

2021 May 21 Video Committee Meeting
Common Interest Ownership Act and Condominium Act

The issue we need to resolve is how to express the idea the special declarant rights (SDRs) are real-estate rights and are appurtenant to (1) real estate owned by the declarant in the common interest community and (2) real estate that the declarant may add to the common interest community under a development right.

Based on our discussion during the Style Committee meeting in April 2021, we moved the relevant language to the definition of SDRs in Section 1-103(33) where we added the phrase “appurtenant to real estate owned by the declarant and described in the declaration.” The Drafting Committee’s discussion at its meeting on May 7 indicated that further work is needed.

I now think that the concept merits a subsection of its own in 3-104 and will not work well as part of the definition of SDRs. ***Our objective is to make SDRs automatically appurtenant to the proper real estate***, without the need for the declaration to do anything other than (1) list the SDRs desired and (2) for a development right, describe the real estate parcel where the development right is to be exercised. We don’t mean that the declaration is supposed to say anything about the SDR being appurtenant to units or real estate. If we put his content in the definition, near the existing phrase, “rights reserved for the benefit of the declarant”, it may look like the declaration has to say something about the declarant’s units or real estate.

Here’s my recommendation.

3-104(b). A special declarant right is appurtenant to all units owned by the declarant and to real estate subject to a development right to create additional units.

Note: The second clause, making SDRs appurtenant to “real estate subject to a development right to create additional units” is important because it preserves the SDRs when the declarant has sold all of the existing platted units, but has a development right to create more units. The development right may cover real estate already owned by the declarant or real estate described in the declaration that the declarant hopes to acquire in the future. The purpose of saying SDRs are appurtenant to this real estate is to show that they are benefitted by the SDRs. The modern of law of servitudes in land allows this. Practically, this means that the benefit of servitude “floats.” It is realized and becomes active and relevant only if the declarant exercises

the development right; if it lapses unexercised, the SDRs terminate. Some of the above may go into a Comment.

Here are some points to consider.

(1) The above makes it clear enough that the SDR is real property (UCIOA used the defined term “real estate”) due to the word “appurtenant.” Anything appurtenant to real property (here “units” and “real estate”) is necessarily also real property. But if we want more emphasis, here are two choices:

3-104(b). A special declarant right is an interest in real estate, which is appurtenant to all units owned by the declarant and real estate subject to a development right to create additional units.

3-104(b). A special declarant right is a real-estate interest that is appurtenant to all units owned by the declarant and real estate subject to a development right to create additional units.

(2) The Drafting Committee and the subcommittee on special declarant rights has considered whether this provision ought to refer to the declarant’s “units” or “real estate.” I think “units” is easier to understand, is better for substance, and fully protects the declarant. The distinction only matters when the declarant has sold all existing units in the common interest community (all platted units). If the declarant still owns other real estate within the common interest community, this declarant-owned real estate falls within UCIOA’s definition of “common elements.” In this event, the declarant can convert a common element into additional units only if the declarant has reserved a development right to do this.

(3) Is it clearer to tabulate this provision?

3-104(b). A special declarant right is appurtenant to:

- (1) all units owned by the declarant and
- (2) real estate subject to a development right to create additional units.