

Memorandum on Emergency Powers

FROM: Jim Smith, Reporter
TO: Drafting Committee, ABA Advisor, Observers
DATE: Jan. 28, 2021

A brief discussion about adding something on emergency powers to UCIOA took place at the November 2020 meeting of the Drafting Committee. No decision was made, but the consensus was that further exploration is merited, partly due to overall heightened interest in the topic due to the Covid pandemic.

Existing UCIOA has several relevant provisions. Section 3-108, *Meetings*, sets forth requirements for unit owners' meetings. Section 3-108(a)(4) states: "The minimum time to give notice required by paragraph (3) may be reduced or waived for a meeting called to deal with an emergency." A similar provision deals with meetings of the executive board and association committees; Section 3-108(b)(5) states: "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." Section 3-108 Comment 7 explains: "7. Subsection (b)(5) does provide that the need for notice to unit owners of executive board meetings may be avoided in the event of an 'emergency'. While the Act does not define that term, the concept plainly includes the notion of 'immediate irreparable harm' or other circumstances where the board must act promptly to either avoid an adverse outcome or avoid failing to take advantage of an opportunity. 'Emergency' includes the further notion that there is insufficient time from the time the issue came to the attention of the directors to give complete notice to owners."

Section 3-123, *Adoption of Budgets; Special Assessments*, allows the executive board to propose special assessments to the unit owners, with an exception bypassing the owners in cases of emergency. Section 3-123(c) states: sets forth requirements for unit owners' meetings. Section 3-108(a)(4) states: "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." Section 3-108 Comment 7 explains: "... it is not unusual for the executive board to be confronted with an emergency. In that event, as discussed in subsection (c), if 2/3s of the executive board determine that an emergency exists, the board may dispense with the unit owner vote and proceed directly to adopt a special assessment. The balance of subsection (c) describe various safeguards designed to avoid abusive use of the emergency special assessment."

A number of states have much more detailed emergency powers legislation for condominium unit owners associations. David Ramsey has supplied a memorandum (Nov. 11, 2020), which discusses emergency powers and contains the Florida statute, and a typical emergency powers bylaws provision (both are attached to this memo). More detailed provisions may expand the board's emergency powers, compared to what's presently in UCIOA, but they also often limit the board's discretion, e.g, by defining what is an emergency.



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



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.

Bylaws Emergency Powers Provision

(h) In the event of any “emergency” as defined in subparagraph (xii) below, the Board may exercise the following emergency powers:

- (i) The Board may name as Assistant Officers persons who are not Trustees, which Assistant Officers shall have the same authority as regular Officers to whom they are assistant during the period of emergency, to accommodate the incapacity of any Officer.
- (ii) The Board may relocate the principal office or designate alternative principal offices or authorize the Officers to do so.
- (iii) During emergencies, the Board may hold meetings with notice given only to those Trustees with whom it is practicable to communicate, and the notice may be given in any practicable manner, including publication or radio. Notwithstanding any statement contained in these Bylaws to the contrary, the Trustee or Trustees in attendance at such a meeting shall constitute a quorum.
- (iv) Based upon advice of emergency management officials or upon the advice of licensed professionals retained by the board, determine any portion of the condominium property unavailable for entry or occupancy by unit owners, family members, tenants, guests, agents, or invitees to protect the health, safety, or welfare of such persons.
- (v) Mitigate further damage, including taking action to contract for the removal of debris and to prevent or mitigate the spread of fungus, including, but not limited to, mold or mildew, by removing and disposing of wet drywall, insulation, carpet, cabinetry, or other fixtures on or within the condominium property, even if the unit owner is obligated by the declaration or law to insure or replace those fixtures and to remove personal property from a unit.
- (vi) The Board may change or postpone the annual meeting date to a date and time determined by the Board, even if such change will result in not holding an annual meeting in a particular calendar year, provided the annual meeting is held not more than eighteen (18) months after the preceding annual meeting.
- (vii) Contract, on behalf of any unit owner or owners, for items or services for which the owners are otherwise individually responsible, but which are necessary to prevent further damage to the condominium property. In such event, the unit owner or owners on whose behalf the board has contracted are responsible for reimbursing the association for the actual costs of the

items or services, and the association may use its lien authority provided by s. 718.116 to enforce collection of the charges. Without limitation, such items or services may include the drying of units, the boarding of broken windows or doors, and the replacement of damaged air conditioners or air handlers to provide climate control in the units or other portions of the property.

- (viii) Corporate action taken in good faith during an emergency under this Section to further the ordinary affairs of the Association shall bind the Association, and shall have the rebuttable presumption of being reasonable and necessary.
- (ix) The Board may use reserve funds to meet Association needs, and may use reserve funds as collateral for Association loans. The Board may adopt emergency assessments with such notice deemed practicable by the Board.
- (x) Any Trustee, Officer or employee of the Association acting with a reasonable belief that his or her actions are lawful in accordance with these emergency provisions shall incur no liability for doing so, except in the case of willful misconduct.
- (xi) These emergency provisions shall supersede any inconsistent or contrary provisions of the Bylaws during the period of the emergency.
- (xii) “Emergency,” as used in this paragraph, shall exist only during the period of time that the Condominium, or the immediate geographic area in which the condominium is located, is subject to:
 - a. a state of emergency declared by local or state civil or law enforcement authorities;
 - b. a hurricane warning;
 - c. a partial or complete evacuation order;
 - d. Federal or state “disaster area” status designation;
 - e. a catastrophic occurrence, whether natural or manmade, which seriously damages or threatens to seriously damage the physical existence of the Condominium, such as an earthquake, fire, hurricane, war, civil unrest, or act of terrorism;
 - f. An unanticipated set of circumstances, which, if not acted upon immediately, is likely to cause imminent and material financial harm to the Association, its Members, or the Condominium Property.