

MEMORANDUM

TO: UCIOA drafting committee members, ABA advisor and Observers
FROM: Bill Breetz
DATE: JUNE 21, 2021

RE: ISSUES FROM OUR INFORMAL ZOOM SESSION

Greetings, all. I write to ask that the Drafting Committee – and any interested observers who may receive this memo – meet briefly this week in a ZOOM session to discuss the two issues raised by Commissioners Jamie Pedersen (Washington State) and David Biklen (Connecticut) at our informal reading on June 9.

For that reason, I am asking Chicago to schedule a ZOOM call – not to exceed an hour – for **THIS THURSDAY**, June 24, at

4 pm Eastern, 3 pm Central, 2 pm Mountain, 1 pm Pacific, 10 am Hawaii

I apologize for asking you to meet on such short notice. However, I now understand that our final draft must be delivered to Chicago not later than a week from today – and Jim will require some time to incorporate any changes the Committee proposes into the draft before then.

I recognize that the short notice will inevitably conflict with other commitments some of you will have, and I do not expect any addressee to re-arrange prior commitments if that is not practical or convenient. However, if you know that you will be unable to join us on Thursday, I would appreciate knowing that, and would be even more appreciative of any observations or preferences regarding these two matters you may be able to share with me before our meeting.

The Issues

1. Applicability to Common Interest Communities Created Before UCIOA

During our June 9 discussion, Commissioner Pedersen expressed serious concerns about UCIOA's enactability if we sought to automatically require all pre-enactment Common Interest Communities ("CIC's") to follow UCIOA. He described the difficulties he encountered in the debate when Washington enacted UCIOA in 2018, and he urged us to reconsider the subject.

This is, of course, a topic we have discussed repeatedly over the past two years and our Reporter's notes reflect that discussion; *see* the attached Draft of Section 5-101 [Effective Date] in the attached Exhibit and in Jim's various notes that follow.

Particularly relevant is Jim's Proposed New Comment:

If a state decides that full applicability of the act to preexisting common interest communities is not appropriate, the state may decide to include an opt-out procedure in this section reading as follows:

"This [act] does not apply to a common interest community created before [the effective date of this [act]] which approves an amendment pursuant to this subsection before [all-inclusive date]. An amendment authorized by this subsection must be adopted in conformity with the requirements of this subsection, which supersede any provisions in the declaration or bylaws of the common interest community. The executive board may in its discretion propose an amendment to the unit owners. In this event, the board shall submit the proposed amendment for a vote by the unit owners under Section 3-110. Approval requires a vote of more than 50 percent of the votes in the association."

After Thursday's discussion, the Committee may decide to leave the draft as it is. Alternatively, there are a broad range of alternative ways in which the Committee might recommend that UCIOA address this issue by relaxing the automatic 'all-in' provisions. They include at least the following possible amendments (there are surely others):

* Adopt Jim's Proposed Comment as a new Section – with or without brackets.

* Adopt Jim's Proposed Comment as a new Section – with or without brackets – but amended to make it easier to 'opt-out' in any of several ways –

e.g., reduce the percentage of unit owners needed; eliminate need for Executive Board or Unit Owner approval, eliminate need for amending the declaration or simplify the amendment process, etc.

* Extend the amount of time that all CICs have to consider the matter before the so-called 'all-inclusive' date.

- * Automatically apply UCIOA retroactively only to Condominiums – all others can opt **in** - forever, or for a limited time.
- * Automatically apply UCIOA retroactively only to Condominiums – all others can opt **out**- forever, or for a limited time.
- * Reduce the number of UCIOA sections that automatically apply retroactively – *see* Section 1-304 in the attached Exhibit.

2. Require That Unit Owners Have Access to Draft Board Minutes

During the discussion on June 9 and later in his email, Commission Biklen expressed his view that draft/unapproved minutes should not be excluded from the general rubric that unit owners should have reasonable access to all materials provided to members of the Executive Board. His email included this proposed draft amendment to Section 3-108(b)(6):

Minutes are like a condo newsletter - the more info to owners, the better for the association, owners and board. Owners should not have to make a special request of the management company to obtain the minutes. And, in my experience, I know of at least two associations that do not maintain a website. It is relatively easy - so I am told - to send a "list" email with minutes to all owners.

“Sec. 3-108 [MEETINGS]

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

(6) If [any] materials are distributed to the executive board before **or at** the meeting, the executive board at the same time shall make copies of [those] **the** materials reasonably available to unit owners, [except that the board need not make available] **including** copies of unapproved minutes **clearly marked “draft and unapproved”**. **As soon as reasonably practicable after approval, the board shall make available to unit owners approved minutes. [or] The board need not make available** materials that are to be considered in executive session.”

At least two members of the Drafting Committee have signaled their general approval of Commissioner Biklen’s proposal. I believe that we should discuss the concept and the wording of his proposal on Thursday.

EXCERPTS FROM UCIOA DRAFT ARTICLE 5

[ARTICLE] 5 **TRANSITION**

SECTION 5-101. EFFECTIVE 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].

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

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

Reporter’s Note (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 all-inclusive date should be at least 1 year and no more than 3 years after the effective date of the act. The length should depend on how long it should take for people who are responsible for running the affairs of associations (e.g., executive boards and in many cases management companies) to become aware of and familiar with the new act.

Reporter’s Note (1/29/2021)

1. This redraft of Article 1, Part 2 of the act implements the decision made by the Drafting Committee at its November 2020 meeting to make the act generally applicable to all common interest communities

in the State, including those created before the effective date of the act.

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

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

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

Proposed new Comment

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

amendment for a vote by the unit owners under Section 3-110. Approval requires a vote of more than 50 percent of the votes in the association.”

Note: The Proposed new Comment in the current UCIOA draft replaces an opt-in provision contained in an earlier UCIOA draft (Feb. 12 and 19, 2021), which reads with accompanying notes:

Section 1-101(e) (1) The declaration of any common interest community created before [the effective date of this [act]] may be amended to provide that this [act] shall not apply to the common interest community. An amendment authorized by this subsection must be adopted in conformity with the requirements of this subsection, which supersede any provisions in the declaration or bylaws of the common interest community.

(2) The executive board may in its discretion propose an amendment to the unit owners. In this event, the board shall submit the proposed amendment for a vote by the unit owners under Section 3-110. The amendment shall be deemed approved if approved by a vote of more than 50 percent of the votes in the association.

[***Choice 1 for paragraph (3):*** (3) This [act] does not apply to a common interest community that approves an amendment pursuant to this subsection before [all-inclusive date].]

[***Choice 2 for paragraph (3):*** (3) If a common interest community approves an amendment pursuant to this subsection before [all-inclusive date], this [act] does not apply to a common interest community until 20 years after [all-inclusive date]. On [all-inclusive date + 20 years], this [act] governs a common interest community that approves an amendment pursuant to this subsection.]

Reporter’s Note (1/29/2021)

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

Reporter’s Note (4/2/2021)

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

SECTION 5-104. APPLICABILITY TO PRE-EXISTING COMMON INTEREST COMMUNITIES.

(a) Except for 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, the following sections apply to a common interest community created before [the effective date of this [act]]:

- (1) Section 1-105;
- (2) Section 1-106;
- (3) Section 1-107;
- (4) Section 1-206;
- (5) Section 2-102;
- (6) Section 2-103;
- (7) Section 2-104;
- (8) Section 2-117 (h) and (i);
- (9) Section 2-121;
- (10) Section 2-124;
- (11) Section 3-102(a)(1) through (6) and (11) through (16);
- (12) Section 3-103;
- (13) Section 3-111;
- (14) Section 3-116;
- (15) Section 3-118;
- (16) Section 3-124;
- (17) Section 4-109;
- (18) Section 4-117; and
- (19) Section 1-103 to the extent necessary to construe those sections.

(b) The sections listed in subsection (a) apply only to events and circumstances occurring after [the effective date of this [act]] and do not invalidate existing provisions of the declaration or bylaws of the common interest community.

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

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

Reporter's Note (5/25/2021)

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