



MEMORANDUM

To: Bill Breetz, Esq.
Joint Editorial Board Uniform Real Property Acts: Uniform Law Commission

From: David Ramsey, Esq. Fellow College of Community Association Lawyers (CCAL)

Dawn M. Bauman, CAE
Senior Vice President, Government & Public Affairs

Date: November 11, 2020

Re: Considerations for Discussion of Inclusion in Uniform Common Interest Ownership Act (UCIOA)

Thank you for the opportunity to submit materials for the task force discussion of amendments to the Uniform Common Interest Ownership Act (UCIOA). During the unprecedented circumstances in 2020 related to the COVID-19 pandemic and issues related to racial equality and social justice, Community Associations Institute (CAI) adopted new policies and established model language for our legislative committees to use as they navigate these issues during the 2020 and 2021 legislative sessions.

COVID-19 Pandemic –Emergency Powers: As boards of directors navigate the administration, governance, and operations of their communities during a pandemic that forced people to shelter-in-place and stay at home, they looked to their state statute for guidance on their authority. UCIOA does not address emergency powers; however, two state common interest ownership laws do – California and Florida. In addition, many nonprofit corporation acts address emergency powers. Some of the state nonprofit acts do not address emergency powers and due to organizational structure, some common interest communities are not organized as nonprofit corporations and therefore do not benefit from the statute. Recognizing the need, CAI’s Government & Public Affairs Committee drafted model legislation for states to consider adopting in 2021 to address the need for emergency powers.

CAI respectfully request the UCIOA task force consider addressing emergency powers in UCIOA. To assist the task force with the conversation, we’ve attached the following:

CAI Model Language
California Statute
Florida Statute
ABA Model Nonprofit Corporation Act Emergency Powers Section

COVID-19 Pandemic –Virtual Meetings: Virtual meeting for community associations may be a silver lining of the COVID-19 pandemic. Navigating community association governance during a pandemic

As community association boards tried to navigate

Racial Equality and Social Justice – Process to Remove Discriminatory Covenants: As our discussion at the Joint Editorial Board meeting on November 6 revealed, the issue concerning the removal of removing discriminatory covenants, particularly when viewed at the macro level, has significant complexities, that include, but are not limited to the identity of the party that commences the removal of such covenants as a matter of the public record; whether individuals are mandated to remove the offensive covenants once discovered; must the unlawful covenants be redacted from the public record or would the recording of a current document containing the deletion of the discriminatory covenant be sufficient; how would a statutory provision deal with reversionary clauses, and so forth. It is expected that a stand-alone statute would have to grapple with each of these issues and that the result might be quite different depending on the nature of the property (a single lot versus a planned unit development), whether the property is in a common interest community, and other relevant factors. We believe that such a statute would be required to respond to each different ownership scenario.

However, the manner in which a common interest community may be authorized to remove a discriminatory covenant is, generally, quite simple. A governing board may statutorily be given the authority to remove the covenant unilaterally - that is simply by the vote of a majority of the full board. CAI has developed the following recommended language for the removal of discriminatory covenants that has been provided to each of its state Legislative Action Committees:

A restriction, covenant, or condition, that prohibits or limits the conveyance, encumbrance, rental, occupancy, or use of real property on the basis of race, color, national origin, religion, sex, familial status, or prohibits maintaining a trained guide dog or assistance animal because the individual is blind, deaf or has a physical disability, is void and has no legal effect, except a limitation of use for religious purposes as permitted under the Federal Fair Housing Act or state law.

CORRECTIVE ACTIONS BY AMENDMENT

(a) A homeowners' or property owners' association, cooperative corporation, condominium association, or planned community acting through a majority vote of its full board membership, may amend the association's governing documents for the purpose of removing any restriction, covenant, or condition, that prohibits or limits the conveyance, encumbrance, rental, occupancy, or use of real property on the basis of race, color, national origin, religion, sex, familial status or maintains a trained guide dog or assistance animal because the individual has a disability recognized under the Fair Housing Act (42 U.S.C. 3601 et seq. or [insert citation to state anti-discrimination law]).

(b) If the board of a homeowners' or property owners' association, condominium association, or planned community, receives a written request by a member of the association that the board exercise its amending authority under subsection (a), the board shall, within a reasonable time not to exceed 90 days, investigate any claim of an unenforceable covenant and if determined to be unlawfully discriminatory shall cause the provision to be removed, as provided under this section.

(c) Removal of a restriction, covenant, or condition pursuant to subparagraphs (a) or (b) above will not require approval of the owners, notwithstanding any provision of the governing documents to the contrary.

(d) An amendment under subsection (a) may be executed by any board officer.

PROPERTY DEED CHANGE

(a) If a deed or other instrument contains a provision that is prohibited as discriminatory under state or federal law, the owner, occupant, or tenant of the property that is subject to the provision or any member of the board of a homeowners' or property owners' association that would have a right to enforce such a provision may bring an action in the [insert court having jurisdiction] to have the provision stricken from the records of the register of deeds.

(b) An action under this section must be brought as an in rem, declaratory judgment action and the title of the action must include a description of the property. The owners of record of the property or any part of the property described in a deed containing an unlawful discriminatory provision are necessary parties to the action.

(c) If the court finds that any provisions of the deed or instrument are prohibited under this act, it shall enter an order striking the provisions from the records of the public recording office and direct that the order striking the provisions be notated on the deed or other instrument for the property described.

(d) Any reversionary clauses or other provisions intended to penalize the violation of a discriminatory provision in a deed or other instrument that is authorized to be removed under this law shall be void and unenforceable.

While it is understood that the foregoing language would need to be drafted to be consistent with ULC style language that is consistent with the terminology of UCIOA, it is CAI's position that it would be a missed opportunity to not include similar language in the updated draft of UCIOA. We believe that it is likely that the revised UCIOA will be going to a final vote of the ULC this coming summer. Hence, in terms of speed it would make available language for common interest communities expeditiously. If, in fact, the ULC approves a drafting committee for the preparation of a stand-alone act, the efforts of the two drafting committees could be coordinated so that the stand-alone bill could reflect the UCIOA language for the removal of discriminatory covenants from common interest community governing documents.

Thank you in advance for your support. Please contact us with any questions.



Model Language for Association Emergency Powers

Association Emergency Powers

1. Unless specifically prohibited by the declaration or other recorded governing documents, the board of directors, in response to an event for which a state of emergency is declared in the state, may exercise the following powers:
 - a. Conduct board or membership meetings after notice of the meetings and board decisions is provided in as practicable a manner as possible, including via publication, radio, United States mail, the Internet, public service announcements, conspicuous posting on the association property, or any other means the board deems appropriate for the health and safety of the members under the circumstances:
 - i. Publishes notice of the date, time and means of accessing such meeting in as practicable a manner as possible, including via publication, radio, United States mail, the Internet, public service announcements, conspicuous posting on the association property, or any other means the board deems appropriate for the health and safety of the members under the circumstances;
 - ii. Extent to the extent such meeting is permitted to be held in executive session, provides a means for members of the Association to observe and, during open form, participate in such meeting, either through audio or video means; and
 - iii. Publishes minutes of such meeting after the meeting minutes are formally adopted by the Board of Directors, using the same method of publication as was used to publish the notice of such meeting.
 - b. Call and conduct a membership meeting using video or audio conferencing without the necessity of meeting in a physical location, Participation by means of remote communication shall be subject to such guidelines and procedures the board of directors adopts. Members participating in a members' meeting by means of remote communication shall be deemed present and may vote at such a meeting if the corporation has implemented reasonable measures to:
 - i. Verify that each person participating remotely is a member or a member's proxy; and
 - ii. Provide such members a reasonable opportunity to participate in the meeting and to vote on matters submitted to the members, including an opportunity to read or hear the proceedings of the meeting, substantially concurrently with such proceedings.

Quorum at any such membership meeting shall be satisfied if at the time such meeting is called to order, the requisite percentage of votes of the Association are present by video or audio conferencing or by proxy, which may be submitted electronically. Any votes cast may be cast through electronic means, provided the method of voting is

through a secured means. Any election of directors may be conducted through an electronic voting platform, and the Board of Directors may designate a time prior to or during the conduct of the meeting when voting shall be closed.

- c. Call and conduct committee meetings using video or audio conferencing at which the committee may conduct any and all business assigned to such committee by the Declaration, Bylaws, Articles of Incorporation, resolution of the Board of Directors or applicable law, provided that the Association:
 - i. Publishes notice of the date, time and means of accessing such meeting in as practicable a manner as possible, including via publication, radio, United States mail, the Internet, public service announcements, conspicuous posting on the association property, or any other means the board deems appropriate for the health and safety of the members under the circumstances;
 - ii. To the extent the meeting otherwise is required to be open to members under applicable law, provides a means for members of the Association to observe such meeting, either through audio or video means; and
 - iii. Publishes minutes of such meeting after the meeting minutes are formally adopted by the Board of Directors, using the same method of publication as was used to publish the notice of such meeting.
 - d. Cancel and reschedule an association meeting;
 - e. Designate assistant officers who are not directors. If the executive officer is incapacitated, the assistant officer has the same authority during a declared state of emergency as the executive officer he or she assists;
 - f. Relocate the association's principal office or designate an alternative principal office;
 - g. Notwithstanding a provision in the Declaration or governing Documents to the contrary, and regardless of whether such authority does not specifically appear in the declaration or other governing documents, levy special assessments without a vote of the owners;
 - h. Without owners' approval, borrow money and pledge association assets as collateral to fund emergency repairs and carry out the duties of the Association if operating funds are insufficient. This paragraph does not limit the general authority of the association to borrow money, subject to such restrictions contained in the declaration or other recorded governing documents; and
 - i. If the board determines that an immediate association rule change is required to address an imminent threat to public health or safety, or an imminent risk of substantial economic loss to the association, it may make an emergency rule change, and no notice is required. An emergency rule change is effective for the period of the state of emergency, unless the rule change provides for a shorter effective period.
2. The authority granted under subsection (1) is limited to any period during which the state is subject to a legally-declared state of emergency.

California Emergency Powers Statute

Civil Code §4360. Notice and Approval of Rule Change by Board.

(a) The board shall provide general notice pursuant to [Section 4045](#) of a proposed rule change at least 28 days before making the rule change. The notice shall include the text of the proposed rule change and a description of the purpose and effect of the proposed rule change. Notice is not required under this subdivision if the board determines that an immediate rule change is necessary to address an imminent threat to public health or safety or imminent risk of substantial economic loss to the association.

(b) A decision on a proposed rule change shall be made at a board meeting, after consideration of any comments made by association members.

(c) As soon as possible after making a rule change, but not more than 15 days after making the rule change, the board shall deliver general notice pursuant to [Section 4045](#) of the rule change. If the rule change was an emergency rule change made under subdivision (d), the notice shall include the text of the rule change, a description of the purpose and effect of the rule change, and the date that the rule change expires.

(d) If the board determines that an immediate rule change is required to address an imminent threat to public health or safety, or an imminent risk of substantial economic loss to the association, it may make an emergency rule change, and no notice is required, as specified in subdivision (a). An emergency rule change is effective for 120 days, unless the rule change provides for a shorter effective period. A rule change made under this subdivision may not be readopted under this subdivision.

The link to it on California Legislative Information's website is:

http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=4360.&lawCode=CIV

Florida Emergency Powers Statute

720.316 Association emergency powers.—

(1) To the extent allowed by law, unless specifically prohibited by the declaration or other recorded governing documents, and consistent with s. 617.0830, the board of directors, in response to damage caused by an event for which a state of emergency is declared pursuant to s. 252.36 in the area encompassed by the association, may exercise the following powers:

(a) Conduct board or membership meetings after notice of the meetings and board decisions is provided in as practicable a manner as possible, including via publication, radio, United States mail, the Internet, public service announcements, conspicuous posting on the association property, or any other means the board deems appropriate under the circumstances.

(b) Cancel and reschedule an association meeting.

(c) Designate assistant officers who are not directors. If the executive officer is incapacitated or unavailable, the assistant officer has the same authority during the state of emergency as the executive officer he or she assists.

(d) Relocate the association's principal office or designate an alternative principal office.

(e) Enter into agreements with counties and municipalities to assist counties and municipalities with debris removal.

(f) Implement a disaster plan before or immediately following the event for which a state of emergency is declared, which may include, but is not limited to, turning on or shutting off elevators; electricity; water, sewer, or security systems; or air conditioners for association buildings.

(g) Based upon the advice of emergency management officials or upon the advice of licensed professionals retained by the board, determine any portion of the association property unavailable for entry or occupancy by owners or their family members, tenants, guests, agents, or invitees to protect their health, safety, or welfare.

(h) Based upon the advice of emergency management officials or upon the advice of licensed professionals retained by the board, determine whether the association property can be safely inhabited or occupied. However, such determination is not conclusive as to any determination of habitability pursuant to the declaration.

(i) Mitigate further damage, including taking action to contract for the removal of debris and to prevent or mitigate the spread of fungus, including mold or mildew, by removing and disposing of wet drywall, insulation, carpet, cabinetry, or other fixtures on or within the association property.

(j) Notwithstanding a provision to the contrary, and regardless of whether such authority does not specifically appear in the declaration or other recorded governing documents, levy special assessments without a vote of the owners.

(k) Without owners' approval, borrow money and pledge association assets as collateral to fund emergency repairs and carry out the duties of the association if operating funds are insufficient. This paragraph does not limit the general authority of the association to borrow money, subject to such restrictions contained in the declaration or other recorded governing documents.

(2) The authority granted under subsection (1) is limited to that time reasonably necessary to protect the health, safety, and welfare of the association and the parcel owners and their family members, tenants, guests, agents, or invitees, and to mitigate further damage and make emergency repairs.

History.—s. 19, ch. 2014-133.

Webpage:

http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0700-0799/0720/Sections/0720.316.html

American Bar Association

Model Nonprofit Corporation Act (with proposed changes from ABA March 2020)

https://www.americanbar.org/groups/business_law/committees/nonprofit/mnca/

Sec. 303: EMERGENCY POWERS

(a) In anticipation of or during an emergency, the board of directors of a nonprofit corporation may:

- (1) modify lines of succession to accommodate the incapacity of any director, officer, employee, or agent; and
- (2) relocate the principal office, designate alternative principal offices or regional offices, or authorize the officers to do so.

(b) During an emergency, unless the articles of incorporation or bylaws provide otherwise:

- (1) notice of a meeting of the board of directors need be given only to those directors it is practicable to reach and may be given in any practicable manner; and
- (2) those directors who participate in a meeting of the board of directors shall constitute a quorum; and

(3) one or more officers of the nonprofit corporation present at a meeting of the board of directors may be deemed to be directors for the meeting, in order of rank and within the same rank in order of seniority.

(c) Corporate action taken in good faith during an emergency to further the ordinary activities and affairs of the nonprofit corporation:

- (1) binds the corporation; and
- (2) may not be used to impose liability on a director, officer, employee, or agent.

(d) An emergency exists for purposes of this section if a quorum of the board of directors cannot readily be assembled reasonably because of some catastrophic event.



Virtual Meeting Model Language

Meetings Statute (with virtual components)

(A) Unless the declaration or bylaws otherwise provide, the board may meet by any method of communication, including electronic or telephonic communication, provided that each member of the board can hear or read in real time and participate and respond to every other member of the board.

(1) The meeting notice must indicate the method of communication that the board meeting is going to be held through, if not a meeting in executive session, provide information as to how unit owners may participate in the conference directly or by meeting at a central location or conference connection; and

(2) The process must provide all unit owners the opportunity to hear the discussion and offer comments as provided in subsection (b) of this section. After termination of the period of declarant control, unit owners may amend the bylaws to vary the procedures for conference calls described in this subsection.

Note: This is a mix of the Delaware Common Interest Ownership Act and the Ohio Planned Communities/Condominium Act.



Amendment Process to Remove Discriminatory Restrictive Covenants

Policy

Community Associations Institute (CAI) supports a process by which a governing board of a community association may remove antiquated and unenforceable discriminatory restrictions contained in covenants without a vote of the owners. CAI advocates the adoption of state legislation that provides for a process to allow for the removal of restrictions deemed to be discriminatory under the federal Fair Housing Act and/or state anti-discrimination laws.

Background

In 1968, Congress passed the Fair Housing Act ("FHA") to prohibit private parties from setting discriminatory terms and conditions on the sale or use of property by making the practice of writing racial covenants into deeds illegal. Despite being deemed illegal by the FHA, that law did not provide for a method of removing discriminatory provisions from deeds and governing documents and thus remain as a blot on housing documents such as plats, deeds, and homeowner association bylaws. These discriminatory covenants are unenforceable and may cause unnecessary emotional distress to members of the community. Learn more about CAI's Fair Housing Policy here:

<https://www.caionline.org/Advocacy/PublicPolicies/Pages/Fair-Housing.aspx>

Recommendation

CAI supports legislation that authorizes a simple process whereby a governing board of a community association can remove antiquated, illegal, and unenforceable covenant restrictions deemed to be discriminatory under federal Fair Housing Act and/or state anti-discrimination laws. CAI supports complementary legislation that would mandate the removal of discriminatory restrictions upon receipt of an individual owner's petition to the governing board of a community association or a court to remove discriminatory restrictions.

Model Language

Some states have statutes that explicitly allow community associations an expeditious and tenable process to remove discriminatory restrictive covenants. However, if a state does not have a statute allowing modifications of unenforceable restrictive covenant language, CAI supports the following model language:

A restriction, covenant, or condition, that prohibits or limits the conveyance, encumbrance, rental, occupancy, or use of real property on the basis of race, color, religion, sex, national

origin, familial status, or prohibits maintaining a trained guide dog or assistance animal because the individual is blind, deaf or has a physical disability, is void and has no legal effect, except a limitation of use for religious purposes as permitted under the Federal Fair Housing Act or state law.

CORRECTIVE ACTIONS BY AMENDMENT

(a) A homeowners' or property owners' association, cooperative corporation, condominium association, or planned community acting through a majority vote of its full board membership, may amend the association's governing documents for the purpose of removing any restriction, covenant, or condition, that prohibits or limits the conveyance, encumbrance, rental, occupancy, or use of real property on the basis of race, sex, national origin, familial status, or using a trained dog guide or service animal because the individual has a disability recognized under the Fair Housing Act (42 U.S.C. 3601 et seq. or [insert citation to state anti-discrimination law].

(b) If the board of a homeowners' or property owners' association, condominium association, or planned community, receives a written request by a member of the association that the board exercise its amending authority under subsection (a), the board shall, within a reasonable time not to exceed 90 days, investigate any claim of an unenforceable covenant and if determined to be unlawfully discriminatory shall cause the provision to be removed, as provided under this section.

(c) Removal of a restriction, covenant, or condition pursuant to subparagraphs (a) or (b) above will not require approval of the owners, notwithstanding any provision of the governing documents to the contrary.

(d) An amendment under subsection (a) may be executed by any board officer.

PROPERTY DEED CHANGE

(a) If a deed or other instrument contains a provision that is prohibited as discriminatory under state or federal law, the owner, occupant, or tenant of the property that is subject to the provision or any member of the board of a homeowners' or property owners' association that would have a right to enforce such a provision may bring an action in the [insert court having jurisdiction] to have the provision stricken from the records of the register of deeds.

(b) An action under this section must be brought as an in rem, declaratory judgment action and the title of the action must include a description of the property. The owners of record of the property or any part of the property described in a deed containing an unlawful discriminatory provision are necessary parties to the action.

(c) If the court finds that any provisions of the deed or instrument are prohibited under this act, it shall enter an order striking the provisions from the records of the public recording office and direct that the order striking the provisions be notated on the deed or other instrument for the property described.

(d) Any reversionary clauses or other provisions intended to penalize the violation of a discriminatory provision in a deed or other instrument that is authorized to be removed under this law shall be void and unenforceable.

Approved by CAI Government & Public Affairs Committee -January 21, 2020
Adopted by the CAI Board of Trustees – February 27, 2020