of the common  
15 elements and units of the common interest community following termination. If, pursuant to the  
16 agreement, any real estate in the common interest community is to be sold following termination,  
17 the termination agreement must set forth the minimum terms of the sale.

18 [(d) Reserved.]

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

1 has all powers necessary and appropriate to effect the sale. Until the sale has been concluded and  
2 the proceeds thereof distributed, the association continues in existence with all powers it had  
3 before termination. Proceeds of the sale must be distributed to unit owners and lien holders as  
4 their interests may appear, in accordance with subsections (h), (i), (j), and (m). Unless  
5 otherwise specified in the termination agreement, as long as the association holds title to the real  
6 estate, each unit owner and the unit owner's successors in interest have an exclusive right to  
7 occupancy of the portion of the real estate that formerly constituted the unit. During the period of  
8 that occupancy, each unit owner and the unit owner's successors in interest remain liable for all  
9 assessments and other obligations imposed on unit owners by this [act] or the declaration.

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

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

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

21 (i) In a cooperative, the declaration may provide that all creditors of the association have  
22 priority over any interests of unit owners and creditors of unit owners. In that event, following  
23 termination, creditors of the association holding liens on the cooperative which were [recorded]

1 [docketed] [insert other procedures required under state law to perfect a lien on real estate as a  
2 result of a judgment] before termination may enforce their liens in the same manner as any lien  
3 holder, and any other creditor of the association is to be treated as if the creditor had perfected a  
4 lien against the cooperative immediately before termination. Unless the declaration provides that  
5 all creditors of the association have that priority:

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

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

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

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

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

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

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

22 (1) Except as otherwise provided in paragraph (2), the respective interests of unit  
23 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 appraisal made by the independent appraisers must be distributed to the unit owners and becomes final unless:

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

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

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

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

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

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

(C) in a planned community, their respective common expense liabilities

1 immediately before the termination.

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

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

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

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

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



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

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

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

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

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

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

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

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

3. Existing subsection (f) handles title to real estate not being sold pursuant to the termination agreement. The existing subsection shifts title to all common

elements to the unit owners in tenancy in common (note in the condominium the unit owners already hold title in this form), shifts title to the units to a tenancy in common in communities having only horizontal-boundary units, 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 New subsection (m) 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

1 withdrawing units is not effective. See Section 2-117(d).

2  
3 **Comment**

4 \* \* \*

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

7  
8 Termination without sale is not likely to be the usual case, but might occur if the unit  
9 owners plan to form a new common interest community. In a condominium or planned  
10 community, title to the common elements following termination vests in the unit owners as  
11 tenants in common if that real estate is not to be sold. The unit owners continue to hold  
12 individual titles to their units. Therefore, in a condominium or planned community with units  
13 located in a high-rise building, either the declaration or the termination agreement should  
14 address the needs for easements of support and access for the high-rise units over the real estate  
15 which all the unit owners will own as tenants in common. Undoubtedly, the unit owners will  
16 immediately reconstitute themselves as some form of common interest community.

17  
18 9. Subsection (f) does not cover the possibility that a cooperative might be terminated but  
19 the real estate not sold. While this is not likely to be the usual case, termination without sale  
20 might occur if the cooperative unit owners plan conversion to another form of common interest  
21 community, such as a condominium. Since, after termination of a cooperative title to the real  
22 estate remains in the association, it could record a new declaration corresponding to the new  
23 form of common interest community adopted, convey the units to the former unit holders, and  
24 then itself continue as the new common interest community's association.

25  
26 **SECTION 2-120. MASTER ASSOCIATIONS.**

27 (a) A declaration may:

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

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

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

35 (b) All provisions of this [act] applicable to unit owners associations apply to the

1 master association, except as modified by this section.

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

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

13 (e) At a meeting of the unit owners for which the subject of delegation of powers from  
14 the executive board to a master association is listed in the notice of the meeting, the unit owners  
15 by a majority of the votes cast at the meeting may revoke the delegation. The effect of revocation  
16 on the rights and obligations of parties under a contract between a unit owners association and a  
17 master association is determined by law of this state other than this [act].

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

23 (g) After a unit owners association delegates a power to a master association, the

unit owners association and its executive board members and its officers have no liability for an act or omission of the master association with respect to the delegated power.

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

(i) Not later than 90 days after termination of a period of declarant control of the master association, the executive board of the master association must be elected in one of the following ways:

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

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

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

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

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

1 master association.

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

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

- 5  
6 1. The content of subsection (a) is reorganized without major changes.  
7 Language in subsection (a) that served as part of the definition of “master  
8 association” is moved to Section 1-103(22). The revision clarifies the language  
9 used in the existing subsection, which (i) uses the term “delegate” only when a  
10 unit owners association transfers a power to a separate master association (ii)  
11 uses the term “exercise” when a master association serving multiple common  
12 interest communities is also the unit owners association. See the definition of  
13 “master association” that describes both types of master associations. Section  
14 1-103(22). Revised subsection (a) also recognizes the special declarant right to  
15 make the common interest community subject to a master association.  
16  
17 2. The existing section requires that all delegations to a master association be  
18 set forth in the declaration. New subsection (c) adds flexibility by allowing the  
19 executive board of the common interest community to delegate powers to a  
20 master association, subject to review by the unit owners. A decision to delegate  
21 powers to a master association often has a substantial impact on unit owners. If  
22 after notice more than 10% of the unit owners object to a board delegation, the  
23 delegation is effective only if approved by the unit owners at a meeting or by  
24 ballot without a meeting under Section 3-110.  
25  
26 3. Subsection (d) allows revocation of a delegation to a master association by  
27 deferring to the normal procedures for amending the declaration for  
28 delegations contained in the declaration. See Section 2-117, *Amendment of*  
29 *Declaration*.  
30  
31 4. New subsection (e) has a special rule for revocation by the unit owners of a  
32 board-approved delegation of powers to a master association. By a majority  
33 vote at any meeting in which the subject of revocation is listed in the meeting  
34 notice, the unit owners may revoke a delegation by majority vote. As the last  
35 sentence of subsection (e) indicates, the statutory right to revoke does not  
36 override any contract rights a master association may have under an existing  
37 contract. For example, other law determines whether the association is  
38 obligated to pay damages if revocation terminates a contract before its  
39 scheduled expiration date.  
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-

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

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

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

(a) Any two or more common interest communities may be merged or consolidated into a single common interest community under subsection (b) by agreement of the unit owners or by the exercise of a special declarant right. In the event of a merger or consolidation, unless the 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 through or over the common  
23 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(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.

Originally subsection (a) specified that officers and members elected by the unit owners



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

6  
7 For both declarant-appointed and elected officers and members, subsection (a) looks to  
8 other state law to measure the standard of care and the basis of liability. For declarant-appointed  
9 persons, the law of trusts determines the precise content of the fiduciary duties, as well as other  
10 duties including conflict-of-interest rules, owed to the unit owners. For elected officers and  
11 members, the standards of conduct and the standards of liability are determined by the content of  
12 the state nonprofit corporation statute. This applies regardless of the organizational type of the  
13 association. Thus, if an association is a limited liability company (LLC), the standards for its  
14 officers and board members are not affected by the content to of the state LLC statute.

15  
16 A majority of states have adopted a version of the ~~ABA's~~ABA's Model Nonprofit  
17 Corporation Act (MNCA) (3d ed. 1987; the ABA is presently working on a 4th edition). MNCA  
18 Section 8.30 sets forth standards of conduct, and section 8.31 sets forth standards of liability for  
19 directors. Executive board members are treated as “directors” whether or not they have the  
20 formal title of “director” as a member of the association’s governing board. MNCA Section 8.42  
21 prescribes standards of conduct for officers; they include a duty to act with the care of “an  
22 ordinarily prudent person.” States without the model act may apply different rules for director  
23 conduct, such as a trust rule or the rules applicable to directors of standard, for-profit  
24 corporations, as well as different rules for officers.

25  
26 2. Executive board members frequently will obtain the benefits of the business judgment  
27 rule under subsection (a). The business judgment rule is a standard of liability, not a standard of  
28 conduct. The rule curtails judicial review of board decisions by creating a presumption of sound  
29 business judgment. As long as the board decision might serve a rational business purpose, courts  
30 do not interfere by substituting their own ideas of what is or is not a correct or reasonable  
31 decision. The rule also presumes that the directors act in good faith, on an informed basis, and  
32 with the honest belief that their action furthers the best interests of the corporation. The business  
33 judgment rule began as common-law rule for evaluating the conduct of directors of for-profit  
34 corporations. Now many courts apply the rule in the non-profit context generally and as the  
35 basis for evaluating the activities of boards of unit owners associations. See, e.g., *Reiner v.*  
36 *Ehrlich*, 66 A.3d 1132 (Md. Ct. Spec. App. 2013); *Committee for a Better Twin Rivers v. Twin*  
37 *Rivers Homeowners Association*, 929 A.2d 1060 (N.J. 2007); *40 West 67th Street v. Pullman*,  
38 *790 N.WE.2d 1174* (N.Y. 2003).

39  
40 Subsection (a) does not codify the business judgment rule. Its application to executive  
41 boards depends on judicial adoption and on other state statutes. Nor does MNCA Section 8.31  
42 codify the business judgment rule, but it has several components, one of which reflects some of  
43 the principal elements of the common-law business judgment rule.

44  
45 [RENUMBER SUBSEQUENT COMMENTS 3 and 4]  
46

\* \* \*

\* \* \*

**SECTION 3-104. SPECIAL DECLARANT RIGHTS.**

(a) In this section:

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

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

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

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

(d) A declarant may voluntarily transfer part or all of a special declarant right only by an instrument that describes the special declarant right being transferred. The transfer becomes effective when recorded in every [county] in which any portion of the common interest community is located. (e) Except as otherwise provided in this section, a successor to a special declarant right is subject to all obligations and liabilities imposed on the transferor by this [act] or the declaration.

(f) If a declarant transfers a special declarant right to an affiliate of the declarant, the transferor and the successor are jointly and severally liable for all obligations and liabilities

1 imposed on either person by this [act] or the declaration. Lack of privity does not deprive a unit  
2 owner of standing to maintain an action to enforce any obligation or liability of the transferor or  
3 transferee.

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

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

7 (2) is not liable for an obligation or liability arising after the transfer imposed on  
8 the successor by this [act] or the declaration.(h) A non-affiliate successor that succeeds to fewer  
9 than all special declarant rights held by the transferor is not subject to an obligation or liability  
10 that relates to a special declarant right not transferred to the successor.

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

13 (1) a misrepresentation by a previous declarant;

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

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

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

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

1 (k) A successor to a special declarant right by an involuntary transfer may declare its  
2 intention in a recorded instrument to hold the right solely for transfer to another person. After  
3 recording the instrument, the successor may not exercise a special declarant right, other than a  
4 right to control the executive board under Section 3-103(d), and an attempt to exercise a special  
5 declarant right in violation of this subsection is void. As long as the successor complies with this  
6 subsection, the successor is not subject to an obligation or liability imposed by this [act] or the  
7 declaration other than liability for its act or omission under Section 3-103(d).

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

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

12  
13 Extensive revisions are made to Section 3-104, including reorganization, in an  
14 attempt to make the section easier to comprehend. The major changes of  
15 substance are the following:

16  
17 1. Subsection (b) makes all special declarant rights interests in real property  
18 and automatically makes every special declarant right appurtenant to all units  
19 owned by the declarant in the common interest community, including potential  
20 additional units that the declarant may add in the future by exercise of a  
21 development right. In effect, a special declarant right is a “floating” servitude;  
22 it is appurtenant to the declarant’s real estate in the common interest  
23 community as it changes over time – reduced when the declarant sells units  
24 and makes other transfers and increased when the declarant adds units to the  
25 common interest community. A related revision to Section § 2-105(a)(8),  
26 *Contents of Declaration*, drops the requirement that the declaration sufficiently  
27 describe “the real estate to which each [special declarant right] applies” except  
28 for a development right.

29  
30 2. Subsection (c) is a mandatory rule that terminates all special declarant rights  
31 when the declarant owns no units in the common interest community or the  
32 right to create additional units pursuant to a development right, which  
33 describes the relevant real estate in the declaration.

34  
35 3. Subsection (d) allows all types of voluntary transfers of special declarant  
36 rights. Because a transfer of “part or all of a special declarant right” is allowed,

1 a special declarant right is divisible. A declarant may transfer a special  
2 declarant right on an exclusive or non-exclusive basis. This section states no  
3 rules for involuntary transfers of special declarant rights (e.g., sales to satisfy  
4 judgment liens, tax sales) but they are allowed; the law generally recognizes  
5 that rights that may be voluntarily transferred are transferable involuntarily.  
6 The last sentence of existing Section 3-104(a) states: "The instrument is not  
7 effective unless executed by the transferee." This sentence is not retained in  
8 subsection (d), and it is a change of substance. Most deeds and mortgages are  
9 signed only by the grantor, not by the "transferee." A grantee's acceptance of  
10 the instrument is considered agreement to its contents. Requiring execution by  
11 the transferee might result in inadvertent failures to transfer a special declarant  
12 right if parties fail to study the act carefully.

13  
14 4. Subsection (i) protects successor declarants from certain obligations and  
15 liabilities of the transferor declarant who granted a special declarant right to  
16 the successor. This subsection relieves the successor only from obligations and  
17 liabilities "imposed by this [act] or the declaration." This limitation means that  
18 a successor who uses improvements made by a previous declarant in the  
19 successor's project is not necessarily relieved of an obligation to repair defects  
20 or make upgrades to the improvements. Other law, including contract and tort  
21 principles, will determine whether the successor who uses the transferor's old  
22 improvements undertakes an obligation or liability.

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

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

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

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

38 (2) An association shall hold a special meeting of unit owners to address any  
39 matter affecting the common interest community or the association if its president, a majority of  
40 the executive board, or unit owners having at least 20 percent, or any lower percentage specified

1 in the bylaws, of the votes in the association request that the secretary call the meeting. If the  
2 association does not notify unit owners of a special meeting within 30 days after the requisite  
3 number or percentage of unit owners request the secretary to do so, the requesting members may  
4 directly notify all the unit owners of the meeting. The unit owners may discuss at a special  
5 meeting matters not described in the notice under paragraph (3), but may not take action on a  
6 matter not described in the notice without the consent of all unit owners.

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

11 including: ~~(A)~~ (A) a statement of the general nature of any proposed amendment to the  
12 declaration or bylaws;

13 (B) any budget changes; and

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

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

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

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

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

23 (6) In the notice for a meeting held at a physical location, the executive board may

1 notify all unit owners that they may participate remotely in the meeting by a means of  
2 communication consistent with paragraph (5).

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

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

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

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

12 (C) discuss labor or personnel matters;

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

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

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

23 (3) During the period of declarant control, the executive board shall meet at least

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

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

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

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

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

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

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



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

3 (9) During the period of declarant control, the executive board may act, without  
4 a meeting, by unanimous consent as documented in a record authenticated by all its members.  
5 The secretary promptly shall give notice to all unit owners of any action taken by unanimous  
6 consent. After termination of the period of declarant control, the executive board may act by  
7 unanimous consent only to undertake ministerial actions or to implement actions previously  
8 taken at a meeting of the executive board.

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

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

16 1. The revision to Section 3-108(a)(2) clears up an ambiguity about what  
17 matters may be "considered" at a special meeting. The revision clarifies that,  
18 subject to the normal rules governing meetings, unit owners may raise and discuss  
19 any issues of their choosing, including the taking of nonbinding (straw) votes,  
20 which do not take or implement action. The revision also allows unit owners to  
21 avoid the rule against taking action on a matter not described in the meeting  
22 notice with the consent of all unit owners.  
23

24 2. Section 3-108(a)(4) and 3-108(b)(5) are deleted because the subject of  
25 notice for emergency meetings is now addressed by new Section 3-125(c),  
26 *Emergency Powers*, infra, which applies notwithstanding other sections of the act.  
27

28 3. Revised 3-108(a)(5) and (6) authorize electronic unit owner meetings,  
29 in which everyone attends remotely, and hybrid meetings in which some attend at  
30 a physical location and some attend remotely. The existing paragraph authorizes  
31 an electronic meeting only if authorized by the declaration or bylaws. Revised  
32 paragraph (5) changes the default rule, allowing electronic meetings unless  
33 prohibited by the declaration or bylaws. This allows the executive board to decide

whether live or electronic meetings are preferable. Second, this revision follows the language of the Uniform Electronic Wills Act (E-Wills Act) (2019), approved by the ULC in 2019, which defines “Electronic presence” as “the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location.” Id. § 2(2). As the Comment to the E-Wills Act notes, the “to the same extent” phrase accommodates access for persons with disabilities. See also Revised Uniform Law on Notarial Acts (RULONA) § 14A(a)(1) (2018), which defines “communication technology” as “an electronic device or process that: (A) allows a notary public and a remotely located individual to communicate with each other simultaneously by sight and sound; and (B) when necessary and consistent with other applicable law, facilitates communication with a remotely located individual who has a vision, hearing, or speech impairment.”

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

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

#### **Proposed New Comment**

7. Subsection (b)(5) provides for unit owners to have access to materials distributed to the executive board before its meeting with an exception for unapproved minutes. After a meeting, it is clearly the better practice for the board to approve minutes and make them available to unit owners as soon as reasonably practicable. Because the customs of common interest communities and the expectations of unit owners in those communities vary widely across the country, the drafters thought it inappropriate to impose a single standard regarding how or when to mandate approval of minutes and the manner of their circulation to unit owners. The association, however, may adopt a rule or bylaw governing the process and timing of approval of minutes for board meetings that is consistent with the community’s expectations.

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

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

attend in person, by proxy, or by means of communication under Section 3-

108(a)(6) or (7) .(b) Unless the bylaws specify a larger number, a quorum of the executive board is present for purposes of determining the validity of any action taken at a meeting of the executive board only if individuals entitled to cast a majority of the votes on that board are present at the time a vote regarding that action is taken. If a quorum is present when a vote is taken, the affirmative vote of a majority of the board members present is the act of the executive board unless a greater vote is required by the declaration or bylaws.

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

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

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

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

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

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

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

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

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

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

3                   When a unit owner votes by proxy, the association must be able to verify the  
4 identity of the unit owner and the proxy holder.       (3) A unit owner may revoke a proxy given  
5 pursuant to this section only by actual notice of revocation to the person presiding at a meeting.

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

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

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

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

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

15                   (2) With the notice the association shall deliver instructions for casting a ballot  
16 and:

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

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

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

23                   (4) In the notice the association shall :

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. New Section 3-110(b)(2) requires that for electronic meetings and hybrid electronic meetings, the association must implement reasonable measures to verify the identity of each unit owner attending remotely. Those unit owners

1 have the right to vote by a method determined under Section 3-110(b)(1).

2  
3 4. The content in existing Section 3-110(b)(3) dealing with the number of  
4 votes required to pass an action is moved to new subsection (h), with some  
5 changes in its language including extending its scope from voting at meetings to  
6 votes taken without a meeting.

7  
8 5. The existing Section allows a unit owner to vote at a meeting without  
9 being physically present either by “absentee ballot” under existing Section 3-  
10 110(b)(4) or by proxy under Section 3-110(c). The revision eliminates the  
11 alternatives, allowing an absent unit owner to vote at a meeting only by using a  
12 proxy (which may be directed or undirected). Section 3-110(b)(4) is deleted, and  
13 the revised section uses “ballot” only for a vote without a meeting. This better  
14 conforms to how the terms are generally used in corporate practice.

15  
16 6. New Section 3-110(c)(2) adds a requirement that, for proxy voting, the  
17 association must be able to verify the identity of the unit owner and the proxy  
18 holder.

19  
20 7. The revisions to Section 3-110(d) dealing with voting without a meeting  
21 include rules for electronic ballots, the right of a unit owner to revoke a ballot,  
22 and requirements that the association verify the identity of unit owners casting  
23 ballots and create a record of electronic votes that is capable of retention,  
24 retrieval, and review.

25  
26 **SECTION 3-115. ASSESSMENTS.**

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

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

35 (c) The declaration may provide that:

36 (1) a common expense associated with the maintenance, repair, or replacement of

1 a limited common element must be assessed against the units to which that limited common  
2 element is assigned, equally, or in any other proportion the declaration provides;

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

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

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

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

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

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

21 (f) Before the association makes an assessment under subsection (e), the association shall  
22 give notice to the unit owner and an opportunity for a hearing. The assessment is limited to the  
23 expenses of the association incurred under subsection (e) less any insurance proceeds received



1 by the association, whether the difference results from the application of a deductible or  
2 otherwise.

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

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

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

9  
10 1. Section 3-115(c) is revised to make it clear that for all three paragraphs  
11 (1)-(3), the declaration may change the default rule of Section 3-115(b) that unit  
12 owners pay common expenses according to their allocated interests only if the  
13 declaration has a provision that common expenses "must be assessed" differently.  
14 The provision in the declaration may not confer discretion on the executive board  
15 with respect to making an assessment.

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

31  
32 3. Section 3-115(c)(3) is revised to make clear that assessing utilities "in  
33 proportion to usage" does not require separate metering if usage is reasonably  
34 estimated.

35  
36 4. Section 3-115(e) deals with the ability of the association to assess  
37 expenses exclusively against a unit owner whose "bad behavior" causes loss,  
38 damage, or expense. The revision to this subsection requires "wilfull  
39 misconduct," eliminating the ability to assess due to "gross negligence" on the

1 ground that it is too difficult for executive boards and other persons to distinguish  
2 gross negligence from ordinary negligence. The revision adds liability for a unit  
3 owner's failure to meet maintenance standards for their equipment for which they  
4 are responsible causes damage outside their unit. For example, an association rule  
5 may require replacement of hot water heaters every 10 years, and a failure to  
6 replace may result in water damage to property outside of the owner's unit. New  
7 subsection (f) adds procedural protections for unit owners charged with "bad  
8 behavior" and provides that the owner is liable only for loss not covered by the  
9 association's master insurance policy. The source for revised subsection (e) and  
10 new subsection (f) is Conn. Gen. Stat. Ann. § 47-257(e), which Connecticut  
11 adopted as a non-uniform provision in an amendment to its enactment of UCIOA.  
12

13 5. New subsection (h) allows the association to adopt a rule allowing unit  
14 owners to prepay their assessments at a reasonable discount.  
15

### 16 **Comment**

17 1. This section contemplates that a declarant might find it advantageous, particularly in  
18 the early stages of project development, to pay all of the expenses of the common interest  
19 community himself rather than assessing each unit individually. Such a situation might arise, for  
20 example, where a declarant owns most of the units in the project and wishes to avoid billing the  
21 costs of each unit separately and crediting payment to each unit. It might also arise in the case of  
22 a declarant who, although willing to assume all expenses of the common interest community, is  
23 unwilling to make payments for replacement reserves or for other expenses which he expects  
24 will ultimately be part of the association's budget. Subsection (a) grants the declarant such  
25 flexibility while at the same time providing that once an assessment is made against any unit, all  
26 units, including those owned by the declarant, must be assessed for their full portion of the  
27 common expense liability.  
28

29 2. Common expenses are by their nature recurring, and the association must collect what  
30 the act calls the "periodic common expense assessment." Subsection (a) requires assessment "at  
31 least annually" and allows any shorter period. Monthly assessments are most commonly used.  
32 The association may choose to change its periodic common expense assessment if it determines a  
33 shorter or longer period is appropriate.  
34

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

36 (a) The executive board, at least annually, shall adopt a proposed budget for the  
37 common interest community for consideration by the unit owners. Not later than [30] days after  
38 adoption of a proposed budget, the executive board shall provide to all the unit owners a  
39 summary of the budget, including any reserves, and a statement of the basis on which any  
40 reserves are calculated and funded. Simultaneously, the board shall set a date not less than 10

1 days or more than 60 days after providing the summary for a meeting of the unit owners to  
2 consider ratification of the budget. Unless at that meeting a majority of all unit owners or any  
3 larger number specified in the declaration reject the budget, the budget is ratified, whether or not  
4 a quorum is present. If a proposed budget is rejected, the budget last ratified by the unit owners  
5 continues until unit owners ratify a subsequent budget.

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

10 **Reporter's Note (4/2/2021)**

11  
12 Subsection (c), the final subsection of this section, is deleted because the subject  
13 is now addressed by new proposed Section 3-125(e), *Emergency Powers*, infra.

14 **Comment**

15 \* \* \*

16 3. . . .

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

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

21 (B) a statement of any other reserves;

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

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

25  
26 **SECTION 3-125. EMERGENCY POWERS.**

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

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

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

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

3 (B) threat to the habitability of units;

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

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

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

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

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

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

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

23 (f) The executive board may use funds of the association, including reserves, to pay the

1 reasonable costs of an action under subsection (e).

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

4 **Reporter's Note (6/26/2021)**

5  
6 1. New Section 3-125 provides guidance and flexibility for associations  
7 and their executive boards to respond to emergencies, including natural disasters  
8 and public health emergencies such as the coronavirus pandemic. This section  
9 replaces and expands upon the following three existing provisions in the act:

10 Section 3-108(a)(4). The minimum time to give notice [for a unit owners  
11 meeting] may be reduced or waived for a meeting called to deal with an  
12 emergency.

13 Section 3-108(b)(5). Unless the [executive board] meeting is included in a  
14 schedule given to the unit owners or the meeting is called to deal with an  
15 emergency, the secretary or other officer specified in the bylaws shall give  
16 notice of each executive board meeting to each board member and to the unit  
17 owners. The notice must be given at least 10 days before the meeting and must  
18 state the time, date, place, and agenda of the meeting.

19 Section 3-123(c). If the executive board determines by a two-thirds vote  
20 that a special assessment is necessary to respond to an emergency: (1) the  
21 special assessment becomes effective immediately in accordance with the  
22 terms of the vote; (2) notice of the emergency assessment must be provided  
23 promptly to all unit owners; and (3) the executive board may spend the funds  
24 paid on account of the emergency assessment only for the purposes described  
25 in the vote.

26  
27 2. Subsection (a) defines "emergency," a term not defined in the existing  
28 act. Although the definition is broad, it should serve to discourage an executive  
29 board from bypassing normal procedures by "declaring an emergency" without a  
30 solid justification. The section provides special rules for notices. Before and after  
31 acting to respond to an emergency, the executive board must notify unit owners  
32 "whom it is practicable to reach" with notices given "in any practicable manner."  
33 Subsection (e) authorizes the board to take actions it considers reasonably  
34 necessary to protect the unit owners and other persons during an emergency. The  
35 section does not attempt to indicate what those actions may be; when appropriate,  
36 they may include turning off electrical and other utility services, limiting access to  
37 the common interest community for residents and other persons, and passing  
38 emergency rules. In taking action under this section, board members must comply  
39 with the normal standards of care and loyalty required by Section 3-103.

40  
41 **[ARTICLE] 4**

42 **PROTECTION OF PURCHASERS**

1           \* \* \*

2           **SECTION 4-103. PUBLIC OFFERING STATEMENT; GENERAL**

3           **PROVISIONS.**

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

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

9                   (2) a general description of the common interest community, including to the  
10 extent possible, the types, number, and declarant's schedule of commencement and completion  
11 of construction of buildings, and amenities that the declarant anticipates including in the  
12 common interest community;

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

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

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

21                  (6) any services not reflected in the budget that the declarant provides, or  
22 expenses that the declarant pays and which the declarant expects may become at any subsequent  
23 time a common expense of the association and the projected common expense assessment

1 attributable to each of those services or expenses for the association and for each type of unit;

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

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

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

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

10 (11) a statement that:

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

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

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

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

23 (13) a statement that any deposit made in connection with the purchase of a unit

1 will be held in an escrow account until closing and will be returned to the purchaser if the  
2 purchaser cancels the contract pursuant to Section 4-108, together with the name and address of  
3 the escrow agent;

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

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

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

10 (15) a description of the insurance coverage provided for the benefit of unit  
11 owners;

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

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

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

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

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



1 association fails to pay real estate taxes or payments due the holder of a security interest  
2 encumbering the cooperative;

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

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

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

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

16 (B) a statement of any other reserves;

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

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

20 (c) If a common interest community composed of not more than 12 units is not subject to  
21 any development right and no power is reserved to a declarant to make the common interest  
22 community part of a larger common interest community, group of common interest communities,  
23 or other real estate, a public offering statement may include the information otherwise required

1 by subsection (a) (9), (10), (15), (16), (17), (18), and (19) and the narrative descriptions of  
2 documents required by subsection (a)(4).

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

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

6  
7 1. New Section 4-103(a)(22) requires the public offering statement to  
8 disclose whether units may be sold without the consent of all the unit owners after  
9 termination under Section 2-118 if the common interest community contains a  
10 unit without horizontal boundaries (i.e., if there are units not in multi-story  
11 buildings). This added disclosure is a companion to the revision to Section 2-  
12 118(c) and (d), which allows termination of a common interest community and  
13 the sale of all real estate, including all units, with a supermajority vote of 80%,  
14 regardless of whether the units have horizontal boundaries. This is a significant  
15 change in rights of units owners, who should be informed of the possibility.  
16

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

#### 26 **Comment**

27 \* \* \*

28 7. Paragraph (14) requires that the declarant disclose the existence of any restrictions on  
29 the use and occupancy of units, including restrictions on rentals or the creation of time-share  
30 arrangements. The declarant must disclose any rights of first refusal or other restrictions on the  
31 classes of persons to whom units may be sold. It also requires disclosure of any provisions  
32 limiting the amount for which units may be sold or on the part of the sales price which may be  
33 retained by the selling unit owner. In some existing housing cooperatives for low income  
34 families the unit owner is required to sell at no more than a fixed sum; sometimes the amount  
35 which the unit owner paid; sometimes that plus a fixed appreciation. In addition to that practice,  
36 the section contemplates other possible limitations on the owner's right to receive sales proceeds  
37 such as a provision under which the developer shares in any appreciation in value.  
38

39 \* \* \*

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

## Reporter's Notes

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

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

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

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

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

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

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

### Comment

1 1. Time sharing has become increasingly ~~years~~ frequent since the 1960s, particularly to  
2 in resort common interest communities. In recognition of this fact, this section requires the  
3 disclosure of certain information with respect to time sharing. This section does not apply to the  
4 sale of time-share units that are subject to another state statute requiring the declarant to file a  
5 public offering statement with a state agency. See Section 4-107.  
6

7 2. Some existing state statutes dealing with condominiums, planned communities, or  
8 cooperatives are silent with respect to time-share ownership. The inclusion of disclosure  
9 provisions for certain forms of time sharing in this Act, however, does not imply that other law  
10 regulating time sharing is affected in any way in a State merely because that State enacts this  
11 Act.  
12

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

#### 17 **Reporter's Note**

18  
19 The amendment updates the language of the Comment and refers to Section  
20 4-107, which contains a proposed amendment for an exemption from this act's  
21 requirement of a public offering statement when the declarant has prepared a  
22 time-share public offering statement.  
23

#### 24 **SECTION 4-107. SAME; COMMON INTEREST COMMUNITY**

25 **REGISTERED WITH GOVERNMENT AGENCY.** If an interest in a common interest  
26 community is currently registered with the Securities and Exchange Commission of the United  
27 States [or with the state pursuant to [cite to appropriate state time-share statute or other state  
28 statute]], a declarant satisfies all requirements of this [act] relating to the preparation of a public  
29 offering statement if the declarant delivers to the purchaser a copy of the public offering  
30 statement filed with the Securities and Exchange Commission [or [the appropriate state agency]].  
31 [An interest in a common interest community is not a security under [cite to appropriate state  
32 securities regulation statutes].]

33 **Legislative Note:** A state that has an agency that regulates time-share developments or other  
34 types of common interest communities and requires the preparation of a public offering  
35 statement should refer to statute and provide the name of the state agency in the brackets in the  
36 first sentence.  
37

1 **Reporter's Note**

2  
3 The proposed amendment provides optional language for an exemption from the  
4 public offering statement provisions of this article when the state has enacted a  
5 time-share statute that requires the developer or seller of time shares to prepare a  
6 public offering statement to be filed with a state agency and given to purchasers.  
7 The amendment follows the language of Nev. Rev. Stat. § 116.4107, which  
8 provides an exemption for a common interest community registered to sell time-  
9 shares with the Real Estate Division of the Department of Business and Industry.  
10

11 **SECTION 4-109. RESALES OF UNITS.**

12 (a) Except in the case of a sale in which delivery of a public offering statement is  
13 required, or unless exempt under Section 4-101(b), a unit owner shall furnish to a purchaser  
14 before the earlier of conveyance or transfer of the right to possession of a unit, a copy of the  
15 bylaws, the rules of the association, and the declaration other than plats and plans. The unit  
16 owner shall also furnish a certificate containing:

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

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

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

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

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

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

1 (7) the current operating budget of the association;

2 (8) a statement of any unsatisfied judgments against the association and the status  
3 of any pending suits in which the association is a defendant;

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

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

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

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

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

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

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

23 (16) a statement disclosing the effect on the unit to be conveyed of any

1 restriction on the right to use or occupy the unit , including a restriction on a lease or other  
2 rental of the unit.

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

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

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

14  
15 1. The revision to Section 4-109(a) removes a possible ambiguity  
16 concerning the location of the phrase "other than." The "other than" phrase means  
17 the unit owner need not furnish "plats and plans" to the purchaser; the owner must  
18 furnish the bylaws and rules.

19  
20 2. The revision to Section 4-109(a)(16) expands the scope of the  
21 disclosure in to include not only standard leases, but also time-share  
22 arrangements, short-term rentals, and sharing platforms that sell licenses to  
23 guests, such as Airbnb. The revision matches the scope of what the declaration  
24 must and may disclose in Section 2-105(a)(12) and (b). Recently many common  
25 interest communities have placed restrictions on short-term rentals in declarations  
26 and rules, and this information is important for many ~~buyers~~purchasers.

### 27 **[ARTICLE] 5**

### 28 **~~TRANSITION~~**

29 **~~SECTION~~ TRANSITIONSECTION 5-101. EFFECTIVE DATE EFFECTIVE  
30 DATE.**

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

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

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

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

~~(e)(c)~~ [Except as provided in subsection (d).] On and after [all-inclusive date] this [act] applies to all common interest communities.

[(d) This [act] does not apply to a common interest community created before [the effective date of this [act]] which elects not to be subject to this [act] by amending its declaration by vote or agreement of unit owners of units to which more than 50 percent of the votes in the association are allocated and recording the amendment before [all-inclusive date]. This subsection supersedes the requirements of Section 2-117(a), any inconsistent provisions of other laws of this State, and any inconsistent provisions in the declaration or bylaws of the common interest community.]

**Legislative Note:** The “all-inclusive” date should be ~~at least one year~~ three years after the effective date of the act, ~~but no more than three years~~. For a state that previously adopted UCIOA (2014) or an earlier version of UCIOA, the effective date in subsection (b) should be the effective date stated in the earlier adoption. Subsection (d) is an optional provision. If a state decides that full applicability of the act to all preexisting common interest communities is not appropriate, subsection (d) provides for a procedure for preexisting communities to make an election to opt out of the act.

### Reporter’s Note (5/25/2021)

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



1 in many cases management companies) to become aware of and familiar with the  
2 new act.

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

10  
11 ***Proposed new Comment***

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

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

29 (1) do not apply to common interest communities that are subject to this [act]; and

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

32 ***Legislative Note:** For a state that previously adopted UCIOA (2014) or an earlier version of*  
33 *UCIOA, the effective date in this section should be the effective date stated in the earlier*  
34 *adoption. After the all-inclusive date, unless the state adopts the optional bracketed provision*  
35 *in Section 5-101(d), the state should repeal any previous condominium statute identified in this*  
36 *section because this act will then apply to all condominiums within the state.*

37  
38 **Reporter’s Note (5/25/2021)**

39  
40 This section moves the existing second sentence from Section 1-201 and keeps it

without change as paragraph (1). The existing text in Section 1-201 does not expressly address retention of the statutes for preexisting communities, although obviously that is implied. New paragraph (2) says this directly. A preexisting common interest community remains subject to the old statutes until the “all-inclusive date” or until it makes an election to adopt the act under Section 1-202, 1-203, or 5-101(b)(2).

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

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

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

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

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

(1) to comply with the requirements of this [act] for the creation of a common interest community; or

(2) to prepare or amend surveys, plats, and plans.

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

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

**Reporter’s Note (5/25/2021)**

1. Subsection (a) invalidates the provisions in the declaration or bylaws of a preexisting common interest community that do not comply with the act’s

1 mandatory rules when the community becomes subject to the act. Common  
2 interest communities created before the effective date of this act become fully  
3 subject to this act under Section 5-101(c) at the all-inclusive date or by an earlier  
4 election under Section 5-101(b)(2).

5  
6 2. A common interest community that becomes subject to the act should  
7 study their governing documents and amend or restate them to comply with this  
8 act, but this section does not require amendment; invalidation of provisions that  
9 are not permitted takes place automatically.

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

20 4. Plats and plans are part of the declaration. Under subsection (b), a  
21 preexisting common interest community does not have to prepare plats and plans  
22 if ~~the community~~ was validly created without them; or amend any existing  
23 ~~surveys, plats,~~ and plans that do not comply with Section 2-109.

24  
25 **SECTION 5-104. APPLICABILITY TO PRE-EXISTING COMMON INTEREST**  
26 **COMMUNITIES.**

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

31 (1) Section 1-105;

32 (2) Section 1-106;

33 (3) Section 1-107;

34 (4) Section 1-206;

35 (5) Section 2-102;

(6) Section 2-103;  
(7) Section 2-104;  
(8) Section 2-117 (h) and (i);  
(9) Section 2-121;  
(10) Section 2-124;  
(11) Section 3-102(a)(1) through (6) and (11) through (16);  
(12) Section 3-103;  
(13) Section 3-111;  
(14) Section 3-116;  
(15) Section 3-118;  
(16) Section 3-124;  
(17) Section 4-109;  
(18) Section 4-117; and  
(19) Section 1-103 to the extent necessary to construe those sections.

(b) The sections listed in subsection (a) 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

1 common interest community created before the effective date of this act that  
2 becomes fully subject to this act at the all-inclusive date or by election. For such a  
3 community, the validity of the existing provisions of its declaration and bylaws  
4 are subject to Section 5-103(a).