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FOR DISCUSSION ONLY

AMEND OR REVISE THE UNIFORM COMMON INTEREST OWNERSHIP ACT AND THE UNIFORM CONDOMINIUM ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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CLEAN DRAFT

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February 2, 2021

AMEND OR REVISE THE UNIFORM COMMON INTEREST OWNERSHIP ACT AND THE UNIFORM CONDOMINIUM ACT

The committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this act consists of the following individuals:

WILLIAM R. BREETZ	Connecticut, *Chair*
ANGELA ALEXANDER	Texas
STEPHEN C. CAWOOD	Kentucky
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MARC FEINSTEIN	South Dakota
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HOWARD J. SWIBEL	Illinois
DAVID S. JENSEN	Idaho
CARL H. LISMAN	Vermont, *President*
CAM WARD	Alabama, *Division Chair*

OTHER PARTICIPANTS

JAMES C. SMITH	Georgia, *Reporter*
BARRY B. NEKRITZ	Illinois, *American Bar Association Advisor*
LOUISE M. NADEAU	Connecticut, *Style Liaison*
TIM SCHNABEL	Illinois, *Executive Director*

Copies of this act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.uniformlaws.org

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AMEND OR REVISE THE UNIFORM COMMON INTEREST OWNERSHIP ACT AND THE UNIFORM CONDOMINIUM ACT

[ARTICLE] 1

GENERAL PROVISIONS

[PART] 1

SECTION 1-103. DEFINITIONS. In this [act]:

* * *

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

Reporter's Note (1/29)

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

(18) "Executive board" means the body, regardless of name, which acts on behalf of the association.

Reporter's Note (1/29)

The proposed revision to the definition of "executive board" recognizes that the board might be created by a variety of documents, including articles of incorporation or articles of organization, and coordinates with other proposed revisions, including the process for the election of master-association boards. UCIOA does not require a designation of the executive board in the declaration or bylaws. See UCIOA § 2-105. Usually the board is a subset of the unit owners, but this is not required (e.g., a small association might be an LLC managed by all its members).

* * *

(22) "Master association" ~~means an organization described in Section 2-120, whether~~

~~or not it is also an association described in Section 3-101.~~

means:

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

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

Reporter's Note (10/23)

Jack Burton writes:

Again, this is a great draft. These are minor points in the scheme of the larger picture, but worth fixing.

1-103(22). Reverse paragraphs (A) and (B) and reletter them.

Reason: to avoid "not" in Paragraph A being read to modify paragraph (B) along with the end of paragraph (A). I realize that if the reader stops and reads the text through again and pays close attention to the punctuation, the reader will arrive at the correct meaning. But we can draft the statute to make it absolutely clear for the reader the first time simply by reversing the order of paragraphs (A) and (B).

(22A) "Mortgage" means a consensual interest in real estate which secures payment or performance of an obligation. The term does not include an association's lien on a unit.

Reporter's Note (1/29)

A definition of "mortgage" is necessary due to the revisions proposed by the subcommittee on special declarant rights, which treat all SDRs as real property. This act's definition of "security interest" below is not adequate for this purpose because it includes both mortgages and UCC Article 9 security interests on personal property. This addition uses the definition of "mortgage" from the Uniform Home Foreclosure Procedures Act, slightly modified to fit the language of this act.

* * *

(31) "Association rule" means a policy, guideline, restriction, procedure, or regulation of

an association, however denominated, which is not set forth in the declaration or bylaws and which governs the conduct of persons or the use or appearance of property.

Reporter's Note (1/29)

1. This proposed retitling of this definition fixes a problem of usage in the existing UCIOA text and conforms to Style. ULC Drafting Rules 302(d) (2012) ("Do not use a defined term in the act in a sense that is inconsistent with the definition."). UCIOA uses the words "rule" and "rules" in many sections. Sometimes it is clear from context that the intent is to point to the defined term; sometimes it is clear from context that this cannot be intended (e.g., § 1-114: "consequential, special, or punitive damages may not be awarded except as specifically provided in this [act] or by other rule of law"); and sometimes there is ambiguity. The Comments also frequently use the words "rule" and "rules."

2. David Ramsey writes:

Recently, I received an email concerning the difference between a "rule" and a negative covenant under UCIOA. It involves the following two sections:

> (31) "Rule" means a policy, guideline, restriction, procedure, or regulation of an association, however denominated, which is not set forth in the declaration or bylaws and which governs the conduct of persons or the use or appearance of property.
>
> Section 2-117 (f). An amendment to the declaration may prohibit or materially restrict the permitted uses of or behavior in a unit or the number or other qualifications of persons who may occupy units only by vote or agreement of unit owners of units to which at least 80 percent of the votes in the association are allocated, unless the declaration specifies that a larger percentage of unit owners must vote or agree to that amendment or that such an amendment may be approved by unit owners of units having at least 80 percent of the votes of a specified group of units that would be affected by the amendment . An amendment approved under this subsection must provide reasonable protection for a use or occupancy permitted at the time the amendment was adopted.

I think intuitively educated practitioners would say that the use of a unit is a matter that must be set forth in the declaration to be enforceable. But the definition of "rule" in UCIOA seems to define rule as something that a board could adopt that concerns the use of property. While it is clear that a rule in furtherance of a negative covenant ("no resident of a unit shall create noise that is an annoyance or nuisance to another owner") by defining what that means (i.e. "no playing of musical instruments that can be heard in another unit between the hours of 10:00 p.m. and 8:00 a.m."), but the language in the definition of "rule" is so broad that it could be argued that it includes new restrictions on the use of a

unit.

I note that in the comments there is nothing about the definition of "rule," so perhaps a comment is in order on this subject. As you know, though, not all states include the comments in the legislative history, so it's not clear that the comments are sufficient to offset the plain language or the rule definition in terms of whether a board may actually adopt a rule that changes the permitted use or a unit (i.e. no person may smoke tobacco or other products in a unit"). . . .

The real issue is what does "use or appearance of property" mean? If we were talking about the appearance of a lot of the exterior of a home in the homeowners association context I think there would be general agreement that rules dealing with appearance of property are necessary to respond to architectural guidelines. But "use" of property should never have been in the definition unless it was the use of "common elements." It's a very easy fix, which would be something like the following:

> "Rule" means a policy, guideline, ~~restriction~~, procedure, or regulation of an association, ~~however denominated,~~ which is not set forth in the declaration or bylaws and ~~which~~ ***that covers the conduct of persons on the common elements, or that further clarifies or regulates restrictions in the declaration or bylaws, or that*** ~~which governs the conduct of persons or the use or~~ appearance of property.

(32) "Security interest" means a consensual interest in personal property, which secures payment or performance of an obligation or a mortgage.

Reporter's Note (1/29)

This proposed revision conforms the "security interest" definition to the addition of the new definition of "mortgage" above and simplifies to follow the UCC Article 9 definition of security interest for personal property.

(33) "Special declarant rights" means rights reserved for the benefit of a declarant to:

(A) complete improvements indicated on plats and plans filed with the declaration or to complete improvements described in the public offering statement pursuant to Section 4-103(a)(2);

Reporter's Note (1/29)

The proposed revisions to the definition of "special declarant rights" reflect the work of the subcommittee on special declarant rights. The proposed revision to

paragraph (A) allows the declarant to complete improvements shown in the public offering statement for all types of common interest communities. Section 4-103(a)(2) is not limited to cooperatives. It requires that the public offering statement contain "a general description of the common interest community, including to the extent possible, the types, number, and declarant's schedule of commencement and completion of construction of buildings, and amenities that the declarant anticipates including in the common interest community."

(B) exercise any development right;

(C) maintain offices, models, and signs pursuant to Section 2-115;

Reporter's Note (1/29)

The declarant's right to easements through the common elements is created by Section 2-116, *Easement and Use Rights* (see below), whether or not the declarant reserves easement rights in the declaration. In contrast, special declarant rights exist only if they are described in the declaration. Section 2-105(a)(8), *Contents of Declaration.* This proposed deletion makes it clear that the declarant's easement rights arise by operation of law under Section 2-116 and do not depend on express language in the declaration.

(D) make the common interest community subject to a master association pursuant to Section 2-120;

(E) merge or consolidate communities pursuant to Section 2-121.

Reporter's Note (1/29)

Discussion by the subcommittee on special declarant rights indicated that special declarant rights are intended as pointers to the relevant sections of the act that govern the subject matter. They are not freestanding rights independent of those sections. Accordingly, the proposed revisions add cross references where appropriate.

The Reporter wonders whether this is sufficient, or whether in some cases (including this merger paragraph) ambiguity remains. Section 2-121 has nice rules, the thrust of which is to allow merger when the unit owners of each community being merged approve the merger by supermajority votes. Good enough. Nothing in Section 2-121 refers to the declarant(s), the content of the declaration(s), or any special declarant right. The 2-121 Comments don't add anything relevant. Consider two situations.

Situation 1. The declarant has formed two neighboring communities and has not reserved the SDR to merge the communities in the declarations. But the declarant still holds enough votes in both associations by raw number of unsold units. May the declarant hold votes in both associations and merge them under 2-121, so that the declarant's failure to reserve the SDRs is irrelevant? The answer appears to be "yes." Or somehow is the declarant's failure to reserve the SDR supposed to disenfranchise the declarant from doing this when minority unit purchasers object?

Situation 2. Same facts as Situation 1, but here the declarant reserves the SDR to merge communities in both declarations, using the words of this paragraph with no further explanation. Obviously, the declarant now has greater rights to merge the two communities than in Situation 1. If not, the SDR for merger adds nothing and is superfluous - completely meaningless. But what are those greater rights, and how can they operate without the prospect of causing unfairness for unit purchasers? Can the declarant use his SDR to merge the two communities, overriding the vote percentages in 2-121, when he has sold 80 percent of the units in Community 1 and 40 percent of the units in Community 2?

(F) appoint or remove officers and members of an executive board pursuant to Section 3-103(d);

((G) control any construction, design review, or aesthetic standards committee or process pursuant to Section 3-120(c);

(H) attend meetings of the unit owners and, except during an executive session, the executive board; and

(I) have access to the records of the association to the same extent as a unit owner.

(34) "Time share" means [a "time share" defined in [cite to definition of "time share" in appropriate state statute]] [any ownership rights in or the right to use a unit for a period of time less than a full year during any given year, on a recurring basis for more than one year, but not necessarily for consecutive years].

Reporter's Note (1/29)

The proposed amendment to the definition of "time share" offers two choices. Forty-one states have enacted statutes that regulate time shares, sometimes as a freestanding act and sometimes as part of their brokerage act, deceptive trade

practices act, or other act. Most states have designated a state agency that is responsible for time-share regulation. It is preferable that this Act and the state's time-share statute define "time share" the same way. This definition of "time share" may incorporate the time-share statute's definition by cross reference. Of the states that have adopted UCIOA, Nevada has the most time-shares. Its version of UCIOA exactly reproduces verbatim the definition contained in the Nevada time-share statute. Nev. Rev. Stat. Ann. §§ 116.091, 119A.140.

For states that do not have a suitable statutory definition, the proposed amendment includes a definition that tracks closely the key elements of the current definitions of "time share" in the Florida and California statutes. Florida and California have more time shares than other states: 31% and 10% of the US total number of time-share units, respectively. The proposed amendment's definition also closely resembles the time-share definitions in Hawaii (7%) and Nevada (6%). The proposed definition also is compatible with the Bankruptcy Code's long and complicated definition of "timeshare plan." 11 U.S.C. § 101(53D).

Reporter's Note (10/23)

Jack Burton writes:

1-103(43). The act defines time share by borrowing a definition of "time share estate" from the Model Real Estate Time-Share Act. This act was last revised almost 40 years ago, in 1982. According to the ULC Reference Book the model act has been adopted by only 5 states, Louisiana, Massachusetts, Michigan, Rhode Island, Wisconsin, and Wisconsin. According to the ULC website, the last enactments occurred in 1988. As far as I am aware the ULC does not keep track of how many of those states have retained the borrowed definition. The question is whether we can't find a more widely accepted, and more modern definition of time share to borrow for our act.

Comment

* * *

26. Definition (35), "Unit," describes a tangible, physical part of the project rather than a right in, or claim to, a tangible physical part of the property. Therefore, for example, ~~a "time-share" arrangement in which a unit is sold to 12 different persons, each of whom has the right to occupy the unit for one month~~ the sale of a unit to 5 persons as tenants in common does not create ~~12~~ 5 new units – there are, rather, ~~12~~ 5 owners of the unit. (Under the section on voting (Section ~~2-110~~ 3-110), a majority of the ~~time-share owners of a unit~~ tenants in common are entitled to cast the vote assigned to that unit.)

* * *

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

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

In the special case of a cooperative, the declarant is treated as the owner of a unit or "potential unit" to which allocated interests have been allocated, until that unit is conveyed to another.

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

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

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

When a unit is devoted to time shares that are classified as personal property (e.g., a license, a membership, or contract rights), then the time-share owners are not unit owners. In this 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 benefit of the time-share owners, and its obligations and rights, including voting rights, are the

same as an entity who owns a regular unit for the benefit of shareholders, members, or other individuals.

SECTION 1-104. NO EVASION BY DECLARANT. 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.

Reporter's Note (1/29)

1. Section 1-104 requires modification due to the new proposed UCIOA scope provisions, in particular, newly drafted Section 1-204, *Mandatory and Default Rules*, which covers the same subject as the first sentence of existing Section 1-104. The proposed edit deletes the first sentence and edits the the title of the section. Alternatively, Section 1-104 might be deleted in its entirety, with the content of the second sentence moved elsewhere.

2. ***[Based on the work of the subcommittee on master associations, all or part of the following may go into the Comments]*** The second sentence of this section invalidates any device of a declarant that has the intent or effect of evading the limitations or prohibitions of this Act. One example relates to new Section 2-120(f), which guarantees the right of unit owners to hold votes in the master association commensurate with their allocated interests and their financial obligations to pay assessments made by the master association.

Example: A declarant establishes a common interest community, retaining title to the road system providing access to the community from a nearby highway and to all of the units. The road system is not part of the common elements described in the declaration, and persons other than unit owners are allowed to use the road system. Instead, the declarant grants right-of-way easements to use the roads to the association and the unit owners. The easement instrument obligates the declarant or its assignee to repair and maintain the roads and obligates the unit owners to pay substantial fees to use the roads that far exceed the declarant's reasonable and projected repair and maintenance costs. See Section 1-209(b), dealing with contractual arrangements for cost sharing between an association and an owner of real estate located outside the common interest community's boundaries. The road system should be property of a master association because it is necessary for the unit owners' use and enjoyment of their residences and they are obligated to pay common expenses for repair and maintenance. This device is invalid because it evades the protections given by the Act to unit owners under Section 2-120(f). The declarant is acting as if it were a master association without formally creating that organization.

[PART] 2

APPLICABILITY

SECTION 1-201. GENERAL APPLICABILITY TO COMMON INTEREST COMMUNITIES. (a) Except as otherwise provided in this [part], this [act] applies to all common interest communities created within this state.

Reporter's Note (1/29)

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.

(b) The provisions of [insert reference to all present statutes expressly applicable to planned communities, condominiums, cooperatives, or horizontal property regimes] do not apply to common interest communities created that are subject to this [act].

Reporter's Note (10/23)

At the September 2020 Zoom annual meeting first reading of the act, a concern from the floor was raised that the last sentence of this sentence may result in an old common interest community inadvertently becoming subject to UCIOA when it makes an amendment to its declaration.

(c) Before [all-inclusive date], this [act] governs 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]] which elects to be subject to this [act] by amending its declaration.

(d) Except as otherwise provided in subsection (e), on and after [all-inclusive date] this [act] governs all common interest communities created within this state.

Reporter's Note (1/29)

Subsections (c) and (d) provide effective-date rules using the technique of an "all-inclusive date" found in many ULC acts dealing with corporations and other business organizations. A legislature note should be added to offer advice on selection of the all-inclusive date. Probably it should be at least 2 years and no more than 5 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.

(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)

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.

(f) A common interest community created before [the effective date of this [act]] which becomes subject to this [act] is not required to amend its declaration or bylaws to conform to this [act]. This act does not invalidate existing provisions of the declaration and bylaws; provided, existing provisions that do not comply with this [act] remain enforceable only to the extent that Section 1-204 allows variation of the provisions of this [act].

Reporter's Note (1/29)

1. Subsection (f) deals with the declaration, including plats and plans, and bylaws of preexisting common interest communities. Many preexisting common interest communities that become subject to the act may want to study their governing documents and amend or restate them to comply with UCIOA, but the first sentence of subsection (f) makes this unnecessary.

2. As subsection (f) states, any provisions of the declaration and bylaws that are

rendered unenforceable by the act are – actually – unenforceable. This follows the pattern of obsolete statutes and regulations well-understood by lawyers. Often legislatures and agencies do not revise statutes and regulations to take account of legal developments, such as judicial decisions and other changes in law, that make certain provisions obsolete or unenforceable. Lawyers and other persons need to understand which provisions are still active and relevant, and which are not.

3. The reference in subsection (f) to newly drafted Section 1-204, *Mandatory and Default Rules*, means that existing provisions of the declaration and bylaws that are inconsistent with the rules and procedures of UCIOA remain effective if UCIOA allows their variation by content in the declaration or bylaws. For example, if the preexisting declaration provides that termination of the common interest community requires the unanimous approval of unit owners, this provision supersedes the rule in Section 2-118 that authorizes termination by a vote of 80 percent of unit owners. The preexisting community does not have to amend its declaration to restate its unanimity provision.

(g) This [act] does not invalidate actions validly taken, and transactions validly entered into, before this [act] takes effect.

(h) This [act] shall not alter the rights and obligations of declarants of common interest communities created before [the effective date of this [act]].

Reporter's Note (1/29)

Many ULC acts, especially those approved recently, include a part or article at the end of the act titled "Transition." This approach shortens the scope section and makes it cleaner. As time passes, the transition rules become generally unimportant to most persons subject to the legislation. We could move most of the proposed subsections in 1-201 to a new UCIOA Transition article.

SECTION 1-202. EXCEPTION FOR SMALL COOPERATIVES. If a cooperative contains no more than 12 units and is not subject to any development rights, it is subject only to Sections 1-106 (Applicability of Local Ordinances, Regulations, and Building Codes) and 1-107 (Eminent Domain) of this [act] unless the declaration provides that the entire [act] is applicable.

SECTION 1-203. EXCEPTION FOR SMALL AND LIMITED EXPENSE LIABILITY PLANNED COMMUNITIES. (a) Unless the declaration provides that this entire [act] is applicable, a planned community that is not subject to any development right is subject only to Sections 1-105, 1-106, and 1-107, if the community:

(1) contains no more than 12 units; or

(2) provides in its declaration that the annual average common expense liability of all units restricted to residential purposes, exclusive of optional user fees and any insurance premiums paid by the association, may not exceed $300, as adjusted pursuant to Section 1-115.

(b) The exemption provided in subsection (a)(2) applies only if:

(1) the declarant reasonably believes in good faith that the maximum stated assessment will be sufficient to pay the expenses of the planned community; and

(2) the declaration provides that the assessment may not be increased above the limitation in subsection (a)(2) during the period of declarant control without the consent of all unit owners.

Reporter's Note (1/29)

1. Section 1-204 of existing UCIOA becomes obsolete if UCIOA is amended to make the act generally applicable to all common interest communities, regardless of their date of formation. At the November 2020 meeting of the Drafting Committee, there was substantial support for replacing Section 1-204 with a new section that details which provisions of UCIOA are mandatory and which are permissive (default rules). New Section 1-204 below provides a list. This new section would overlap with, and supersede, an existing much shorter UCIOA provision in Article 1, Part 1, which states: "Section 1-104. *No Variation by Agreement*. 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."

2. 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. The proposed new Section 1-204 below follows the second way, which is consistent with UCIOA existing Section 1-207 and the drafting style generally used in existing ULC acts.

SECTION 1-204. MANDATORY AND DEFAULT RULES.

(a) Except as otherwise provided in subsection (b), this [act] governs the rights and obligations of the declarant, the association, the executive board, unit owners, and other persons having an interest in a common interest community.

(b) The declaration [or bylaws] governing a common interest community may vary the following provisions in the following listed sections:

(1) Section 1-105(a), which deals with the classification of a unit in a cooperative as real estate or personal property.

(2) Section 1-107(c), which deals with the allocation of proceeds from eminent domain which are attributable to limited common elements.

(3) Sections 1-202, 1-203, 1-205, 1-206, and 1-207 to the extent that they permit declarants and unit owners to make elections with respect to applicability.

(4) Section 2-102, which deals with boundary lines between units and common elements.

(5) Section 2-108(b), which provides for a reallocation of limited common elements.

(6) Section 2-109(e), which deals with the horizontal boundaries of units.

(7) Section 2-111, which deals with alterations of units and common elements made by unit owners.

(8) Section 2-112(a) and (b), which deal with the relocation of boundaries of units.

(9) Section 2-113(a), which deals with the subdivision of units.

(10) Section 2-115 to the extent it deals with signs maintained by a declarant on the common elements.

(11) Section 2-116(a) and (c), which deal with easements through, and rights to use, common elements.

(12) Section 2-117(a) to the extent it allows a change in the percentage of votes required to amend the declaration.

(13) Section 2-118(a) to the extent it allows a change in the percentage of votes required to terminate a common interest community.

(14) Section 2-120(a) to the extent it allows the executive board to delegate powers to a master association.

(15) Section 3-102(a) to the extent that it grants powers to the association.

(16) Section 3-107(a) to the extent it allocates responsibility for maintenance, repair, and replacement of units and common elements.

(17) Section 3-108(a)(2) to the extent it allows a change in the percentage of unit owners who may request a special meeting.

(18) Section 3-109, which deals with quorum requirements for meetings and rules for conducting meetings.

(19) Section 3-110 to the extent it deals with voting by proxies, voting by ballots, and voting without a meeting.

(20) Section 3-112 (a), (b), and (g) to the extent they allow a change in the percentage of votes required to convey or encumber common elements.

(21) Section 3-113(k), which deals with insurance in non-residential common interest communities.

(22) Section 3-114, which deals with the payment of surplus funds of the association.

(23) Section 3-116(a) to the extent it treats fees, costs, charges, and other sums as assessments for lien purposes.

Reporter's Note (1/29)

Section 1-205 is deleted because in effect it is a continuation of existing Section 1-204, *Applicability to Preexisting Common Interest Communities*. Certain small preexisting cooperatives and planned communities will be exempt from UCIOA under Sections 1-202 and 1-203, respectively, which apply to all common interest communities regardless of date of formation.

Reporter's Note (1/29)

Section 1-206 becomes obsolete if UCIOA is amended to make the act generally applicable to all common interest communities, regardless of their date of formation. Note that certain common interest communities that are not otherwise made subject to UCIOA have opt-in rights under Section 1-202, *Exception for Small Cooperatives*; Section 1-203, *Exception for Small and Limited Expense Liability Planned Communities*; and Section 1-207, *Applicability to Nonresidential and Mixed-use Common Interest Communities.*

SECTION 1-205. APPLICABILITY TO NONRESIDENTIAL AND MIXED-USE COMMON INTEREST COMMUNITIES.

(a) Except as otherwise provided in subsection (d), this section applies only to a common interest community in which all units are restricted exclusively to nonresidential purposes.

(b) A nonresidential common interest community is not subject to this [act] except to the extent the declaration provides that:

(1) this entire [act] applies to the community;

(2) [Articles] 1 and 2 apply to the community; or

(3) in the case of a planned community or a cooperative, only Sections 1-105, 1-106, and 1-107apply to the community.

(c) If this entire [act] applies to a nonresidential common interest community, the declaration may also require, subject to Section 1-112, that:

(1) notwithstanding Section 3-105, any management, maintenance, operations, or employment contract, lease of recreational or parking areas or facilities, and any other contract or lease between the association and a declarant or an affiliate of a declarant continues in force after the declarant turns over control of the association; and

(2) notwithstanding Section 1-104, purchasers of units must execute proxies, powers of attorney, or similar devices in favor of the declarant regarding particular matters enumerated in those instruments.

(d) A common interest community that contains units restricted exclusively to nonresidential purposes and other units that may be used for residential purposes is not subject to this [act] unless the units that may be used for residential purposes would comprise a common interest community that would be subject to this [act] in the absence of the nonresidential units or the declaration provides that this [act] applies as provided in subsection (b) or (c).

SECTION 1-206. APPLICABILITY TO OUT-OF-STATE COMMON INTEREST COMMUNITIES. This [act] does not apply to a common interest community located outside this state, but Sections 4-102 and 4-103 and, to the extent applicable, Sections 4-104 through 4-106**,** apply to a contract for the disposition of a unit in that common interest community signed in this state by any party unless exempt under Section 4-101(b) [and the agency regulation provisions under [Article] 5 apply to any offering thereof in this state].

SECTION 1-207. OTHER EXEMPT REAL ESTATE ARRANGEMENTS.

(a) An arrangement between the associations for two or more common interest communities to share the costs of real estate taxes, insurance premiums, services, maintenance

or improvements of real estate, or other activities specified in their arrangement or declarations does not create a separate common interest community.

(b) An arrangement between an association and the owner of real estate that is not part of a common interest community to share the costs of real estate taxes, insurance premiums, services, maintenance or improvements of real estate, or other activities specified in their arrangement does not create a separate common interest community. However, assessments against the units in the common interest community required by the arrangement must be included in the periodic budget for the common interest community, and the arrangement must be disclosed in all public offering statements and resale certificates required by this [act].

SECTION 1-208. OTHER EXEMPT COVENANTS. A covenant that requires the owners of separately owned parcels of real estate to share costs or other obligations associated with a party wall, driveway, well, or other similar use does not create a common interest community unless the owners otherwise agree.

[ARTICLE] 2

CREATION, ALTERATION, AND

TERMINATION OF COMMON INTEREST COMMUNITIES

* * *

SECTION 2-105. CONTENTS OF DECLARATION.

(a) The declaration must contain:

* * *

(6) (A) a description of any limited common elements and the unit or units to which each limited common element is allocated, other than those specified in Sections 2-102(2) and (4) [and 2-109(b)(10)]; and

(B) in a planned community, any real estate that is or must become common elements;

Reporter's Note (1/29)

This proposed revision consolidates paragraph (6) with related content from the first sentence of Section 2-108(a), *Limited Common Elements*. Should we keep or delete the reference to Section 2-109(b)(10)? It's not clear to me how paragraph (6) and Section 2-109(b)(10) are intended to fit together. Section 2-109(b)(10) requires the plat to show "the approximate location and dimensions of any porches, decks, balconies, garages, or patios allocated as limited common elements, and show or contain a narrative description of any other limited common elements." Comment 9 to Section 2-109, *Plats and Plans*, states: "The 1994 amendments to subsections (6), (7), and (10) seek to balance the need for disclosure and certainty in understanding what a unit owner 'owns,' with the practical limitations of the surveying profession. The balance struck in the 1994 amendments to this section requires that the plat or survey – as a minimum – actually show only the kinds of limited common elements that most people would understand to be an important appurtenance to their units. All other kinds of limited common elements – parking spaces, window boxes, etc., – may be either shown on the survey or simply described in words." Note, the plat is part of the declaration. Section 2-109(a). If a limited common element is described in the plat, is another description in the text part of declaration required? May the declarant choose to describe some limited common elements only in the text part of the declaration, and others only in the plat?

* * *

(8) a description of any special declarant rights reserved by the declarant a time limit within which each of those rights must be exercised, and any other conditions or limitations under which the rights may be exercised or will lapse;

(9) if any development right may be exercised with respect to different parcels of real estate at different times, a statement to that effect together with:

(A) either a statement fixing the boundaries of those parcels and regulating the order in which those parcels may be subjected to the exercise of each development right or a statement that no assurances are made in those regards; and

(B) a statement as to whether, if any development right is exercised in any parcel, that development right must be exercised in all or any parcels;

Reporter's Note (1/29)

The proposed revisions to the paragraphs (8)-(10) reflect the work of the subcommittee on special declarant rights. Paragraph (6) no longer requires the declaration to describe parcels of real estate to which special declarant rights are connected. See Section 3-104(a) below.

SECTION 2-108. LIMITED COMMON ELEMENTS.

(a) An allocation of limited common elements may not be altered without the consent of the unit owners whose units are affected.

Reporter's Note (1/29)

At the November 2020 Drafting Committee meeting, a revision was recommended to the first sentence of subsection (a) to indicate that the limited common element must be allocated to "fewer than all" the units. Instead of this change, this draft recommends deletion of the sentence. The sentence is redundant with (and possibly not fully consistent with) Section 2-105, *Contents of Declaration*, which states: "The declaration must contain: . . . (6) a description of any limited common elements, other than those specified in Section 2-102(2) and (4), as provided in Section 2-109(b)(10) and, in a planned community, any real estate that is or must become common elements." A revision is also proposed to Section 2-105(a)(6) (see above) that combines and reconciles the two provisions.

(b) ~~Except as the declaration otherwise provides otherwise,~~ Unless the declaration provides otherwise, all or part of a limited common element may be reallocated only by an amendment to the declaration executed by the ~~unit owners between or among whose units~~ owners of the units affected by the reallocation. ~~is made. The persons executing the amendment shall provide a copy thereof to the association, which shall record it. The amendment must be recorded in the names of the parties and the common interest community.~~

Question and Possible Alternative for subsection (c): The reason for not requiring a quorum is that associations often find it hard to get a quorum of members to vote, and this may be especially difficult for a matter like this,

which usually affects few members. A possible alternative for subsection (c) is to dispense with the regular quorum, but require a minimum number of votes required to be cast.

Reporter's Note (1/29)

The subcommittee on limited common elements recommends that the Drafting Committee consider 3 choices for subsection (c), which are laid out below:

1. Make no major change to this section and allow the declaration to establish a reasonable process. The declaration may provide a process for converting general common elements to limited common elements; if not, the general rules for amending the declaration apply.

2. Revise this section along the lines proposed in the November 2020 draft to make it easier to reallocate a common element as a limited common element. A unit owner requests that the executive board approve a reallocation. The board puts the request on its meeting agenda. Unit owners receive notice of all executive board meeting agendas. If the board approves the request, the reallocation is effective only after the board notifies all unit owners of its action. If a unit owner objects, the reallocation is effective only if the board submits the request to the unit owners for approval. Approval requires an affirmative vote of 67 percent with no quorum requirement.

3. This choice follows Choice 2 above but limits the process to less than all common elements. The subcommittee thinks the limitations or variables likely to work best are common elements that are: (a) contiguous to the unit of the requesting owner; (b) inside a building; and (c) of no practical use to other unit owners. Different combinations of the above and other variations are of course possible.

[*Choice 1.* A common element not previously allocated as a limited common element may be so allocated only by an amendment to the declaration.]

[*Choice 2.* A common element not previously allocated as a limited common element may be so allocated only by an amendment to the declaration. A unit owner may request that the executive board amend the declaration to allocate, as a limited common element for the exclusive use of the owner's unit, all or part of a common element. The board shall put the request on the agenda of a board meeting. In the amendment the executive board may prescribe conditions or obligations, including obligations to maintain the new limited common element

and to pay fees or charges to the association. If the board approves the amendment, the board shall give notice of its action to the unit owners. The amendment is effective if the board receives no written objection to the proposed amendment before the board meeting or no later than 30 days after delivery of notice. If an objection is received, the amendment is approved only if the unit owners vote under Section 3-110, whether or not a quorum is present, to approve the amendment by a vote of at least [67] percent of the votes cast, including [67] percent of the votes cast and allocated to units not owned by the declarant. On approval of the amendment, the association and the owner of the benefitted unit shall execute the amendment.]

[*Choice 3, changes from Choice 2 shown in bold ital.* A common element not previously allocated as a limited common element may be so allocated only by an amendment to the declaration. A unit owner may request that the executive board amend the declaration to allocate, as a limited common element for the exclusive use of the owner's unit, all or part of a common element [***that is contiguous to the owner's unit] [and part of a building] [and of no practical use to a unit owner other than the unit owner requesting the allocation]***. The board shall put the request on the agenda of a board meeting. In the amendment the executive board may prescribe conditions or obligations, including obligations to maintain the new limited common element and to pay fees or charges to the association. If the board approves the amendment, the board shall give notice of its action to the unit owners. The amendment is effective if the board receives no written objection to the proposed amendment before the board meeting or no later than 30 days after delivery of notice. If an objection is received, the amendment is approved only if the unit owners vote under Section 3-110, whether or not a quorum is present, to approve the amendment by a vote of at least [67] percent of the votes cast, including [67] percent of the votes cast and allocated to units not owned by the declarant. On

approval of the amendment, the association and the owner of the benefitted unit shall execute the amendment.]

(d) The association shall record an amendment to the declaration made under this section. The amendment must be indexed in the names of the parties and the association as grantor or grantee, as appropriate. If an amendment changes any information in a plat or plan concerning a limited common element described in Section 2-109(b)(10) other than a common wall between units, the association shall prepare and record a revised plat or plan.

Reporter's Note (10/23)

Observations from our August 2020 informal Zoom session on the act 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?

At the September 2020 Zoom annual meeting first reading of the act, a concern was raised as to the 50-foot size limit – whether it was too small, and whether a size limit is necessary.

SECTION 2-112. RELOCATION OF UNIT BOUNDARIES.

(a) ~~Subject to the provisions of the declaration and other provisions of law, the~~ The boundaries between adjoining units may be relocated only by an amendment to the declaration ~~up~~on application to the ~~association~~ executive board by the owners of those units. If the owners of the adjoining units have specified a reallocation between their units of their allocated interests,

the application must state the proposed reallocations. Unless ~~the executive board determines, within 30 days, that the reallocations are unreasonable,~~ the declaration provides otherwise, the association shall prepare an amendment that identifies the units involved and states the reallocations~~.~~ unless the executive board determines, not later than 30 days after receipt of the application, that the reallocation is unreasonable. The amendment must be executed by those unit owners~~, contain words of conveyance between them, and, on recordation, be indexed in the name of the grantor and the grantee, and [in the grantee's index] in the name of the association~~.

~~(b) Subject to the provisions of the declaration and other provisions of law, boundaries between units and common elements may be relocated to incorporate common elements within a unit by an amendment to the declaration upon application to the association by the owner of the unit who proposes to relocate a boundary. Unless the declaration provides otherwise, the amendment may be approved only if persons entitled to cast at least [67] percent of the votes in the association, including [67] percent of the votes allocated to units not owned by the declarant, agree to the action. The amendment may describe any fees or charges payable by the owner of the affected unit in connection with the boundary relocation and the fees and charges are assets of the association. The amendment must be executed by the unit owner of the unit whose boundary is being relocated and by the association, contain words of conveyance between them, and on recordation be indexed in the name of the unit owner and the association as grantor or grantee, as appropriate.~~

(b) The boundary of a unit may be relocated only by an amendment to the declaration. A unit owner may request that the executive board amend the declaration to include within the owner's unit all or part of a common element [***that is contiguous to the owner's unit] [and part of a building] [and of no practical use to a unit owner other than the unit owner requesting***

the allocation].

Reporter's Note (1/29)

At the November 2020 meeting of the Drafting Committee, the question was raised whether this subsection (b) allows a unit boundary relocation to add space outside a building, such as a parking space. The new bracketed choices would limit the types of common elements eligible for the executive board process. They are the same as those presented for consideration in this draft for converting common elements to limited common elements under Section 2-108 above.

The executive board may prescribe in the amendment fees or charges payable by the unit owner to the association in connection with the relocation, an increase in the allocated interest of the unit pursuant to Section 2-107, or both.

Unless the declaration provides otherwise, the executive board may approve the amendment only if the unit owners vote to approve the amendment by a vote under Section 3-110, whether or not a quorum is present, of at least [67] percent of the votes cast, including [67] percent of the votes cast and allocated to units not owned by the declarant. On approval of the amendment, the association and the owner of the benefitted unit shall execute the amendment.

(c) An amendment to the declaration under this section must contain words of conveyance between the parties. The association shall record an amendment made under this section. The amendment must be indexed in the name of the parties and the association as grantor or grantee, as appropriate. ~~The association (i) in~~ In a condominium or planned community, the association shall prepare and record plats or plans necessary to show the altered boundaries of affected units, and their dimensions and identifying numbers., ~~and (ii) in~~ In a cooperative, the association shall prepare and record amendments to the declaration, including any plans necessary to show or describe the altered boundaries of affected units, and their dimensions and identifying numbers.

Comment

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

* * *

~~**Alternative A**~~

~~**[SECTION 2-114. EASEMENT FOR ENCROACHMENTS.** To the extent that any unit or common element encroaches on any other unit or common element, a valid easement for the encroachment exists. The easement does not relieve a unit owner of liability in case of his willful misconduct nor relieve a declarant or any other person of liability for failure to adhere to any plats and plans or, in a cooperative, to any representation in the public offering statement.]~~

~~**Alternative B**~~

~~**[SECTION 2-114. MONUMENTS AS BOUNDARIES.** The existing physical boundaries of a unit or the physical boundaries of a unit reconstructed in substantial accordance with the description contained in the original declaration are its legal boundaries, rather than the boundaries derived from the description contained in the original declaration, regardless of vertical or lateral movement of the building or minor variance between those boundaries and the boundaries derived from the description contained in the original declaration. This section does not relieve a unit owner of liability in case of his willful misconduct or relieve a declarant or any other person of liability for failure to adhere to any plats and plans or, in a cooperative, to any representation in the public offering statement.]~~

~~**End of Alternatives**~~

SECTION 2-114. BUILDING ENCROACHMENTS.

Alternative A

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

Alternative B

(a) Except as otherwise provided in subsection (b) or (c), if the construction, reconstruction, or alteration of a building or the vertical or lateral movement of a building results in an encroachment due to the divergence between the existing physical boundaries of a unit and the boundaries described in the declaration pursuant to 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 any plat or plan or, in a cooperative, to any representation in the public offering statement.

Reporter's Note (1/29)

When this section applies, an easement is created or the boundary is relocated by operation of law. There is no need for an amendment to a declaration or a deed or another type of conveyance.

SECTION 2-116. EASEMENT AND USE RIGHTS.

(a) A declarant has easements through the common elements as may be reasonably necessary for the purposes of discharging the declarant's obligations, exercising special declarant rights, or making improvements within the common interest community or within real estate that may be added to the common interest community.

Reporter's Note (1/29)

This proposed language incorporates language deleted from the definition of "special declarant rights" in Section 1-103(33)(D) (see above). The qualifier "subject to the declaration" is deleted because the declarant should not be allowed to expand its easement rights beyond those stated in this section. The unit owners own the common elements.

(b) Subject to Sections 3-102(a)(6) and 3-112, the unit owners have an easement in the common elements for access to their units.

(c) Subject to the declaration and association rules, the unit owners have a right to use the common elements that are not limited common elements and all real estate that must become common elements for the purposes for which they were intended.

SECTION 2-118. TERMINATION OF COMMON INTEREST COMMUNITY.

(a) Except for a taking of all the units by eminent domain, foreclosure against an entire cooperative of a security interest that has priority over the declaration, or in the circumstances described in Section 2-124, a common interest community may be terminated only ~~by agreement of unit owners of units to which~~ if the unit owners vote under Section 3-110 to approve the termination by a vote of at least 80 percent of the votes in the association, ~~are allocated, or any~~

~~larger percentage the declaration specifies, and with any other approvals required by the declaration~~ including 80 percent of the votes allocated to units not owned by the declarant. The declaration may require a larger percentage of total votes in the association for approval, but termination still requires approval by at least 80 percent of the votes allocated to units not owned by the declarant. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential uses. The declaration may require approvals of persons other than unit owners for termination, which does not alter the percentage of unit owner votes required by this section.

Reporter's Note (10/23)

At our August 2020 informal Zoom session on the act, the comment was made that if we retain this sentence, we mean approvals by persons other than unit owners and changes to the required vote percentages are not allowed.

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

Reporter's Note (10/23)

At the September 2020 Zoom annual meeting first reading of the act, a concern was raised that subsection (c) requires recording in county offices, but Rhode Island and several other states have municipal recording offices. This is why "county" is in brackets.

Reporter's Note (1/29)

Proposed revisions below beginning with subsection (c) reflect the work of the

subcommittee on partial terminations. Two choices are given with respect to the definition of "partial termination." Choice 1 allows partial termination for all types of common interest communities. Choice 2 limits it to condominiums. Florida applies its partial termination rules only to condominiums, and it's possible that a statutory rule is not necessary, or should be markedly different, for planned communities or cooperatives. When a traditional planned community is fully built-out, the problem of economic obsolescence years after development may not need a "solution" by partial termination accomplished by a supermajority vote of owners. In addition, planned communities are not susceptible to the problem of certain condominium buildings becoming less valuable as owner-occupied units, with the prospect of creating market value by converting a building to rental real estate.

(c) [***Choice 1*** In this section, a "partial termination" means a termination of fewer than all of the units in a common interest community. A termination agreement may provide for a partial termination.] [***Choice 2*** In this section, a "partial termination" means a termination of fewer than all of the units in a condominium. A termination agreement may provide for a partial termination of a condominium, but not a planned community or cooperative.] ~~In the case of a condominium or planned community containing only units having horizontal boundaries described in the declaration, a~~ A termination agreement may provide for the sale of common elements and units following termination. If, pursuant to the agreement, any real estate is to be sold following termination, the termination agreement must set forth the minimum terms of the sale.

Reporter's Note (10/23)

At the September 2020 Zoom annual meeting first reading of the act, Howard Swibel suggested changing "must be sold" to "is to be sold" in the first sentence of this subsection.

~~(d) In the case of a condominium or planned community containing any units not having horizontal boundaries described in the declaration, a termination agreement may provide for sale of the common elements, but it may not require that the units be sold following termination, unless the declaration as originally recorded provided otherwise or all the unit owners consent to~~

~~the sale.~~

~~(c)~~ (d) The association, on behalf of the unit owners, may contract for the sale of real estate in a common interest community, but the contract is not binding on the unit owners until approved pursuant to subsections (a) and (b). If any real estate is to be sold following termination,~~,~~

title to ~~that~~ the real estate~~, upon termination, vests in the association~~ not already owned by the association vests on termination in the association as trustee for the holders of all interests in the units being terminated.

Question: Do we need paragraph (2)? The purpose is to make the transfer of real estate from the unit owners to the association as trustee appear in a document recorded in the public records. Subsection (b) above requires recordation of the termination statement. The transfer, however, happens automatically under this subsection (d), with no need for a deed or recording. Adding the requirement raises the problem of what happens if the termination agreement omits the required statement. Perhaps paragraph (2) is only useful if we determine that title insurance companies and title attorneys perceive a need for this.

Reporter's Note (10/23)

Barry Hawkins writes:

> I think paragraph 2 is not needed as the result follows clearly from what is now paragraph 1 which ought to be consolidated with the last sentence of (d). To state it twice is both redundant and may lead to unintended confusion as readers try to think out why it had to be stated again in 2 having already been dealt with in paragraph 1.

(e) ~~Thereafter, the~~ The association has all powers necessary and appropriate to effect ~~the~~ a sale approved under subsections (a) and (b). Until the sale ~~has been~~ is concluded and the proceeds ~~thereof~~ distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale must be distributed to unit owners and lien holders as their interests may appear, in accordance with subsections (h), (i), (j), and (m). Unless otherwise specified in the termination agreement, as long as the association holds title to the real estate,

each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit. During the period of ~~that~~ occupancy, each unit owner and the unit owner's successors in interest remain liable for all assessments and other obligations imposed on unit owners by this [act] or the declaration.

(f) Except in a partial termination, if the real estate in a condominium or planned community is not to be sold following termination, title to the common elements ~~and, in a common interest community containing only units having horizontal boundaries described in the declaration, title to all the real estate in the common interest community,~~ vests in the unit owners ~~upon~~ on termination, as tenants in common in proportion to their respective interests ~~as provided in~~ under subsection (j)~~, and liens on the units shift accordingly~~. Unit owners continue to hold individual titles to their respective units. The arrangement is not a new common interest community under this [act] if the real estate not to be sold is not a common interest community as defined in Section 1-103(9). ~~While the tenancy in common exists, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit~~.

Reporter's Note (1/29)

The Drafting Committee at its November 2020 recognized that unsold real estate would become a new common interest community under the act if unit owners remain obligated to pay taxes or other expenses related to the units or other real estate. See the definition of "common interest community," Section 1-103(9). The new sentence added at the end of subsection (f) responds to this concern. If unit owners remain obligated to pay common expenses, a new CIC is formed. This prevent use of the termination procedure as a loophole — otherwise a community that wants to opt out of UCIOA can just terminate under 2-118 without selling. If owners do not remain obligated for common expenses, law other than this act, including the law of tenancy in common, determines the unit owners' rights and obligations.

Reporter's Note (10/23)

At the September 2020 Zoom annual meeting first reading of the act, Howard Swibel suggested changing "is not to be sold" to "is not sold" in the first sentence of this subsection.

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

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

(i) In a cooperative, the declaration may provide that all creditors of the association have priority over any interests of unit owners and creditors of unit owners. In that event, following termination, creditors of the association holding liens on the cooperative which were [recorded] [docketed] [insert other procedures required under state law to perfect a lien on real estate as a result of a judgment] before termination may enforce their liens in the same manner as any lien holder~~,~~. ~~and any other creditor~~ All other creditors of the association ~~is~~ are to be treated as if ~~the creditor~~ they had perfected ~~a lien against the cooperative~~ liens on the cooperative immediately before termination. Unless the declaration provides that all creditors of the association have that priority:

(1) the lien of each creditor of the association which was perfected against the association before termination becomes, upon termination, a lien against each unit owner's

interest in the unit as of the date the lien was perfected;

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

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

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

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

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

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

(1) Except as otherwise provided in paragraph (2), the respective interests of unit 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 decision of the independent appraisers must be distributed to the unit owners and becomes~~ appraisal. The association shall select one or more independent appraisers and send the appraisal to the unit owners. The appraisal is final unless

(i) disapproved within 30 days after distribution by unit owners of units to which 25 percent of the votes in the association are allocated~~.~~ or (ii) one or more unit owners file written objection to the appraisal not later than 20 days after receipt of the appraisal. A unit

owner that objects may designate 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, the appraisers mutually shall designate a third appraiser. A panel consisting of an appraiser selected by the association, the unit owner's appraiser, and the designated third appraiser shall determine, by majority vote, the value of the unit owner's interest. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the appraised fair market value of that unit owner's ~~unit and its allocated interests~~ interest by the total appraised fair market values of all ~~the units and their allocated~~ unit owners' 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 immediately before the termination.

(k) In a condominium or planned community, except as otherwise provided in subsection (l), foreclosure or enforcement of a lien or encumbrance against the entire common interest community does not terminate, of itself, the common interest community, and foreclosure or enforcement of a lien or encumbrance against a portion of the common interest community, other than withdrawable real estate, does not withdraw that portion from the

common interest community. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate, or against common elements that have been subjected to a security interest by the association under Section 3-112, does not withdraw, of itself, that real estate from the common interest community, but the person taking title thereto may require from the association, upon request, an amendment excluding the real estate from the common interest community.

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

Reporter's Note (10/23)

1. At our August 2020 informal Zoom session on the act, the suggestion was made that the Drafting Committee might consider adding language to authorize partial terminations of communities and that Florida's condominium act might provide a useful starting point. Fla. Stat. § 718.117. After this Note are provisions based on the Florida act, modified to take account of the scope and terminology of UCIOA. If we add a partial termination provision, some of the existing subsections (a)-(*l*) above may require modification; but for the sake of our initial discussion, none are included in this draft.

2. Section 718.117 of the Florida condominium act, like UCIOA § 2-118, originally addressed only total (regular) terminations. In 2011, the Florida legislature amended § 718.117 to add partial termination provisions, which were further amended in 2015. Florida applies the same voting and approval rules to total and partial terminations; unit owners have the same voting rights whether their unit is designated for termination or continuation. For useful background, see Peter M. Dunbar, et al., *Partial Termination, Good Things Can Happen to Bad Projects*, 87 Fla. B.J. 47 (2013).

(m) A partial termination is subject to the following requirements:

(1) The termination agreement requires the approval of at least 80 percent of the

votes allocated to the units being terminated, in addition to the other requirements of subsections (a) and (b).

(2) The termination agreement described in subsection (b) must identify the units and common elements that survive the partial termination and provide that such units and common elements remain in the common interest community.

(3) Title to the surviving units and common elements that remain part of the common interest community specified in the termination agreement remain vested in the ownership shown in the public records and do not vest in the association.

(4) The termination agreement may require separate appraisal for the common elements. In the absence of separate appraisal, it is presumed that the common elements have no independent value but rather that their value is incorporated into the appraisal of the units, including their allocated interests. The aggregate values of the units and common elements being terminated must be separately determined, and the termination agreement must specify the allocation of the proceeds of sale for the units and common elements being terminated.

(5) Liens on surviving units and surviving common elements continue, and liens on units being terminated no longer extend to any surviving common elements.

(6) The unit owners association may continue as the association for the units that remain subject to the declaration.

(7) An amendment to the declaration or an amended and restated declaration must be recorded simultaneously with the recordation of the termination agreement under subsection (b). Approval of the amendment under Section 2-117 is not required if the ownership share of the common elements of each surviving unit in the common interest

community remains in the same proportion to the surviving units as it was before the partial termination.

(n) The termination of a common interest community does not bar the creation of another common interest community by the execution of a new declaration covering the terminated real estate or any portion thereof.

Reporter's Note (1/29)

The new proposed subsection (n) makes it clear that termination under this Section does not bar the creation of a new common interest community, either pursuant to the plan of termination or otherwise, and supplements the new sentence added to subsection (f), which states that real estate that is not sold after termination does not automatically become a new common interest community. This proposed subsection (n) is based on Fla. Stat. § 718.117(19), which provides: "*Creation of another condominium*. The termination or partial termination of a condominium does not bar the filing of a new declaration of condominium by the termination trustee, or the trustee's successor in interest, for the terminated property or any portion thereof. The partial termination of a condominium may provide for the simultaneous filing of an amendment to the declaration of condominium or an amended and restated declaration of condominium by the condominium association for any portion of the property not terminated from the condominium form of ownership."

Reporter's Note (10/23)

1. At our August 2020 informal Zoom session on the act, a question from the floor asked whether any of this section applies or should apply to a governmental condemnation of a common interest community.

2. UCIOA § 1-107, *Eminent Domain*, provides some rules, but appears to focus only on the taking of a single unit or part of a unit. Possibly § 1-107 does not apply to a taking of all or substantially all of a community.

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

Comment

* * *

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

~~Subsections (b) and (g), the parallel provisions to Section 2-117(b) and (d) of MRECA, contemplate the same possibility in the case of cooperatives.~~ Termination without sale is not likely to be the usual case, but might occur if the unit owners plan ~~conversion~~ to ~~another~~ form ~~of~~ a new common interest community.~~, for example, conversion from a cooperative to a condominium. In the case of a cooperative, title to the real estate upon termination would remain in the name of the association as trustee for the unit owners; *see* subsection (g).~~ In a condominium or planned community, title to the common elements following termination vests in the unit owners as tenants in common if that real estate is not to be sold.~~, *see* subsection (f), but until a sale occurs vests in the association if the real estate is to be sold; *see* subsection (e). In the case of a condominium or planned community which contains only units with horizontal boundaries, these title rules also apply to all the units. (*See* subsection (f).) In the remaining case, *i.e.*, the case where there are some units with horizontal boundaries and some without horizontal boundaries, the Act provides, in subsection (f), that unit owners become tenants in common of the common elements, but~~ The unit owners continue to hold individual titles to their units. Therefore, in a condominium or planned community with units located in ~~both a high rise~~ in a high-rise building~~, and in single story structures, the unit owners in the high rise building will hold individual title to their unit upon termination, and~~ either the declaration or the termination agreement should address the needs for easements of support and access for the ~~high rise~~ high-rise units over the real estate which all the unit owners will own as tenants in common. Undoubtedly, the unit owners will immediately reconstitute themselves as some form of common interest community.

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

SECTION 2-120. MASTER ASSOCIATIONS.

(a) ~~If the declaration provides that any of the powers described in Section 3-102 are to be exercised by or may be delegated to a profit or nonprofit corporation [or unincorporated association] that exercises those or other powers on behalf of one or more common interest communities or for the benefit of the unit owners of one or more common interest communities, all~~ The declaration may delegate any power described in Section 3-102 to a master association. Unless the declaration provides otherwise, the executive board of a unit owners association may delegate any additional power described in Section 3-102 to a master association. ***[Choice 1:*** A delegation of the board is subject to approval by the unit owners. The board shall make approval of the delegation an item on the agenda at the first meeting of the unit owners association after the delegation. A delegation of powers to a master association is not effective before acceptance by the board of the master association.] ***[Choice 2, replace these 3 sentences with:*** A delegation of the board is effective when approved by the unit owners and accepted by the board of the master association.] All provisions of this [act] applicable to a unit owners~~'~~ associations apply to ~~any such corporation [or unincorporated~~ a master association~~]~~, except as modified by this section.

Reporter's Note (1/29)

1. The Drafting Committee at its November 2020 meeting discussed whether the bylaws may modify the rules of this subsection (see Reporter's note below) and decided to make no change. One reason is that in UCIOA states (unlike New Jersey) bylaws are not required to be recorded.

2. The subcommittee on master associations discussed the last sentence of subsection (a), which on its face imposes limits what master associations are allowed to do and imposes many obligations on master associations and their executive boards. Section 2-120 Comment 3 explains: "Subsection (a) makes it clear that, if any of the powers of the unit owners' association may be exercised by, or delegated to, a master association, all other provisions of this Act, which apply to a unit owners' association apply to that master association except as modified by this section. Accordingly, provisions on notice, voting, quorums, records, meetings, and other matters which apply to the unit owners' association would apply with equal validity to such a master association." ***Query whether further guidance should be given, either in statutory text or the Comments.***

Example. Consider, for example, how this sentence and the Comment apply to the budget process regulated by Section 3-123, *Adoption of Budgets; Special Assessments*. Probably the master association (before and after the period of declarant control ends) must send its proposed budget to the unit owners of all common interest communities subject to the master association, and then schedule a meeting for its consideration, etc. If there is ambiguity here, the problem may be that for a regular unit owners association, all unit owners are members of the association; but for a master association, the unit owners seldom will be members or shareholders in the master association. Our act says nothing about who are or may be members or shareholders in a master association.

Reporter's Note (10/23)

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

(b) At any meeting of the unit owners for which the subject of delegation of powers to a master association is listed in the notice of the meeting, the unit owners may approve, disapprove, or revoke any delegation of powers to a master association by a majority of the votes cast at the meeting. Other law determines the effect of revocation on the rights and obligations of parties under an existing contract between a unit owners association and a master association.

Reporter's Note (10/23)

David Ramsey writes:

Do we mean any meeting of the members? Do we mean any meeting of the board? I assume the former and, if so, perhaps we need to say that. Further, it

shouldn't be subject to a vote if a motion is made at the meeting, but without prior notice that the matter will be on the agenda. Otherwise, a meeting with a bare quorum could vote to revoke a delegation, when the majority of the members would be opposed to revoking the delegation.

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

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

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

~~(e)~~ (f) [After the period of declarant control - ***should this be inserted here (see Reporter's note below)?***] All of the votes in the master association must be held by common interest communities that are subject to the master association, unless the master association serves real estate not located within a common interest community. Each common interest community subject to the master association must hold an equitable portion of the votes in the master association. The executive board of the master association must be elected in one of the following ways:

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

Reporter's Note (10/23)

David Ramsey writes:

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

(2) If the instruments governing the master association equitably apportion the seats on the board to each common interest community [as a separate voting class], all unit owners associations of each common interest community subject to the master association shall elect one or more members of the master association's executive board.

Reporter's Note (10/23)

David Ramsey writes:

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

Reporter's Note (1/29)

1. The proposed revision to subsection (f) and the new subsection (g) below reflect the work of the subcommittee on master associations. The revision shortens and simplifies this subsection but makes several important changes:

First, new paragraph (1) requires an equitable allocation of the votes in the master association among all the common interest communities served by the master association. The allocation should be contained in the articles of organization or other governing documents of the master association.

Second, new subsection (f) provides mandatory rules designed 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. The existing statutory language authorizes four "ways" to elect the executive board, apparently allowing other methods of election. New subsection (f) requires that the governing instruments of the master association select alternative (A) or (B).

Third, new subsection (f) preserves the existing flexibility in this provision by allowing an "at-large" election of the master board or the designation of particular seats on the board to each common interest community, as explained in Comment 7 to this section. The "four ways" of the old subsection are collapsed into two ways. New subparagraph (2)(A) provides for at-large seats, and new subparagraph (2)(B) provides for designated (i.e., "district") seats.

The new subsection still allows voting either by unit owners or their boards. 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.

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 new subsection (f), 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, each community may be a separate voting class, with Community A having 2 seats and Community B having 4 seats. Under the existing subsection, the size of the sub-association boards determines how many votes each sub-association holds under paragraphs ("ways") (2) and (4). The new subsection makes size of the sub-association boards irrelevant – in this example, it should not matter that smaller Community A has a bigger board than Community B. Also note, Community A may exercise its master-association votes by all its members voting individually at a sub-association meeting, while Community B may exercise its master-association votes by the vote of its executive board.

2. Existing subsection (f) specifies voting rules only "after the period of declarant control" without explaining what this means. Section 3-103(d) defines declarant control, when the declarant may appoint and remove board officers and members of sub-associations, with no express reference to master associations. Two choices are (1) develop the concept of "period of declarant control" of the master association or (2) drop the declarant-control condition, i.e, make the voting rules apply at the outset. The condition seems unnecessary to protect a declarant's legitimate interests because the declarant will have de facto control under the subsection (f) voting rules when it still controls all or a majority of the CICs that are subject to the master association. In effect, declarant control of the sub-associations gives it automatic control over electing the master association board. In case the committee prefers the first choice, here is a new subsection that deals with the period of declarant control over a master association and generally

parallels Section 3-103(d):

> (g) A period of declarant control of the master association terminates no later than the earliest of:
>
> (1) [60] days after conveyance of [three-fourths] of the units all common interest communities subject to the master association that may be created to unit owners other than a declarant;
>
> (2) two years after all declarants have ceased to offer units for sale in the ordinary course of business;
>
> (3) two years after any right to add new units was last exercised; or
>
> (4) the day any declarant [all declarants], after giving notice in a record to unit owners, records an instrument voluntarily surrendering all rights to control activities of the master association.

SECTION 2-125. ADVERSE POSSESSION AND PRESCRIPTIVE EASEMENTS. A unit owner or a person claiming through a unit owner may not acquire title by adverse possession or an easement by prescription to a common element in derogation of the title of any other unit owner or the association.

Reporter's Note (10/23)

At the August 2020 informal Zoom session and the September 2020 Zoom annual meeting first reading of the act, questions were raised as to whether we need the "in derogation of the title of any other unit owner or the association" qualification; and if so, whether other language might be better? At the August meeting, an observation was made that this 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.

Reporter's Notes

1. The Study Committee Report (topic # 2) recommends: "A drafting committee should consider drafting a statute describing the circumstances when the enacting State's substantive law of adverse possession should apply in a common interest community. The Drafting Committee at its January 2020 meeting discussed the issues and considered the Reporter's Memorandum on Adverse Possession, dated January 24, 2020, which includes four possible statutory approaches to deal with adverse possession. The Drafting Committee voted in favor of Approach 2, which immunizes common elements from loss by adverse possession by claims of unit owners. The Committee also agreed that the immunity should extend to prescriptive easements.

The Drafting Committee at its April 2020 meeting discussed this new

section and decided to add the phrase "or a person claiming through a unit owner" to protect common elements from claims made by tenants of unit owners or similar persons.

2. The proposed new Section 2-125 protects all the common elements from loss of title by claims of adverse possession or prescription by a limited immunity. This immunity is limited to real estate defined as "common elements" in UCOIA. This Section precludes only a claim made by a unit owner. When the unit owners own the common elements in tenancy in common, this provision modifies existing law by not allowing a unit owner to acquire adverse possession by proving an "ouster" of the other cotenants. When the association owns the common elements, this provision modifies existing law, which in most states lacks reported law clearly delineating the requirements for a person to acquire adverse possession title to property owned by an association of which the person is a member.

This section adopts Approach 2 described in the Reporter's Memorandum on Adverse Possession (Jan. 24, 2020). This section provides a more limited immunity than Approach 1 described in the Reporter's Memorandum, which would have provided immunity from claims against the common elements made by any person, including unit owners and neighboring property owners.

3. The new section leaves intact the enacting State's substantive law of adverse possession to govern claims made by the association or the unit owners collectively as tenants in common. Claims of this type may be asserted when the common elements are subject to a title defect: a person other than association or the unit owners owns or has a potential claim to a common element. An adverse possession claim of this type protects the unit owners' interest in the common elements, rather than jeopardizing the unit owners' expectations of ownership and use of the common elements.

4. The language in this section is based on Minn. Stat. § 508.02, which provides: "No title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession, but the common law doctrine of practical location of boundaries applies to registered land whenever registered." Like the Minnesota statute, this section refers to both "adverse 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.

5. 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.

(a) Except as otherwise provided in subsection (b) and other provisions of this [act], the association:

(1) shall adopt and may amend bylaws and may adopt and amend association rules;

(2) shall adopt and may amend budgets under Section 3-123, may collect

assessments for common expenses from unit owners, and may invest funds of the association;

(3) may hire and discharge managing agents and other employees, agents, and independent contractors;

(4) may institute, defend, or intervene in litigation or in arbitration, mediation, or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community, subject to Section 3-124;

(5) may make contracts and incur liabilities;

(6) may regulate the use, maintenance, repair, replacement, and modification of common elements;

(7) may cause additional improvements to be made as a part of the common elements;

(8) may acquire, hold, encumber, and convey in its own name any right, title, or interest to real estate or personal property, but:

(A) common elements in a condominium or planned community may be conveyed or subjected to a security interest only pursuant to Section 3-112; and

(B) part of a cooperative may be conveyed, or all or part of a cooperative may be subjected to a security interest, only pursuant to Section 3-112;

(9) may grant ~~easements, leases, licenses, and concessions~~ an easement, lease, license, or concession through or over the common elements, except that the association may not make a grant under this paragraph to a unit owner that benefits only the unit of the owner;

Reporter's Note (10/23)

Style rewrote this section, which previously stated: "(9) may grant easements, leases, licenses, and concessions through or over the common elements; *provided, the association shall not grant an easement, lease, license, or concession to a unit owner for the benefit of the unit owner's unit;*".

Concerning this paragraph as revised by Style, David Biklen writes:

New 3-102(a)(9)
"(9) may grant an easement, lease, license, or concession through or over the common elements, [unless the grant is to a unit owner for the benefit of the owner's unit] **except that the board may not make a grant under this paragraph to a unit owner that benefits only the unit of the owner.**

It seems to me the proposed rewrite by the drafting committee - in brackets - might not clearly say that the board cannot do this. "unless" what then? Why not simply prohibit it? How about something like the new [bold] language above?

(10) may impose and receive any payments, fees, or charges for:

(A) the use, rental, or operation of the common elements, other than limited common elements described in Section 2-102(2) and (4); and

(B) services provided to unit owners;

(11) may impose charges for late payment of assessments and, after notice and an opportunity to be heard, may impose reasonable fines for violations of the declaration, bylaws, and association rules;

(12) may impose reasonable charges for the preparation and recordation of amendments to the declaration, resale certificates required by Section 4-109, or statements of unpaid assessments;

(13) may provide for the indemnification of its officers and executive board and maintain directors and officers liability insurance;

(14) except to the extent limited by the declaration, may assign its right to future income, including the right to receive assessments;

(15) may exercise any other powers conferred by the declaration or bylaws;

(16) may exercise all other powers that may be exercised in this state by organizations of the same type as the association;

(17) may exercise any other powers necessary and proper for the governance and operation of the association;

(18) may require that disputes between the association and unit owners or between two or more unit owners regarding the common interest community be submitted to 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.

(b) The declaration may not limit the power of the association beyond the limit authorized in subsection (a)(18) to:

(1) deal with the declarant if the limit is more restrictive than the limit imposed on the power of the association to deal with other persons; or

(2) institute litigation or an arbitration, mediation, or administrative proceeding against any person, subject to the following:

(A) the association shall comply with Section 3-124, if applicable, before instituting any proceeding described in Section 3-124 (a) in connection with construction defects;

and

(B) the executive board promptly shall provide notice to the unit owners of any legal proceeding in which the association is a party other than proceedings involving enforcement of association rules or to recover unpaid assessments or other sums due the association.

(c) If a tenant of a unit owner violates the declaration, bylaws, or association rules, in addition to exercising any of its powers against the unit owner, the association may:

(1) exercise directly against the tenant the powers described in subsection (a)(11);

(2) after giving notice to the tenant and the unit owner and an opportunity to be heard, levy reasonable fines against the tenant for the violation; and

(3) enforce any other rights against the tenant for the violation which the unit owner as landlord could lawfully have exercised under the lease or which the association could lawfully have exercised directly against the unit owner, or both.

(d) The rights referred to in subsection (c)(3) may be exercised only if the tenant or unit owner fails to cure the violation within 10 days after the association notifies the tenant and unit owner of that violation.

(e) Unless a lease otherwise provides, this section does not:

(1) affect rights that the unit owner has to enforce the lease or that the association has under other law; or

(2) permit the association to enforce a lease to which it is not a party in the absence of a violation of the declaration, bylaws, or association rules.

(f) The executive board may determine whether to take enforcement action by

exercising the association's power to impose sanctions or commencing an action for a violation of the declaration, bylaws, and association rules, including whether to compromise any claim for unpaid assessments or other claim made by or against it. The executive board does not have a duty to take enforcement action if it determines that, under the facts and circumstances presented:

(1) the association's legal position does not justify taking any or further enforcement action;

(2) the covenant, restriction, or association rule being enforced is, or is likely to be construed as, inconsistent with law;

(3) although a violation may exist or may have occurred, it is not so material as to be objectionable to a reasonable person or to justify expending the association's resources; or

(4) it is not in the association's best interests to pursue an enforcement action.

(g) The executive board's decision under subsection (f) not to pursue enforcement under one set of circumstances does not prevent the executive board from taking enforcement action under another set of circumstances, but the executive board may not be arbitrary or capricious in taking enforcement action.

(h) The executive board shall establish a reasonable method for unit owners to communicate among themselves and with the executive board on matters concerning the association.

Reporter's Note (10/23)

Observations from our August 2020 informal Zoom session on the act included:

(1) Does the restriction of grants to unit owners in 3-102(a)(9) extend (and should it extend) to temporary construction easements?
(2) Should this restriction prevent the existing practice in some states to transfer outside spaces to unit owners who agree to undertake maintenance of the areas, described in the

Reporter's Note to 2-108?

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 only the unit of the owner." 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;

(3) terminate the common interest community;

(4) elect members of the executive board but may fill vacancies in its membership for the unexpired portion of any term or, if earlier, until the next regularly scheduled election of executive board members; or

(5) determine the qualifications, powers, duties, or terms of office of executive board members.

(c) The executive board shall adopt budgets as provided in Section 3-123.

(d) Subject to subsection (e), the declaration may provide for a period of declarant control of the association, during which a declarant, or persons designated by the declarant, may appoint and remove the officers and members of the executive board. A declarant may voluntarily surrender the right to appoint and remove officers and members of the executive board before the period ends. In that event, the declarant may require during the remainder of the period that specified actions of the association or executive board, as described in a recorded instrument executed by the declarant, be approved by the declarant before they become effective. Regardless of the period provided in the declaration, and except as provided in Section 2-123(g), a period of declarant control terminates no later than the earliest of:

(1) [60] days after conveyance of [three-fourths] of the units that may be created

to unit owners other than a declarant;

(2) two years after all declarants have ceased to offer units for sale in the ordinary course of business;

(3) two years after any right to add new units was last exercised; or

(4) the day the declarant, after giving notice in a record to unit owners, records an 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(e), 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 have a duty of "ordinary and reasonable care." The 1994 amendment conforms the Act to expectations of owners, officers, members of executive boards, and courts. The duties owed by an elected officer or board member ought to parallel the standards imposed on persons holding equivalent positions in non-profit corporations in the state where the common interest community is located.

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

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

2. Executive board members frequently will obtain the benefits of the business judgment rule under subsection (a). The business judgment rule is a standard of liability, not a standard of conduct. The rule curtails judicial review of board decisions by creating a presumption of sound business judgment. As long as the board decision might serve a rational business purpose, courts do not interfere by substituting their own ideas of what is or is not a correct or reasonable decision. The rule also presumes that the directors act in good faith, on an informed basis, and with the honest belief that their action furthers the best interests of the corporation. The business judgment rule began as common-law rule for evaluating the conduct of directors of for-profit corporations. Now many courts apply the rule in the non-profit context generally and as the

basis for evaluating the activities of boards of unit owners associations. See, e.g., Reiner v. Ehrlich, 66 A.3d 1132 (Md. Ct. Spec. App. 2013); Committee for a Better Twin Rivers v. Twin Rivers Homeowners Association, 929 A.2d 1060 (N.J. 2007); 40 West 67th Street v. Pullman, 790 N.WE.2d 1174 (N.Y. 2003).

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

[RENUMBER SUBSEQUENT COMMENTS 3 and 4]

* * *

~~5. The 1994 amendment to subsection (a) is intended to conform the Act to expectations of owners, members of executive boards, and courts. The duty owed by an elected member of an executive board ought to parallel the standard imposed on directors of non-profit corporations. The original text set out a lesser standard. By making reference to the non-profit corporate model, members will also obtain the benefits of the business judgment rule, now commonly applied by courts in the non-profit context; see, for example, Levandusky v. One Fifth Avenue Apartment Corp., 75 N.Y.2d 530 (1990).~~

~~Comment 5 was expanded in 2008, because of the importance of this issue. The Act continues to rely on the Business Judgment Rule as the basis for evaluating the actions of the Board. "As long as directors of a corporation decide matters rationally, honestly, and without a disabling conflict of interest, the decision will not be reviewed by the courts." Atkins v. Hibernia Corp., 182 F3d 320, 324, (5 th cir. 1999) quoted in Block, Barton & Radin, The Business Judgment Rule, (5th ed. 1998) in 2002 Supp. Page 6.~~

~~The business judgment rule is a tool of judicial review, not a standard of conduct. The rule (1) shields directors from liability and protects decisions made by directors when The rule's elements a business decision, disinterestedness, and independence, due care, good faith and no abuse of discretion are present and a challenged decision does not constitute fraud, illegality, ultra vires conduct or waste, and (2) creates a presumption that directors have acted in accordance with each of the elements of the rule.~~

~~[Block et al at page 110.] In its 2007 decision, the Supreme Court of New Jersey confirmed the continuing vitality of the business judgment rule as the basis for evaluating the activities of the executive board of a unit owners association. See Committee for a Better Twin Rivers v. Twin Rivers Homeowners Association, 192 N.J. 344; 929 A.2d 1060 (2007); the decision is expected to be widely followed.~~

~~The change from "fiduciary" to "trustee" as the standard of care for declarant-appointed directors makes the standard of care more precise. The law contemplates many forms of fiduciary relationships; among them, the trustee's duty is the highest.~~

* * *

SECTION 3-104. SPECIAL DECLARANT RIGHTS.

Reporter's Note (1/29)

The proposed revisions in this Section and in Sections 3-104A and 3-104B reflect the work of the subcommittee on special declarant rights. At the November 2020 meeting of the Drafting Committee, a consensus emerged to define all special declarant rights as real property while implementing the simplicity and flexibility of Alternative 1, which drops many of the restrictions on transfer in existing Section 3-104.

(a) A special declarant right is a servitude appurtenant to all real estate owned by the declarant in the common interest community, including real estate added to the common interest community.

Reporter's Note (1/29)

Proposed new subsection (a) makes all special declarant rights interests in real property and automatically makes every special declarant right appurtenant to all real estate owned by the declarant in the common interest community. Except for mortgages, a declarant's voluntary transfer of real estate in a common interest community does not transfer any interest in a special declarant right unless an instrument describes the special declarant right as a subject of the transfer. In effect, a special declarant right is a "floating" servitude; it is appurtenant to the declarant's real estate in the common interest community as it changes over time – reduced when the declarant sells units and makes other transfers and increased when the declarant adds real estate to the common interest community. A related revision to Section UCIOA § 2-105, *Contents of Declaration* (above), drops the requirement that the declaration sufficiently describe "the real estate to which each [special declarant right] applies."

(b) A declarant that no longer owns real estate in the common interest community ceases to have any special declarant rights.

(c) A special declarant right is transferable and divisible. Except for a mortgage, a declarant may make a voluntary transfer of all or part of a special declarant right ~~(Section 1-103(29)) created or may be transferred only by an instrument evidencing the transfer recorded in every [county] in which any portion of the common interest community is located. The instrument is not effective unless executed by the transferee.~~ only to a person that owns real

estate in the common interest community 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.

Reporter's Note (10/23)

Observations from our August 2020 informal Zoom session on the act 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.

Reporter's Note (1/29)

The subcommittee working on special declarant rights discussed an issue raised by David Ramsey at the November Drafting Committee meeting. Sometimes new developers use facilities and equipment installed by their predecessors, and the items contain defects or flaws that ought to be remedied, but the successor fails to do so. Examples include a water detention pond built in Phase 1, with a new developer for Phase 2 using the detention pond for Phase 2; and an elevator that serves a high-rise building, with the new developer acquiring rights to develop only the top floors of the building. The existing SDR provisions in Section 3-104A below do not address this problem, and it was not clear to the subcommittee what if anything might be added to the act.

SECTION 3-104A. LIABILITY AFTER TRANSFER OF SPECIAL DECLARANT RIGHTS.

(a) In this section, "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) Except as otherwise provided in this section and in Section 3-104B(e), a successor to a special declarant right is subject to all obligations and liabilities imposed on the transferor by this [act] or by the declaration.

Reporter's Note (1/29)

This subsection (b) is moved up from subsection (d) in the last draft with no change in language except insertion of the reference to Section 3-104B(e). This subsection states the most basic rule of this section and seems better positioned here.

(c) ~~Upon transfer of any special declarant right, the liability of a transferor declarant is as follows:~~

~~(1) A transferor is not relieved of any obligation or liability arising before the transfer and remains liable for warranty obligations imposed upon him~~ If a transferor 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 imposed upon either party by this [act] or the declaration. Lack of privity does not deprive ~~any~~ a unit owner of standing to maintain an action to enforce ~~any~~ an obligation or liability of the transferor or transferee.

~~(2) If a successor to any special declarant right is an affiliate of a declarant (Section 1-103(1)), the transferor is jointly and severally liable with the successor for any obligations or liabilities of the successor relating to the common interest community.~~

~~(3) If a transferor retains any special declarant rights, but transfers other special declarant rights to a successor who is not an affiliate of the declarant, the transferor is liable for any obligations or liabilities imposed on a declarant by this [act] or by the declaration relating to the retained special declarant rights and arising after the transfer.~~

~~(4) A transferor has no liability for any act or omission or any breach of a contractual or warranty obligation arising from the exercise of a special declarant right by a successor declarant who is not an affiliate of the transferor.~~

(d) If a declarant transfers a special declarant right to a non-affiliate successor, the transferor remains liable for any obligation or liability arising before the transfer, including a

warranty obligation imposed on the transferor by this [act]. The transferor is not liable for any obligation or liability arising after the transfer which is imposed on the successor by this [act] or the declaration relating to the transferred special declarant right.

~~(c) Unless otherwise provided in a mortgage instrument, deed of trust, or other agreement creating a security interest, in case of foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under Bankruptcy Code or receivership proceedings, of any units owned by a declarant or real estate in a common interest community subject to development rights, a person acquiring title to all the property being foreclosed or sold, but only upon his request, succeeds to all special declarant rights related to that property held by that declarant, or only to any rights reserved in the declaration pursuant to Section 2-115 and held by that declarant to maintain models, sales offices, and signs. The judgment or instrument conveying title must provide for transfer of only the special declarant rights requested.~~

~~(d) Upon foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under Bankruptcy Code or receivership proceedings, of all interests in a common interest community owned by a declarant:~~

~~(1) the declarant ceases to have any special declarant rights, and~~

~~(2) the period of declarant control (Section 3-103(d)) terminates unless the judgment or instrument conveying title provides for transfer of all special declarant rights held by that declarant to a successor declarant.~~

(e) A non-affiliate successor that acquires fewer than all special declarant rights held by the transferor is not subject to an obligation or liability that relates to special declarant rights not transferred to the successor.

~~(2) A successor to any special declarant right, other than a successor described in paragraph (3) or (4) or a successor who is an affiliate of a declarant, is subject to the obligations and liabilities imposed by this [act] or the declaration:~~

~~(i) on a declarant which relate to the successor's exercise or nonexercise of special declarant rights; or~~

~~(ii) on his transferor, other than:~~

(f) A non-affiliate successor is not subject to an obligation or liability that relates to:

~~(A)~~ (1) a misrepresentation~~s~~ by ~~any~~ a previous declarant;

~~(B)~~ (2) a warranty obligation~~s~~ on an improvement~~s~~ made by ~~any~~ a previous declarant~~,~~ or made before the common interest community was created;

~~(C)~~ (3) breach of ~~any~~ a fiduciary obligation by ~~any~~ a previous declarant or ~~his~~ the previous declarant's appointees to the executive board; or

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

Reporter's Note (1/29)

This subsection (g) dealing with the special declarant right (SDR) to maintain models, offices, and signs is now redundant due to other revisions to this section. (1) It is not necessary to say that a holder of only this SDR may not exercise other SDRs. This is a truism that obviously applies to all rights holders. (2) Subsection (e) above relieves the holder of the SDR to maintain models, offices, and signs from obligations related to other SDRs. (3) We don't need a special rule saying the holder of the SDR to maintain models, offices, and signs must comply with Article 5 dealing with the public offering statement and registration of the common interest community. Subsections (b) and (e) read together make it clear that the holder of this SDR is liable for all obligations related to this SDR, which necessarily includes Article 5 obligations.

Reporter's Note (1/29)

This subsection is deleted because the same content appears below in Section 3-104B(d).

SECTION 3-104B. FORECLOSURE OF SPECIAL DECLARANT RIGHTS.

(a) In this section, "foreclosure sale" means a 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.

(b) If a foreclosure sale includes a special declarant right, the purchaser may elect to acquire or reject the special declarant right. The judgment or instrument conveying title must provide for transfer of only the special declarant rights acquired.

Reporter's Note (1/29)

This subsection (c) is deleted. The content from paragraph (1) is moved to new Section 3-104(b) above and terminates a declarant's SDRs whenever the declarant no longer owns real estate in a common interest community, whether due to foreclosure or otherwise. Due to our other revisions, we no longer need the special rule of paragraph (2). If the purchaser at foreclosure elects to acquire the SDR for appointing and removing executive board members and officers, then the period of declarant control continues. If the purchaser does not acquire this right, declarant control either ends or remains as an SDR if still held by a declarant who owns real estate.

~~(4)~~ (c) ~~A successor to all special declarant rights held by a transferor who succeeded to those rights pursuant to a deed or other instrument of conveyance in lieu of foreclosure or a judgment or instrument conveying title under subsection (c),~~ A purchaser of a special declarant right at a foreclosure sale is a successor declarant that may declare its intention in a recorded instrument ~~the intention~~ to hold those rights solely for transfer to another person. ~~Thereafter, until transferring all special declarant rights to any person acquiring title to any unit or real estate subject to development rights owned by the successor, or until recording an instrument permitting exercise of all those rights, that successor may not exercise any of those rights~~ After recording the instrument, the successor declarant may not exercise a special declarant right, other than ~~any~~ a right held by ~~his~~ the transferor to control the executive board in

accordance with Section 3-103(d) ~~for the duration of any period of declarant control~~, and any ~~attempted~~ attempt to exercise ~~of those rights~~ a special declarant right in violation of this section is void.

The successor declarant may transfer some or all its special declarant rights pursuant to Section 3-104.

(d) ~~So~~ As long as a successor declarant ~~may not exercise special declarant rights under this subsection~~ described in subsection (c) complies with this section, the successor declarant is not subject to any obligation or liability ~~or obligation~~ as a declarant other than liability for ~~his~~ its acts and omissions under Section 3-103(d).

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

SECTION 3-108. MEETINGS.

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

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

(2) An association shall hold a special meeting of unit owners to address any matter affecting the common interest community or the association if its president, a majority of the executive board, or unit owners having at least 20 percent, or any lower percentage specified in the bylaws, of the votes in the association request that the secretary call the meeting. If the association does not notify unit owners of a special meeting within 30 days after the requisite number or percentage of unit owners request the secretary to do so, the requesting members may directly notify all the unit owners of the meeting.

(3) An association shall notify unit owners of the time, date, and place of each annual and special unit owners meeting not less than 10 days or more than 60 days before the meeting date. Notice may be by any means described in Section 3-121. The notice of any meeting must state the time, date and place of the meeting, and the items on the agenda, including a description of all matters on which a vote of the unit owners is required for action to be taken:

The unit owners may discuss other matters not described in the notice at a meeting, but may not vote to implement action on other matters.

Reporter's Note (1/29)

At the November 2020 meeting, the Drafting Committee had a long discussion of paragraphs (3) and (4). The consensus was that unit owners should not be allowed to vote to take action on any matters that are not disclosed to the unit owners in the notice sent out before the meeting, whether a regular or special meeting. An agenda item that says only "New Business" is not a sufficient description to allow a vote on a new subject brought up for the first time. This limitation follows the general practice in the corporate world. For meetings of community associations, many unit owners decided not to attend meetings personally if the notice discloses no issue that they consider to be important to them. The proposed revision to paragraphs (3) and (4) responds to the Drafting Committee's discussion. The proposed revision replaces the list of three subjects in subparagraphs (A), (B), and (C) that the notice "must state" with the generic phrase "all matters on which a vote of the unit owners is required for action to be taken." The list of three subjects probably is not be complete under existing UCIOA, and particular associations may expand the list with special provisions in their governing documents. The last sentence of the proposed revision responds to a concern expressed that the term in paragraph 2 "may be considered" is ambiguous. At any meeting, subject to the normal rules governing meeting, unit owners should be allowed to raise and discuss any issues of their choosing, including the taking of nonbinding (straw) votes, which do not take or implement action.

(4) The minimum time to give notice required by paragraph (3) may be reduced or waived for a meeting called to deal with an emergency.

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

(6) Unless prohibited by the declaration or bylaws, ~~allow for meetings~~ a meeting of unit owners ~~to be conducted by telephonic, video, or other conferencing process, if the alternative process is consistent with subsection (b)(7)~~ is not required to be held at a geographic location if the meeting is conducted by a means of communication that enables owners to in different locations to communicate in real time to the same extent as if they were physically present in the same location.

Reporter's Note (1/29)

Two revisions to this paragraph (6) come from discussion at the November 2020 meeting of the Drafting Committee. First, the declaration or bylaws do not have to authorize electronic meetings. They are allowed unless 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."

(7) The executive board may allow unit owners to participate remotely in a meeting held at a geographic location by a means of communication that is consistent with paragraph (6).

~~(7)~~ (8) Except as otherwise provided in the bylaws or this [act], meetings of the association must be conducted in accordance with the most recent edition of Roberts' Rules of Order Newly Revised.

(b) The following requirements apply to meetings of the executive board and

committees of the association authorized to act for the association:

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

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

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

(C) discuss labor or personnel matters;

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

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

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

(3) During the period of declarant control, the executive board shall meet at least four times a year. At least one of those meetings must be held at the common interest community or at a place convenient to the community. After termination of the period of declarant control,

all executive board meetings must be at the common interest community or at a place convenient to the community unless the unit owners amend the bylaws to vary the location of those meetings.

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

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

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

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

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

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

(8) After termination of the period of declarant control, unit owners may amend

the bylaws to vary the procedures for meetings described in paragraph (7).

(9) Instead of meeting, during the period of declarant control the executive board may act by unanimous consent as documented in a record authenticated by all its members. The secretary promptly shall give notice to all unit owners of any action taken by unanimous consent. After termination of the period of declarant control, the executive board may act by unanimous consent only to undertake ministerial actions or to implement actions previously taken at a meeting of the executive board.

Reporter's Note (1/29)

The Drafting Committee discussed paragraph (9) at its November 2020 meeting. The primary concern is transparency, with frequent reforms in some areas of law that prefer that decision-making occursis in "open meetings," which interested persons may attend. The counterargument is that declarant-controlled boards are able to enact measures without the consent of unit owners, and it's efficient to do so by unanimous consent without a live meeting. But is there value in requiring the steps to call a meeting so that unit owners may choose to attend in order to observe? The Committee's discussion did not lead to consensus as to whether to make a change here.

Reporter's Note (10/23)

David Biklen writes:

I believe this says that the board may take any action it wishes without notice and an open meeting so long as the board decision is unanimous. Do we really mean that? And if so, how is that good policy? It completely guts the open meeting rules of the act.

(10) An action seeking relief for the failure of the executive board to comply with this section may be brought not later than [60] days after the latter to occur of:

(A) approval of the minutes of the meeting with respect to which the alleged noncompliance relates; or

(B) distribution to the unit owners of a record describing the board's conduct that is alleged not to comply with this section.

Reporter's Note (1/29)

At its November 2020 meeting, the Drafting Committee concluded that the first sentence of paragraph (10) is redundant and merits deletion. The Committee also thought the key terms in the second sentence – challenge, validity, and action – would benefit from more precision. There may be further questions remaining with respect to the scope of paragraph (10), both under the existing version and the proposed revision. E.g.:

(1) Does the 60-day limit apply only to conduct taken by the executive board without a unit owners' meeting, or does it include board misconduct in calling or holding a unit owner's meeting (e.g., failure to give at least 10 days' notice of the meeting pursuant to paragraph (3))?

(2) Does the 60-day limit apply if the plaintiff names the *association* as defendant rather than the executive board (the executive board always acts on behalf of the association, whether or not the board's conduct is rightful, so a court could grant relief against the association for the improper conduct of its board).

(3) How does the 60-day time limit work if the board conduct complained of does not involve a meeting (e.g., improper action taken by unanimous consent under paragraph (9))? There will be no minutes, only a record of the unanimous consent. Apparently the 60-day limit never expires due to the phrase "latter to occur" (or "whichever is later").

Reporter's Note (10/23)

1. Observations from our August 2020 informal Zoom session on the act 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) Consider expanding Section 3-108(a)(6) to allow remote attendees to make motions and amend motions.
(4) 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.

2. At the September 2020 Zoom annual meeting first reading of the act, a floor comment suggested that we make sure that the rules in this section on how many days before meetings notices must be sent work with electronic communications and with the voting procedures in § 3-110: Note: § 3-121 provides rules for notices and authorizes e-mail notices, but does not indicate whether notices are effective when sent or when received for any of the types of notices (i.e., does a mailbox rule apply?).

3. David Biklen has concerns about Unit Owner Communication with Other Unit Owners, which relates to meetings and voting but extends further. David writes:

My condo board says they can communicate with other unit owners by email, but I must deliver by hand or by US mail. The board will not share email addresses. It seems to me the proper rule ought to be that a unit owner may communicate with other unit owners in the same means as does the board or management company.

The situation. My condo complex has three brick towers with 20 units in each. Two years ago, a nighttime fire in the unit below mine destroyed the unit and drove most residents of the other 19 units from the building - some actually never woke up or left the building. My unit was too dangerous to return to until firefighters removed the dangerous levels of carbon monoxide.

The board and management company did not notify all 60 association members of the fire (many had slept thru it or were away) and, despite my request, did not call an emergency board meeting - even tho the fire had started in an electric baseboard unit common to all units. (Why scare residents was the statement - much like T's recent statement re covid.)

I then hand delivered a memo to all unit owners describing the fire and asking for an emergency board meeting- which was then held - to address the fire damage and find and remediate the cause.

The board then emailed a memo to all unit owners criticizing my "alarmist" memo and calling into question its accuracy. I prepared a brief response to the board memo because my veracity had been called into question. I asked the board to distribute my memo in the same manner that the board distributed its memo - by email. The board refused to distribute my memo by email even tho it related to the board's email that criticized me.

That ought not be the case. It would be great if the drafting committee could devise a way to avoid this result.

SECTION 3-109. QUORUM.

(a) Unless the bylaws otherwise provide, a quorum is present throughout any meeting of

the unit owners if persons entitled to cast [20] percent of the votes in the association at the beginning of the meeting are present 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 (1/29)

Subsection (c) is deleted because precisely the same language is found in existing Section 3-108(a)(8) as one of the requirements for unit owner meetings, where it seems better placed.

SECTION 3-110. VOTING BY UNIT OWNERS.

Reporter's Note (1/29)

At its November 2020 meeting, the Drafting Committee extensively discussed Section 3-110, requesting a number of revisions and leaving a number of points open for further work. The Reporter has reorganized this section extensively, including moving some paragraphs to places where they seem a better fit.

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

(1) Unless the bylaws otherwise provide, unit owners ~~who~~ may vote by voice vote, show of hands, standing, or any other method ordered by the assembly or designated by the person presiding at the meeting.**Reporter's Note (1/29)**

Discussion at the November 2020 Drafting Committee meeting included the question whether this paragraph works for election of the board by acclamation. *Robert's Rules of Order* uses the term "voice vote" and indicates it is the same as acclamation. The addition of "ordered by the assembly" conforms this paragraph to *Robert's Rules*. Query whether "designated by the person presiding at the meeting" should be retained. The intent of the proposed revision is that an order

of the assembly overrides the person presiding at the meeting (e.g. if the chair calls for a voice vote and a motion for a secret ballot passes, the motion prevails).

(2) Unit owners that participate by a means of communication under Section 3-108(a)(6) or (7) may vote at the meeting, whether or not held at a geographic location, if the association has implemented reasonable measures to verify the identity of each person participating remotely as a unit owner.

Reporter's Note (1/29)

At its November 2020 meeting, the Drafting Committee recommended that paragraph (b)(3) above and paragraph (c)(2) below, dealing with voting when a unit has multiple owners at live meetings and by proxies, respectively, should be combined and integrated into a single provision. See new subsection (d) below.

Reporter's Note (10/23)

At the September 2020 Zoom annual meeting first reading of the act, a floor comment suggested that this paragraph (3) may not work when owners are voting by electronic ballots.

~~(4) Subject to subsection (a), a unit owner may vote by absentee ballot without being present at the meeting. The association promptly shall deliver an absentee ballot to an owner that requests it if the request is made at least [three] days before the scheduled meeting. Votes cast by absentee ballot must be included in the tally of a vote taken at that meeting.~~

~~(5) When a unit owner votes by absentee ballot, the association must be able to verify that the ballot is cast by the unit owner having the right to do so.~~

Reporter's Note (1/29)

Existing Section 3-110 uses the term "absentee ballot" to describe how a unit owner votes at a meeting without being physically present and uses the terms "paper ballot" and "electronic ballot" to describe the mechanism for voting without a meeting. Following suggestions made at the November 2020 Drafting Committee meeting, this redraft uses "ballot" only for a vote without a meeting and allows an absent unit owner to vote at a meeting only by using a proxy. This better conforms to how the terms are generally used in corporate practice. Note, however, *Robert's Rules of Order* 45:17 & 45:18 allows voting by ballot at

meetings "when expressly ordered by the assembly or prescribed by its rules." *Robert's Rules* does not discuss the subject of voting or other decision making by an organization without holding a meeting.

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

the following requirements :

(A) The association promptly shall deliver a proxy to an owner that requests it if the request is made at least [three] days before the scheduled meeting.

(B) When a unit owner votes by proxy, the association must be able to verify that the proxy is cast by the unit owner having the right to do so.

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

(D) A unit owner may revoke a proxy given pursuant to this section only by actual notice of revocation to the person presiding at a meeting.

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

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

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

(b) Unless prohibited or limited by the declaration or bylaws, an association may conduct a vote without a meeting subject to the following requirements ~~apply~~:

(1) The association shall notify the unit owners that the vote will be taken by ballot [***or should we say absentee ballot?***], and the notice shall also:

(A) indicate the number of responses needed to meet the quorum

requirements;

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

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

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

(2) A unit owner may vote by:

(A) paper ballot; or

(B) if the association allows electronic voting and a unit owner consents in a record to electronic voting, by electronic ballot.

(3) The ballot must set forth each proposed action and provide an opportunity to vote for or against the action.(4) A ballot for a vote at a meeting may be cast only at the scheduled meeting and any recessed session of the meeting. A ballot for a vote without a meeting must state an expiration date after which the ballot may not be cast.

(5) A unit owner may revoke a ballot before a deadline established by the association, which for a meeting may not be more than five days before the scheduled date for the meeting. Except as otherwise provided in the declaration or bylaws, a ballot is not revoked by death or disability after delivery to the association ~~by death or disability or attempted revocation by the person that cast that vote~~.

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

~~the action.~~

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

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

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

Reporter's Note (1/29)

This section does not limit the ways in which "electronic voting" may take place at a meeting or under this subsection (b) for voting without a meeting. See the proposed new definition of "electronic" above in Section 1-103(17A). Under paragraph (8), however, "electronic ballots" require the creation of a record. The association may prepare a written form or content for electronic ballots and distribute the form or content to unit owners; or the electronic ballots could be as simple as the unit owners communicating "yes" or "no" by e-mail, text message, or voice mail in response to the association's notice that explains what issue is to be decided. Existing UCIOA § 3-110(d)(2) requires the association to "deliver a paper or electronic ballot to every unit owner entitled to vote on the matter," which may imply that the association must distribute something other than just telling the unit owner to respond by email. The proposed revision to this subsection drops the "delivery" requirement.

(c) Unless a different number or fraction of the votes in the 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.

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

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

(2) If more than one of the owners casts a vote, unless the declaration provides

otherwise 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 (1/29)

This new subsection (d) integrates existing Section 3-110 paragraphs (b)(3) and (c)(2) above and makes a few minor changes of substance:

(1) New subsection (d) retains the "majority in interest" rule of paragraph (b)(3) for live meetings and expands it to proxies and all other types of voting.

(2) New subsection (d) deletes the "protest" language from both existing paragraphs (b)(3) and (c)(2) on the ground that it is unnecessary. If one owner votes and another owner casts a contradictory vote or protests, the "majority in interest" rule should resolve the issue.

(3) New subsection (d) preserves the language of existing paragraphs (b)(3) and (c)(2), which allows the declaration to override the "majority in interest" rule, but not the other rules stated therein. Query whether this is best. Perhaps this entire subsection should be a mandatory rule, or a default rule subject to change by the declaration.

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

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

(2) unit owners that have leased their units to other persons may not cast votes on 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; and

~~(f)~~ (4) unit owners are entitled to notice of all meetings at which lessees are entitled to vote.

~~(g)~~ (f) 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.

Reporter's Note (10/23)

Observations from the August 2020 informal Zoom session on the act 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 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.

SECTION 3-115. ASSESSMENTS.

(a) Until the association makes a common expense assessment, the declarant shall pay all common expenses. After ~~an assessment has been made by the association, assessments must be made~~ the association makes its first assessment, it shall make periodic common expense assessments at least annually, based on a budget adopted at least annually by the association.

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

(c) ~~To the extent required by the~~ The declaration may provide for~~:~~

~~(1) a~~ the assessment of common expenses associated with the maintenance, repair, or replacement of a limited common element ~~must be assessed~~ against the units to which ~~that~~ the limited common element is assigned~~,~~. The declaration may provide that the assessment be made equally~~,~~ against the units or in any other proportion ~~the declaration provides;~~.

Reporter's Note (1/29)

Proposed revisions below in subsections (c) and (g) reflect the work of the subcommittee on partial terminations. Two choices are given with respect to the definition of "partial termination." Choice 1 allows partial termination for all

types of common interest communities. Choice 2 limits it to condominiums. Florida applies its partial termination rules only to condominiums, and it's possible that a statutory rule is not necessary, or should be markedly different, for planned communities or cooperatives. When a traditional planned community is fully built-out, the problem of economic obsolescence years after development may not need a "solution" by partial termination accomplished by a supermajority vote of owners. In addition, planned communities are not susceptible to the problem of certain condominium buildings becoming less valuable as owner-occupied units, with the prospect of creating market value by converting a building to rental real estate.

~~(2)~~ (d) ~~a~~ To the extent provided by the declaration, the association must assess common expenses benefiting fewer than all of the units or their owners against the units ~~or unit owners~~ benefitted or unit owns benefitted. [***Choice 1 – declaration must give category or list the common expense***] If the common expense is for the maintenance, repair, or replacement of common elements other than limited common elements, an exclusive assessment against benefitted units is allowed and required only if the declaration reasonably identifies the common expense by specific listing or category.]

[***Choice 2 – restrict benefit rule to statutory list of categories***] If the common expense is for the maintenance, repair, or replacement of common elements other than limited common elements, an exclusive assessment against benefitted units is allowed and required only if the declaration reasonably identifies the common expense and the common expense is for the maintenance, repair, or replacement of utility installations, equipment, windows, or doors [serving only the owner's unit [or serving fewer than 10 units]].

Reporter's Note (1/29)

1. Proposed revisions in subsections (c) above and (g) below reflect the work of the subcommittee on common expenses. Two choices are given with respect to the scope of the benefit rule in subsection (c). Choice 1 borrows some of the language from UCC Article 9. UCC § 9-108(b), *Sufficiency of Description*, provides: ". . . a description of collateral reasonably identifies the collateral if it identifies the collateral by: (1) specific listing; (2) category; . . . ." The UCC rules for describing collateral in security agreements and financing statements

have proven to be generally successful in striking a balance between flexibility and notice to debtors and third parties. Categories include heating and air conditioning equipment, elevators, and recreational facilities.

Choice 2 is more restrictive, limiting exclusive assessments to a statutory list of categories. This prevents drafting the declaration with a long list of "categories" that may include everything imaginable. For Choice 2, we could expand the statutory list of permitted exclusive-benefit categories, but if the list gets too long or ends with a catch-all phrase, the list would become meaningless. This provision is partly based on some of the language in the Texas condominium act. Texas adopted the Uniform Condominium Act (UCA), but has a non-uniform provision, Tex. Property Code § 82.107, which states:

> (b) Except as provided by the declaration, each unit owner is responsible for the cost of maintenance, repair, and replacement of any utility installation or equipment serving only the owner's unit, without regard to whether the installation or equipment is located wholly or partially outside the designated boundaries of the unit. For purposes of this subsection, utility installations and equipment include electricity, water, sewage, gas, water heaters, heating and air conditioning equipment, and television antennas.
>
> (c) Except as provided by the declaration, each unit owner is responsible for the cost of maintenance, repair, and replacement of windows and doors serving only the owner's unit.

2. Another issue the committee may consider is whether we want a different default rule. For the items in all 3 paragraphs of existing UCIOA Section 3-115(c), all common expenses must be assessed to all owners, no matter their nature, unless the declaration provides for exclusive assessments. For example, should the default rule apply to expenses for special services provided by the association to particular owners who request them (snow removal, etc.)? Note, the Texas act (quoted above) has a default rule that if the declaration is silent, the association must exclusively assess for maintenance, repair, and replacement of utility installations and equipment that serve only the owner's unit. Also, what should be the default rule for maintenance, repair, and replacement of limited common elements? Section 3-115(c) makes all unit owners pay unless the declaration requires assessing only the owners to whom the limited common element is allocated.

Reporter's Note (10/23)

Barry Hawkins writes:

After considerable thought and re-reading of subsection (d) I have come to like it better and better and do not think it needs any major surgery. As I now read it it would appear to apply primarily to ongoing maintenance and repairs or replacements. As long as there are no big surprises for the unit owner I think it

makes sense to allocate financial responsibility to those unit owners whose units include features different in kind from that of other owners. Everybody would be on an even playing field since the features triggering different allocations from the standard (whether based upon value, square footage or any other measuring tool) would be disclosed specifically and the buyer could choose to buy or not buy depending upon that factor among others. I think that works well in on going maintenance and perhaps less well in the event of allocating cost of repairing or replacing features harmed by some loss event because of the interplay of insurance and causation and the difficulty of advance disclosure of the many unexpected events which could have been allocated differently with perfect foresight. None the less and subject to my subsequent comments on subsection (g) I think it works and is an elegant solution to a difficult problem.

~~(3)~~ (e) To the extent required by the declaration, the costs of insurance must be assessed in proportion to risk, and the costs of utilities must be assessed in proportion to usage whether metered or reasonably estimated.

Reporter's Note (1/29)

The subcommittee on common expenses raised the question whether the requirement in subsection (e) of assessing utilities "in proportion to usage" works, given that some utilities may not be separately metered (e.g. water) and some may not be capable of metering (e.g., cable television).

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

~~(e)~~ (g) The association may assess the following common expenses, including expenses related to damage to property, exclusively against an owner's unit:

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

(2) Expense caused by the unit owner's failure to comply with an association rule prescribing a maintenance standard, which association rule contains a statement that owners may be liable for damage or loss caused by their failure to comply with the

maintenance standards.

Notice to the unit owner and an opportunity for a hearing is required before the association makes the assessment. The assessment is limited to the portion of the common expense in excess of any insurance proceeds received by the association under its insurance policy, whether that portion results from the application of a deductible or otherwise.

Reporter's Note (1/29)

This proposed revision to the "bad behavior" rule of subsection (g) follows Barry Hawkins's recommendation (see below) to look to Connecticut's modification to this provision, which reads:

> If any common expense is caused by the willful misconduct, failure to comply with a written maintenance standard promulgated by the association or gross negligence of any unit owner or tenant or a guest or invitee of a unit owner or tenant, the association may, after notice and hearing, assess the portion of that common expense in excess of any insurance proceeds received by the association under its insurance policy, whether that portion results from the application of a deductible or otherwise, exclusively against that owner's unit.

Conn. Gen. Stat. Ann. § 47-257(e). The proposed revision deletes the "gross negligence" prong on the ground that it is too difficult for executive boards and other persons to distinguish gross negligence from ordinary negligence.

The revision allows the association to charge unit owners when their failure to meet maintenance standards for equipment for which they are responsible causes damage outside their unit. For example, the rule may require replacement of hot water heaters every 10 years. The rule should warn owners of the possible consequence of failure to follow the standard – liability for property damage caused to other persons.

Reporter's Note (10/23)

Barry Hawkins writes:

> Now I turn to subsection (g) and that is a horse of different color. I think we got it wrong in 2008 and now it needs to be corrected. As I will elaborate on later I think we saw the problem in our 2010 deliberations in Connecticut and modified what was then 3-115(e) to its present format in Conn. Gen Statutes Section 47-257. I propose that (g) be discussed as part of your committee's agenda and have concluded that it be substantially re-written to more closely track 47-257. In hindsight I think we came closer to the solution in 2010 and now regret that we

did not then tackle amending CIOA to implement that fix.

Subsection (e) as it was identified in 1982 CIOA was maintained in the original formulation from 1982 through the substantial amendments in 1994. It was apparently modified in 2008 and that is where I think we went wrong. The original formula allowed the association to directly surcharge the unit owner for misconduct resulting in a loss. The language did not deal with the issue of whether or not there was insurance coverage for the loss and the formula has no explanatory commentary.

I submit that the formulation and absence of commentary result from the fact that almost all property insurance policies exclude from coverage damages resulting from the intentional bad acts of the insured. This limitation of liability is identical between master policies covering multiple units and standalone single homes. It would not be a surprise or unfair for a unit owner to find that their policy would not pay for intentional bad acts (read "misconduct").

In a common interest community of course there is a need to reconcile the fact that unit owners are insured but they are also not individually responsible for purchasing and paying for the policy premium. To avoid an unfair result in such a community we also provided for mandatory insurance Waiver of subrogation rights to make sure that a unit owners misconduct would not defeat the claims of other unit owners for damages To their units and the association on behalf of all owners to achieve the same result for damages to common elements resulting from misconduct of a unit owner. Section 3-113 sets forth the provisions needed to reflect the unique needs of unit owners in a multi-family ownership situation and it did it quite nicely in a manner which was consistent with 3-115. These two subsections worked reasonably well from 1983-2008 when I think we left the tracks inadvertently but with good intentions.

In 2008 section 3-115(e) was amended to add the word willful as a modifier to misconduct (a change of no substance I think since willful is inherently an implied feature of misconduct and this changes the standard not at all) and much more importantly added the troubling standard of gross negligence to the conduct that would allow the association to visit the entire cost of repairing damages upon the errant unit owner and even worse added the concept that this would be done whether or not there was any insurance coverage for the conduct and the resulting damages.

The origin of these unfortunate changes was probably based upon the factors discussed in the commentary to section 3-113 of the 2008 CIOA text. The changes made to 3-115(e) are described in the accompanying commentary as being made at least in part to resolve the issues described in the 2008 commentary to 3-113 as needing solution. Unfortunately they do not directly nor adequately address the very real problems of high deductibles, lack of incentives for unit owners to act carefully with respect to maintaining common elements, and lack of

incentives for unit owners not to file numerous small claims against the master policy thus raising the costs of premiums for all as well as leading to higher deductible amounts resulting in associations effectively having to self insure many such smaller claims. The raising of insurance premium cost and higher deductibles results of course in all unit owners paying the resulting cost of such lack of incentives.

Although the 2008 commentary acknowledges the difficulty of selecting fair and adequate alternatives it appears to have been mesmerized by the prospect of passing on the costs of many tort claims by expanding upon the concept of assigning fault to unit owners having tort claims and blithely passing it on to the unit owners individual property owners insurance carriers to pay for the repair or replacement of damages which had formerly been the responsibility of the master policy Carrier.

Accordingly 3-115(e) was modified to allow the association to decide whether the damages resulted from ordinary or gross negligence and if the latter, to allocate the total cost of repair or replacement to the unit owner. Presumably the association would not receive much resistance since that owner could then submit the claim to his unit insurance carrier paying only the much more modest deductible charged by that unit carrier. In effect and despite the existence of provisions in 3-113 making it clear that the master policy was to provide primary insurance and the unit policy only secondary, this flim flam game depended upon the unit policy carrier accepting the decision of the association that the tort was one of gross negligence and therefor the tort was not an insured event under the master policy.

It did not take unit policy insurers long to realize that this was actually a three card Monte scheme with unit owner responsibility for negligence being cleverly passed on to the unit carrier. The unit carriers have of course pushed back with higher premium costs, larger deductibles and sometimes complex litigation claims. Many association lawyers, including me, have advised their clients to encourage unit owners to obtain unit property damage insurance coverage from the same carrier that writes the master policy, making the carrier agnostic as to the characterization of the tort as gross or simple negligence. Either way the carrier must pay and there is in reality no change in the incentives to be given to change unit owner conduct. I would submit that a scheme of coverage based upon an absence of incentives and a pull the wool over the carriers eyes is not a sound policy to be promoted by the ULC.

Even in the absence of a “hiding the ball “scheme of passing liability for payment on to the unit policy insuror there are a number of sound policy reasons not to add “fault” to decide whether a unit owner should pay for the cost of repair or replacement resulting from an accident. First, ordinary insurance policies on single family homes cover accident damage claims so that is the ordinary expectation of the property owner. In order to vary that expected and normal

result there should be a sound rationale based upon some unique circumstance of common ownership that justifies a difference in result.

There are some differences of course such as the association pays the premium based upon mandatory payments from all owners and the policy prohibits any subrogation claims against the unit owners based upon their status as owners. This payment difference does lessen the incentive of an owner not to file meritless or numerous small claims since that conduct would raise the cost of premiums for all owners and no individual owner is likely to risk having their coverage threatened by non renewal or premium surcharge levied only against them. If the conduct of claims is poorly managed by one or more unit owners all owners will bear that risk jointly.

Secondly the distinctions between simple and gross negligence have been perplexing and difficult for jurists and juries alike for many decades. Saddling this distinction on multi family structures only as opposed to single family homes is a real step backwards and likely to be favored only by litigators who are paid to explore the often subtle differences.

Third , since the initial decision about whether to submit a claim to the master insurance policy or not to do so will fall to the associations board (which has a strong incentive to avoid raising the expenses of all owners either because of high deductible or future premium increases or both) the unhappy owner may or may not be able to rely upon a unit policy carrier (and least have to pay that deductible alone) or to sue the Board for using gross negligence as a reason for non submission. If the latter the unit owner would then have the burden of proving that he or she was not grossly negligent as difficult and expensive as that may be.

Finally the incentives arguably justifying this unfair choice of not seeking payment under already available insurance coverage paid for by all owners are not the least expensive and most efficient way to provide proper incentives.

The problem of multiple small or frivolous claims can be met by applying a de minimus standard to all claims below a reasonable minimum at which if meritorious the association would self insure by paying to repair the damage with funds of all owners through the common charges. Claims could be denied as not being meritorious by the Board But only after notice and opportunity for the unit owner to be heard.

In addition to misconduct as a trigger for unit owner liability the same high standard could also be applied to a unit owner who has violated a duly publicized written standard of maintenance such as maintaining heat in temporarily unoccupied units to prevent frozen pipe damage, not exchanging water heaters or laundry hoses beyond x years. Again after notice and hearing such conduct would be deemed equal to misconduct triggering individual liability.

Finally the desirable standard should probably articulate whether the Prohibited conduct of a unit owner warrants individual responsibility for all damages including deductibles or whether the standard should be all such expenditure (including deductible) after payment of all insurance proceeds. That decision may have to be made also in contemplation of the fact that damages to other units or common areas resulting from such conduct may be beyond the resources of a single unit owner and you may not want to deprive the association from access to the insuror's presumably deeper pockets.

As noted above the choices made in 2010 by the Connecticut council reviewing the 2008 act, as reflected in Section 47-257 of the Conn Gen Statutes would serve as a useful starting point in improving the policy decisions still reflected in what is now Section 3-115(g) of the Act being drafted. It is now time to correct our earlier error.

(h) The association may adopt a policy that allows all unit owners to prepay assessments at a reasonable discount specified in the policy.

~~(f)~~ (i) If common expense liabilities are reallocated pursuant to Section 1-107, 2-106(d), 2-110, or 2-113(b), common expense assessments and any ~~instalment thereof~~ installment of the assessment not yet due must be recalculated in accordance with the reallocated common expense liabilities.

Comment

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

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

SECTION 3-123. ADOPTION OF BUDGETS; SPECIAL ASSESSMENTS.

(a) The executive board, at least annually, shall adopt a proposed budget for the common interest community for consideration by the unit owners. Not later than [30] days after adoption of a~~–~~ proposed budget, the executive board shall provide to all the unit owners a summary of the budget, including any reserves, and a statement of the basis on which any reserves are calculated and funded. Simultaneously, the board shall set a date not less than 10 days or more than 60 days after providing the summary for a meeting of the unit owners to consider ratification of the budget. Unless at that meeting a majority of all unit owners or any larger number specified in the declaration reject the budget, the budget is ratified, whether or not a quorum is present. If a proposed budget is rejected, the budget last ratified by the unit owners continues until unit owners ratify a subsequent budget.

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

(c) If the executive board determines by a two-thirds vote that a special assessment is necessary to respond to an emergency:

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

(2) notice of the emergency assessment must be provided promptly to all unit owners; and

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

Comment

* * *

3. . . .

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

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

(B) a statement of any other reserves;

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

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

[ARTICLE] 4

PROTECTION OF PURCHASERS

* * *

SECTION 4-103. PUBLIC OFFERING STATEMENT; GENERAL PROVISIONS.

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

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

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

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

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

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

(6) any services not reflected in the budget that the declarant provides, or expenses that the declarant pays and which the declarant expects may become at any subsequent time a common expense of the association and the projected common expense assessment attributable to each of those services or expenses for the association and for each type of unit;

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

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

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

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

(11) a statement that:

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

(B) if a declarant fails to provide a public offering statement to a

purchaser before conveying a unit, that purchaser may recover from the declarant [10] percent of the sales price of the unit plus [10] percent of the share, proportionate to the purchaser's common expense liability, of any indebtedness of the association secured by security interests encumbering the common interest community; and

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

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

(13) a statement that any deposit made in connection with the purchase of a unit will be held in an escrow account until closing and will be returned to the purchaser if the purchaser cancels the contract pursuant to Section 4-108, together with the name and address of the escrow agent;

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) a statement of any other reserves;

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

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

(c) If a common interest community composed of not more than 12 units is not subject to any development right and no power is reserved to a declarant to make the common interest community part of a larger common interest community, group of common interest communities, or other real estate, a public offering statement may include the information otherwise required by subsection (a) (9), (10), (15), (16), (17), (18), and (19) and the narrative descriptions of documents required by subsection (a)(4).

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

Reporter's Notes

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

2. The proposed addition to the public offering statement in Section 4-103(a)(22) is a companion to the revision to Section 2-118(c) and (d), which allows termination of a common interest community and the sale of all real estate, including all units, with a supermajority vote of 80%, regardless of whether the units have horizontal boundaries.

Comment

* * *

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

* * *

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

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

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

Reporter's Notes

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

SECTION 4-107. ~~SAME~~ PUBLIC OFFERING STATEMENT; COMMON INTEREST COMMUNITY ~~SECURITIES~~ REGISTERED WITH GOVERNMENT AGENCY. If an interest in a common interest community is currently registered with the Securities and Exchange Commission of the United States [or with the state pursuant to [cite to appropriate state time-share statute]], a declarant satisfies all requirements of this [act] relating to the preparation of a public offering statement ~~of this [act]~~ if the declarant delivers to the purchaser ~~[and files with the agency]~~ a copy of the public offering statement filed with the Securities and Exchange Commission [or [the appropriate state agency]]. [An interest in a common interest community is not a security under ~~the provisions of~~ [~~insert~~ cite to appropriate state securities regulation statutes].]

Reporter's Notes

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

SECTION 4-109. ~~RESALES OF UNITS~~ RESALE OF UNIT.

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

Reporter's Note (10/23)

At the September 2020 Zoom annual meeting first reading of the act, Howard

Swibel suggested an edit to the preceding clause to make it clear that "other than" applies only to "any plats and plans" and not to the bylaws and rules, which follow later in the sentence.

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

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

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

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

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

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

(7) the current operating budget of the association;

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

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

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

(11) a statement as to whether the executive board has received notice in a

record from a governmental agency of any violation of environmental, health, or building codes with respect to the unit, the limited common elements assigned thereto, or any other portion of the common interest community which has not been cured;

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

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

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

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

(16) a statement disclosing the effect on the unit to be conveyed of any restrictions on the ~~owner's~~ right to use or occupy the unit ~~or to~~, including a restriction on a lease or other rental of the unit ~~to another person~~.

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

(c) A purchaser is not liable for any unpaid assessment or fee greater than the amount set forth in the certificate prepared by the association. A unit owner is not liable to a purchaser

for the failure or delay of the association to provide the certificate in a timely manner, but the purchase contract is voidable by the purchaser until the certificate has been provided and for [five] days thereafter or until conveyance, whichever first occurs.

Reporter's Notes

The proposed amendment expands the scope of the disclosure in Section 9-106(a)(16) to include not only standard leases, but also time-share arrangements. short-term rentals, and sharing platforms that sell licenses to guests, such as Airbnb. The proposed amendment matches the scope of what the declaration must and may disclose in Section 2-105(a)(12) and (b). Recently many common interest communities have placed restrictions on short-term rentals in declarations and rules, and this information is important for many buyers.