

MEMORANDUM

TO: UCIOA Drafting Committee Members and ABA Advisor
FROM: Jim Smith, Reporter
DATE: Sept. 8, 2020
RE: Summary of Aug. 21, 2020, informal Zoom session

The drafting committee hosted an informal two-hour Zoom session on Friday, August 21, to discuss the proposed annual-meeting draft and other matters related to UCIOA. Participants included the drafting committee members, the ABA advisor, ULC commissioners in addition to those serving on the drafting committee, and observers. As announced in the call for the meeting, the purpose of the meeting was to discuss the draft and related matters. No votes were taken; no edits were made to the draft; no decisions were made. Below are summaries of some of the highlights from the Zoom session discussion.

1. Scope of the Act. UCIOA generally applies only to common interest communities created after the Act's effective date. Some commissioners and observers expressed support for an amendment to extend the scope to cover communities formed before the Act's effective date ("old communities"). Additional observations included:

- (1) Retroactivity sometimes poses special problems for unincorporated associations, with some laws preserving special rights for them.
- (2) Statutes that modify marital property rights are sometimes struck down as unconstitutional.
- (3) Some but not all of UCIOA articles might be made retroactive (the current version of UCIOA makes some UCIOA sections retroactive, rather than entire articles).
- (4) If the scope of the Act is amended to apply to old communities, we should carefully identify which UCIOA rules are default rules, and which the Act would permit old communities to change.
- (5) Retroactivity may create special problems for declarants (developers) who have unsold inventory; special transition rules for ongoing developments may be necessary.

2. Section 2-108. Limited Common Elements. The UCIOA annual-meeting draft allows the conversion of a common element into a limited common element with approval of the executive board of the association. A vote of the unit owners is required unless the area is not more than 50 square feet and of no practical use to anyone other than the benefitted unit owner. Observations included:

- (1) Consider removing the size limitation. Is it necessary? If the space is not useful to anyone other than the requesting unit owner, why require a vote, whether or not the area exceeds 50 feet?
- (2) The proposed amendment to this section borrows language from a similar provision, Section 2-112, which requires that the amendment to the declaration include "words of conveyance between the parties." This requirement is not included in Section 2-108. Should it be?
- (3) All unit owners affected by conversions of space should get copies of an amendment

to the declaration and other documents.

(4) In some states (e.g., Arizona, Colorado) associations commonly transfer rights to outside spaces, including yards, to individual unit owners who agree to undertake responsibility for maintenance, and watering. This saves the association money. Should the Drafting Committee permit such transfers?

3. Section 2-114. Building Encroachments. The UCIOA annual-meeting draft rewrites the two existing alternatives dealing with shifting unit boundaries. Observations included making sure that easements under this section complies with formalities for the creation of express easements.

4. Section 2-118. Termination of Common Interest Community. The UCIOA annual-meeting draft retains the existing rule allowing terminations of common interest communities by an 80-percent supermajority vote. The draft modifies the voting rule by requiring the approval of 80 percent of the units sold to buyers and extend the voting rule to all communities, regardless of building type. The draft also allows a unit owner to obtain an independent appraisal of the value of the owner's unit when the owner believes the association's appraisal is too low. Observations included:

(1) The draft retains an existing provision stating the declaration may require "other approvals" for termination. We should make it clear that this means approvals by persons other than unit owners and does not allow changes to the required vote percentages.

(2) This section does not expressly allow the partial termination of a common interest community. Consider, for example, a condominium consisting of two high-rise buildings, where one is destroyed in a hurricane. In such a case, partial termination may be a sensible outcome. In other situations, however, the possibility of partial termination may pose other issues. Florida has adopted a statutory provision for partial terminations, which we might consider.

5. Section 2-120. Master Associations. The UCIOA annual-meeting draft allows the executive board to delegate powers to a master association subject to an approval right of the unit owners to be exercised at their next meeting. Discussion included the possibility of changing the draft to make a board's delegation effective only after unit owner approval.

6. Section 2-125. Adverse Possession and Prescriptive Easements. The UCIOA annual-meeting draft immunizes common elements from loss by the law of adverse possession or prescriptive easement by claims of unit owners. Observations included:

(1) The provision applies when the adverse possession claim is "in derogation of the title of any other unit owner or the association." Should we retain this limitation?

(2) This new section may propose a good rule, but it is not highly important because unit owners who raise adverse possession claims to common elements rarely win their cases.

(3) There is a mistake in the last sentence of Reporter's Note 4. Prescriptive easements are barred only when a unit owner is the claimant.

7. Section 3-102. Powers and Duties of Unit Owners Association. The UCIOA annual-

meeting draft removes the power of an executive board to grant an easement or lease on a common element to a unit owner for the benefit of the owner's unit. Observations included:

- (1) Does the restriction of grants to unit owners extend (and should it extend) to temporary construction easements?
- (2) Is this restriction the preferable rule, when compared to the existing practice in some states described in comment (4) to the summary above regarding Section 2-108: limited common elements?

8. Section 3-104. Transfer of Special Declarant Rights. The UCIOA annual-meeting draft reorganizes the material and adds two new sections. An unresolved question is whether "special declarant rights" are contract rights (intangible personal property) or rights appurtenant to real estate owned by the declarant. The draft contains two alternatives for further consideration, which implement the two competing views. Observations included:

- (1) We should provide clear rules for the transfer, financing, and encumbering of special declarant rights.
- (2) Development rights are often especially valuable, and their transfers are common.
- (3) Under the act as it stands now, title insurance companies are not willing to issue insurance on transfers of special declarant rights.

9. Section 3-108. Meetings and Section 3-110. Voting; Proxies; Ballots. The UCIOA annual-meeting draft authorizes unit owners to participate remotely at a meeting held at a geographic location and authorizes "all-electronic" meetings where there is no geographic location for in-person attendees. The draft also includes new rules for electronic ballots, the duration of ballots, and the revocation of ballots. Observations included:

- (1) The section should use the defined term "record" in appropriate places so as to include electronic documents and electronic communications.
- (2) We should make sure that the statutory language works correctly for hybrid meetings, when some owners are present in person and some participate remotely.
- (3) We should consider authorizing or facilitating secret ballots for electronic voting and for remote attendees at meetings. There appears to be technology currently being used that allows secret ballots to be cast electronically and securely, with the recipients who count votes not able to identify the voters.
- (4) Consider expanding Section 3-108(a)(6) to allow remote attendees to make motions and amend motions.
- (5) Consider changing Section 3-108(b)(6), which allows the executive board to withhold "unapproved minutes" from the unit owners. Discussion included the following points:
 - (i) unapproved minutes frequently contain inaccuracies;
 - (ii) owners should be informed about actions taken at board meetings within a reasonable period of time after the meeting;
 - (iii) board actions are effective when taken, regardless of whether or when minutes are prepared and approved; and
 - (iv) the Act has no express time limit on how long the board may take before

approving minutes from a prior meeting.

10. Section 3-115. Assessments. The UCIOA annual-meeting draft restricts the executive board's discretion to assess a common expense to one or a few unit owners who are "benefitted" by the expense by requiring that the declaration specify which common expenses (if any) are to be assessed to fewer than all the unit owners. Observations included:

- (1) Cost of insurance and costs of utilities are assessed to all unit owners proportionately, unless the declaration specifies assessment based on insurance risk or utility usage.
- (2) We should consider removing the "gross negligence" prong of Section 3-115(g), which allows assessing the damage to the grossly negligent owner, even though the loss is covered by insurance. The line between ordinary negligence and gross negligence is too easy to manipulate.

11. Time shares. The UCIOA annual-meeting draft revises the definition of "Time share" (Section 1-103(34)), requires time-share disclosures in the public offering statement (Section 4-103), and provides an exemption from the act's public offering statement rules when a state agency regulates time-share developments (Section 4-107).