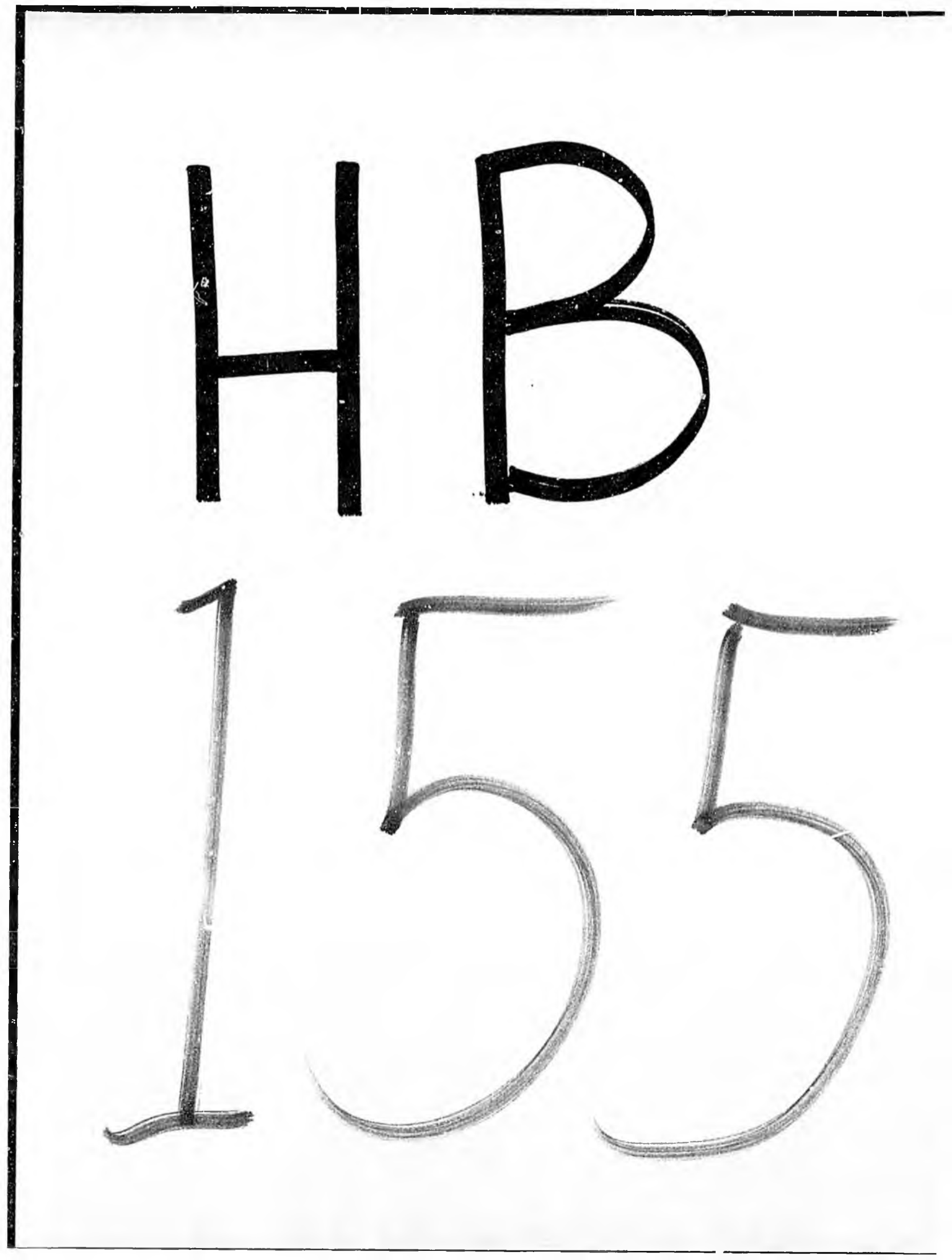
HB
1553

COMMITTEE REPORT

HOUSE

(7)

FURTHER: JUDICIARY

1/30/85

Date: March 19 1985

The Committee on LABOR & COMMERCE has had HB 155

"An Act permitting the establishment of horizontal property regimes for manufactured housing; and providing for an effective date."

under consideration and recommends:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[X] replace with CS for HB 155 (RLC) [X] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] Zero Fiscal Not . Attached

[X] reports it back without recommendation w/amendment sep 31

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

Mike Kadas

Mike Thomas

CHAIRMAN

To: Mike
From: Roger February 24, 85

Update on 155:

1) There are several items in your file added on February 20, Wednesday, though we didnt hear the bill then and held it over to this Monday. One is the proposed CS by Ringstad. I will have to check with the Clerks Office on Monday, because I think a change in the title of a bill (in this case from manufactured housing to mobile homes) if it is substantive, is not allowed without some special process or vote taking place on the floor of the house.

You also have some research and backup provided by AKPIRG (check the File Contents page to see the detail)

2) AT the request of Maureen Kennedy of AKPIRG, and also Linda O'Bannon of the Consumer Protection AGency in the Dept. of Law, a two-wire teleconference was set up to their offices in Anchorage, so that they can give testimony on this bill. Since the request was made, Maureen Kennedy told me she would be in Juneau so she would testify in person; so the two-wire is just for Linda O"Bannon; therefore, if you wish to hold the bill over, it won't inconvenience anyone that much--I can just call Linda, if it turns out we have to do something about the bill title.

3) I did obtain some written testimony from Senator Halford's office that was meant to replace his personal testimony, demonstrating how SB 44 ties into HB 155. I gather he has since talked to you and asked that this be withdrawn.

4) HB 155 would grandfather in all mobile home park owners who converted, even if SB 44 did pass both bodies. Also, HB 155 does nothing to protect the mobile home owners from inadequate notice or right of first purchase; among other shortcomings.

HB 155 File Contents

February 20, 1985

Initial materials on February 7, 1985

1) Bill Summary -- Legislative Reporting Service

2) Overview -- Committee Staff Memo

3) Bill Analysis -- Legislative Legal Counsel Memo 2/6/85

4) Fiscal Note -- Dept. of Law, Administrative Servs. 2/4/85

5) Backup -- Packet on Last Year's CSSB 464 (Finance), including Minutes of Senate Finance Committee testimony on the bill. -- Provided by Rep. Ringstad

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Added February 20, 1985 Wednesday

6) Proposed CS by sponsor Ringstad

7) Number of Mobile Homes in Anchorage -- From AKPIRG
   a. By Community Council area
   b. By Election District

8) Written testimony of Maureen Kennedy -AKPIRG Director

Added February 25, 1985 Monday

9) Proposed Amendments -- Alaska Public Interest Research Group

Testimony on HB 155:

There will be a two-wire teleconference on this bill at the request of two people who wanted to testify; so we simply call their office and they can talk to us and us to them, but the whole universe isnt invited to speak.

1) Linda O'Bannon, head of the Consumer Protection AGency, Dept. of Law, in Anchorage, will testify briefly on consumer concerns regarding the bill. He is opposed to the bill.

2) Bill McNall, a private lawyer, and not a lobbyist, will testify on the bill from his viewpoint having been involved in litigation on this whole issue, and having represented all sides on this issue. He is opposed to the bill.

There will also be present in the audience Marueen Kennedy, from AKPIRG, who will testify against the bill and also submit proposed amendments (see your file)

Alaska State Legislature

POUCH V
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(907) 465-4931

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BOX 111038
ANCHORAGE, ALASKA 99511
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CHAIRMAN
Special Committee on
Telecommunications

MEMBER
Labor and Commerce
State Affairs
Finance—Subcommittee Administration

Representative H. A. "Red" Boucher

M E M O R A N D U M

DATE: March 11, 1985

TO: House Labor & Commerce Committee Members

FROM: Representative Boucher
Representative Collins

SUBJECT: Subcommittee Report on HB 155.

In the last several years the problem of relocation of mobile homes in and around the urban areas of the state has become overwhelming. Anchorage has been especially hard hit by this problem due to an unprecedented amount of growth in the area. It was our concern that the mobile home owners of our District, and the State receive adequate protection under the legislation proposed in HB 155.

In reviewing this bill, however, we also looked at SB 44 which would adopt a national model law called the Common Interest Ownership Act. This Act appears to fill the many holes in existing state law concerning Condominiums, Planned Unit Developments (PUD's), and Cooperatives. It also appears to allow the same type of "condominiumizing" of mobile home parks as is provided for in HB 155 but is far more comprehensive. In addition, SB 44 would supercede the now out-dated Horizontal Property Regimes Act.

While it seems to be generally agreed that there is a need for the Common Interest Ownership Act, the bill is very lengthy and will likely move slowly through the committee process. In the event that SB 44 does not pass both houses this session, we feel that it will be beneficial to have at least the minimal provisions in place for mobile home owners in the existing Horizontal Property Regimes Act.

Attached is a copy of the proposed Committee Substitute for HB 155 along with a copy of a sectional analysis of the bill. Briefly, the changes we propose would require a 180 day eviction notification for any change in land use, and would ensure a first right of refusal for the mobile home owners in a park when a Horizontal Property Regime is established.

We also suggest that the Labor & Commerce Committee consider introducing a version of the Common Interest Ownership Act in the House to help speed the adoption of this much needed legislation.

Sund, et al Work Draft

House

BY THE LABOR AND COMMERCE COMMITTEE

IN THE HOUSE

CS FOR HOUSE BILL NO. 155 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to notice requirements on the closure of mobile home parks and permitting the establishment of horizontal property regimes for mobile homes; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 34.03.225 is amended to read:

Sec. 34.03.225. LIMITATIONS ON MOBILE HOME PARK OPERATOR'S RIGHT TO TERMINATE. A mobile home park operator may evict a mobile home or a mobile home park dweller or tenant only for one of the following reasons:

(1) the mobile home dweller or tenant has defaulted in the payment of rent owed;

(2) the mobile home dweller or tenant has been convicted of violating a federal or state law or local ordinance, and that violation is continuing and is detrimental to the health, safety or welfare of other dwellers or tenants in the mobile home park;

(3) the mobile home dweller or tenant has violated a provision, enforceable under AS 34.03.130, of the rental agreement or lease signed by both parties and not prohibited by law including rent and the terms of agreement; and

(4) a change in the use of the land comprising the mobile home park, or the portion of it on which the mobile home to be evicted is located; however, all dwellers or tenants so affected by a change in land use shall be given at least 180 days' [90 DAYS] notice, or

longer if a longer notice period is provided in a valid lease.

* Sec. 2. AS 34.07 is amended by adding a new section to read:

ARTICLE 8. HORIZONTAL PROPERTY REGIME FOR MOBILE HOMES.

Sec. 34.07.500. HORIZONTAL PROPERTY REGIME FOR MOBILE HOMES. (a) Notwithstanding the provisions of AS 34.07.010 - 34.07.460, a horizontal property regime for mobile homes may be established as an estate in real property consisting of an undivided interest in common in a portion of the real property together with a separate interest in space, the boundaries of which are described in a declaration filed by the sole owner or all of the owners of the property and which complies to the extent applicable with AS 34.07.020.

(b) The portion of the parcel of real property held in undivided interest may be all of the real property of an existing parcel except for the separate interests in space without regard to any three-dimensional aspects of the real property if the purpose of the horizontal property regime is the establishment of a horizontal property regime for mobile homes.

(c) A person who intends to convert a mobile home park into a horizontal property regime for mobile homes under this section shall give each tenant and each subtenant in possession of a portion of the conversion land notice of the conversion no later than 180 days before the tenant and any subtenant in possession is required to vacate. The notice must set out generally the rights of tenants and subtenants under this section and must be hand delivered to the tenant or subtenant in possession or mailed by prepaid United States mail to the tenant and subtenant at the address of the unit or any other mailing address provided by a tenant. A tenant or subtenant may not be required to vacate upon less than 180 days' notice except by reason of nonpayment of rent, waste, or conduct that constitutes a continuing

private nuisance, and the terms of the tenancy may not be altered during the period. The failure to give notice as required by this section is a defense to an action for possession.

(d) For 60 days after delivery or mailing of the notice described in (c) of this section, the person required to give the notice shall offer to convey the unit or proposed unit to the tenant. If a tenant fails to purchase the unit during the 60-day period, the offeror may not offer to dispose of an interest in the unit during the following 180 days at a price or on terms more favorable to the offeree than the price or terms offered to the tenant.

* Sec. 3. This Act takes effect immediately in accordance with AS 01.-10.070(c).

SECTIONAL ANALYSIS CSHB 155 (PROPOSED)

A title change has been made over HB 155 to include the changes made to the Landlord Tenant Act on notification requirements.

SECTION 1 - The section amends A.S. 34.03.225(4) of the Landlord Tenant Act to provide 180 days eviction notice for mobile home owners when any change in land use is to be made. This provision is designed to provide the same level of protection to the mobile home owner during conversion to a non-horizontal property regime as is provided for in conversion to a horizontal property regime.

SECTION 2 - This section has been expanded from the original bill by changing "manufactured housing" to "mobile homes" and deleting the old subsection (c) and adding new sections (c) and (d). The new subsection (c) requires that 180 days notice be given prior to the eviction date and that the notice include the rights of the tenant under this section. The new subsection (d) gives the tenant or subtenant of a mobile home first right of refusal on the land and states that if the offer is not accepted then the offeror may not offer the land at a better price or terms for 180 days following.

SECTION 3 - Immediate effective date.

Introduced: 1/30/85
Referred: Labor & Commerce
and Judiciary

IN THE HOUSE

BY RINGSTAD, DUNCAN, SUND, JENKINS, UEHLING AND MARROU

HOUSE BILL NO. 155

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act permitting the establishment of horizontal property regimes for manufactured housing; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 34.07 is amended by adding a new section to read:

ARTICLE 8. HORIZONTAL PROPERTY REGIME FOR MANUFACTURED HOUSING.

Sec. 34.07.500. HORIZONTAL PROPERTY REGIME FOR MANUFACTURED HOUSING. (a) Notwithstanding the provisions of AS 34.07.010 - 34.07.460, a horizontal property regime for manufactured housing may be established as an estate in real property consisting of an undivided interest in common in a portion of the real property together with a separate interest in space, the boundaries of which are described in a declaration filed by the sole owner or all of the owners of the property and which complies to the extent applicable with AS 34.07.020.

(b) The portion of the parcel of real property held in undivided interest may be all of the real property of an existing parcel except for the separate interests in space without regard to any three-dimensional aspects of the real property if the purpose of the horizontal property regime is the establishment of a horizontal property regime for manufactured housing.

(c) Except to the extent that AS 34.07.010 - 34.07.460 is inapplicable to a horizontal property regime for manufactured housing, the provisions of AS 34.07.010 - 34.07.460 apply to a horizontal

property regime established for manufactured housing.

* Sec. 2. This Act takes effect immediately in accordance with AS 01.-10.070(c).

Bradley
3/6/85

Original sponsors: Ringstad, Duncan,
Sund, et al

IN THE HOUSE

BY THE LABOR AND COMMERCE COMMITTEE

CS FOR HOUSE BILL NO. 155 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to notice requirements on the closure of mobile home parks and permitting the establishment of horizontal property regimes for mobile homes; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 34.03.225 is amended to read:

Sec. 34.03.225. LIMITATIONS ON MOBILE HOME PARK OPERATOR'S RIGHT TO TERMINATE. A mobile home park operator may evict a mobile home or a mobile home park dweller or tenant only for one of the following reasons:

(1) the mobile home dweller or tenant has defaulted in the payment of rent owed;

(2) the mobile home dweller or tenant has been convicted of violating a federal or state law or local ordinance, and that violation is continuing and is detrimental to the health, safety or welfare of other dwellers or tenants in the mobile home park;

(3) the mobile home dweller or tenant has violated a provision, enforceable under AS 34.03.130, of the rental agreement or lease signed by both parties and not prohibited by law including rent and the terms of agreement; and

(4) a change in the use of the land comprising the mobile home park, or the portion of it on which the mobile home to be evicted is located; however, all dwellers or tenants so affected by a change in land use shall be given at least 180 days' [90 DAYS] notice, or

longer if a longer notice period is provided in a valid lease.

* Sec. 2. AS 34.07 is amended by adding a new section to read:

ARTICLE 8. HORIZONTAL PROPERTY REGIME FOR MOBILE HOMES.

Sec. 34.07.500. HORIZONTAL PROPERTY REGIME FOR MOBILE HOMES. (a) Notwithstanding the provisions of AS 34.07.010 - 34.07.460, a horizontal property regime for mobile homes may be established as an estate in real property consisting of an undivided interest in common in a portion of the real property together with a separate interest in space, the boundaries of which are described in a declaration filed by the sole owner or all of the owners of the property and which complies to the extent applicable with AS 34.07.020.

(b) The portion of the parcel of real property held in undivided interest may be all of the real property of an existing parcel except for the separate interests in space without regard to any three-dimensional aspects of the real property if the purpose of the horizontal property regime is the establishment of a horizontal property regime for mobile homes.

(c) A person who intends to convert a mobile home park into a horizontal property regime for mobile homes under this section shall give each tenant and each subtenant in possession of a portion of the conversion land notice of the conversion no later than 180 days before the tenant and any subtenant in possession is required to vacate. The notice must set out generally the rights of tenants and subtenants under this section and must be hand delivered to the tenant or subtenant in possession or mailed by prepaid United States mail to the tenant and subtenant at the address of the unit or any other mailing address provided by a tenant. A tenant or subtenant may not be required to vacate upon less than 180 days' notice except by reason of nonpayment of rent, waste, or conduct that constitutes a continuing

private nuisance, and the terms of the tenancy may not be altered during the period. The failure to give notice as required by this section is a defense to an action for possession.

(d) For 60 days after delivery or mailing of the notice described in (c) of this section, the person required to give the notice shall offer to convey the unit or proposed unit to the tenant. If a tenant fails to purchase the unit during the 60-day period, the offeror may not offer to dispose of an interest in the unit during the following 180 days at a price or on terms more favorable to the offeree than the price or terms offered to the tenant.

* Sec. 3. This Act takes effect immediately in accordance with AS 01.-10.070(c).

HB 155 Supplemental File Contents

From Subcommittee Report

March 13, 1985

1) Cover Memo from Subcommittee -- Boucher & Collins -- March 11, 85

2) Proposed CS for HB 155 (L & C)

3) Sectional Analysis of CS HB 155 (L & C)

4) SB 44

5) Summary -- The Uniform Common Interest Ownership Act

6) Landlord Tenant Act

7) Comments on the Common Interest Ownership Act -- January 31, 85
Memo from William L. McNall to Senator Rodey

For complete copy of bill see bill book or microfilm

Introduced: 1/14/85
Referred: Judiciary and Finance

BY HALFORD, FAIKS, STURGULEWSKI AND KERTTULA

IN THE SENATE

SENATE BILL NO. 44

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the Uniform Common Interest Ownership Act; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 34 is amended by adding a new chapter to read:

CHAPTER 8. COMMON INTEREST OWNERSHIP.

ARTICLE I. APPLICABILITY.

Sec. 34.08.010. APPLICABILITY GENERALLY. Except as provided in AS 34.08.020 and 34.08.030, this chapter applies to each common interest community created within the state after the effective date of this Act. The provisions of AS 10.15 and AS 34.07 do not apply to common interest communities created after the effective date of this Act.

Sec. 34.08.020. APPLICABILITY TO SMALL COOPERATIVES. If a cooperative contains only units restricted to nonresidential use or contains no more than 12 units and is not subject to any development rights, or if it is then subject to financing from the Alaska Housing Finance Corporation it is subject only to AS 34.08.850 and 34.08.860 unless the declaration provides that the entire chapter is applicable.

Sec. 34.08.030. APPLICABILITY TO SMALL AND LIMITED EXPENSE LIABILITY PLANNED COMMUNITIES. If a planned community contains no more than 12 units and is not subject to any development rights or if it is then subject to financing from the Alaska Housing Finance Corporation or provides, in its declaration, that the annual average common

expense liability of all units restricted to residential purposes, exclusive of optional user fees and ar insurance premiums paid by the association, may not exceed $100, as adjusted under AS 34.08.820, the planned community is subject only to AS 34.08.710, 34.08.730, and 34.08.740, unless the declaration provides that the entire chapter is applicable.

Sec. 34.08.040. APPLICABILITY TO PREEXISTING COMMON INTEREST COMMUNITIES. Except as provided in AS 34.08.050, the provisions of AS 34.08.110, 34.08.120, 34.08.290, 34.08.320(1) - (6) and (11) - (16), 34.08.420, 34.08.470, 34.08.490, 34.08.590, 34.08.670, 34.08.720, 34.08.730, 34.08.740, and 34.08.990, to the extent necessary in construing any of those sections, apply to all common interest communities created in the state before the effective date of this Act except that the sections apply only with respect to events and circumstances occurring after the effective date of this Act and do not invalidate existing provisions of the declaration, bylaws, or plats or plans of the common interest communities.

Sec. 34.08.050. APPLICABILITY TO SMALL PREEXISTING COOPERATIVES AND PLANNED COMMUNITIES. If a cooperative or planned community created within the state before the effective date of this Act contains no more than 12 units and is not subject to any development rights, it is subject only to AS 34.08.720, 34.08.730, and 34.08.740, unless the declaration is amended in conformity with law and with the procedures and requirements of the declaration to take advantage of the provisions of AS 34.08.060, in which case all the sections enumerated in AS 34.08.040 apply to the cooperative or planned community.

Sec. 34.08.060. AMENDMENTS TO GOVERNING INSTRUMENTS. (a) In amendments to the declaration, bylaws, or plats and plans of a common interest community created before the effective date of this Act:

S U M M A R Y

The Uniform Common Interest Ownership Act

UNIFORM COMMON INTEREST OWNERSHIP ACT

Between 1977 and 1981, the National Conference of Commissioners on Uniform State Laws (ULC) promulgated three Acts dealing with multiple-ownership forms of real estate. These were the Uniform Condominium Act, the Uniform Planned Community Act, and the Model Real Estate Cooperative Act. Each form of ownership involves a different organization of ownership interests. In condominiums, owners have title to their units and undivided shares in the common elements. A planned community has owners who own their own units, but the common elements are owned by the owners' association. Every owner is a member of the owners' association. In a cooperative, the association owns all the real estate. Cooperative members own shares in the association, and lease their individual units from the association. These are the principal differences between these forms of multiple ownership.

But these forms are greatly similar to each other, as well, and the similarities have greater practical significance than the differences. For all of them, there is an owners' association responsible for the affairs of the community. Every owner belongs, and has voting rights and the opportunity to participate in the governing board. The community, in all cases, assesses the owners for common expenses and maintenance. The association, in all cases, contracts for management and services for the whole project. The documentation for any multiple-ownership project during its life, although some language may vary slightly, is much the same. Any multiple-ownership form requires some kind of creation document or declaration, as an example, and these documents have much the same function, no matter the form. In short, the technical questions of ownership do not create an enormous difference between these forms when it comes down to matters of operation of a project. And the three earlier Acts by the ULC look very much alike.

So why not one Act that includes all forms within its scope? In response in 1982, the ULC has produced the Uniform Common Interest Ownership Act. It encompasses all forms of multiple or "common interest" ownership.

The major obstacle to such an Act is, basically, definitional. The Common Interest Ownership Act uses the new term "common interest community." It means "real estate with respect to which any person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in the declaration. 'Ownership of a unit' does not include holding a leasehold interest of less than [20] years in a unit, including renewal options." The basic determinant of applicability is obligation for assessments. All multiple-ownership arrangements call for assessments.

Then, the sub-forms, such as condominiums, planned communities, and cooperatives, are defined as kinds of common interest communities. So a developer may choose any form for his project, initially, designating that particular form in the declaration.

The Act then treats the subject of common interest communities, comprehensively, as the earlier Acts treated the individual forms, comprehensively. A comprehensive statute deals with the creation, financing, management and termination of these communities. It also provides for consumer protection and regulation. These subjects must be included before any legislation on common interest real estate can be considered comprehensive.

Creation begins with a declaration, which is the fundamental property document describing the common interest project and identifying it. This document is filed in the land records of the locality. The Act deals with a great number of issues relating to creation, such as unit and common element boundaries, allocation of common element interests and voting rights, rights of the developer in the property while sales of units go on, and procedures for amendment of the declaration. Of special interest is the concept of development rights, which permits the developer to reserve the right to add or subtract real estate, and to add units and common elements, in the declaration. This permits the developer to plan phased common interest projects as long as all effects upon owners' interests are described and disclosed at the outset.

This Act also provides for the other end of any common interest project in time. How can such a project be terminated, if and when it is desirable and necessary? The answer

is to provide a procedure for termination and some rules to protect owners' specific rights. Actual termination requires the agreement of a substantial number of owners (suggested is 80% of the total number). The agreement must be recorded in the land records. Once the termination is authorized, the association, as trustee, oversees the actual termination of the declaration, the sale, if any, and the distribution of proceeds, if any. Owners receive exactly their share of the total interest, whether that be proceeds or an individual interest in the real estate. Without the termination procedure, there is no assurance that a project can be terminated or that ownership interests will be protected.

This Act, further, deals with the substantial interests of those who finance common interest projects. There are three key things it does. The Act limits any control of the project or the owners' association by lenders that adversely affects owners. It establishes clear priorities for liens or secured interests against the project or individual owners' interests. It allows the developer's lender or lenders to assume declarant rights so that failure of the developer does not, necessarily, mean failure of the project. The Act defines rights and obligations between lenders and others, generally, to keep the project going, once it has been launched.

The management provisions of the Common Interest Ownership Act establish a workable basis for the ongoing community which the project must become. A common interest ownership community is like a small municipality. It must be governed, and it must be governed democratically. The developer must establish the owners' association at least by the time the first sale is made. Every owner becomes a member upon purchase. The governing body is the Executive Board, elected by the owners on a regular basis. The Executive Board has all of the powers essential to governing the community, including the power to make and enforce assessments. Its members are, also, accountable to the owners as fiduciaries, and are held to that higher standard of care.

The developer has a strong interest in the governance of the community, diminished in proportion to the units he sells. He can, therefore, appoint the initial Executive Board and control it until his interest diminishes sufficiently. Under this Act, he relinquishes control by stages - giving up his Executive Board members at given times during the sell-out. He must relinquish total control at a specific

time, either at a given percentage of the sell-out (75% suggested) or within a specific time (2 years suggested), whichever comes first. Then, the developer may not capture the government of the community beyond the span of his own legitimate interests.

Since the developer, also, makes the initial contracts for maintenance and services, this Act, in addition, permits the association to repudiate his contracts after control passes to the owners. Developers and contractors are put on notice that burdensome, sweetheart contracts will not survive, if they are attempted.

The Act and the project declaration act as a kind of constitution for the community. For example, the Act establishes liability and allocation of risk for insurance purposes for all communities. These are basic provisions to which any common interest project is subject. The Act also empowers the Association to make its bylaws which function as the statutes of the community. The association governs itself, mostly, through its bylaws. The object of the Act is to make each community as autonomous a self-governing entity as possible. These various documents, coupled with the enabling provisions of this Act, are simply the tools to accomplish this purpose.

Consumer protection is accomplished with four basic controls on the sale from developer to purchaser, but it is important to note that this Act tries to provide stability in all phases of common interest ownership development. That stability is the most important characteristic of any project to any buyer. But the specific provisions to protect buyers fall into readily identifiable categories: disclosure, warranties, escrow of deposits, and recission rights.

This Act requires an extensive public offering statement which must be delivered to a purchaser of a unit in any common interest project before a sales contract can be concluded. The statement must give the customer all the information essential to an adequate purchase decision. That kind of information includes accurate identification of the developer, information about the significant features of the project, and balance sheets and budgets, as examples. However, drafters of these documents are encouraged to summarize those items that may be summarized, in an effort to keep public offering statements more reasonable in volume and weight.

The public offering statement is linked to the buyer's recission rights, another important aspect of buyer protection. Every buyer has a 15-day period from the time the public offering statement is delivered, within which any sales contract may be cancelled. This right gives the buyer time to consider the character of the purchase and to review his commitment - a cooling off period for the purchase decision. In addition, these recission rights are part of the disclosure requirements so that the buyer is made aware of them before they accrue.

Tied, also, to the recission rights and disclosure is the escrow requirement. Any deposit made in connection with a purchase must be placed in an appropriate escrow account. It is not possible, then, for deposits to be dissipated before buyers close on the purchase of a unit. If the buyer wishes to exercise his or her recission right, or is faced with the seller's default in any way, deposits are safe.

What remains, then, for consumer protection is a remedy for defects that are the responsibility of the developer. This Act provides both express and implied warranties of sale. The seller is bound by any representation made with respect to quality of the project. In addition, whatever is affirmed expressly, and unless adequately disclaimed, the developer must deliver the unit in at least as good a condition as at the time of contracting. It must also be suitable for the ordinary uses to which such property may be put, and free of defects. For residential property, the developer warrants that the existing use does not violate any applicable law when conveyed to, or possessed by, the buyer. If seller and purchaser specifically agree, implied warranties may be waived. For other than residential property, the seller may use a general disclaimer of warranties. And warranties are subject to a statute of limitations in order to encourage timely litigation or settlement of any claims.

The Common Interest Ownership Act also provides for agency supervision of condominium development. The agency has the power to review disclosure. It has investigative and enforcement powers to protect purchasers. It should be noted, however, that the agency article is offered as an optional addition to this Act. Many states do not want to create new agencies or increase the authority and responsibility of old ones. Fiscal constraints underlie such decisions, for the most part. This Act tries to enhance self-enforcement by purchasers as much as possible. Purchasers

can sue for any violation of the Act and ask for attorney's fees. So, an agency presence is not mandatory, and may be considered as an extra element of protection to be added at a jurisdiction's desire.

It is not possible to describe all aspects of a comprehensive act's provisions. It is important to emphasize the need for comprehensiveness. If these kinds of common interest communities are to survive over time, the law must give to them a definite, discernible character. They must know what they are and what they can do. Only a comprehensive act addressing all of the major issues in a careful and complementary way can do the job fully. This is that Act.

UNIFORM COMMON INTEREST OWNERSHIP ACT

The Committee that acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Common Interest Ownership Act was as follows:

MARION W. BENFIELD, JR., University of Illinois, College of Law, Champaign, IL 61820, *Co-Chairman*

WILLIS E. SULLIVAN, P. O. Box 2527, Boise, ID 83701, *Co-Chairman*

ALBERTO FERRER, P. O. Box 8513, Santurce, PR 00910

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
645 North Michigan Avenue, Suite 510
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PREFATORY NOTE

The Uniform Common Interest Ownership Act (UCIOA) was adopted at the 1982 Annual Meeting of the National Conference of Commissioners on Uniform State Laws.

The explosive rise in land costs during the 1960s and 1970s, coupled with the desire of many consumers to own housing and recreational amenities which they could not afford except when owned with others, led to an extraordinary development of various forms of shared or "common" ownership of real estate. The three most common forms of common ownership have been condominiums, cooperatives and so-called "planned unit developments", or cluster housing projects. Each of these forms typically includes creation of a mandatory owners association to manage and maintain common amenities, while separate portions of the real estate—units—are occupied for individual use.

Title to the common amenities, or common elements, typically rests in varying entities depending on the form of ownership—they are owned on an undivided interest basis by the unit owners in condominiums, while the association "owns" the common elements in the case of cooperatives and PUDS. Similarly, legal title to the units lies with the unit owners in condominiums and PUDS, but with the association in the case of cooperatives. In all forms, however, the beneficial interest in both the common elements and the units lies with the unit owners, while management of the common elements is performed by the association.

While this common scheme is shared by all 3 forms, the legal consequences flowing from the choice of form differ substantially. Typically, condominiums are a highly regulated form of ownership under statute, often with consumer protection provisions in the statute. Cooperatives and PUDS are significantly less regulated. Moreover, when comparing laws between states, the statutes or common law governing condominiums, cooperatives and planned communities use varying and sometimes inappropriate terminology, and differ in numerous details, all of which make it difficult for a national lender to assess the appropriateness of project documents and of financing arrangements in those states. Finally, the varying statutes, and case law creating different "bundles of rights" for purchasers of common interest communities in the various states, make it difficult for the increasingly mobile consumer to become educated in this very complex area.

UCIOA represents the culmination of the Conference's 9-year effort to offer comprehensive legislation to the States which provides a common structural and regulatory scheme equally applicable to all three forms of common ownership.

DEVELOPMENT OF THE ACT

Condominiums

The first Uniform Act in the field was the Uniform Condominium Act (UCA), adopted by the Conference in 1977.

All states have statutes which provide for the creation of condominiums and establish some rules concerning their governance. The first statute in the United States was adopted in 1958 in Puerto Rico, and many present state statutes are patterned after that 1958 statute, or after the 1962 Federal Housing Administration model condominium statute. As the condominium form of ownership became widespread, however, many states realized that these early statutes were inadequate to deal with the growing condominium industry. In particular, many states perceived a need for additional consumer protection, as well as a need for more flexibility in the creation and use of condominiums. As a result, some states have enacted more detailed and comprehensive "second generation" statutes. Many actual or potential problems, however, involving such matters as termination of condominiums, eminent domain, insurance, and the rights and obligations of lenders upon foreclosure of a condominium project, had not been satisfactorily addressed by any existing condominium statute. Moreover, the statutes differ widely from state to state. The Uniform Condominium Act was drafted primarily to resolve those various problems.

Planned Communities

The Uniform Planned Community Act (UPCA) was adopted at the 1980 Annual Meeting of the Conference.

While the historical development of condominiums can be traced to early statutory enactments at the state level supported by the conveyancing bar and national lending institutions, planned communities, historically, developed as a zoning concept at the local level. As single family subdivisions were increasingly supplanted in land planning theory by "clustering" to enhance the availability of shared open space, local governments required a zoning mechanism responsive to the implications of this new concept. That device, frequently, was the "planned unit development" or PUD zone, in which cluster housing could be built, at the same or greater density than the land in question would support as single family homes on individual lots. This zoning device typically permitted local zoning authorities wide discretion in reviewing and approving designs for the dwelling units as well as the common facilities.

The growing acceptance of PUD zoning techniques by local governments in turn created new interest in an old form of real estate ownership: the multi-unit residential "planned community" served by common area facilities owned and operated by a homeowners' association. Although such developments are remarkably similar to condominiums, they have operated for years under the common law without the benefit of statutory enablement and, in virtually all states, without the regulatory burdens and consumer protection benefits applicable to condominiums.

The homeowner associations that administer such common law planned communities often perform exactly the same functions as the condominium associations that administer statutory condominium regimes. They derive their powers from a declaration of covenants, conditions and restrictions (CC&R declaration) which is recorded at the beginning of the project and which relies for its enforceability on the state common law governing covenants which "run with the land". Not surprisingly, large portions of such CC&R declarations are indistinguishable from condominium declarations. The only basis on which CC&R regimes are exempted from state and local condominium regulation is that title to the common areas is held in the name of the homeowners' association instead of being divided among the unit owners as tenants in common.

These common-law homeowner association regimes take many forms. They include not only planned residential developments, which follow the classic models described in the Homes Association Handbook promulgated in 1962 by the Urban Land Institute and which inspired FHA Form 1400, but also various forms of cooperative ownership based on corporate forms, some real estate, some trust, and many other combinations of real and personal property ownership. In addition, new communities now are being formed which contain multiple layers of community associations having, at different levels, condominium, PUD or master association governance in as many combinations as there are draftsmen and problems to be solved.

Each of these multi-owner forms involve all of the important issues of consumer protection and association management, and many of the complex title matters, such as termination and eminent domain, which had been addressed by the Conference in the condominium field through the Uniform Condominium Act. Ironically, however, while all of those questions are of equal importance in these forms of multiple ownership, and while various states have begun to address these problems for condominiums, almost no legislative attention has focused on planned communities, except to the extent that they are swept up in general home warranty statutes, or addressed on an *ad hoc* basis by local zoning officials.

The Conference was also mindful of the increasing and understandable inclination of developers, in the face of changing condominium legislation, to choose these alternative forms of developing multi-owner projects. This avoidance process acknowledged the often superior multi-owner arrangements possible under a homeowner association structure that avoids fractionalizing ownership of the common elements. The process also represents, however, an economic decision by developers to avoid, when possible, additional costs imposed by condominium legislation in the form of disclosure, escrow requirements, or restricted practices. The Conference believed that the states should have available for their consideration a uniform act which reflected the same public policies as are contained in the Uniform Condominium Act. In this way, a state could extend the same public policies reflected in UCA to this very common form of real estate development. This need for parallelism whenever appropriate was a major factor in the drafting of the Act as finally adopted.

The result of this process was a comprehensive Act which closely paralleled UCA, and thus would yield the same consumer protections, regulatory structure, and administrative benefits to unit owners in most multi-owner developments, regardless of how title to the common elements had been treated.

The 1980 UCA Amendments

As a result of the legislative process in the various states considering UCA from 1977 to 1980, and after review of UCA by the Drafting Committee on UPCA, a substantial number of amendments to the 1977 UCA were proposed to the Conference.

Many of these amendments were adopted at the 1980 annual meeting of the Conference, and were included in the current version of UCA. Most of these amendments were of a minor, non-substantial nature; they were intended to resolve insignificant technical questions, or to clarify the meaning of provisions susceptible to misinterpretation. A few amendments were adopted which resulted in more significant changes, either on particular matters of substance, or in the use of terms throughout the Act which simplified the structure and readability of the Act. A summary of the more significant amendments may be obtained from the Headquarters Office of the NCCUSL, Suite 510, 645 North Michigan Avenue, Chicago, Illinois 60611.

A second category of changes resulted from a decision of the Conference at its 1978 annual meeting that the Condominium and Planned Community Acts should contain identical provisions wherever possible, in order to facilitate the future consolidation of the two Acts. This required a large number of textual changes with no substantive effect.

Real Estate Cooperatives

One year after adoption of UPCA and the UCA amendments, the Model Real Estate Cooperative Act (MRECA) was adopted at the 1981 Annual Meeting of the Conference. It closely tracked its two predecessor Acts, since consolidation of the three Acts was anticipated by the Conference. Accordingly, MRECA, like the other Acts, was designed principally to insure that, to the extent practicable and consistent with the differences inherent in the various forms of ownership, consumers, developers and lenders would be able to identify a coherent and consistent pattern of rights and obligations applicable to all "common interest" developments, whether organized as condominiums, planned communities or cooperatives.

That Act contains comprehensive provisions designed to provide a unified and modern law applicable to the co-operative form of ownership of real estate. The Act has no applicability to the many cooperatives formed for such purposes as commodity marketing or consumer services. Moreover, while principally applicable to the ownership of residential real estate, a common form of ownership in many jurisdictions, the Act contemplates that, in appropriate cases, it may but need not be used for industrial or commercial real estate as well.

Real estate cooperatives are a very common form of apartment ownership in several jurisdictions; in other states, however, they are virtually unknown, save in areas where they have been created pursuant to a variety of low income housing programs sponsored by the United States Department of Housing and Urban Development. Although cooperatives are similar in a number of ways to condominiums and other forms of multiply owned real estate regimes, they have operated for years under the corporate law without the benefit of specific statutory enablement, and in virtually all states, without the regulatory burdens and consumer protection benefits available to condominiums.

As with planned communities, the associations that administer such cooperatives often perform exactly the same functions as condominiums. They typically derive their powers from a declaration of covenants, conditions and restrictions or some ancillar form of instruments, be it in an offering plan, bylaws of the corporation, or a proprietary lease between the corporation which holds title to the property, and the tenants of that corporation who in fact hold the beneficial interest in the corporation and the property which it owns. Commonly, but by no means uniformly, the instruments which create the co-operative form of ownership are not recorded, and the enforceability of the instrument depends principally on the law of landlord and tenant, state corporate trust law, or other law peculiar to the form under which the cooperative was organized. Not surprisingly, large portions of the instruments which create the cooperative are indistinguishable from similar provisions in condominium or planned community declarations, since the instruments are obliged to resolve many of the same issues which arise in those forms of ownership.

Each of these multi-owner forms involve all of the important issues of consumer protection and association management, and many of the complex title matters, such as termination and eminent domain, which had been addressed by the Conference in the condominium field through the Uniform Condominium Act and the planned community field by the Uniform Planned Community Act. Ironically, however, as in the case of planned communities, while all of those questions are of equal importance in these forms of multiple ownership, and while various states have begun to address these problems for condominiums, almost no legislative attention has been focused on cooperatives.

THE UNDERLYING CONCEPT OF UCIOA

Nearly without exception, UCIOA achieves the goal of uniformity among all three forms of ownership simply by consolidating the three prior Acts of the Conference and adding a very few generic definitions. The principal new definition is "common interest community."

Because of the use of consistent definitions and policies in the three Acts preceding UCIOA, consolidation of the three in the merged Act was a relatively simple task. The section numbering system of UCIOA is entirely parallel with the other 3 Acts, and the language of UCIOA tracks, as applicable, with the cognate sections of those 3 Acts. Differences in result between the 3 Acts are preserved where appropriate. At the same time, during the drafting of UCIOA, in a few instances, it became clear that some differences in result were of form rather than legitimate substance. In those cases, the substantive result of one or more of the 3 Acts was changed to reflect a policy generally applicable in all forms.

The result is that a state wishing to consider legislation in the common interest ownership field has a range of choices from which to select. Many states will wish to adopt comprehensive legislation, providing maximum flexibility and certainty to all developers, lenders, and title insurers, while at the same time providing all unit purchasers and their associations a uniform level of disclosure, warranty protection, and other rights. In those states, the consolidated Act is a workable and desirable long-term solution. Other states may wish simply to adopt a modern condominium statute to replace an existing but plainly outdated, statutory structure. In those states, UCA alone is the obvious choice. Finally, in states where existing "second" or "third" generation condominium statutes are seen as satisfactory, but a need for additional certainty and structure is desirable for planned communities or cooperatives, the 2 Acts governing those forms of ownership are available. Following adoption of one of the 3 constituent Acts, it would be very feasible, by a few carefully considered amendments, to adopt UCIOA and thereby extend coverage to include all forms of ownership in the field.

UNIFORM COMMON INTEREST OWNERSHIP ACT

ARTICLE 1

GENERAL PROVISIONS

PART 1

DEFINITIONS AND OTHER GENERAL PROVISIONS

§ 1-101. Short Title

This [Act] may be cited as the Uniform Common Interest Ownership Act.

§ 1-102. Applicability

Applicability of this [Act] is governed by Part II of this Article.

§ 1-103. Definitions

In the declaration and bylaws (Section 3-100), unless specifically provided otherwise or the context otherwise requires, and in this [Act]:

(1) "Affiliate of a declarant" means any person who controls, is controlled by, or is under common control with a declarant. A person "controls" a declarant if the person (i) is a general partner, officer, director, or employer of the declarant, (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than 20 percent of the voting interest in the declarant, (iii) controls in any manner the election of a majority of the directors of the declarant, or (iv) has contributed more than 20 percent of the capital of the declarant. A person "is controlled by" a declarant if the declarant (i) is a general partner, officer, director, or employer of the person, (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than 20 percent of the voting interest in the person, (iii) controls in any manner the election of a majority of the directors of the person, or (iv) has contributed more than 20 percent of the capital of the person. Control does not exist if the powers described in this paragraph are held solely as security for an obligation and are not exercised.

(2) "Allocated interests" means the following interests allocated to each unit: (i) in a condominium, the undivided interest in the common elements, the common expense liability, and votes in the association; (ii) in a cooperative, the common expense liability and the ownership interest and votes in the association; and (iii) in a planned community, the common expense liability and votes in the association.

(3) "Association" or "unit owners' association" means the unit owners' association organized under Section 3-101.

(4) "Common elements" means (i) in a condominium or cooperative, all portions of the common interest community other than the units; and (ii) in a planned community, any real estate within a planned community owned or leased by the association, other than a unit.

(5) "Common expenses" means expenditures made by, or financial liabilities of, the association, together with any allocations to reserves.

(6) "Common expense liability" means the liability for common expenses allocated to each unit pursuant to Section 2-107.

(7) "Common interest community" means real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration. "Ownership of a unit" does not include holding a leasehold interest of less than [20] years in a unit, including renewal options.

(8) "Condominium" means a common interest community in which portions of the real estate are designated for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of those portions. A common interest community is not a condominium unless the undivided interests in the common elements are vested in the unit owners.

(9) "Conversion building" means a building that at any time before creation of the common interest community was occupied wholly or partially by persons other than purchasers and persons who occupy with the consent of purchasers.

(10) "Cooperative" means a common interest community in which the real estate is owned by an association, each of whose members is entitled by virtue of his ownership interest in the association to exclusive possession of a unit.

(11) "Dealer" means a person in the business of selling units for his own account.

(12) "Declarant" means any person or group of persons acting in concert who (i) as part of a common promotional plan, offers to dispose of his or its interest in a unit not previously disposed of or (ii) reserves or succeeds to any special declarant right [, or (iii) applies for registration of a common interest community under Article 5].

(13) "Declaration" means any instruments, however denominated, that create a common interest community, including any amendments to those instruments.

(14) "Development rights" means any right or combination of rights reserved by a declarant in the declaration to (i) add real estate to a common interest community; (ii) create units, common elements, or limited common elements within a common interest community; (iii) subdivide units or convert units into common elements; or (iv) withdraw real estate from a common interest community.

(15) "Dispose" or "disposition" means a voluntary transfer to a purchaser of any legal or equitable interest in a unit, but the term does not include the transfer or release of a security interest.

(16) "Executive board" means the body, regardless of name, designated in the declaration to act on behalf of the association.

(17) "Identifying number" means a symbol or address that identifies only one unit in a common interest community.

(18) "Leasehold common interest community" means a common interest community in which all or a portion of the real estate is subject to a lease the expiration or termination of which will terminate the common interest community or reduce its size.

(19) "Limited common element" means a portion of the common elements allocated by the declaration or by operation of Section 2-102(2) or (4) for the exclusive use of one or more but fewer than all of the units.

(20) "Master association" means an organization described in Section 2-120, whether or not it is also an association described in Section 3-101.

(21) "Offering" means any advertisement, inducement, solicitation, or attempt to encourage any person to acquire any interest in a unit, other than as security for an obligation. An advertisement in a newspaper or other periodical of general circulation, or in any broadcast medium to the general public, of a common interest community not located in this State, is not an offering if the advertisement states that an offering may be made only in compliance with the law of the jurisdiction in which the common interest community is located.

(22) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or other legal or commercial entity. [In the case of a land trust, however, "person" means the beneficiary of the trust rather than the trust or the trustee.]

(23) "Planned community" means a common interest community that is not a condominium or a cooperative. A condominium or cooperative may be part of a planned community.

(24) "Proprietary lease" means an agreement with the association pursuant to which a member is entitled to exclusive possession of a unit in a cooperative.

(25) "Purchaser" means a person, other than a declarant or a dealer, who by means of a voluntary transfer acquires a legal or equitable interest in a unit other than (i) a leasehold interest (including renewal options) of less than 20 years, or (ii) as security for an obligation.

(26) "Real estate" means any leasehold or other estate or interest in, over, or under land, including structures, fixtures, and other improvements and interests that by custom, usage, or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance. "Real estate" includes parcels with or without upper or lower boundaries, and spaces that may be filled with air or water.

(27) "Residential purposes" means use for dwelling or recreational purposes, or both.

(28) "Security interest" means an interest in real estate or personal property, created by contract or conveyance, which secures payment or performance of an obligation. The term includes a lien created by a mortgage, deed of trust, trust deed, security deed, contract for deed, land sales contract, lease intended as security, assignment of lease or rents intended as security, pledge of an ownership interest in an association, and any other consensual lien or title retention contract intended as security for an obligation.

(29) "Special declarant rights" means rights reserved for the benefit of a declarant to (i) complete improvements indicated on plats and plans filed with the declaration (Section 2-109) or, in a cooperative, to complete improvements described in the public offering statement pursuant to Section 4-103(a)(2); (ii) exercise any development right (Section 2-110); (iii) maintain sales offices, management offices, signs advertising the common interest community, and models (Section 2-115); (iv) use easements through the common elements for the purpose of making improvements within the common interest community or within real estate which may be added to the common interest community (Section 2-116); (v) make the common interest community subject to a master association (Section 2-120); (vi) merge or consolidate a common interest community with another common interest community of the same form of ownership (Section 2-121); or (vii) appoint or remove any officer of the association or any master association or any executive board member during any period of declarant control (Section 3-103(d)).

(30) "Time share" means a right to occupy a unit or any of several units during [5] or more separated time periods over a period of at least [5] years, including renewal options, whether or not coupled with an estate or interest in a common interest community or a specified portion thereof.

(31) "Unit" means a physical portion of the common interest community designated for separate ownership or occupancy, the boundaries of which are described pursuant to Section 2-105(a)(5). If a unit in a cooperative is owned by a unit owner or is sold, conveyed, voluntarily or involuntarily encumbered, or otherwise transferred by a unit owner, the interest in that unit which is owned, sold, conveyed, encumbered, or otherwise transferred is the right to possession of that unit under a proprietary lease, coupled with the allocated interests of that unit, and the association's interest in that unit is not thereby affected.

(32) "Unit owner" means a declarant or other person who owns a unit, or a lessee of a unit in a leasehold common interest community whose lease expires simultaneously with any lease the expiration or termination of which will remove the unit from the common interest community, but does not include a person having an interest in a unit solely as security for an obligation. In a condominium or planned community, the declarant is the owner of any unit created by the declaration. In a cooperative, the declarant is treated as the owner of any unit to which allocated interests have been allocated (Section 2-107) until that unit has been conveyed to another person.

COMMENT

1. The first clause of this Section permits the defined terms used in the Act to be defined differently in the declaration and bylaws. Regardless of how terms are used in those documents, however, terms have an unvarying meaning in the Act, and any restricted practice which depends on the definition of a term is not affected by a changed term in the documents.

EXAMPLE:

A declarant might vary the definition of "unit owner" in the declaration to exclude himself in an attempt to avoid assessments for units which he owns. The attempt would be futile, since the Act defines a declarant who owns a unit as a unit owner and defines the liabilities of a unit owner.

2. The definition of "Affiliate of a declarant" (Section 1-103(1)) is similar to the definition of 12 U.S.C. Section 1730a, which prescribes the authority of the Federal Savings and Loan Insurance Corporation to regulate the activities of savings and loan holding companies, and in 15 U.S.C. Section 78c(a)(18), which defines persons deemed to be associated with a broker or dealer for purposes of the federal securities laws.

The objective standards of the definition permit a ready determination of the existence of affiliate status to be made. Unlike 12 U.S.C. Section 1730a(a)(2)(B), no power is vested in an agency to subjectively determine the existence of "control" necessary to establish affiliate status. Thus, affiliate status does not exist under the Act unless these objective criteria are met.

As a result of this definition, the association may, in some instances, be a declarant. Under the definition of "Affiliate of a declarant," it is possible that 20% of the unit owners may "act in concert" to control the activities of the association. While the mere casting of these votes at an association meeting would not normally constitute "concerted action" by those unit owners, other acts by individual unit owners might constitute such concerted action. The consequences of that result are determined under Section 3-101.

3. Definition (2), "Allocated interests," refers to all of the interests which this Act requires the declaration to allocate to the common interest communities.

"Allocated interests" is defined differently with respect to the 3 forms of Ownership.

First, the important interests, common to all projects, are the proportionate shares of common expense liabilities, and votes in the association, allocated to each unit. In either a cooperative, condominium, or planned community, every unit in the project must have a share of the votes and common expense liabilities.

Second, because the common elements are "owned" by the association in a planned community or cooperative, in contrast to a condominium, there is no common element interest allocated to unit owners in a planned community or cooperative.

Third, in a cooperative, because unit owners have traditionally had an ownership interest in the cooperative corporation, either in the form of stock or a membership certificate, the Act continues to require allocation of an "ownership interest in the association" to each unit.

The common element or ownership interest has limited significance. One situation in which the common element interest allocation would be important, however, is the distribution of insurance proceeds following a loss where an entire condominium project is not repaired or replaced and insurance proceeds are distributed to unit owners. *See* Section 3-113(h). *See also* 2-118(j)(2).

4. Definition (4), "Common elements" is bifurcated. The Act adopts the UCA and MRECA definition with respect to condominiums or cooperatives. However, the Act adopts UPCA's definition with respect to planned communities.

5. Definitions (9) and (31), treating "Common elements" and "Unit"

should be examined in light of Section 2-102, which specifies in detail how the differentiation between units and common elements is to be determined in any given common interest community to the extent that the declaration does not provide a different scheme. No exhaustive list of items comprising the common elements is necessary in this Act or in the declaration, as long as the boundaries between units and common elements can be ascertained with reasonable certainty. The common elements include by definition all of the real estate in the condominium or cooperative not designated as part of the units.

6. Definition (7), "Common interest community," is new to this Act. The term creates one comprehensive definition of those interests governed by the Act. This generic definition, derived from the definition of planned community in UPCA, is used through the Act to refer collectively to the 3 particular forms of common interest community: condominiums, cooperatives and planned communities.

Each of those forms in turn, has a separate definition. "Condominium" and "cooperative" are defined precisely as they are in the Acts which apply to those forms. The definition of "planned community", however, is new, and, under UCIOA, becomes a residual concept. Any ownership arrangement which is a common interest community but which does not meet the definition of either a condominium or cooperative, would be a planned community. Thus, there are but three forms of common interest community: (1) condominiums; (2) cooperatives and (3) everything else.

7. Definition (8), "Condominium" makes clear that, unless the real estate title to the common elements is vested in the owners of the units, the project is not a condominium. Thus, for example, if title to the common elements is in an association in which each unit owner is a member, the project is not a condominium, but a planned community.

8. Definition (9), "Conversion building," is important because of the protection which the Act provides in Section 4-112 for tenants of buildings which are being converted into a common interest community. The definition distinguishes between buildings which have never been occupied by any person before the time that the building is submitted to the cooperative form of ownership, and buildings, whether new or old, which have been previously occupied by tenants. In the former case, because there have been no tenants in the building, the building would not be a conversion building, and no protection of tenants is necessary.

9. Definition (10), "Cooperative," makes clear that the Act applies only to cooperatives which constitute common interest communities. The common interest community real estate, moreover, must be owned by the association, which, under Section 3-101, may be organized as a profit or nonprofit corporation, trust, trustee, partnership, or depending on the option adopted in a particular state, as an unincorporated association. In requiring, as does Section 3-101, that the association consist exclusively of "unit owners"—defined in MRECA as "proprietary lessees"—the definition tracks the usual requirements of cooperative instruments, which exclude from association membership persons who are not owners or proprietary lessees of the units.

The definition also recognizes the fundamental link between association membership and occupancy rights in providing that unit owners who are the members of the association are entitled to exclusive possession of their units under a proprietary lease—see Definition (24)—by virtue of their ownership interests in the assets of the association.

The ownership interest of a cooperative unit owner is a composite interest, which consists of the owner's ownership interests in the association and his right to occupy a unit pursuant to a proprietary lease. This interest, since it includes the proprietary interest under a lease, may not, as a theoretical matter, exist until a proprietary lease has in fact been executed by the declarant for the units in the cooperative. The definition "unit" resolves this theoretical gap by providing that the declarant is treated as the owner of cooperative interests which have not yet been created.

10. Definition (11), "Dealer", is a newly defined term in UCIOA. It was not used in any of the 3 separate Acts. It replaces, in many sections, the words "person in the business of selling (either) real estate (or) cooperative interests for his own account." Use of the term in UCIOA does not change the substantive results in any of the 3 Acts.

11. Definition (12), "Declarant," is designed to exclude persons who may be called upon to execute the declaration in order to ratify the creation of the common interest community, but who are not intended to be charged

with the responsibilities imposed on all declarants by this Act if that is all they do. Examples of such persons include holders of pre-existing liens and, in the case of leasehold common interest communities, ground lessors. (Of course, such a person may become a declarant by subsequently succeeding to a Special declarant right). Other persons similarly protected by the narrow wording of this definition include real estate brokers, because they do not offer to dispose of their own interest in a unit. Similarly, unit owners reselling their units are not declarants because these units were "previously disposed of" when originally conveyed.

If the association, itself, or in conjunction with another declarant, is offering units for sale to others, and if those units have not previously been sold or otherwise disposed of, then the association itself is a declarant.

Finally, a person who, while in control of the association, chooses not to exercise that control, is still a declarant.

The last bracketed clause in this definition must be deleted in any state which chooses not to enact Article 5 of the Act.

12. Definition (13), "Declaration," is defined as "any instruments, however denominated, that create a common interest community, including any amendments to those instruments". Thus, the term would not only include the traditional condominium declaration with which most practitioners are familiar, or the declaration of covenants, conditions and restrictions (CC&R's) so common in planned unit developments. It would also include, for example, a series of deeds to units with common mutually beneficial restrictions, or to any other instruments which create the relationship which constitutes a common interest community. If those recorded instruments create that relationship, then those documents constitute a declaration and must contain, for new projects, the information required by Section 2-105.

The Declaration of a cooperative does not include the proprietary leases of the individual units, although a sample of such a lease might be attached as an exhibit to the declaration.

Similarly, the definition of "declaration" of any common interest community does not refer to the bylaws of the association or the documents creating the association. Such documents do not "create" the common interest community, but merely regulate its use after creation. The bylaws may, but need not be, an exhibit to the declaration.

13. Definition (14), "Development rights," includes a panoply of sophisticated development techniques that have evolved over time throughout the United States and which have been expressly recognized and regulated in the case of condominiums, in an increasing number of jurisdictions, beginning with Virginia in 1974.

The concept of "development rights" lies at the heart of one of the principal goals of the Act, which is to maximize the flexibility available to a developer seeking to adjust the size and mix of a project to the demands of the marketplace, both before and after creation. The principal constraint on that flexibility is the obligation of disclosure, and its impact on marketing. Thus "development rights" include the rights to:

(a) increase the size or density of a project, either by adding real property to it, or by creating new units, common elements or limited common elements on either the original land or within the original buildings, or on any other land or buildings subsequently added;

(b) change the mix of units, common elements and limited common elements, either by subdividing units, or by converting units into common elements or limited common elements; and

(c) reduce the size of a project by withdrawing real property—whether land, entire buildings, or particular units—from it.

As a matter of simple logic, there are few other things that could be done to a real property regime which are not included within the concept of development rights. This great flexibility, particularly when coupled with the broad definitions of "unit" and "real estate", the power to create leasehold projects, and the right to subordinate unit mortgages to blanket mortgage on either the units or common elements, is an important element in the Act.

For example, a declarant may be building (or converting) a 50-unit building on Parcel A with the intention, if all goes well, to "expand" the common interest community by adding an additional building on Parcel B, containing additional units, as part of the same common interest community. If he reserves the right to do so, i.e., to "add real estate to a common interest community," he has reserved a "development right."

In certain cases, however, the declarant may desire, for a variety of reasons, to include both parcels in the common interest community from the outset, even though he may subsequently be obliged to withdraw all or part of one parcel. Assume, for example, that in the example just given the declarant intends to build an underground parking garage that will expand into both parcels. If the project is a success, his documentation will be simpler if both parcels were included in the common interest community from the beginning. If his hopes are not realized, however, and it becomes necessary to withdraw all or part of Parcel B from the common interest community and devote it to some other use, he may do so if he has reserved such a development right "to withdraw real estate from the common interest community." The portion of the garage which extends into Parcel B may be left in the common interest community (separated from the remainder of Parcel B by a horizontal boundary), or the garage may be divided between Parcels A and B with appropriate cross-easement agreements.

The right "to create units, common elements, or limited common elements" has frequently been useful in the case of commercial or mixed use common interest communities, where the declarant needs to retain a high degree of flexibility to meet the space requirements of prospective purchasers who may not approach him until the common interest community has already been created. For example, an entire floor of a high-rise building may be intended for commercial buyers, but the declarant may not know in advance whether one purchaser will want to buy the whole floor as a single unit or whether several purchasers will want the floor divided into service units, separated by common element walls and served by a limited common element corridor. This development right is sometimes useful even in purely residential common interest communities, especially those designed to appeal to affluent buyers. Similarly, the development rights "to subdivide units or convert units into common elements" is most often of value in commercial common interest communities, but may be useful in certain kinds of residential common interest communities as well.

14. Definition (15), "Dispose" or "Disposition," includes voluntary transfers to purchasers of any interest in a unit, other than as security for an obligation. Consequently, the grant of a mortgage or other security interest is not a "disposition," nor is any transfer of any interest to a person who is excluded from the definition of "Purchaser," *infra*. However, the term includes more than conveyances and would, for example, cover contracts of sale.

15. Definition (18), "Leasehold common interest community," should be distinguished from land which is leased to a common interest community but not subjected to the common interest community regime. A leasehold common interest community means, by definition, real estate which has been subjected to the common interest community form of ownership. In such a case, units located on the leasehold real estate are typically leased for long terms. At the expiration of such a lease, the common interest community unit or the real estate underlying the unit would be removed from the common interest community if the lease were not exercised or renewed. On the other hand, real estate may not be subjected to common interest community ownership, but may be leased directly to the association or to one or more unit owners for a term of years.

16. In this Act, in contrast to UPCA, Definition (23), "Planned Community," is a residual concept. That is, any common interest community which fails to fall into the category of a condominium or a cooperative is, by definition, a planned community. The definition also indicates that a planned community may have a condominium or cooperative as a constituent element.

17. Definition (24), "proprietary lease," describes that instrument initially executed by a cooperative association with the purchaser of a unit, granting the right of exclusive occupancy of a unit. The term and its significance is more fully treated in the comments to the definition of "Unit".

18. Definition (25), "Purchaser," includes a person who acquires any interest in a unit, even as a tenant, if the lease including renewal options, entitles him to occupy the premises for more than 20 years. Excluded from the definition, however, are mortgagees, declarants and dealers. Persons excluded from the definition of "purchaser" do not receive certain benefits under Article 4, such as the right to a public offering statement (Section 4–102(c)) and the right to rescind (Section 4–108).

19. Definition (26), "Real estate," is very broad, and is very similar to the definition of "real estate" in Section 1–201(16) of the Uniform Land Transactions Act.

Although often thought of in two-dimensional terms, real estate is a three-dimensional concept, and the third dimension is usually important in the condominium and planned community context. Where real estate is described in only two dimensions (length and width), it is correctly assumed that the property extends indefinitely above the earth's surface and downwards to a point in the center of the planet. In most condominium and planned communities, however, as in so-called "air rights" projects, ownership does not extend "from the center of the earth to the heavens" because units are stacked on top of units or units and common elements are interstratified. In such cases, the upper and lower boundaries must be identified with the same precision as the other boundaries.

20. Definition (28), "Security interest," encompasses any interest in real or personal property which secures payment or performance of an obligation. Thus, for example, regardless of whether or not the units in a cooperative are treated as real or personal property pursuant to Section 1–105(a), a lender's interest in a unit securing the debt is a "security interest." This definition is adapted from Sections 3–102 and 3–103 of the Uniform Land Transactions Act.

21. Definition (29), "Special declarant rights," seeks to isolate those rights reserved for the benefit of a declarant which are unique to the declarant and not shared in common with other unit owners. The list, while short, encompasses virtually every significant right which a declarant might seek in the course of creating or expanding a common interest community.

Any person who possesses a special declarant right would be a "declarant," including any who succeed under Section 3–104 to any of those rights. Thus, the concept of special declarant rights triggers the imposition of obligations on those who possess the rights. Under Section 3–104, those obligations vary significantly, depending upon the particular special declarant rights possessed by a particular declarant. These circumstances are described more fully in the comments to Section 3–104.

22. Definition (30), "Time [illegible] is based on Section 1–102(1) and (18) of the Model Real Estate Time-Share Act.

23. Definition (31), "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 does not create 12 new units—there are, rather, 12 owners of the unit. (Under the Section on voting (Section 2–110), a majority of the time-share owners of a unit are entitled to cast the vote assigned to that unit.)

Similarly, in a cooperative, the unit remains a physical part of the real estate; its legal title is vested in the association while the right to possession is held by the unit owner under a proprietary lease. The definition, however, makes it clear that the association's interest in the unit is unaffected by transfers of interests in that unit to or by unit owners. The unit owner's interest is a composite interest, which consists of an ownership interest in the association, coupled with the right to occupy a unit pursuant to a lease.

The definition makes clear that in the case of a cooperative, if a unit owned by a unit owner is sold, conveyed, or encumbered or otherwise transferred by the unit owner, the interest in such unit which is affected is the right to possession of that unit under a proprietary lease, coupled with the allocated interests of that unit. In recognizing the relationship between the physical "unit" and the nature of a unit owner's interest in that unit, and by describing that relationship concisely in the definition, the merged Act was able to delete the definition of "cooperative interest" as it was used in MRECA.

24. Definition (32), "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.

§ 1–104. Variation by Agreement

Except as expressly provided in this [Act], its provisions may not be varied by agreement, and rights conferred by it may not be waived. 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.

COMMENT

1. The Act is generally designed to provide great flexibility in the creation of common interest communities and, to that end, the Act permits the parties to vary many of its provisions. In many instances, however, provisions of the Act may not be varied, because of the need to protect purchasers, lenders, and declarants. Accordingly, this Section adopts the approach of prohibiting variation by agreement except in those cases where it is expressly permitted by the terms of the Act itself.

2. One of the consumer protections in this Act is the requirement for consent by specified percentages of unit owners to particular actions or changes in the declaration. In order to prevent declarants from evading these requirements by obtaining powers of attorney from all unit owners, or in some other fashion controlling the votes of unit owners, this Section forbids the use by a declarant of any device to evade the limitation or prohibition of the Act or of the declaration.

3. The second sentence of the section is an important limitation upon the rights of a declarant. Today it is the practice in many jurisdictions, particularly those proscribing expansion of a condominium or planned community by statute, for a declarant to secure powers of attorney from all unit purchasers permitting the declarant unilaterally to expand the condominium or planned community by "unanimous consent" to include new units and to reallocate common element interests, common expense liability, and votes. With such powers of attorney, many declarants have purported to comply with the typical provision of "first generation" condominium statutes requiring unanimous consent for amendments of the declaration concerning such matters. The Act bars this practice.

1. The following sections permit variation:

Section 1-103. (Definitions). All definitions used in the declaration and bylaws may be varied in the declaration, but not in interpretation of the Act.

Section 1-105. (Separate Titles and Taxation). This section permits the declarant of a cooperative to determine whether unit owners' interests are real or personal property.

Section 1-107. (Eminent Domain). The formulas for reallocation upon taking a part of a unit, and for allocation of proceeds attributable to limited common elements, may be varied.

Article 1, Part II, *Sections 1-202, 1-203, 1-205, 1-206, and 1-207*, permit a variety of elections to declarants and unit owners with respect to applicability.

Section 2-102. (Unit Boundaries). The declaration may vary the distinctions as to what constitutes the units and common elements.

Section 2-105. (Contents of Declaration). A declarant may add any information he desires to the required content of the declaration.

Section 2-108. (Limited Common Elements). The Act permits reallocation of limited common elements unless prohibited by the declaration.

Section 2-109. (Plats and Plans). There is a presumption regarding horizontal boundaries of units, unless the declaration provides otherwise.

Section 2-111. (Alterations Within Units). Subject to the provisions of the declaration, unit owners may make alterations and improvements to units.

Section 2-112. (Relocation of Boundaries Between Adjoining Units). Subject to the provisions of the declaration, boundaries between adjoining units may be relocated by affected unit owners.

Section 2-113. (Subdivision of Units). If the declaration expressly so permits, a unit may be subdivided into two or more units.

Section 2-115. (Use for Sales Purposes). The declarant may maintain sales offices, management offices, and model units only if the declaration so provides. Unless the declaration provides otherwise, the declarant may maintain advertising on the common elements.

Section 2-116. (Easement to Facilitate Exercise of Special Declarant Rights). Subject to the provisions of the declaration, the declarant and unit owners have easements for the purposes described.

Section 2-117. (Amendment of Declaration). The declaration of a non-residential common interest community may specify less than a two-thirds vote to amend the declaration. Any declaration may require a larger majority.

Section 2-118. (Termination). The declaration may specify a majority larger than 80 percent to terminate and, in a non-residential common interest community, a smaller majority. The declarant may require that the units be sold following termination even though none of them have horizontal boundaries.

In a cooperative, upon termination, the declaration may specify that association creditors have priority over the rights of unit owners, and their creditors.

Section 2-119. (Rights of Secured Lenders). The declaration may require lender approval of specified actions of unit owners or the association.

Section 2-120. (Master Associations). The declaration may provide for some of the powers of the Executive Board to be exercised by a master association.

Section 2-122. (Addition of Unspecified Real Estate). The declaration of a planned community may grant a declarant the right to add additional real estate to the project without stating the location of that real estate in the original declaration.

Section 3-102. (Powers of the Association). The declaration may limit the right of the association to exercise any of the listed powers, except in a manner which discriminates in favor of a declarant. The declaration may authorize the association to assign its rights to future income.

Section 3-103. (Executive Board Members and Officers). Except as limited by the declaration or bylaws, the Executive Board may act for the association.

Section 3-106. (Bylaws). Subject to the provisions of the declaration, the bylaws may contain any matter in addition to that required by the Act.

Section 3-107. (Upkeep of the Common Interest Community). Except to the extent otherwise provided by the declaration, maintenance responsibilities are set forth in this section, and income from real estate subject to development rights inures to the declarant.

Section 3-108. (Meetings). The bylaws may provide for special meetings at the call of less than 20 percent of the Executive Board or the unit owners.

Section 3-109. (Quorums). This section permits statutory quorum requirements to be varied by the bylaws.

Section 3-110. (Voting; Proxies). A majority in interest of the multiple owners of a single unit determine how that units' vote is to be cast unless the declaration provides otherwise. The declaration may require that lessees vote on specified matters.

Section 3-112. (Conveyance or Encumbrance of Common Elements). The declaration may vary the percentages of unit owners whose approval is required to convey or encumber common elements.

The declaration may also provide that a conveyance or encumbrance of common elements defeats prior encumbrances on those common elements.

Section 3-113. (Insurance). The declaration may vary the provisions of this section in non-residential common interest communities, and may require additional insurance in any community.

Section 3-114. (Surplus Funds). Unless otherwise provided in the declaration, surplus funds are paid or credited to unit owners in proportion to their common expense liabilities.

Section 3-115. (Assessments for Common Expenses). To the extent provided in the declaration, common expenses for limited common elements must be assessed against the units to which they are assigned, common expenses benefiting fewer than all the units must be assessed only against the units benefited, insurance costs must be assessed in proportion to risk, and utility costs must be assessed in proportion to usage.

Section 3-116. (Lien for Assessments). Unless the declaration provides otherwise, fines, late charges, and other fees are treated as assessments for lien purposes.

Section § 101. (Applicability; Waiver). All of Article 4 is modifiable or waivable by agreement in a common interest community restricted to non-residential use.

Section § 115. (Warranties). Implied warranties of quality may be excluded or modified by agreement.

Section § 116. (Statute of Limitation on Warranties). The 6-year limitation may be modified by agreement of the parties.

5. While freedom of contract is a principle of this Act, and variation by agreement is accordingly widely permit-

ble, freedom of contract does not extend so far as to permit parties to disclaim obligations of good faith, *see* Section 1-113, or to enter into contracts which are unconscionable when viewed as a whole, or which contain unconscionable terms. *See* Section 1-112. This Section derives from Section 1-102(3) of the Uniform Commercial Code.

§ 1-105. Separate Titles and Taxation

(a) In a cooperative, unless the declaration provides that a unit owner's interest in a unit and its allocated interests is real estate for all purposes, that interest is personal property. [That interest is subject to the provisions of [insert reference to state homestead exemptions], even if it is personal property.]

(b) In a condominium or planned community:

(1) If there is any unit owner other than a declarant, each unit that has been created, together with its interest in the common elements, constitutes for all purposes a separate parcel of real estate.

(2) If there is any unit owner other than a declarant, each unit must be separately taxed and assessed, and no separate tax or assessment may be rendered against any common elements for which a declarant has reserved no development rights.

(c) Any portion of the common elements for which the declarant has reserved any development right must be separately taxed and assessed against the declarant, and the declarant alone is liable for payment of those taxes.

(d) If there is no unit owner other than a declarant, the real estate comprising the common interest community may be taxed and assessed in any manner provided by law.

COMMENT

1. Subsection (a) of this Section follows the MRECA provisions. The classification of the unit and its allocated interests as real property or as personal property is significant for purposes of such matters as tenure, sales, recordation, transfer taxes, property taxes, estate and inheritance taxes, testate and intestate succession, mortgage lending, the perfection, priority and enforcement of liens, and rights of redemption.

Subsection (a) resolves an important theoretical and practical issue which pervades the cooperative field: whether a unit owner in a cooperative holds an interest in real or in personal property. Subsection (a) permits the declarant to decide that issue for each cooperative on a project-by-project basis.

The issue arises from the fact that the unit owner's interest in the cooperative typically has elements of both real and personal property. His interest includes both a beneficial interest in the association—either through stock ownership or membership—which is clearly a personal property interest, and a long term "proprietary" or ownership interest under a proprietary lease in an apartment—clearly an interest in real estate.

While this is in many ways a highly theoretical issue, it has many practical consequences. For example, if the unit owner's interest is a real estate interest, then that interest—aside from the association's interest—may be subject to real property taxes and conveyance taxes; the recording laws would apply to conveyance of those interests; and real estate foreclosure laws would apply to foreclosure of a lien against those interests. Moreover, a security interest in the unit owner's stock or membership certificate would not be effective against the stock without a security instrument being recorded on the land records. In general, none of Article 9 of the Uniform Commercial Code would be applicable to that interest, and all of the conveyancing rules would apply.

On the other hand, if the interest is a personal property interest—the result required by this Section in the absence of a provision in the declaration that the interest is real property—then all of Article 9 of the Uniform Commercial Code would apply to security interests in the unit, the real estate conveyancing rules would not apply, and the interest would be treated for all purposes as personal property.

2. This act, of course, would apply in all respects regardless of the characterization of the unit owner's interests. Thus, for example, recording of the declaration is required, whether or not the owner's interest in a cooperative interest is real or personal property, because the cooperative itself is the real estate.

3. Whether an institutional lender may lawfully make loans on the unit owner's interest may or may not depend on whether that interest is characterized as real or personal property. That issue is not affected by this Act however, but by other state law which may permit loans to be made by certain institutional lenders only if secured by an interest in real estate.

4. If a unit owner's interest is a real property interest, recordation of the proprietary lease in the land records is constructive notice of the unit owner's rights. If the unit owner's interest is a personal property interest, recordation of the lease in the land records would be ineffective as constructive notice of that interest, and Article 9 of the Uniform Commercial Code does not provide a mechanism for filing evidence of that ownership interest. It is likely, however, that holders of security interests in units which are personal property would adopt a procedure similar to that followed in Illinois with respect to land trusts, which have been held to be personal property in that state. Under Article 9 of the Uniform Commercial Code and Illinois common law, the secured party files notice of the lien and the lien is thereby perfected for 5 years, when it must be renewed.

5. Subsection (b) integrates the language of UCA and UPCA regarding condominiums and planned communities. A condominium or planned community may be created, by the recordation of a declaration, long before the first unit is conveyed. This happens frequently, for example, with existing rental apartment projects which are converted into either condominiums or planned communities. Subsection (d) spares the local taxing authorities from having to assess each unit separately until such time as the declarant begins conveying units, although separate assessment from the date the common interest community is created may be permitted under general state law, which permits or requires separate taxation of individual parcels of real estate. When separate tax assessments become mandatory under this Section, the assessment for each unit must be based on the value of that individual unit, under whatever uniform assessment mechanism prevails in the state or locality. Importantly, no separate tax bill on the common elements is to be rendered to the association or the unit owners collectively, even though, in the context of planned communities, the common elements owned by the association might be subject to taxation as a separately owned parcel of real estate, in the absence of this provision. Any common element subject to development rights, however, must be separately assessed and taxed to the declarant, *see* Subsection (c), in recognition of the independent economic value that those development rights have. This would be true even if the real estate subject to development rights is a part of the common interest community and lawfully "owned" by the unit owners in common, since the rights are in fact an asset of the declarant.

6. If there is any doubt in a particular state whether a unit occupied as a residential dwelling is entitled to treatment as any other residential single-family detached dwelling under the homestead status, this Section should be modified to ensure that units are similarly treated.

7. Unlike the law of some states, this Section imposes no limitations on the power of a jurisdiction to tax units based on the fair market value of the individual units, rather than on the project as a whole. In most jurisdictions, experience has shown that upon conversion of an apartment building to a common interest form of ownership, the fair market value of the units exceeds the fair market value of the building prior to conversion. Accordingly, a jurisdiction under this Act may impose real estate taxes on common interest community units which reflect the fair market value of those units in the same way that the jurisdiction taxes other forms of real estate.

§ 1-106. Applicability of Local Ordinances, Regulations, and Building Codes

(a) A building code may not impose any requirement upon any structure in a common interest community which it would not impose upon a physically identical development under a different form of ownership.

(b) In condominiums and cooperatives, no zoning, subdivision, or other real estate use law, ordinance, or regulation may prohibit the condominium or cooperative form of ownership or impose any requirement upon a condominium or cooperative which it would not impose upon a physically identical development under a different form of ownership.

(c) Except as provided in subsections (a) and (b), the provisions of this [Act] do not invalidate or modify any provision of any building code, zoning, subdivision, or other real estate use law, ordinance, rule, or regulation governing the use of real estate.

COMMENT

1. The purpose of this section is to resolve the relative roles of the state and local communities in regulating the creation of common interest communities. The underlying concept is to make clear that the municipality has a legitimate interest in regulating the use of real estate, in accordance with long established zoning, building code and similar practices, and that such practices continue to have equal applicability to common interest communities as they do to purely rental projects. With respect to forms of ownership, however, this Act, as a state enactment, preempts the field and accordingly, except as provided in the Act, the municipality may not regulate the form of ownership, as opposed to the use of that real estate.

2. Consistent with the concept described in comment 1, subsections (a) prohibits discriminatory application of building codes against common interest communities by local law making authorities. Thus, if a building code imposes a requirement which cannot be met if property is owned as a common interest community but which would not be violated if all of the property constituting the common interest community were owned by a single owner, this Section makes it unlawful to apply that requirement or restriction to the common interest community. For example, in the case of a high-rise apartment building, if a building code requirement imposing a minimum fire wall rating between apartments would not prevent a rental apartment building from being built, this Act would override any requirement that might impose a higher fire wall rating between apartments merely because the same building might be owned as a common interest community.

3. While Subsection (a) prevents discrimination against all forms of common interest communities under building codes, Subsection (b) does not prevent local law making authorities from using zoning, subdivision and other real estate regulations to specifically regulate the planned community form of ownership, in ways different from rental project, or condominiums. This distinction simply recognizes the existing practice in some communities that permits a local zoning board, as a condition of granting a cluster housing zoning permit, to require the right of prior plan approval. However, such regulations may not be used to proscribe the condominium or cooperative form of ownership, or to discriminate against these two types of common interest communities. Accordingly, a community could not prevent a condominium conversion by applying setback requirements between apartments which would not apply if all the apartments were owned by a single owner, or by requiring more parking for condominiums than for rental apartments.

4. Subsection (c) makes clear that, except for the prohibition on discrimination against common interest communities under building codes, and except for the prohibition on the use of zoning, subdivision and other real estate laws, ordinances, or regulations to ban or discriminate against cooperatives and condominiums, the Act has no effect on real estate or personal property laws. For example, a particular parcel of real estate submitted to the common interest community form of ownership might be of such size that all of the real estate is required to support a proposed density of units or to satisfy minimum setback requirements. Under this Act, part of the submitted real estate might be subject to a development right entitling the declarant to withdraw it from the common interest community, but the mere reservation of this right would not constitute a subdivision of the parcel into separate ownership. If a declarant or foreclosing lender at a later time sought to exercise the option to withdraw the real estate, however, withdrawal would constitute a subdivision and would be illegal if the effect of withdrawal would be to violate setback requirements, or to exceed the density of units permitted on the remaining parcel.

§ 1-107. Eminent Domain

(a) If a unit is acquired by eminent domain or part of a unit is acquired by eminent domain leaving the unit owner with a remnant that may not practically or lawfully be used for any purpose permitted by the declaration, the award must include compensation to the unit owner for that unit and its allocated interests, whether or not any common elements are acquired. Upon acquisition, unless the decree otherwise provides, that unit's allocated interests are automatically reallocated to the remaining units in proportion to the respective allocated interests of those units before the taking, and the association shall promptly prepare, execute, and record an amendment to the declaration reflecting the reallocations. Any remnant of a unit remaining after part of a unit is taken under this subsection is thereafter a common element.

(b) Except as provided in subsection (a), if part of a unit is acquired by eminent domain, the award must compensate the unit owner for the reduction in value of the unit and its interest in the common elements, whether or not any common elements are acquired. Upon acquisition, unless the decree otherwise provides, (i) that unit's allocated interests are reduced in proportion to the reduction in the size of the unit, or on any other basis specified in the declaration and (ii) the portion of the allocated interests divested from the partially acquired unit are automatically reallocated to that unit and to the remaining units in proportion to the respective allocated interests of those units before the taking, with the partially acquired unit participating in the reallocation on the basis of its reduced allocated interests.

(c) If part of the common elements is acquired by eminent domain, the portion of the award attributable to the common elements taken must be paid to the association. Unless the declaration provides otherwise, any portion of the award attributable to the acquisition of a limited common element must be equally divided among the owners of the units to which that limited common element was allocated at the time of acquisition.

(d) The court decree must be recorded in every [county] in which any portion of the common interest community is located.

COMMENT

1. The provisions of this statute are not intended to supplant the usual rules of eminent domain but merely to supplement those rules in addressing the unique problems which eminent domain raises in the context of a common interest community. Nevertheless, because the law of eminent domain differs widely among the various states, the law of each state should be reviewed to ensure that the eminent domain code and this Section are properly integrated. For example, Subsection (a) uses the words "the award must include compensation to the unit owner". This language, a change first made in MREUA, suggests that, under other state law, compensation for other interests may be required in an appropriate case and the section does not limit that result.

2. When a unit is taken or partially taken by eminent domain, this section provides for a recalculation of the allocated interests of all units.

EXAMPLE 1

Suppose that all allocated interests in a 9-unit common interest community were originally allocated to the units on the basis of size. If eight of the units are all equal in size and one is twice as large as the others, the allocated interests would be 20% for the largest unit and 10% for each of the other eight units.

Suppose that one of the smaller units is removed from the common interest community by a condemning authority. Subsection (a) provides that the allocated interests would automatically shift, at the time of the taking, so that the larger unit would have 22$\frac{2}{9}$% while each of the small units would have 11$\frac{1}{9}$%.

EXAMPLE 2

Suppose, in Example 1, that the condemnation only reduced the size of one of the smaller units by 50%, leaving the remaining half of the unit usable. Subsection (b) provides that the allocated interests would automatically shift to 5$\frac{5}{9}$% for the partially taken unit, 21$\frac{1}{18}$% for the largest unit, and 10$\frac{10}{18}$% for each of the other units. Note that the fact that the partially taken unit was reduced to half its former size does not mean that its allocated interests are only half as large

as before the taking. Rather, that unit participates in the reallocation in proportion to its reduced size. That is why the partially taken units' reallocated interests are 5$\frac{5}{10}$% rather than 5%.

3. An important issue raised by this section is whether or not a governmental body acquiring a unit by eminent domain has a right to also take that unit's allocated interests and thereby assume membership in the association by virtue of its power of eminent domain. While there is no question that a governmental body may acquire any real property by eminent domain, there is no case law on the question of whether or not the governmental body may take a unit as part of a common interest community or must take the unit and have the unit excluded from the common interest community.

Subsection (a) merely requires that the taking body compensate the unit owner for all of his unit and its allocated interests, whether or not any common elements are acquired. The Act also requires that the allocated interests are automatically reallocated upon taking to the remaining units unless the decree provides otherwise. Whether or not the decree may constitutionally provide otherwise in the case of a particular taking (for example, by allocating the allocated interests to the government) is an unanswered question.

4. In the circumstances of a taking of part of a unit, it is important to have some objective test by which to measure the portion of allocated interests to be reallocated. Subsection (b) sets forth a formula based on relative size, but permits the declaration to vary that formula to some other more appropriate formula in a particular circumstance. The right to vary the formula in the declaration is important, since it is clear that the formula set forth in the statute may in some instances result in gross inequities.

EXAMPLE 1

Suppose in a commercial common interest community consisting of four units, each unit consists of a factory and parking lot, and the declaration provides that each unit's common expense liability, including utilities, is equal. Suppose further that the area of the factory building and parking lot in unit number 1 are equal, and that ½ the parking lot is taken by eminent domain, leaving the factory and ½ the lot intact. Under the formula set out in the statute, unit number one's common expense liability would be reduced even though its utilities might not be reduced at all, thus resulting in a windfall for the unit owner.

EXAMPLE 2

Suppose that a common interest community contains ten units, each of which is allocated a $\frac{1}{10}$ undivided interest in the association. Suppose further that a taking by eminent domain reduces the size of one of the units by 50%. In such case, the ownership interest of all the units will be reallocated so that the partially-taken unit has a $\frac{1}{19}$ undivided interest in the common elements and the remaining 9 units each has a $\frac{2}{19}$ undivided interest in the common elements. Thus, the partially-taken unit has a common element interest equal to ½ of the common element interest allocated to each of the other units. Note that this is not equivalent to the partially-taken unit having a 5% undivided interest and the remaining 9 units each having a 10% undivided interest.

5. Even before the amendment formally acknowledging the reallocation of percentages required by this section is recorded, the reallocation is deemed to have occurred simultaneously with the taking. This rule is necessary to avoid the hiatus that otherwise could occur between the taking and the reallocation of interests, votes, and liabilities.

§ 1-108. Supplemental General Principles of Law Applicable

The principles of law and equity, including the law of corporations [and unincorporated associations], the law of real property, and the law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance, or other validating or invalidating cause supplement the provisions of this [Act], except to the extent inconsistent with this [Act].

COMMENT

1. This Act displaces existing law relating to common interest communities and other law only as stated by specific sections and by reasonable implication therefrom. Moreover, unless specifically displaced by this statute, common law rights are retained. The listing given in this section is merely an illustration, no listing could be exhaustive.

2. The bracketed language concerning unincorporated associations should be deleted if the enacting state requires incorporation of a unit owners' association. *See* the parallel language contained in Section 3-101.

§ 1-109. Construction against Implicit Repeal

This [Act] being a general act intended as a unified coverage of its subject matter, no part of it shall be construed to be impliedly repealed by subsequent legislation if that construction can reasonably be avoided.

COMMENT

This section derives from Section 1-104 of the Uniform Commercial Code.

§ 1-110. Uniformity of Application and Construction

This [Act] shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

COMMENT

This Act should be construed in accordance with its underlying purpose of making the law uniform with respect to all forms of common interest communities, as well as the purposes stated in the Prefatory Note of simplifying, clarifying, and modernizing the law of common interest communities, promoting the interstate flow of funds to common interest communities, and protecting consumers, purchasers, and borrowers against common interest community practices which may cause unreasonable risk of loss to them. Accordingly the text of each section should be read in light of the purpose and policy of the rule or principle in question, and also of the Act as a whole.

§ 1-111. Severability

If any provision of this [Act] or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provisions or applications, and to this end the provisions of this [Act] are severable.

§ 1-112. Unconscionable Agreement or Term of Contract

(a) The court, upon finding as a matter of law that a contract or contract clause was unconscionable at the time the contract was made, may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause in order to avoid an unconscionable result.

(b) Whenever it is claimed, or appears to the court, that a contract or any contract clause is or may be unconscionable, the parties, in order to aid the court in making the determination, must be afforded a reasonable opportunity to present evidence as to:

(1) the commercial setting of the negotiations;

(2) whether a party has knowingly taken advantage of the inability of the other party reasonably to protect his interests by reason of physical or mental infirmity, illiteracy, inability to understand the language of the agreement, or similar factors;

(3) the effect and purpose of the contract or clause; and

(4) if a sale, any gross disparity, at the time of contracting, between the amount charged for the property and the value of that property measured by the price at which similar property was readily obtainable in similar transactions. A disparity between the contract price and the value of the property measured by the price at which similar property was readily obtainable in similar transactions does not, of itself, render the contract unconscionable.

COMMENT

This section is similar to Section 2-302 of the Uniform Commercial Code and Section 1-311 of the Uniform Land Transactions Act. The rationale and comments provided in those sections are equally applicable to this section.

§ 1-113. Obligation of Good Faith

Every contract or duty governed by this [Act] imposes an obligation of good faith in its performance or enforcement.

COMMENT

This section sets forth a basic principle running throughout this Act: in transactions involving common interest communities, good faith is required in the performance and enforcement of all agreements and duties. Good faith, as used in this Act, means observance of two standards: "honesty in fact", and observance of reasonable standards of fair dealing. While the term is not defined, the term is derived from and used in the same manner as in Section 1-201 of the Uniform Simplification of Land Transfers Act, and Sections 2-103(1)(b) and 7-404 of the Uniform Commercial Code.

§ 1-114. Remedies to be Liberally Administered

(a) The remedies provided by this [Act] shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. However, consequential, special, or punitive damages may not be awarded except as specifically provided in this [Act] or by other rule of law.

(b) Any right or obligation declared by this [Act] is enforceable by judicial proceeding.

§ 1-115. Adjustment of Dollar Amounts

(a) From time to time the dollar amounts specified in Sections 1-203 and 4-101(b)(7) must change, as provided in subsections (b) and (c), according to and to the extent of changes in the Consumer Price Index for Urban Wage Earners and Clerical Workers: U. S. City Average, All Items 1967 = 100, compiled by the Bureau of Labor Statistics, United States Department of Labor, (the "Index"). The Index for December, 1970, which was 230, is the Reference Base Index.

(b) The dollar amounts specified in Sections 1-203 and 4-101(b)(7), and any amount stated in the declaration pursuant to those sections, must change on July 1 of each year if the percentage of change, calculated to the nearest whole percentage point, between the Index at the end of the preceding year and the Reference Base Index is 10 percent or more, but

(i) the portion of the percentage change in the Index in excess of a multiple of 10 percent must be disregarded and the dollar amounts shall change only in multiples of 10 percent of the amounts appearing in this [Act] on the date of enactment;

(ii) the dollar amounts must not change if the amounts required by this section are those currently in effect pursuant to this [Act] as a result of earlier application of this section; and

(iii) in no event may the dollar amounts be reduced below the amounts appearing in this [Act] on the date of enactment.

(c) If the Index is revised after December, 1979, the percentage of change pursuant to this section must be calculated on the basis of the revised Index. If the revision of the Index changes the Reference Base Index, a revised Reference Base Index must be determined by multiplying the Reference Base Index then applicable by the rebasing factor furnished by the Bureau of Labor Statistics. If the Index is superseded, the Index referred to in this section is the one represented by the Bureau of Labor Statistics as reflecting most accurately changes in the purchasing power of the dollar for consumers.

PART II
APPLICABILITY

§ 1-201. Applicability to New Common Interest Communities

Except as provided in Sections 1-202 and 1-203, this [Act] applies to all common interest communities created within this State after the effective date of this [Act]. 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 after the effective date of this [Act].

COMMENT

The question of the extent to which a state statute should apply to particular common interest communities involves 2 major conceptual problems: (1) whether the statute should require or permit different results for common interest communities created before and after the statute takes effect; and (2) whether differences in the forms of ownership, and the history of their development, requires different levels of applicability to these various forms.

Two conflicting policies are posed when considering the applicability of this Act to "old" and "new" common interest communities in the enacting state. On the one hand, it is desirable, for reasons of uniformity, for the Act to apply to all common interest communities located in a particular state, regardless of whether the common interest community was created before or after adoption of the Act in that state. To the extent that different laws apply within the same state to different common interest communities, confusion results in the minds of both lenders and consumers. Moreover, because of the inadequacies and uncertainties of common interest communities created under prior law, if any, and because of the requirements placed on declarants and unit owners' associations by this Act which might increase the costs of new common interest communities, different markets might tend to develop for common interest communities created before and after adoption of the Act.

On the other hand, to make all provisions of this Act automatically applicable to "old" common interest communities might violate the constitutional prohibition of impairment of contracts. In addition, aside from the constitutional issue, automatic applicability of the entire Act almost certainly would unduly alter the legitimate expectations of some present unit owners and declarants.

Accordingly, the philosophy of this part reflects a desire to maximize the uniform applicability of the Act to all common interest communities in the enacting state, while avoiding the difficulties raised by automatic application of the entire Act to preexisting common interest communities.

In carrying out this philosophy with respect to "new projects, the Act applies to all common interest communities "created" within the state after the Act's effective date; at the same time, special limitations on that applicability are provided in the case of certain new cooperatives and planned

communities to the following sections. This is the effect of the first sentence of the section. The second sentence makes clear that the provisions of old statutes expressly applicable to common interest communities do *not* apply to common interest communities created after the effective date of this Act.

"Creation" of a common interest community pursuant to this Act occurs upon recordation of a declaration pursuant to Section 2-101; however, the definition of "Common Interest Community" in Section 1-103(7) contemplates that *de facto* common interest communities may exist, if the nature of the ownership interest fits the definition, and the Act would apply to such a project. Any real estate project which includes individually owned units meeting the definition is therefore subject to the Act if created within the state after the Act's effective date. No intent to subject the project to the Act is required, and an express intention to the contrary would be invalid and ineffective.

The reference in this section to "all present statutes expressly applicable to condominiums or horizontal property regimes" is intended to distinguish between a state's condominium and other enabling statutes and those statutes which apply not only to common interest communities but to other forms of real estate, such as taxation statutes or subdivision statutes. Thus, reference to the state's condominium or horizontal property regime enabling statutes should be included here, while references to taxation, subdivision, or other statutes which are not restricted solely to condominiums should not be included.

§ 1-202. Same; Exception for Small Cooperatives

If a cooperative contains only units restricted to nonresidential use, or contains no more than 12 units and is not subject to any development rights, it is subject only to Sections 1-105 (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.

Comment

Section 1-201 provides generally that the Act applies to all cooperatives "created" within the state after the Act's effective date. Under Section 1-202, however, only 2 sections of this Act automatically apply to a cooperative created after the effective date of this Act if that cooperative contains only 12 units or less and is not subject to development rights. Importantly, Section 1-105, which permits the declarant to determine whether the cooperative interests are real or personal property, does not apply unless the declarant elects to have the entire Act apply. Thus, the determination of whether the cooperative interests in a small cooperative created after the effective date of the Act are real or personal property may depend on other state laws. The Act, however, also permits such a cooperative to elect to be subject to the entire Act.

§ 1-203. Same; Exception for Small and Limited Expense Liability Planned Communities

If a planned community:

(1) contains no more than 12 units and is not subject to any development rights; 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 $100, as adjusted pursuant to Section 1-115 (Adjustment of Dollar Amounts),

it is subject only to Sections 1-105 (Separate Titles and Taxation), 1-106 (Applicability of Local Ordinances, Regulations, and Building Codes) and 1-107 (Eminent Domain) unless the declaration provides that this entire [Act] is applicable.

COMMENT

Section 1-201 provides generally that the Act applies to all planned communities "created" within the state after the Act's effective date. Section 1-203, however, makes only a few of the Act's sections applicable to either planned communities containing 12 or fewer units with no development rights or to *de minimis* planned communities—as measured by the size of its common expense assessments—unless the planned community's declaration makes the entire Act applicable.

§ 1-204. Applicability to Pre-existing Common Interest Communities

Except as provided in Section 1-205 (Same; Exception for Small Pre-Existing Cooperatives and Planned Communities), Sections 1-105 (Separate Titles and Taxation), 1-106 (Applicability of Local Ordinances, Regulations, and Building Codes), 1-107 (Eminent Domain), 2-103 (Construction and Validity of Declaration and Bylaws), 2-104 (Description of Units), 2-121 (Merger or Consolidation of Common Interest Communities), 3-102(a)(1) through (6) and (11) through (16) (Powers of Unit Owners' Association), 3-111 (Tort and Contract Liability), 3-116 (Lien for Assessments), 3-118 (Association Records), 4-109 (Resales of Units), and 4-117 (Effect of Violation on Rights of Action; Attorney's Fees), and Section 1-103 (Definitions) to the extent necessary in construing any of those sections, apply to all common interest communities created in this State before the effective date of this [Act]; but those sections apply only with respect to events and circumstances occurring after the effective date of this [Act] and do not invalidate existing provisions of the [declaration, bylaws, or plats or plans] of those common interest communities.

COMMENT

1. This section states the general rules of applicability of the Act to common interest communities which were created before the effective date of this Act.

2. The Act adopts a novel three-step approach to common interest communities created before the effective date of the Act. First, certain provisions of the Act described in Section 1-204 automatically apply to "old" common interest communities, but only prospectively, and only in a manner which does not invalidate provisions of declarations and bylaws valid under "old" law. Second, "old" law remains applicable to previously created common interest communities where not automatically displaced by the Act. Third, under Section 1-206, owners of "old" common interest communities may amend any provisions of their declaration or bylaws, even if the amendment would not be permitted by "old" law, so long as (a) the amendment is adopted in accordance with the procedure required by "old" law and the existing declaration and bylaws, and (b) the substance of the amendment does not violate this Act. In addition, as in the case of "new" projects, special exceptions are provided, in Section 1-205, for "small" projects.

3. Elaboration of the principles described in the last Comment may be helpful.

First, Section 1-201 provides that the enumerated provisions automatically apply to common interest communities created under pre-existing law, even though no action is taken by the unit owners. Many of the sections which do apply should measurably increase the ability of the unit owners to effectively manage the association, and should help to encourage the marketability of common interest communities created under early condominium statutes, or under common law. To avoid possible constitutional challenges[illegible]

provisions, as applied to "old" common interest communities, apply only to "events and circumstances occurring after the effective date of this Act"; moreover, the provisions of this Act are subject to the provisions of the instruments creating the common interest community, and this Act does not invalidate those instruments.

EXAMPLE 1

Under Section 1-201, Section 4-109 (Resale of Units) automatically applies to "old" common interest communities. Accordingly, unit owners in common interest communities established prior to adoption of the Act would be obligated after the Act's effective date to provide resale certificates to future purchasers of units. However, the failure of a unit owner to provide such a certificate to a purchaser who acquired the unit before the effective date of the Act would not create a cause of action in the purchaser, because the conveyance was an event occurring before the effective date of the Act.

EXAMPLE 2

Under Section 1-204, Section 3-118 (Association Records) automatically applies to "old" common interest communities. As a result, a unit owners' association of an "old" common interest community must maintain certain financial records, and all the records of the association "shall be made reasonably available for examination by any unit owner and his authorized agents", even if the "old" law did not require that records be kept, or access provided. If the declaration or bylaws, however, provided that unit owners could not inspect the records of the association without permission of the president of the association, the restriction in the declaration would continue to be valid and enforceable.

Second, the prior laws of the state relating to common interest communities are not repealed by this Act because those laws will still apply to previously-created projects, except when displaced. Some states at one point made certain provisions of their condominium statutes automatically applicable to pre-existing condominiums. In certain instances, this attempted retroactive application has raised serious constitutional questions, has caused doubts to arise as to the continued validity of those condominiums, and has created general confusion as to what statutory rules should be applied.

Third, the Act seeks to alleviate any undesirable consequences of "old" law, by a limited "opt-in" provision, as provided in Section 1-206. More specifically, Section 1-206 permits the owners of a pre-existing common interest community to take advantage of the salutary provisions of this statute to the extent that can be accomplished consistent with the procedures for amending the project instruments as specified in those instruments and in the pre-existing statute or common law.

EXAMPLE 3

Under most "first generation" condominium statutes, unit owners have no power to relocate boundaries between adjoining units. Under Section 2-112 of this Act, unit owners have such power, unless limited by the declaration. While Section 2-112 does not automatically apply to "old" common interest communities, if the unit owners of a pre-existing community amend their declaration to permit unit owners to relocate boundaries, this section would validate that amendment, even if it were invalid under old law.

§ 1-205. Same; Exception for Small Pre-existing Cooperatives and Planned Communities

If a cooperative or planned community created within this State before the effective date of this [Act] contains no more than 12 units and is not subject to any development rights, it is subject only to Sections 1-105 (Separate Titles and Taxation), 1-106 (Applicability of Local Ordinances, Regulations, and Building Codes), and 1-107 (Eminent Domain) unless the declaration is amended in conformity with applicable law and with the procedures and requirements of the declaration to take advantage of the provisions of Section 1-200, in which case all the sections enumerated in Section 1-204 apply to that cooperative or planned community.

COMMENT

Recognizing that pre-Act cooperatives or planned communities of fewer than 12 units ought not to be subject to more rigorous requirements than small cooperatives or planned communities created under the Act, this section provides that only the same sections applicable to small new cooperatives or planned communities will apply to small pre-Act cooperatives and planned communities, unless the declaration of a small pre-Act cooperative or planned community is amended to take advantage of the amendment provisions of Section 1-206. If such an amendment is made pursuant to Section 1-206, the small pre-Act cooperative or planned community would be subject to all of the provisions applicable to large pre-Act cooperatives and planned communities, and further elections under Section 1-201 would then be possible.

§ 1-206. Same; Amendments to Governing Instruments

(a) In the case of amendments to the declaration, bylaws, or plats and plans of any common interest community created before the effective date of this [Act]:

(1) If the result accomplished by the amendment was permitted by law prior to this [Act], the amendment may be made either in accordance with that law, in which case that law applies to that amendment, or it may be made under this [Act]; and

(2) If the result accomplished by the amendment is permitted by this [Act], and was not permitted by law prior to this [Act], the amendment may be made under this [Act].

(b) An amendment to the declaration, bylaws, or plats and plans authorized by this section to be made under this [Act] must be adopted in conformity with [applicable law] and with the procedures and requirements specified by those instruments. If an amendment grants to any person any rights, powers, or privileges permitted by this [Act], all correlative obligations, liabilities, and restrictions in this [Act] also apply to that person.

COMMENT

1. This section tracks closely the provisions of the Uniform Planned Community Act and the Model Real Estate Cooperative Act and provides a straightforward mechanism by which the documents of pre-Act common interest communities may be amended to take advantage of desirable provisions of the Act. *See* the comment to Section 1-205.

2. In considering the permissible amendments under Section 1-206, it is important to distinguish between the law governing the procedure for amending declarations, and the substance of the amendments themselves. An amendment to the declaration of a community created under "old" law, even if permissible under this Act, must nevertheless be adopted "in conformity with the procedures and requirements specified" by the original instruments, and in compliance with the old law.

EXAMPLE

Suppose an "old" condominium declaration and "old" state law both provide that approval by 100% of the unit owners is required to amend the declaration, but the unit owners wish to amend the declaration to provide for only 67% of the unit owners' approval of future amendments, as permitted by Section 2-117 of this Act. The amendment would not be valid unless 100% of the unit owners approved it, because of the procedural requirement of the declaration and "old" law. Once approved, however, only 67% would be required for subsequent amendments.

3. This section does not address the issue of contract rights of unit purchasers which may be affected by amendments under the new Act. Whether an amendment is effective against unit owners who purchased their units prior to the effective date of the Act and prior thereto to the

nendment in question is controlled by the contract and constitutional law of the State.

EXAMPLE:

Assume "old" state law required that 5% of the purchase price of each unit sold by a declarant must be held in escrow until all the common elements in the condominium are completed. Assume further that a declarant created a condominium under "old" law, sold 10 units to purchasers prior to the effective date of the Act, and now is holding 5% of the purchase prices for those 10 units in escrow, since the common elements are not yet completed. Immediately following the effective date of the Act, the declarant amends the declaration pursuant to Section 1-206 to provide that no escrow of any portion of the purchase price is required. The amendment is approved by the requisite votes—all held by declarant—but not by any of the 10 unit owners. On its face, the amendment would appear to comply with the provisions of this Act, since it accomplishes a result—no escrow—which is permitted by this Act and was not permitted by "old" law. Whether that amendment is effective, however, to either permit the declarant to terminate the escrow with respect to the 10 unit owners, or even to terminate the escrow scheme with respect to future unit owners (since the original 10 owners may reasonably have expected that 5% of all purchase prices would be held in escrow) is not addressed by this Act. That determination must be based on the contractual and constitutional rights of the original purchasers.

4. The last sentence of Section 1-[illegible] addresses the potential problem of a declarant seeking to take undue advantage of the amendment provisions to assume a power granted by the Act without being subject to the Act's limitations on the power. The last sentence insures that, if declarants or other persons assume any of the powers and rights which the Act grants, the correlative obligations, liabilities, and restrictions of the Act also apply to that person, even if the amendment itself does not require that result.

EXAMPLE:

Assume that, pursuant to the provisions of "old" condominium law, a declarant may exercise control over the association for only 3 years from the date the condominium is created, but the control may be maintained during that period for so long as declarant owns any units. In the absence of any amendment, a provision in the declaration taking full advantage of the "old" law would be valid and enforceable. Assume further that, in the second year following creation of the condominium in question, this Act is adopted. The declarant then properly amends the declaration pursuant to Section 1-206 to extend the period of declarant control for 5 years from the date of creation. The amendment would effectively extend control for 2 additional years, because Section 3-103(d) does not limit the number of the years the declarant may specify as a control period.

Nevertheless, if the declarant, before that extended time limit has expired, conveys 75 percent of the units that may ever be a part of the condominium, or fails for 2 years to exercise development rights or offer units for sale in the ordinary course of business, the period of declarant control would terminate by virtue of the limitations in Section 3-103(d). That limitation is imposed on the declarant even if the amendment called for retaining control for so long as any units were owned by declarant, and despite the provision in the "old" law permitting such a restriction.

5. In place of the words "declaration, bylaws, and plats and plans", at the end of this Section, each state should insert the appropriate terminology for those documents under the present state law, *e.g.* "master deed, rules and regulations", etc.

6. This section does not permit a pre-existing common interest community to elect to come entirely within the provisions of the Act, disregarding old law. However, the owners of a pre-existing common interest community may elect to terminate the community under pre-existing law and create a new community which would be subject to all the provisions of this Act.

§ 1-207. Applicability to Nonresidential Planned Communities

This [Act] does not apply to a planned community in which all units are restricted exclusively to nonresidential use unless the declaration provides that

the [Act] does apply to that planned community. This [Act] applies to a planned community containing both units that are restricted exclusively to nonresidential use and other units that are not so restricted, only if the declaration so provides or the real estate comprising the units that may be used for residential purposes would be a planned community in the absence of the units that may not be used for residential purposes.

COMMENT

This section provides a choice for non-residential planned communities to opt out of the Act altogether. "Mixed use" projects, on the other hand, are subject to this Act even in the absence of words to that effect in the declaration if the residential portion would, in the absence of the nonresidential portion, constitute of itself a "planned community" within the meaning of this Act.

§ 1-208. Applicability to Out-of-state Common Interest Communities

This [Act] does not apply to common interest communities or units located outside this State, but the public offering statement provisions (Sections 4-102 through 4-108) apply to all contracts for the disposition thereof signed in this State by any party unless exempt under Section 4-[illegible]01(b) [and the agency regulation provisions under Article 5 apply to any offering thereof in this State].

COMMENT

This section reflects the fact that there are practical as well as constitutional limits regarding the extent to which a state should or may extend its jurisdiction to out of state transactions. A state may, of course, properly exercise its authority to protect its citizens from false or misleading information regarding common interest communities located in other states but sold in that state. However, where sales contracts are executed wholly outside the enacting state and relate to common interest communities located outside the state, it seems more appropriate for the courts of the jurisdiction(s) in which the common interest community is located and where the transaction occurs to have jurisdiction over the transaction.

ARTICLE 2

CREATION, ALTERATION, AND TERMINATION OF COMMON INTEREST COMMUNITIES

§ 2-101. Creation of Common Interest Communities

(a) A common interest community may be created pursuant to this [Act] only by recording a declaration executed in the same manner as a deed and, in a cooperative, by conveying the real estate subject to that declaration to the association. The declaration must be recorded in every [county] in which any portion of the common interest community is located and must be indexed [in the grantee's index] in the name of the common interest community and the association and [in the grantor's index] in the name of each person executing the declaration.

(b) In a condominium, a declaration, or an amendment to a declaration, adding units may not be recorded unless (i) all structural components and mechanical systems of all buildings containing or comprising any units thereby created are substantially completed in accordance with the plans, as evidenced by a recorded certificate of completion executed by an independent [registered] engineer, surveyor, or architect [, or (ii) unless the agency has approved the declaration or amendment in the manner prescribed in Section 5-103(b)].

COMMENT

1. Under subsection (a), a common interest community is created pursuant to this Act only by recording a declaration. As with any instrument affecting real estate, the declaration must be recorded in every recording district in

which any portion of the common interest community is located and must be indexed in the manner described in subsection (a). Specific indexing rules are suggested in brackets and should be used in those states where this result would not otherwise occur. For example, the declaration commonly has not been indexed in the grantee's index in the name of the common interest community. Moreover, when multiple persons execute the declaration, the declaration has often been indexed solely in the name of the declarant and not in the name, for example, of lenders and other persons who might have executed the declaration. Because it is important that the names of the association and all persons executing the declaration appear in the index in order to locate all instruments in the land records, that language is not included in brackets.

In the case of a cooperative, there is a second requirement for creation in addition to the recording requirements applicable to all common interest communities discussed above. The declarant must convey the real estate subject to that declaration to the association, since the association (in the form of a corporation, trust or other entity described in Section 3-101) must hold title to that real estate. This requirement may contrast with the current practice in some jurisdictions under which the declarant may retain title to the real estate until proprietary leases for all or most units have been executed. This requirement tracks the language of the Model Real Estate Cooperative Act.

2. In Section 1-103, the Act defines the term "Declaration" as any instruments, however denominated, which create a common interest community, including any amendments to those instruments; "common interest community" in turn is defined as "real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance or improvement of other real estate described in a declaration. "Ownership of a unit" does not include "holding a leasehold interest of less than 20 years in a unit, including renewal options." It is important to realize that other covenants, conditions, or restrictions applicable to the real estate in the common interest community might be recorded before or after the instruments are recorded which divide the real estate into units and common elements. Until the actual recordation of the document which accomplished that result, however, the common interest community has not been created.

3. A common interest community has not been lawfully created unless the requirements of this section have been complied with. Nevertheless, a project which meets the definition of a "common interest community" in Section 1-103(7) is subject to this Act even if this or other sections of the Act have not been complied with.

4. Mortgagees and other lienholders need not execute the declaration, and foreclosure of a mortgage or other lien will not, of itself, terminate a condominium or planned community. However, if that lien is prior to the declaration itself, the lienholder may exclude that real estate from the condominium or planned community. *See* Sections 2-118(k) and (l). Moreover, the declarant may wish to obtain agreements from mortgagees or other lienholders that they will give partial releases permitting lien-free conveyance of condominium or planned community units. *See* Section 1-111(a).

5. Except when development proceeds pursuant to Section 5-103, this Act contemplates that substantial completion must be reached before a unit may be conveyed. See Section 4-120. In the case of a condominium, substantial structural completion is also required before the condominium is created. The purpose of imposing these requirements is to insure that a purchaser will in fact take title to a unit which may be used for its intended purpose.

"If a condominium were said to consist from the beginning of a certain number of units, even though some of these units had not yet been completed or even begun, serious problems would arise if the remaining units were never constructed and if no obligation to complete the construction could be enforced against any solvent person. If the fraudulent owner of the unbuilt units failed to pay his common expense assessments, for example, the unit owners' association might be left with no remedy except a lien of doubtful value against mere cubicles of airspace. Moreover, votes in the unit owners' association could be assigned to units, and those votes could be cast, even though the units were never built. The Act, therefore, requires that significant construction take place before units are assigned an interest in the common elements, a vote in the association, and a share of the common expense liabilities, and before units are conveyed. This requirement of substantial structural and mechanical completion (or the alternative bonding procedure and other assurances required by Section 5-103) reduces the possibility that a failure to complete will upset the expectations of purchasers or otherwise harm their interests in case the declarant becomes insolvent and no solvent person has the obligation to complete the unit.

6. In the case of a condominium, Section 2-101(b) requires that "all structural components and mechanical systems of all buildings containing or comprising any units" which will be created by recording a declaration, must be substantially completed in accordance with the plans. The intent of subsection (b) is that if any buildings are depicted on the plats and plans which are required by Section 2-109, and these buildings contain or comprise spaces which become units by virtue of recording the declaration, the structural components and mechanical systems of these buildings must be substantially complete before the declaration is recorded. This is required even though the plats and plans recorded pursuant to Section 2-109 depict only the boundaries of the buildings and the units created in those buildings, and not the structural components or mechanical systems (which need not be shown). If the boundaries of units are not depicted, of course, then no units are created. If the declarant fails to comply with this section, title is not affected. *See* comment 8, below.

The concept of "structural components and mechanical systems" is one commonly understood in the condominium field and this comment is not intended as a comprehensive list of those components. For example, however, the term "structural components" is generally understood to include those portions of a building necessary to keep any part of the building from collapsing, and to maintain the building in a weather tight condition. This would include the foundations, bearing walls and columns, exterior walls, roof, floors and similar components. It would clearly not include such components as interior non-bearing partitions, surface finishes, interior doors, carpeting and the like. Similarly, typical examples of "mechanical systems" include the plumbing, heating, air conditioning and other like systems. Whether or not "electrical systems" are included within the meaning of the term depends on local practice.

7. Section 4-120 requires that, before an individual unit is conveyed, the unit must be "substantially completed."

"Substantial completion" is a well understood term in the construction industry. For example, the American Institute of Architects Document A 201, General Conditions of the Contract for Construction (1970 Ed.) at para. 8.1.3, states:

> The Date of Substantial Completion of the Work . . . is the date certified by the Architect when construction is sufficiently complete, in accordance with the Contract Documents (that is, the owner-contractor agreement, the conditions of the contract, and the specifications and all addenda and modifications), so the Owner can occupy or utilize the Work . . . for the use for which it is intended.

This standard is also one often used by building officials in issuing certificates of occupancy. It does not suggest that the unit is "entirely completed" as that term is understood in the construction industry; lesser details, such as sticking doors, leaking windows, or some decorative items, might still remain, and the Act contemplates that they need not be completed prior to lawful conveyance.

8. Sections 2-101(b) and 4-120 require that completion certificates be recorded, or local certificates of occupancy be issued, as evidence of the fact that the required levels of construction have been met. In the case of "substantial completion," issuance of "a certificate of occupancy authorized by law," as is commonly required by local ordinance or state building codes, will suffice. Once the certificates have been recorded or issued, as the case may be, good title to the units may be conveyed in reliance on the record. It is possible, of course, that the declarant may have failed to complete the required levels of construction; no certificate of completion may have been filed or the architect, surveyor or engineer (whichever is appropriate in a particular jurisdiction) may have filed a false certificate. Such acts would create a cause of action in the purchaser under section 4-117, but would not affect the validity of the purchaser's title to the unit.

9. The requirement of "substantial completion" does not mean that the declarant must complete all buildings in which all possible units would be located before creating the condominium. If only some of the buildings in which units may ultimately be located have been "structurally" completed, the declarant may create a condominium in which he reserves particular development rights (Section 2-105(a)(8)). In such a project, only the completed

units might be treated as units from the outset, and the development rights would be reserved to create additional units, either by adding additional real estate and units to the condominium, by creating new units on common elements, or by subdividing units previously created. The optional units may never be completed or added to the condominium; however, this will not affect the integrity of the condominium as originally created.

10. Requiring "substantial completion" of the structural components and mechanical systems in the buildings containing or comprising the units in a condominium may encourage creation of more phased condominiums under Section 2-105 in projects which were once in fact built in phases, but under a single non-expandable declaration. Experience in the several states where significantly more rigorous requirements are imposed by statute, however, has shown that this does not create a difficult situation either for the developer or lender. Moreover, it appears likely that the size of the initial phase of a multi-building project will be dictated largely by economics, as occurs in most jurisdictions today, rather than this Act. Finally, many lenders and developers are increasingly sensitive to the secondary mortgage market requirements, particularly those of the Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (FHLMC). Experience indicates that the pre-sale requirements imposed by FNMA and FHLMC frequently dictate that multi-building projects be structured on a phased or expandable basis.

11. The requirement of completion would be irrelevant in some types of common interest communities, such as campsite condominiums or some subdivision planned unit developments where the units might consist of unimproved lots and the airspace above them, within which each purchaser would be free to construct or not construct a residence. Any residence actually constructed would ordinarily become a part of the "unit" by the doctrine of fixtures, but nothing in this Act would require any residence to be built before the lots could be treated as units.

12. The term "independent" architect, surveyor or engineer in subsection (b) and elsewhere in the Act distinguishes any such professional person who acts as an independent contractor in his relationship to the declarant or lender.

§ 2-102. Unit Boundaries

Except as provided by the declaration:

(1) If walls, floors, or ceilings are designated as boundaries of a unit, all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other materials constituting any part of the finished surfaces thereof are a part of the unit, and all other portions of the walls, floors, or ceilings are a part of the common elements.

(2) If any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture lies partially within and partially outside the designated boundaries of a unit, any portion thereof serving only that unit is a limited common element allocated solely to that unit, and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements.

(3) Subject to paragraph (2), all spaces, interior partitions, and other fixtures and improvements within the boundaries of a unit are a part of the unit.

(4) Any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, and all exterior doors and windows or other fixtures designed to serve a single unit, but located outside the unit's boundaries, are limited common elements allocated exclusively to that unit.

COMMENT

1. It is important for title purposes, for purposes of defining maintenance responsibilities, and for other reasons to have a clear guide as to which parts of a common interest community constitute the units and which parts constitute common elements. This Section fills the gap left when the declaration merely defines unit boundaries in terms of floors, ceilings and perimetric walls, and is particularly useful in the case of cooperatives, in which the recording of plats and plans is not required. *See* Section 2-105(a)(5).

The provisions of this section may be varied, of course, to the extent that the declarant wishes to modify the details for a particular common interest community.

For example, in a townhouse project structured as a condominium or planned community, it may be desirable that the unit boundaries constitute the exterior surfaces of the roof and exterior walls, with the center line of the party walls constituting the perimetric boundaries of the units in that plane, and the undersurface of the bottom slab dividing the unit itself from the underlying land. Alternately, the boundaries of the units at the party walls might be extended to include actual division of underlying land itself. In those cases it would be inappropriate for walls, floors and ceilings to be designated as boundaries, and the declaration would describe the boundaries in the above manner.

2. The differentiations made clear here, in conjunction with the provisions of Section 3-107, will assist in minimizing disputes which have historically arisen in association administration with respect to liability for repair of such things as pipes, porches, and other components of a building which unit owners may expect the association to pay for and which the association may wish to have repaired by unit owners. Problems which may arise as a result of negligence in the use of components—such as stoops and pipes—are resolved by Section 3-107, which imposes liability on a unit owner who causes damage to common elements, or under the broader provisions of Section 3-115(c), which permits the association to assess common expenses "caused by the misconduct of any unit owner" exclusively against that person. This would include, of course, not only damages to common elements, but fines or unusual service fees, such as clean-up costs, incurred as a result of the unit owner's misuse of the common elements.

3. The differentiation between components constituting common elements and components which are part of the unit is particularly important in light of Section 3-107(a), which (subject to the exceptions therein mentioned) makes the association responsible for upkeep of common elements and each unit owner individually responsible for upkeep of his unit.

4. The differentiation between unit components and common element components may or may not be important for insurance purposes under the Act. While the common elements in a project must always be insured, the units themselves need not be insured by the Association unless the project [illegible] units divided by horizontal [illegible] *See* Section 3-113(a) and (c). "high rise" configuration, however, Section 3-113(a) contemplates [illegible] will normally be insured by the Association (exclusive of improvements and betterments in individual units) and that the cost of such insurance will be a common expense. That common expense may be allocated, however, on the basis of risk if the declaration so requires. *See* Section 3-115(c)(3).

§ 2-103. Construction and Validity of Declaration and Bylaws

(a) All provisions of the declaration and bylaws are severable.

(b) The rule against perpetuities does not apply to defeat any provision of the declaration, bylaws, rules, or regulations adopted pursuant to Section 3-102(a)(1).

(c) In the event of a conflict between the provisions of the declaration and the bylaws, the declaration prevails except to the extent the declaration is inconsistent with this [Act].

(d) Title to a unit and common elements is not rendered unmarketable or otherwise affected by reason of an insubstantial failure of the declaration to comply with this [Act]. Whether a substantial failure impairs marketability is not affected by this [Act].

COMMENT

1. Subsection (b) does not totally invalidate the rule against perpetuities as applied to common interest communities. The language does provide that the rule against perpetuities is ineffective as to documents which govern the common interest community during the entire life of the project, regard-

less how he that should be. With respect to or devises of units, however, the policies underlying the rule against perpetuities continue to have validity and remain applicable under this Act.

2. In considering the effect of failures to comply with this Act on title matters, subsection (a) refers only to defects in the declaration—which includes the plats and plans in the case of condominiums and planned communities—because the declaration is the instrument which creates and defines the units and common elements. No reference is made to other instruments, such as bylaws, because these instruments have no impact on title, whether or not recorded. However, in all cases of violations of the Act, a failure of the bylaws—or any other instrument—to comply with the Act, would entitle any affected person to appropriate relief under Section 4-117.

3. No special prohibition against racial or other forms of discrimination is included in this Act because the provisions of generally applicable state and federal law apply as much to common interest communities as to other forms of real estate.

4. Some examples may help to clarify what sort of defects in the declaration are to be regarded as "insubstantial" within the meaning of the first sentence of subsection (d).

Suppose the declaration allocates common element interests to all the units, but fails to indicate the formula for the allocation as required by Section 2-107. This would be a substantial defect if the assigned interests were unequal, but if all units were assigned identical interests it would be possible to infer that the basis of the allocation was equality—and the failure of the declaration to say so would be an insubstantial defect. Were this to happen in a common interest community where the right to add new units is reserved, however, it should be noted that a subsequent amendment to the declaration adding new units could not use any formula other than equality for reallocating the common elements interests unless a different formula were specified pursuant to Section 2-107(c).

Other examples of insubstantial defects that might occur include failure of the declaration to include the word "condominium", "cooperative", or "planned community", as required by Section 2-105(a)(1), or failure of the plats or plans in the case of condominium and planned communities, to comply satisfactorily with the requirement of section 2-109(a) that they be "clear and legible," so long as they can at least be deciphered by persons with proper expertise. Failure to organize the unit owners' association at the time specified in Section 3-101 would not be a defect in the declaration at all, and would not affect the validity or marketability of title in the common interest community. It would, however be a violation of this Act, and create a claim for relief under Section 1-117.

5. Each state has case or statutory law dealing with marketability of titles, and the question of whether substantial failures of the declaration to comply with the Act affects marketability of title should be determined by that law and not by this Act.

§ 2-104. Description of Units

A description of a unit which sets forth the name of the common interest community, the [recording data] for the declaration, the [county] in which the common interest community is located, and the identifying number of the unit, is a legally sufficient description of that unit and all rights, obligations, and interests appurtenant to that unit which were created by the declaration or bylaws.

COMMENT

1. The intent of this section is that no description of a unit in a deed, lease, deed of trust, mortgage, or any other instrument or document shall be subject to challenge for failure to meet any common law or other requirements, so long as the requirements of this section are satisfied, and so long as the declaration itself, together with the plats and plans which are a part of the declaration, provides a legally sufficient description.

2. The last sentence makes clear that an instrument which does meet those requirements includes all interests appurtenant to the unit. As a result, it will not be necessary under this Act to continue the practice, common in some jurisdictions, of describing in the instrument conveying title to a unit the common element interests, or limited common elements, appurtenant to that unit or to make reference to surveys or subsequent amendments to declarations.

§ 2-105. Contents of Declaration

(a) The declaration must contain:

(1) the names of the common interest community and the association and a statement that the common interest community is either a condominium, cooperative, or planned community;

(2) the name of every [county] in which any part of the common interest community is situated;

(3) a legally sufficient description of the real estate included in the common interest community;

(4) a statement of the maximum number of units that the declarant reserves the right to create;

(5) in a condominium or planned community, a description of the boundaries of each unit created by the declaration, including the unit's identifying number or, in a cooperative, a description, which may be by plats or plans, of each unit created by the declaration, including the unit's identifying number, its size or number of rooms, and its location within a building if it is within a building containing more than one unit;

(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;

(7) a description of any real estate, except real estate subject to development rights, that may be allocated subsequently as limited common elements, other than limited common elements specified in Section 2-102(2) and (4), together with a statement that they may be so allocated;

(8) a description of any development rights (Section 1-103(14)) and other special declarant rights (Section 1-103(29)) reserved by the declarant, together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised;

(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 (i) either a statement fixing the boundaries of those portions and regulating the order in which those portions may be subjected to the exercise of each development right or a statement that no assurances are made in those regards, and (ii) a statement as to whether, if any development right is exercised in any portion of the real estate subject to that development right, that development right must be exercised in all or in any other portion of the remainder of that real estate;

(10) any other conditions or limitations under which the rights described in paragraph (8) may be exercised or will lapse;

(11) an allocation to each unit of the allocated interests in the manner described in Section 2-107;

(12) any restrictions (i) on use, occupancy, and alienation of the units, and (ii) 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;

(13) the [recording data] for recorded easements and licenses appurtenant to or included in the common interest community or to which any portion of the common interest community is or may become subject by virtue of a reservation in the declaration; and

(14) all matters required by Sections 2-106, 2-107, 2-108, 2-109, 2-115, 2-116, and 3-103(d).

(b) The declaration may contain any other matters the declarant considers appropriate.

COMMENT

1. Many statutes and other regulatory schemes in the multi-owner project field do not separate the functions of a recorded declaration and an unrecorded public offering statement or disclosure documents. As a result, many of the developer's representations and assurances concerning his future plans must appear in the declaration as well as the public offering statement, even though they have nothing to do with the legal structure or title of the project. This results in duplicative requirements and unnecessarily complex declarations.

This Act makes a functional distinction between the declaration and the public offering statement. It only requires the declaration to contain those matters which affect the legal structure or title of the common interest community. This includes the reserved powers of the declarant to exercise development rights within the common interest community. A narrative description of those rights, however, and the possible consequences flowing from their exercise, are required to be disclosed only in the public offering statement and not in the declaration.

In the case of condominiums and planned communities, plats and plans are made part of the declaration by Section 2-109, and their content may in part provide some of the information required by this section.

2. This section requires a statement of the name of the association for the common interest community itself, in order that the declaration may be indexed in the name of the association. *See* Section 2-101.

3. The Act requires that the declaration for a common interest community situated in two or more recording districts be recorded in each of those districts. While the bracketed language refers to the "county" as the recording district in which the declaration is to be recorded, in states where recording is done at the city, town or parish level the bracketed language should be amended accordingly.

Paragraph (a)(4) requires the declarant to state the largest number of units he reserves the right to build. This Act imposes no time limit, measured by an absolute number of years, at the expiration of which the declarant must relinquish control of the association. Instead, declarant control ends when 75% of the maximum number of units which may be created by the declarant have been sold, or at the end of a 2-year period during which development is not proceeding. *See* Section 3-103(d). The flexibility afforded by this section may be important to a declarant as he responds to unanticipated future changes in his market.

In theory, a declarant might overstate the maximum number of units in an attempt to artificially extend the period of declarant control, since the time might never come when a declarant had sold 75% of that number of units. As a practical matter, however, as the following example points out, such a practice would not likely achieve long-term control.

EXAMPLE:

A declarant reserves the right to build 100 units, even though zoning would permit only 75 units on the site, and the declarant actually plans on building only 50 units. As a result of the reservation, the declarant would not lose control of the association under the 75% rule stated in Section 3-103(d)(i) even when all 50 units had been built and sold, because that percentage applies to all potential units, not units actually built. *See* Section 3-103(d)(i).

However, there are practical constraints on the declarant's decision in this matter. Substantial exaggeration of the future density of the development might tend to impede sales of units in that project. Moreover, such a statement might also produce negative governmental reaction to proposals which might require local approval.

Even if the declarant did overstate the number of units to retain control, however, other limitations imposed by Section 3-103(d) will require turnover at an appropriate time. In the example, once the declarant had exercised the right to add the last of the 50 units which he intended to build, the 2 year period imposed by Section 3-103(d)(ii) and (iii) would begin to run and the declarant would lose the right to control the association 2 years from the time the last units were added, even though he had reserved the right to add more units.

5. Paragraph (a)(5) requires that the boundaries of each unit created by the declaration be identified. The words "created by the declaration" emphasize that, in an expandable project, new units may be created in the future by amendments to the declaration. Until those new units are actually added to the project by amending the declaration, however, they are not units within the meaning of that defined term, and they need not be described.

6. Section 2-102 makes it possible in many condominiums or planned communities to satisfy paragraph (a)(5) of this section by merely providing the identifying number of units and stating that each unit is bounded by its ceiling, floor, and walls. The plats and plans will show where those ceilings, floors and walls are located, and Section 2-102 provides all other details, except to the extent the declaration may make additional or contradictory specifications because of the unique nature of the project.

In the case of many cooperatives, it is possible to satisfy paragraph (a)(5) of this section by merely providing the identifying number of the unit, the size of the unit in square feet or its number of rooms, and its location within a building if it is in a building containing more than one unit. Thus, for example, it would be possible to describe a cooperative unit as follows: "Unit Number 243, consisting of 800 square feet, located on the fourth floor of Building A."

7. Paragraph (a)(6) makes clear that the limited common elements described in Section 2-102(2) and (4), need not be described in the declaration. These limited common elements are typically porches, balconies, patios, or other amenities which may be included in a project. Such improvements are treated by the Act as limited common elements, rather than either common elements or parts of units, in order to minimize the attention which the documents need to give them, and to secure the result that would be desired in the usual case. Thus, if these improvements remain limited common elements, and no special provisions concerning them are included in the declaration, they may be used only by the units to which they are physically attached; maintenance of those improvements must be paid for by the association; and such improvements need not be specifically referred to in the declaration. In the case of all common interest communities, except cooperatives, porches, balconies and patios must be shown on the plats and plans (*See* Section 2-109(b)(10)), but other limited common elements described in Section 2-102(2) and (4) need not be shown.

8. Paragraph (a)(7) contemplates that the common elements in the project may be allocated as limited common elements at some future time, either by the declarant or the association. For example, a swimming pool might serve an entire project during early phases of development. At the outset that pool might be a common element which all the unit owners may use. At a later time, with more units and additional pools built in subsequent phases, either the declarant or the association might determine that the first pool should become a limited common element reserved for the use only of units in the first phase, while the other pools should be reserved exclusively for units in the subsequent phases. Such a potential allocation should be described in the declaration pursuant to this section. The method of subsequent allocation is discussed in Section 2-108.

9. Paragraph (a)(8) requires that the declaration describe all development rights and other special declarant rights which the declarant reserves. The declaration must describe the real estate to which each right applies, and state the time limit within which each of those rights must be exercised. The Act imposes no maximum time limit for the exercise of those rights, and contemplates that those rights may be exercised after the period of declarant control terminates.

10. Paragraph (a)(12)(ii) includes certain requirements which were not originally applicable to condominiums and planned communities under UCA and UPCA respectively. Tracking MRECA, paragraph (a)(12)(ii) requires the declaration to include any information which restricts the amount for which a unit may be sold, or the amount to be received by a unit owner upon sale, condemnation or casualty loss. Such restrictions are increasingly common in the development of "limited equity" common interest communities or common interest communities which are designed to minimize the increased value of the common interest community upon resale in order to preserve housing for a particular income group. The Act in no way restricts the use of such provisions, but does require that explicit provisions concerning such restrictions appear in both the declaration and the Public Offering Statement.

11. Paragraph (a)(14) is a cross-reference to other sections of the Act which require the declaration to contain particular matters. Some of these sections, such as 2-107 on the allocation of allocated interests, will affect all projects. Others, such as 2-106 on leasehold common interest communities, will apply only to particular kinds of projects.

12. Subsection (b) contemplates that, in addition to the content required by subsection (a), other matters may also be included in the declaration if the declarant or lender feel they are appropriate to the particular project. In particular, the draftsman should carefully consider any desired provisions which would vary any of the many sections of the Act where variation is permitted, including such matters as expanding or restricting the association's powers.

§ 2-106. Leasehold Common Interest Communities

(a) Any lease the expiration or termination of which may terminate the common interest community or reduce its size [, or a memorandum thereof,] must be recorded. Every lessor of those leases in a condominium or planned community shall sign the declaration. The declaration must state:

(1) the [recording data] for the lease [or a statement of where the complete lease may be inspected];

(2) the date on which the lease is scheduled to expire;

(3) a legally sufficient description of the real estate subject to the lease;

(4) any right of the unit owners to redeem the reversion and the manner whereby those rights may be exercised, or a statement that they do not have those rights;

(5) any right of the unit owners to remove any improvements within a reasonable time after the expiration or termination of the lease, or a statement that they do not have those rights; and

(6) any rights of the unit owners to renew the lease and the conditions of any renewal, or a statement that they do not have those rights.

(b) After the declaration for a leasehold condominium or leasehold planned community is recorded, neither the lessor nor the lessor's successor in interest may terminate the leasehold interest of a unit owner who makes timely payment of a unit owner's share of the rent and otherwise complies with all covenants which, if violated, would entitle the lessor to terminate the lease. A unit owner's leasehold interest in a condominium or planned community is not affected by failure of any other person to pay rent or fulfill any other covenant.

(c) Acquisition of the leasehold interest of any unit owner by the owner of the reversion or remainder does not merge the leasehold and fee simple interests unless the leasehold interests of all unit owners subject to that reversion or remainder are acquired.

(d) If the expiration or termination of a lease decreases the number of units in a common interest community, the allocated interests must be reallocated in accordance with Section 1-107(a) as if those units had been taken by eminent domain. Reallocations must be confirmed by an amendment to the declaration prepared, executed, and recorded by the association.

COMMENT

1. Subsection (a) requires that the lessor of any lease in a condominium or planned community which, upon termination, will terminate the condominium or planned community or reduce its size, must sign the declaration. This requirement insures that the lessor has consented to use of his land as a condominium or planned community. Note that such a signature is not required in the case of a lease in a cooperative. This distinction between the types of common interest communities tracks that made by UCA, UPCA and MRECA.

2. Subsection (a)(1) provides alternative bracketed language which should be considered by each state based on its practice. In any state where the recording acts do not specify the essential terms which must be included in a memorandum of lease, either this section should be supplemented to specify the essential terms, or the bracketed language relating to such memoranda should be deleted.

3. This section sets out requirements concerning leasehold common interest communities which are not typically contained in the laws of most states. In particular, it requires that the declaration describe the rights of the unit owners, or state that they have no rights concerning a variety of significant matters. This section also contains a number of other consumer protection provisions. However, in contrast to the result under some states' condominium laws, neither the unit owners or the association have a statutory right to renewal of a lease upon termination.

4. In the case of leasehold condominiums and planned communities, the most significant matter of consumer protection in this section is subsection (b), which provides that unit owners who pay their share of the rent of the underlying lease may not be deprived of their enjoyment of the leasehold premises.

Subsection (b) is intended to protect the leasehold condominium or planned community "unit owner" regardless of whether he is a lessee, sublessee, or even further down in a chain of transfer of leasehold interests. *See* Section 1-103(32). Thus, for example, if the "unit owner" is a sublessee, the term "lessor (or) his successor in interest" includes not only the lessor, but also the lessee.

Subsection (b) further protects the unit owner by insuring that he will not share with his fellow unit owners any collective obligations toward their common lessor. All obligations are instead fractionalized so that no unit owner can be made liable or otherwise penalized for a default by any of his fellows. Thus, a default by the association in payment of the rent due to a lessor, in a case where the lease of common elements is run to the association would not permit the lessor to terminate continued use of those common elements by those unit owners who then pay their share of the rent.

Subsection (b) does not address the issue of whether a unit owner's tenant may cure a default by the unit owner under the unit owner's lease so as to prevent termination of the unit owner's lease.

EXAMPLE:

Assume that A leases 100 acres of land to B for 50 years. B, in turn, leases the same 100 acres to C, for the duration of the 50 year term. C creates a condominium on the leasehold land, and thereby becomes the declarant; thereafter, he leases a unit in the condominium to D, together with a lease of this allocated undivided interest in the leasehold underlying the unit, for the duration of the 50 year term. D then leases his unit to E for a term of 5 years.

Both A and B must execute the declaration; *see* Section 2-106(a). So long as D meets his obligations to C—or any other persons under the declaration and his sublease, D's interest in the leasehold may not be terminated by either A, B or C; *see* Section 2-106. For that reason, A and B will likely take appropriate steps to protect their interests in the event that D makes timely payment to C, if called for in the declaration or lease, but C fails to meet his obligations to either A or B. If D fails to make timely payment to C or to B or A if those persons have so required, then D's interest may be terminated by the person entitled to payment, unless E is entitled to cure. E may cure and thereby prevent default, however, only if other law of the state permits transferees of partial interests to cure defaults of his transferor. Since E is not a unit owner, he is not entitled to rights under this Act.

However, this section does not permit a unit owner in a cooperative to preserve his interest in the cooperative by paying his pro rata share of the rent in the event the association fails to pay rent due under a ground lease. This distinction flows from the differences in the nature of a cooperative and a condominium or a planned community, and it tracks the distinction made by UCA and UPCA, and MRECA.

5. Subsection (d) considers the problems created when termination of a lease reduces the size of a common interest community. In the event that some units are thereby withdrawn from the common interest community, reallocation of the allocated interests would be required; the section describes how that reallocation would occur.

§ 2-107. Allocation of Allocated Interests

(a) The declaration must allocate to each unit:

(i) in a condominium, a fraction or percentage of undivided interests in the common elements and in the common expenses of the association (Section 3-115(a)), and a portion of the votes in the association;

(ii) in a cooperative, an ownership interest in the association, a fraction or percentage of the common expenses of the association (Section 3-115(a)), and a portion of the votes in the association; and

(iii) in a planned community, a fraction or percentage of the common expenses of the association (Section 3-115(a)), and a portion of the votes in the association.

(b) The declaration must state the formulas used to establish allocations of interests. Those allocations may not discriminate in favor of units owned by the declarant or an affiliate of the declarant.

(c) If units may be added to or withdrawn from the common interest community, the declaration must state the formulas to be used to reallocate the allocated interests among all units included in the common interest community after the addition or withdrawal.

(d) The declaration may provide: (i) that different allocations of votes shall be made to the units on particular matters specified in the declaration; (ii) for cumulative voting only for the purpose of electing members of the executive board; and (iii) for class voting on specified issues affecting the class if necessary to protect valid interests of the class. A declarant may not utilize cumulative or class voting for the purpose of evading any limitation imposed on declarants by this [Act] nor may units constitute a class because they are owned by a declarant.

(e) Except for minor variations due to rounding, the sum of the common expense liabilities and, in a condominium, the sum of the undivided interests in the common elements allocated at any time to all the units must each equal one if stated as a fraction or 100 percent if stated as a percentage. In the event of discrepancy between an allocated interest and the result derived from application of the pertinent formula, the allocated interest prevails.

(f) In a condominium, the common elements are not subject to partition, and any purported conveyance, encumbrance, judicial sale, or other voluntary or involuntary transfer of an undivided interest in the common elements made without the unit to which that interest is allocated is void.

(g) In a cooperative, any purported conveyance, encumbrance, judicial sale, or other voluntary or involuntary transfer of an ownership interest in the association made without the possessory interest in the unit to which that interest is related is void.

COMMENT

1. Subsection (a) treats allocated interests differently in each type of common interest community. The distinctions made in parts (i)-(iii) track those made in the corresponding subsection of UCA, UPCA and MRECA, for condominiums, planned communities, and cooperatives, respectively.

2. Most existing condominium statutes and cooperative documents require a single common basis, usually related to the "value" of the units, to be used in the allocation of common element interests, or ownership interests in cooperatives, votes in the association and common expense liabilities. Following UCA, UPCA, and MRECA, this Act departs radically from such requirements by permitting each of these allocations to be made on different bases, and by permitting allocations which are unrelated to value.

Thus, a common interest community's applicable allocations might be made equally among all units, or in proportion to the relative size of each unit, or on the basis of any other formula the declarant may select, regardless of the value of those units. Moreover, "size" might be used, for example, in allocating common expenses and common element interests (or ownership interests), while equality is used in allocating votes in the association. This section does not require that the formulas used by the declarant be justified, but it does require that the formulas be explained. The sole restriction on the formulas to be used in these allocations is that they not discriminate in favor of the units owned by the declarant. Otherwise, each of the separate allocations may be on any basis which the declarant chooses, and none of the allocations need be tied to any other allocation.

3. While the flexibility permitted in allocations is broader than that commonly used today, it is likely that the traditional bases for allocation will continue to be used, and that the allocation for all allocated interests will often be based on the same formulas. Most commonly, those bases include size, equality, or value of units. Each of these is discussed below.

4. If size is chosen as a basis of allocation, the declarant must choose between reliance on area or volume, and the choice must be indicated in the declaration. The declarant might further refine the formula by, for example, excluding unheated areas from the calculation or by partially discounting such areas by means of a ratio. Again, the declarant must indicate the choices he has made and explain the formula he has chosen.

5. Most existing condominium statutes require that "value" be used as the basis of all allocations. Under this Act a declarant is free to select such a basis if he wishes to do so. For example, he might designate the "par value" of each unit as a stated number of dollars or points. However, the formula used to develop the par values of the various units would have to be explained in the declaration. For example, the declaration for a high rise project might disclose that the par value of each unit is based on the relative area of each unit on the lower floors, but increases by specified percentages at designated higher levels. The formula for determining area in this example could be further refined in the manner suggested in comment 4, above, and any other factors (such as the direction in which a unit faces) could also be given weight so long as the weight given to each factor is explained in the declaration.

6. The purpose of subsection (c) is to require a comprehensive scheme for reallocation of allocated interests in a common interest community subject to development rights, and afford some advance disclosure to purchasers of units in the first phase of an expandable common interest community of how allocated interests will be reallocated if additional units are added.

7. Subsection (d) represents a significant departure from the practice in most states concerning the allocation of votes. The usual rule is that a single allocation of votes is made to each unit, and that allocation applies to all matters on which those votes may be cast. This section recognizes that the increasingly complex nature of some projects requires different allocations on particular questions. Different allocations may be appropriate, for example, in a project where common expense liabilities, or questions concerning rules and regulations, affect different units differently.

EXAMPLE:

In a mixed commercial and residential project, the declaration might provide that each unit owner would have an equal vote for the election of the Board of Directors. However, on matters concerning ratification of the common expense budget, where the commercial unit owners pay a much larger share than their proportion of the total units, the vote of commercial unit owners might be increased so that they exceed the number of votes the residential owners hold. Alternatively, of course, it might be possible to treat this question as a class voting matter, but the draftsman is provided flexibility in this section to choose the most appropriate solution.

8. This section recognizes that there may be certain instances in which class voting in the association would be desirable. For example, in a mixed-use planned community or condominium consisting of both residential and commercial units, there may be certain kinds of issues upon which the residential or commercial unit owners should have a special voice, and the device described in Comment 7 is not desired. To prevent abuse of class voting by the declarant, subsection (d) permits class voting only with respect to specified issues directly affecting the designated class and only insofar as necessary to protect valid interests of the designated class.

EXAMPLE:

Owners of town house units, in a single project consisting of both town house and high-rise buildings, might properly constitute a separate class for purposes of voting on expenditures affecting only the town house units, but they might not be permitted to vote by class on rules for the use of facilities used by all the units.

The subsection further provides that the declarant may not use the class voting device for the purpose of evading any limitation imposed on declarants by this Act (e.g., to maintain declarant control beyond the period permitted by Section 3-103.)

10. The last clause of subsection (d) prohibits a practice common in planned communities, where units owned by declarant constitute a separate class of units for voting and other purposes. Upon transfer of title, those units lose these more favorable voting rights. This section makes clear that the votes and other attributes of ownership of a unit may not change by virtue of the identity of the owner. The Act provides other, more balanced, devices for those circumstances which such clauses were legitimately intended to address, principally declarant control of the association. *See* Section 3-103(d).

§ 2-108. Limited Common Elements

(a) Except for the limited common elements described in Section 2-102(2) and (4), the declaration must specify to which unit or units each limited common element is allocated. An allocation may not be altered without the consent of the unit owners whose units are affected.

(b) Except as the declaration otherwise provides, a limited common element may be reallocated by an amendment to the declaration executed by the unit owners between or among whose units 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.

(c) A common element not previously allocated as a limited common element may be so allocated only pursuant to provisions in the declaration made in accordance with Section 2-105(a)(7). The allocations must be made by amendments to the declaration.

COMMENT

1. Like all other common elements, limited common elements are owned by the association. The use of a limited common element, however, is reserved to less than all of the unit owners. Unless the declaration provides otherwise, the association is responsible for the upkeep of a limited common element and the cost of such upkeep is assessed against all the units. *See* Sections 3-107(a) and 3-115(c)(1). This might include the costs of repainting all shutters or balconies, for example, which are limited common elements pursuant to Section 2-102(4). Accordingly, there may be occasions where, to meet the expectations of owners and to have costs borne directly by those who benefit from those amenities, the declaration might provide that the costs will be borne, not by all unit owners as part of their common expense assessments, but only by the owners to which the limited common elements are assigned.

2. The use of common elements which are not "limited" within the meaning of this Act may nevertheless be restricted by the unit owners' association pursuant to the powers set forth in Section 3-102(a)(6) and (10), unless that power is limited in the declaration. For example, the association might assign reserved parking spaces to designated unit owners, or even to persons who are not unit owners. Such a parking space would differ from a limited common element in that its use would be merely a personal right of the person to whom it is assigned and this section would not have to be complied with to allocate it or to reallocate it.

3. Because a mortgage, deed of trust, or security interest may restrict the borrower's right to transfer the use of a limited common element without the lender's consent, the terms of the encumbrance should be examined to determine whether the lender's consent or release is needed to transfer that right of use to another person.

4. See also Comments 7 and 8 to Section 2-105.

§ 2-109. Plats and Plans

(a) Plats and plans are a part of the declaration, and are required for all common interest communities except cooperatives. Separate plats and plans are not required by this [Act] if all the information required by this section is contained in either a plat or plan. Each plat and plan must be clear and legible and contain a certification that the plat or plan contains all information required by this section.

(b) Each plat must show:

(1) the name and a survey or general schematic map of the entire common interest community;

(2) the location and dimensions of all real estate not subject to development rights, or subject only to the development right to withdraw, and the location and dimensions of all existing improvements within that real estate;

(3) a legally sufficient description of any real estate subject to development rights, labeled to identify the rights applicable to each parcel;

(4) the extent of any encroachments by or upon any portion of the common interest community;

(5) to the extent feasible, a legally sufficient description of all easements serving or burdening any portion of the common interest community;

(6) the location and dimensions of any vertical unit boundaries not shown or projected on plans recorded pursuant to subsection (d) and that unit's identifying number;

(7) the location with reference to an established datum of any horizontal unit boundaries not shown or projected on plans recorded pursuant to subsection (d) and that unit's identifying number;

(8) a legally sufficient description of any real estate in which the unit owners will own only an estate for years, labeled as "leasehold real estate";

(9) the distance between non-contiguous parcels of real estate comprising the common interest community;

(10) the location and dimensions of limited common elements, including porches, balconies and patios, other than parking spaces and the other limited common elements described in Sections 2-102(2) and (4);

(11) in the case of real estate not subject to development rights, all other matters customarily shown on land surveys.

(c) A plat may also show the intended location and dimensions of any contemplated improvement to be constructed anywhere within the common interest community. Any contemplated improvement shown must be labeled either "MUST BE BUILT" or "NEED NOT BE BUILT".

(d) To the extent not shown or projected on the plats, plans of the units must show or project:

(1) the location and dimensions of the vertical boundaries of each unit, and that unit's identifying number;

(2) any horizontal unit boundaries, with reference to an established datum, and that unit's identifying number; and

(3) any units in which the declarant has reserved the right to create additional units or common elements (Section 2-110(c)), identified appropriately.

(e) Unless the declaration provides otherwise, the horizontal boundaries of part of a unit located outside a building have the same elevation as the horizontal boundaries of the inside part and need not be depicted on the plats and plans.

(f) Upon exercising any development right, the declarant shall record either new plats and plans necessary to conform to the requirements of subsections (a), (b), and (d), or new certifications of plats and plans previously recorded if those plats and plans otherwise conform to the requirements of those subsections.

(g) Any certification of a plat or plan required by this section or Section 2-101(b) must be made by an independent [registered] surveyor, architect, or engineer.

COMMENT

1. This section makes clear that plats and plans are a part of the declaration and are required for condominiums and planned communities, but not for cooperatives. That distinction tracks that made by UCA, UPCA, and MRECA.

2. The terms "plat" or "plan" have been given a variety of meanings by custom and usage in the various jurisdictions. Under this Act, it is important to recognize that a "plat" need not mean a "survey" of the entire real estate constituting a project at the time the initial plat is recorded, although through amendments to the plat as development proceeds, it ultimately becomes a survey of the entire project.

As to "plan," the Act does not use that term to mean the actual building plans used for construction of the project. Instead, the required content of the plans in this Act is described in subsection (d). Essentially, the plans constitute a boundary survey of each unit. Typically, the walls will be the vertical ("up and down" or "perimetric") boundaries, and the floors and ceilings will be the horizontal boundaries. Importantly, these boundaries need not be physically measured, but may instead be projected from the plat or from actual building construction plans. Thus, the plans under this Act are not conceived to be "as built" plans.

3. Subsection (e) permits, but does not require, the plats to show the location of contemplated improvements. Since construction of contemplated improvements by a declarant involves the exercise of development rights, a declarant may not create any improvement within real estate where no development rights have been reserved, unless the plats actually show that proposed improvement or unless the association (which the declarant may control) makes the improvement pursuant to Section 3-102(a)(7). Of course, as to existing unit owners, the improvements which may be made by the declarant and the areas within which they may be made, are limited by his contract with those unit owners. Since this is true, the Declarant may not violate that contract directly—by undertaking improvements for which he reserved no rights—or indirectly by making improvements through the association which he controls or by seeking to amend the declaration in violation of the contract. Moreover, under Section 2-117(d), no amendment to the declaration may create or increase special declarant rights without the unanimous consent of the unit owners.

Within land subject to development rights construction may take place in accordance with the reserved rights, even if no contemplated improvements are shown on the plats. As to the declarant's obligation to complete an improvement that is shown, *See* Section 4-119(a).

4. As noted in the Comments to Section 2-101, a condominium or planned community unit may consist of unenclosed ground and/or airspace, with no "building" involved. If this were true of all units in a particular condominium, the provisions of Section 2-109 relating to plans (but not plats) would be inapplicable.

5. In detailing the required contents of the plats, two different types of legal description are contemplated. First, in subsection (b)(1), the plat must show at least a general schematic map of the entire project. While this may be by survey, the Act recognizes that a survey may be unduly expensive or impractical in a large project, and accordingly permits a general schematic map of the entire project at the commencement of development. With respect to those portions of the project, however, where no future development may take place, the flexibility of a general schematic map is not permitted by the statute. As development ceases in particular phases, subsection (b)(2) contemplates that the locations and dimensions of that real estate will be identified. As this process continues, all of the real estate originally shown in a general schematic map will have been surveyed, and the location and dimensions of that real estate identified, at the expiration of development rights. In addition, subsection (2) contemplates that existing improvements must be shown within real estate where no further development will take place. This does not include take place. This does not include the units which may be within each building, but it does include the external physical dimensions of the buildings themselves. The nature of "existing improvements" required to be surveyed under subsection (2) should be determined by local practices in the particular state.

6. Subsection (f) describes the amendments to the plats and plans which must be made as development rights are exercised. This section requires that the plats and plans be amended at each stage of development to reflect actual progress to date. If an original schematic map was recorded as permitted by subsection (b)(1), the survey required by (b)(2) would also constitute the admendments required by subsection (f).

7. The terms "horizontal" and "vertical" are now commonly understood to refer, respectively, to "upper and lower" and "lateral or perimetric." Thus, Section 2-102 contemplates that the perimetric walls may be designated as the "vertical" boundaries of a unit and the floor and ceiling as its "horizontal" boundaries. That is the sense in which the words "horizontal" and "vertical" are to be understood in this section and throughout this Act.

9. Sections 4-118 and 4-119 state the effect of labeling an improvement "MUST BE BUILT" or "NEED NOT BE BUILT," as required by subsection (b)(3).

§ 2-110. Exercise of Development Rights

(a) To exercise any development right reserved under Section 2-105(a)(8), the declarant shall prepare, execute, and record an amendment to the declaration (Section 2-117) and in a condominium or planned community comply with Section 2-109. The declarant is the unit owner of any units thereby created. The amendment to the declaration must assign an identifying number to each new unit created, and, except in the case of subdivision or conversion of units described in subsection (b), reallocate the allocated interests among all units. The amendment must describe any common elements and any limited common elements thereby created and, in the case of limited common elements, designate the unit to which each is allocated to the extent required by Section 2-108 (Limited Common Elements).

(b) Development rights may be reserved within any real estate added to the common interest community if the amendment adding that real estate includes all matters required by Section 2-105 or 2-106, as the case may be, and, in a condominium or planned community, the plats and plans include all matters required by Section 2-109. This provision does not extend the time limit on the exercise of development rights imposed by the declaration pursuant to Section 2-105(a)(8).

(c) Whenever a declarant exercises a development right to subdivide or convert a unit previously created into additional units, common elements, or both:

(1) If the declarant converts the unit entirely to common elements, the amendment to the declaration must reallocate all the allocated interests of that unit among the other units as if that unit had been taken by eminent domain (Section 1-107); and

(2) if the declarant subdivides the unit into two or more units, whether or not any part of the unit is converted into common elements, the amendment to the declaration must reallocate all the allocated interests of the unit among the units created by the subdivision in any reasonable manner prescribed by the declarant.

(d) If the declaration provides, pursuant to Section 2-105(a)(8), that all or a portion of the real estate is subject to a right of withdrawal:

(1) if all the real estate is subject to withdrawal, and the declaration does not describe separate portions of real estate subject to that right, none of the real estate may be withdrawn after a unit has been conveyed to a purchaser; and

(2) if any portion is subject to withdrawal, it may not be withdrawn after a unit in that portion has been conveyed to a purchaser.

COMMENT

1. This section generally describes the method by which any development right may be exercised. Importantly, while new development rights may be reserved within new real estate which is added to the common interest community, the original time limits on the exercise of these rights which the declarant must include in the original declaration may not be extended. Thus, the development process may continue only within the self-determined constraints originally described by the declarant.

2. The reservation and exercise of development rights is typically closely coordinated with financing for the project. As a result, lender review and control of that process is common, and the financing documents reflect the proposed development process.

A typical construction loan mortgage on a portion of a phased condominium or planned community might provide that as soon as that portion of land is added (or, if the portion is also designated withdrawable land, as soon thereafter as anyone other than the declarant becomes the unit owner of a unit in the withdrawable land) the mortgage on that land and on any buildings containing units built on that land before it was added converts into a mortgage on all of the units located within that portion, together in the case of a condominium, with their respective common element interests. In the case of a condominium, the common element interest of those units will, of course, extend to the common elements in other sections of the condominium. Therefore, conveyance of the units in that phase to the lender or to a purchaser at a foreclosure sale would automatically transfer all of those units' common element interest, as a result of the requirements of Sections 2-107(f) and 2-110(a).

3. A lender who holds a mortgage lien on one portion of a condominium or planned community may not cause that portion to be withdrawn from the condominium or planned community unless the portion constitutes withdrawable real estate in which there is no unit owner other than the declarant. Even then, except in the case of foreclosure, the amendment effectuating the withdrawal must be executed by the declarant.

Therefore, a lender may wish to require that an amendment withdrawing the portion on which he has a mortgage be executed by the declarant and placed in escrow at the time the loan is made in order to protect against a recalcitrant borrower. Alternatively, a lender after foreclosure under Section 2-118 (k) may require an amendment from the association. Also a lender could itself execute the amendment if the lender buys in at a foreclosure sale or takes a deed in lieu of foreclosure and elects to become a declarant under Section 3-104(c) or (a).

4. As indicated in the Comments to Section 1-106, the withdrawal of real estate from a common interest community may constitute a subdivision of land under the applicable subdivision ordinance. Under most subdivision ordinances, the owner of the real estate is regarded as the "subdivider." In the event of a withdrawal under this section, however, the declarant is in fact the subdivider because of his unique interest in and control over the real estate, even though the real estate, for title purposes, is a common element until withdrawn. Accordingly, he would bear the cost of compliance with any subdivision ordinance required to withdraw a part of the real estate from the common interest community.

5. Subsection (c) deals with special problems surrounding allocated interests when the declarant subdivides or converts units which were originally created in the declaration into additional units, common elements or both. This development right permits the declarant to defer a final decision as to the size of certain units by permitting the subdivision of larger interior spaces into smaller units. The declarant may thus "build to suit" for purchasers' needs or to meet changing market demand.

For example, a declarant of a 5-story office building common interest community may have purchasers committed at the time of the filing of the common interest community declaration but a lack of purchasers for the upper 2 floors. In such a circumstance, the declarant could designate the upper 2 floors as a unit, reserving to himself the right to subdivide or convert that unit into additional units, common elements or a combination of units and common elements as needed to suit the requirements of ultimate purchasers.

If, at a later time, a purchaser wishes to purchase half of one floor as a unit, the declarant could exercise the development right to subdivide his 2-floor unit into 2 or more units. He may also wish to reserve a portion of the divided floor as a corridor which will constitute common elements. In that case, he would proceed pursuant to this subsection to reallocate the allocated interests among the units in the manner described in this section.

Alternatively, the declarant may ultimately decide that the entire 2 floors should be turned over to the unit owners' association not as a unit but as common elements to be used perhaps as a cafeteria serving the balance of the building, or for retail space to be rented by the association. In that case, should he choose to make the entire 2 floors common elements, the provisions of paragraph (c)(1) would apply.

The declarant may state in his declaration any conditions or limitations on the time limits reserved for the exercise of development rights which would cause that development right to lapse before the time established in the declaration. It would, of course, be possible for a declarant to voluntarily relinquish those rights prior to the time that they automatically lapsed, and an instrument recorded by the declarant would be effective to cause that lapse, subject, of course, to any constraints imposed on voluntary relinquishment by the declarant's lender.

§ 2-111. Alterations of Units

Subject to the provisions of the declaration and other provisions of law, a unit owner:

(1) may make any improvements or alterations to his unit that do not impair the structural integrity or mechanical systems or lessen the support of any portion of the common interest community;

(2) may not change the appearance of the common elements, or the exterior appearance of a unit or any other portion of the common interest community, without permission of the association;

(3) after acquiring an adjoining unit or an adjoining part of an adjoining unit, may remove or alter any intervening partition or create apertures therein, even if the partition in whole or in part is a common element, if those acts do not impair the structural integrity or mechanical systems or lessen the support of any portion of the common interest community. Removal of partitions or creation of apertures under this paragraph is not an alteration of boundaries.

COMMENT

1. This section deals with permissible alterations of the interior of a unit, and impermissible alterations of the exterior of a unit and the common elements, in ways which reflect common practice. The stated rules, of course, may be varied by the declaration where desired.

2. Subsection (3) deals in a unique manner with the problem of creating access between adjoining units owned by the same person. The subsection provides a specific rule which would permit a door, stairwell, or removal of a partition wall between those units, so long as structural integrity is not im-

paired. That alteration would not be an alteration of boundaries, but would be an exception to the basic rule stated in subsection (2).

3. In considering permissible alteration of the interior of a unit, an example may be useful. A nail driven by a unit owner to hang a picture might enter a portion of the wall designated as part of the common elements, but this section would not be violated because structural integrity would not be impaired. Moreover, no trespass would be committed because each unit owner, as a part or beneficial owner of the common elements, has a right to utilize them subject only to such restrictions as may be created by the Act, the declaration, bylaws, and the unit owners' association pursuant to Section 3-102.

4. Removal of a partition or the creation of an opening between adjoining units would permit the units to be used as one, but they would not become one unit. They would continue to be separate units within the meaning of Section 1-105 and would continue to be treated separately for the purposes of this Act.

5. In addition to the restrictions placed on unit owners by this section, the declaration or bylaws may restrict a unit owner from altering the interior appearance of his unit. Although this might be an undue restriction if imposed upon the primary residence of a unit owner, it may be appropriate in the case of time-share or other common interest communities.

§ 2-112. Relocation of Boundaries between Adjoining Units

(a) Subject to the provisions of the declaration and other provisions of law, the boundaries between adjoining units may be relocated by an amendment to the declaration upon application to the association 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 association shall prepare an amendment that identifies the units involved and states the reallocations. 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) The association (i) in a condominium or planned community shall prepare and record plats or plans necessary to show the altered boundaries between adjoining units, and their dimensions and identifying numbers, and (ii) in a cooperative shall prepare and record amendments to the declaration, including any plans, necessary to show or describe the altered boundaries between adjoining 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 restrictions in the declaration.

2. This section contemplates that upon relocation of the unit boundaries, no reallocation of allocated interests will occur if none is specified in the application. If a reallocation is specified but the executive board deems it unreasonable, then the applicants have the choice of resubmitting the application with a reallocation more acceptable to the board, or going to court to challenge the board's findings as unreasonable.

3. The distinctions made by this section as to information required in the amendment, track the distinctions found in the corresponding UCA, UPCA and MRECA provisions, for condominiums, planned communities and cooperatives, respectively.

§ 2-113. Subdivision of Units

(a) If the declaration expressly so permits, a unit may be subdivided into 2 or more units. Subject to the provisions of the declaration and other provisions of law, upon application of a unit owner to subdivide a unit, the association shall prepare, execute, and record an amendment to the declaration, including in a condominium or planned community the plats and plans, subdividing that unit.

(b) The amendment to the declaration must be executed by the owner of the unit to be subdivided, assign an identifying number to each unit created, and reallocate the allocated interests formerly allocated to the subdivided unit to the new units in any reasonable manner prescribed by the owner of the subdivided unit.

COMMENT

1. This section provides for subdivision of units by unit owners, thereby creating more and smaller units than were originally created. The underlying policy of this section is that the original development plan of the project must be followed, and the expectations of unit owners realized. Accordingly, unless subdivision of the units is expressly permitted by the original declaration, a unit may not be subdivided into 2 or more units unless the declaration is amended to permit it. A subdivision itself is accomplished by an amendment to the declaration.

2. At the same time, situations will often occur where future subdivision is appropriate, and this section permits the declaration to provide for it.

3. An analogous concept in the context of development rights is subdivision of units by a declarant.

4. If a unit owned only by the declarant—as opposed to the same unit if owned by another person—may be subdivided into 2 or more units but cannot be converted in whole or in part into common elements, it is still a unit that may be subdivided or converted into 2 or more units or common elements, within the meaning of the definition of development rights. It is therefore governed by Section 2-110 and not by this section.

[*ALTERNATIVE A*]

[§ 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*]

[§ 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.]

COMMENT

Two approaches are presented here as alternatives, since uniformity on this issue is not essential, and various states have adopted one approach or the other. Both theories recognize the fact that the actual physical boundaries may differ somewhat from what is shown on the plats and plans, and the practical effect of both is the same.

The easement approach of Alternative A creates easements for whatever discrepancies may arise, while the "monuments as boundaries" approach of Alternative B would make the title lines move to follow movement of the physical boundaries caused by such discrepancies or subsequent settling or shifting.

§ 2-115. Use for Sales Purposes

A declarant may maintain sales offices, management offices, and models in units or on common elements in the common interest community only if the declaration so provides and specifies the rights of a declarant with regard to the number, size, location, and relocation thereof. In a cooperative or condominium any sales office, management office, or model not designated a unit by the declaration is a common element. If a declarant ceases to be a unit owner, he ceases to have any rights with regard thereto unless it is removed promptly from the common interest community in accordance with a right to remove reserved in the declaration. Subject to any limitations in the declaration, a declarant may maintain signs on the common elements advertising the common interest community. This section is subject to the provisions of other state law and to local ordinances.

COMMENT

1. This section prescribes the circumstances under which portions of the common interest community—either units or common elements—may be used for sales offices, management offices, or models. The basic requirement is that the declarant must describe his rights to maintain such offices in the declaration. There are no limitations on that right, so that either units owned by the declarant or other persons, or the common elements themselves, may be used for that purpose. Typical common element uses might include a sales booth in the lobby of a building, or a trailer or temporary building located outside the buildings on the grounds of the property.

2. In addition, this section contains a permissive provision permitting advertising on the common elements. The declarant may choose to limit his rights in terms of the size, location, or other matters affecting the advertising. The Act, however, imposes no limitations. At the same time, the last sentence of the section recognizes that state or local zoning or other laws may limit advertising, both in terms of size and content of the advertising, or the use of the units or common elements for such purposes. This section makes it clear that local law would apply in those cases.

§ 2-116. Easement Rights

(a) Subject to the provisions of the declaration, a declarant has an easement through the common elements as may be reasonably necessary for the purpose of discharging the declarant's obligations or exercising special declarant rights, whether arising under this [Act] or reserved in the declaration.

(b) In a planned community, subject to the provisions [Sections 3-102(a)(6) and 3-112, the unit owners have an easement (i) in the common elements for purposes of access to their units and (ii) to use the common elements and all real estate that must become common elements [Section 2-103(a)(6)] for all other purposes.

COMMENT

1. This section grants to declarant an easement across the common elements, subject to any self-imposed restrictions on that easement contained in the declaration. At the same time, the easement is not an easement for all purposes and under all circumstances, but only a grant of such rights as may be reasonably necessary for the purpose of exercising the declarant's rights. Thus, for example, if other access were equally available to the land where new units are being created, which did not require the declarant's construction equipment to pass and repass over the common elements in a manner which significantly inconvenienced the unit owners, a court might apply the "reasonably necessary" test contained in this section to consider limitations on the declarant's easement. The rights granted by this section may be enlarged by a specific reservation in the declaration.

2. The declarant is also required to repair and restore any portion of the common interest community used for the easement granted under this section. *See* Section 1-103(b).

3. This section also grants unit owners in a planned community an easement for access, support, and enjoyment in the common elements because unit owners hold a beneficial, but no fee, interest in the common elements. These rights may be limited by the declaration.

§ 2-117. Amendment of Declaration

(a) Except in cases of amendments that may be executed by a declarant under Section 2-109(f) or 2-110, or by the association under Section 1-107, 2-106(d), 2-108(c), 2-112(a), or 2-113, or by certain unit owners under Section 2-108(b), 2-112(a), 2-113(b), or 2-118(b), and except as limited by subsection (d), the declaration, including any plats and plans, may be amended only by vote or agreement of unit owners of units to which at least [67] percent of the votes in the association are allocated, or any larger majority the declaration specifies. The declaration may specify a smaller number only if all of the units are restricted exclusively to non-residential use.

(b) No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded.

(c) Every amendment to the declaration must be recorded in every [county] in which any portion of the common interest community is located and is effective only upon recordation. An amendment, except an amendment pursuant to Section 2-112(a), must be indexed [in the grantee's index] in the name of the common interest community and the association and [in the grantor's index] in the name of the parties executing the amendment.

(d) Except to the extent expressly permitted or required by other provisions of this [Act], no amendment may create or increase special declarant rights, increase the number of units, change the boundaries of any unit, the allocated interests of a unit, or the uses to which any unit is restricted, in the absence of unanimous consent of the unit owners.

(e) Amendments to the declaration required by this [Act] to be recorded by the association must be prepared, executed, recorded, and certified on behalf of the association by any officer of the association designated for that purpose or, in the absence of designation, by the president of the association.

COMMENT

1. This section recognizes that the declaration, as the perpetual governing instrument for the common interest community, may be amended by various parties at various times in the life of the project. The basic rule, stated in subsection (a), is that the declaration, including the plats and plans, may only be amended by vote of 67% of the unit owners. The section permits a larger percentage to be required by the declaration, and also recognizes that, in an entirely non-residential common interest community, a smaller percentage might be appropriate.

In addition to that basic rule, subsection (a) lists the other instances where the declaration may be amended by the declarant alone without association approval, or by the association acting through its board.

2. Section 1-101 does not permit the declarant to use any device, such as powers of attorney executed by purchasers at closings, to circumvent subsection (d)'s requirement of unanimous consent. This section does not supplant any requirements of common law or of other statutes with respect to conveyancing if title to real property is to be affected.

3. Subsection (c) describes the mechanics by which amendments recorded by the association are filed, and resolves a number of matters often neglected by bylaws.

§ 2-118. Termination of Common Interest Community

(a) Except in the case of a taking of all the units by eminent domain (Section 1-107) or in the case of foreclosure against an entire cooperative of a security interest that has priority over the declaration, a common interest community may be terminated only by agreement of unit owners of units to which at least 80 percent of the votes in the association are allocated, or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to non-residential uses.

(b) An agreement to terminate must be evidenced by the execution of a termination agreement, or ratifications thereof, 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 will be void unless it is recorded before that date. A termination agreement and all ratifications thereof must be recorded in every [county] in which a portion of the common interest community is situated and is effective only upon recordation.

(c) In the case of a condominium or planned community containing only units having horizontal boundaries described in the declaration, a termination agreement may provide that all of the common elements and units of the common interest community must be sold following termination. If, pursuant to the agreement, any real estate in the common interest community is to be sold following termination, the termination agreement must set forth the minimum terms of the sale.

(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.

(e) 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 real estate, upon termination, vests in the association as trustee for the holders of all interests in the units. Thereafter, the association has all powers necessary and

appropriate to effect the sale. Until the sale has been 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), and (j). 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) In a condominium or planned community, if the real estate constituting the common interest 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 termination as tenants in common in proportion to their respective interests as provided in subsection (j), and liens on the units shift accordingly. 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.

(g) Following termination of the common interest community, the proceeds of any 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 of the association is to be treated as if he had perfected a lien against 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; and

(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. . . .editors 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 subsections (e), (f), (g), (h), and (i) are as follows:

(1) Except as 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 final unless disapproved within 30 days after distribution by unit owners of units to which 25 percent of the votes in the association are allocated. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the fair market value of that unit owner's unit and its allocated interests by the total fair market values of all the units and their allocated 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: (i) in a condominium, their respective common element interests immediately before the termination, (ii) in a cooperative, their respective ownership interests immediately before the termination, and (iii) in a planned community, their respective common expense liabilities immediately before the termination.

(k) In a condominium or planned community, except as 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 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.

COMMENT

1. This section integrates the corresponding UCA, UPCA, and MRECA provisions governing termination of condominiums, planned communities and cooperatives, respectively. This section continues the distinctions made by UCA, UPCA, and MRECA, for each type of common interest community. Each such distinction is discussed in the Comments to this section, below.

2. Historically, there were instances, particularly during the 1930's where cooperatives were terminated, often as a result of foreclosure following the association's failure to pay debt service. These terminations created enormously complex problems for the cooperatives concerned. While few planned communities or condominiums have yet been terminated under present law, a number of problems are certain to arise upon termination which have not been adequately addressed by most of those statutes.

For all common interest communities, this Act seeks to deal comprehensively with the problems created by both voluntary and involuntary termination. These include such matters as the percentage of unit owners which should be required for termination; the time frame within which written consents from all unit owners must be secured; the manner in which common

elements and units should be disposed of following termination, both in the case of sale and non-sale of all of the real estate; the circumstance under which sale of units may be imposed on dissenting owners; the powers held by the board of directors on behalf of the association to negotiate a sales agreement; the practical consequences to the project from the time the unit owners approve the termination until the transfer of title and occupancy actually occurs; the impact of termination on liens on the units and common elements; distribution of sales proceeds; the effect of foreclosure or enforcement of liens against the entire common interest community with respect to the validity of the project; and other matters.

3. Recognizing that unanimous consent from all unit owners would be impossible to secure as a practical matter in a project of any size, and recognizing as well that a vote of the stockholders of a corporation under state corporate law may not adequately protect the interests of the minority, subsection (a) states a general rule that 80% of the votes in the association are required for termination of a project. The declaration may require a larger percentage of the votes and in a non-residential project, it may also permit a smaller percentage. Pursuant to Section 2-119 (Rights of Secured Lenders), lenders may require that the declaration specify a larger percentage of unit owner consent or, more typically, require the consent of a percentage of the lenders before the project may be terminated.

4. As a result of subsection (a) unless the declaration requires unanimous consent for termination, the declarant may be able to terminate the common interest community despite the unanimous opposition of other unit owners if the declarant owns units to which the requisite number of votes are allocated. Such a result might occur, for example, should a declarant be unable to continue sales in a project where some sales have been made. However, in such a case, other unit owners may have rights against the declarant under other law of the state, including the law of equity and contract.

5. Subsection (b) describes the procedure for execution of the termination agreement. It recognizes that not all unit owners will be able to execute the same instrument, and permits execution or ratification of the master termination agreement. Since the transfer of an interest in real estate is being accomplished by agreements, each of the ratifications must be executed in the same manner as a deed. Importantly, the agreement must specify the time within which it will be effective; otherwise, the project might be indefinitely in "limbo" if ratifications had been signed by some, but not all, required unit owners, and the signing unit owners fail to revoke their agreements. The agreement becomes effective only when it is recorded.

6. Subsections (c) and (d) deal with the question of when all the real estate in a planned community or condominium, or the common elements, may be sold without unanimous consent of the unit owners. The sections reach a different result based on the physical configuration of the project.

Subsection (c) states that if a planned community or condominium contains only units having horizontal boundaries—a typical high rise building—the unit owners may be required to sell their units upon termination despite objection. Under subsection (d), however, if the project contains any units which do not have horizontal boundaries then the termination agreement may not force dissenting unit owners to sell their units unless the declaration as originally recorded provides otherwise. The reason for the rule stated in subsection (d) is that owners of units not having horizontal boundaries—single family homes, for example—may wish to terminate the common interest community regime and sell the real estate which they supported with their common charges, but continue to own the homes which they occupy.

Obviously, if all the unit owners consent to the sale of the units, sale of the entire development would be possible.

7. Subsection (e) describes the powers of the association during the pendency of the termination proceedings. It empowers the association to negotiate for the sale, but makes the validity of any contract dependent on the unit owner approval. This subsection also makes clear that, upon termination, title to the real estate shall be held by the association, so that the association may convey title without the necessity of each unit owner signing the deed. Finally, this subsection makes clear that, until the association delivers title to the property, the project will continue to operate as it had prior to the termination, thus insuring that the practical necessities of operation of the real estate regime will not be impaired.

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 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 continue to hold individual titles to their units. Therefore, in a condominium or planned community with units located in both 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 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.

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.

9. Subsections (g), (h) and (i) deal with the very complex calculations and priorities which might result upon termination of a common interest community. Those questions involve competing claims of first mortgage holders on individual units, other secured and unsecured creditors of individual unit owners, judgment creditors of the association, creditors of the association to whom a security interest in the common elements has been granted and unsecured creditors of the association.

Those subsections accord different treatment to these issues, depending upon the type of common interest community involved. The separate approaches continue the distinctive treatment which condominiums, planned communities and cooperatives have received under UCA, UPCA and MRECA, respectively. Each approach will be discussed and demonstrated in the comments below.

Termination of Condominiums and Planned Communities

10. Subsection (h) establishes general rules with respect to competing claims, but leaves to state law the resolution of the priorities of those competing claims.

The examples which follow illustrate the relative effects of several provisions set out in the Act, based on application of an assumed state lien priority rule of "first in time, first in right." In those instances, particularly involving mechanics' liens, where state law often establishes priorities at variance with that rule, that result is also indicated.

EXAMPLE 1:

HYPOTHETICAL FOR EXAMPLES 1A-1H: A planned community consists of 5 detached single family homes on 5 individually owned lots, together with a 6th lot which is undeveloped but intended for future construction of a swimming pool serving all units. The development is served by a private road. Lot 6 and the private road are common elements owned by the association.

The declaration provides that the Act applies to this development (which would otherwise be exempt as a "small" planned community under Section 1-203). The documents also provide that: (1) upon termination, all units and the common elements must be sold; (2) the association is permitted to encumber Lot 6, and to grant a security interest in that lot for any purpose; and (3) votes and common expense liabilities are allocated equally among the units. For purposes of the example, we have assumed that the documents do not require the consent

of first mortgage holders before the unit owners may vote to terminate.

The 5 units were originally sold at equal prices of $50,000. Common expenses in the project are $100 per unit, per month, and are used for a variety of purposes, including insurance and upkeep of the units and common elements. At the time the units were conveyed, each of them was released from all liens affecting the planned community which were senior to the declaration, and the common elements were deeded to the association free of all liens.

A shopping center developer has offered $380,000 for the purchase of the entire planned community. The association's members unanimously vote in favor of termination, and otherwise comply with Section 2-118. The appraisal required by Section 2-118(j) shows that the units are still of equal value.

EXAMPLE 1A:

At the time of termination, the 5 units were financed as follows:

Unit 1: The owner's first mortgage had an unpaid balance of $50,000.

Unit 2: The owner's first mortgage had an unpaid balance of $40,000.

Unit 3: The owner's first mortgage had an unpaid balance of $25,000.

Units 4 and 5: The owners paid cash, and there is no mortgage on either unit.

In addition, all common expenses had been paid when due. The other assets of the association, including reserves, bank account, and all other personal property, total $20,000.

Under the Act (Section 2-118(g)), the association, following sale, holds the proceeds of sale together with the assets of the association, "as trustee for unit owners and holders of liens on the units as their interests may appear." In these circumstances, the interests of each party in the total value of $400,000 would be as follows:

UNIT #	1	2	3	4	5
Share of Proceeds Due 1st Mortgage Holders	80,000	80,000	80,000	80,000	80,000
	50,000	40,000	25,000	-0-	-0-
Due Owners	30,000	40,000	55,000	80,000	80,000

EXAMPLE 1B:

The facts stated in Example 1A remain true. However, at termination, Unit 1 has failed to pay its common expenses for 12 months. In these circumstances, the interests of each party would be as follows:

UNIT #	1	2	3	4	5
Share of Proceeds Due Association (Priming 1st Mortgage)	80,000	80,000	80,000	80,000	80,000
	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due Owners	28,800	40,000	55,000	80,000	80,000

In this example, both the lenders and the association are fully paid because the sales proceeds exceed the liens on the units. Note, however, that 6 months of the unpaid assessments prime the first mortgage pursuant to Section 3-116(b). Thus, if the sales proceeds had been only $50,000 per unit, rather than $80,000, the results with respect to Unit 1 would have been as follows:

Sales Proceeds	$50,000
6 Month Assessment Due Association	600
Balance	$49,400
Paid to 1st Mortgage Holder	$49,400
Loss to 1st Mortgage Lender	(600)
Loss to Association	(600)

Of course the association has, and the lender may have, a claim against the unit owner, personally, for the unpaid sums due them. Importantly, however, neither the other unit owners nor their units are subject to any liability for these claims.

Because the lien of the first mortgage holder, at termination or foreclosure, is junior to the first 6 months of unpaid assessments due the association, lenders may protect themselves under the Act by requiring the escrow of 6 months' common expense assessments, as they often do for real property taxes.

EXAMPLE 10:

The facts stated in Example 1B remain true. However, after all the units were initially sold, but before termination, 80% of the unit owners agree to build a swimming pool on Lot 6. The association contracts with XYZ Pool Company to build the pool for $100,000. XYZ does not take a security interest in the common elements, as it might have done under Section 3-112; and does not act to perfect any available mechanics' lien under state law. The pool is properly completed. When the association fails to pay, XYZ sues the association, secures a judgment, and properly perfects its judgment pursuant to Section 3-111 (Tort and Contract Liability). As provided in Section 3-111, liens resulting from judgments against the association are governed by Section 3-117. At the time of termination, XYZ has not been paid, and its claim amounts to $100,000.

Section 3-117(a) provides that a "judgment for money against the association," if perfected as a lien on real property under state law, "is a lien in favor of the judgment lienholder against all of the units." However, the last sentence also provides that the judgment is not a lien on the common elements. Accordingly, XYZ holds a $20,000 lien on each of the units as of the date the lien is perfected. In these circumstances, the interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due XYZ	20,000	20,000	20,000	20,000	20,000
Due Owners	8,800	20,000	35,000	60,000	60,000

EXAMPLE 11:

All facts stated in Example 10 remain true, except that XYZ Pool Company, at the time it contracts to build the pool, takes a security interest in Lot 6, pursuant to Section 3-112, and that security interest includes a release of that real estate, upon default, from all restrictions imposed on the real estate by the declaration. At termination, XYZ has not instituted any action against the association to enforce its claim.

In these circumstances, XYZ, as a secured creditor with respect to Lot 6, holds an interest superior to the declaration, and would have the right to exclude that real estate from the project. Any sale of the entire planned community would be subject to the superior interest of XYZ. For that reason, in the normal circumstances, the association would not be able to secure a release of that lien unless XYZ were paid in full from the proceeds of the sale, which would have the effect of reducing the value of the sale to $280,000. Note that this has the economic effect of placing the XYZ claim, at termination, ahead of prior first mortgages. For this reason, first mortgage holders will typically require their consent before common elements may be subjected to a lien.

EXAMPLE 12:

The facts stated in Example 10 remain true so that XYZ holds only a perfected judgment lien, not a security interest in the common elements.

After the XYZ lien was perfected, a $50,000 uninsured judgment is entered against the owner of Unit 4, resulting from his personal business. The lien is perfected, and rests only against Unit 4. In these circumstances, the interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	0	-0-
Due XYZ	20,000	20,000	20,000	20,000	20,000
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
Due Owners	8,800	20,000	35,000	10,000	60,000

EXAMPLE 13:

The facts stated in Example 1E remain true. After the swimming pool is built, a neighbor's child falls into the untended and unfenced pool, and is injured. The child sues the association. One month after the personal judgment against Unit 4 is perfected, the child secures a judgment against the association for $100,000 more than the association's insurance. Under state law, the tort judgment, when perfected, constitutes a lien only from the date judgment is entered, and does not enjoy a higher priority. In these circumstances, the interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due XYZ	20,000	20,000	20,000	20,000	20,000
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
Tort Lien	8,800	20,000	20,000	10,000	20,000
Due Owners	-0-	-0-	15,000	-0-	40,000

Note that the child's lien realizes only $78,800; the estate is not entitled to participate in the proceeds available to Units 3 and 5 to satisfy the unmet claims against Units 1 and 4, because those units are liable only for their pro rata share of the claim, which is the same amount any of those units would have had to pay prior to termination in order to secure a partial release. Thus, if Unit 5, prior to termination, had secured a partial release for $20,000 from the estate, the result would be the same.

Note also that the value of the common elements is not segregated from the values of the units, since the sales' values of the units reflect all of the value of the real estate. Similarly, note that, after termination, the tort claimant is not entitled to reach or segregate the personal property of the corporation, valued before termination at $20,000, even though he could have reached the bank account or other assets prior to termination. Any other rule would create enormous complexity, would impose arbitrary losses on creditors out of priority, and would tend to shift economic losses to unit owners who had paid their share of claims.

EXAMPLE 14:

The facts stated in Example 1F remain true. After the Unit 4 personal lien is perfected, but, one week before the tort judgment against the association is perfected, P Paving Company begins repaving the private road. Work is completed one week after the tort judgment is perfected. The association fails to pay P $50,000 upon completion as agreed, and P immediately records its mechanics' lien. Under state law, a mechanics' lien, if recorded within 60 days of the time work is completed, holds priority as of the day work began. State law does not,

however, grant the mechanics' lien priority over any liens perfected before work began. P Paving sues on its lien, and secures a judgment. In these circumstances, the interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
XYZ Pool Lien	20,000	20,000	20,000	20,000	20,000
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	8,800	10,000	10,000	10,000	10,000
Tort Lien	-0-	10,000	20,000	-0-	20,000
Due Owners	-0-	-0-	5,000	-0-	30,000

Note that, just as in the case of the tort lien, when Unit 1 could not contribute its share of the mechanics' lien, the remaining units are not liable for the balance.

In the example, the common expense lien arises before the P Paving lien had arisen. If the common expense lien arose after the P Paving lien, we would be faced with circular liens, where: (a) the P Paving lien would prime the common expense lien; (b) 6 months of the common expense lien would prime the mortgage; and (c) the mortgage would prime the P Paving lien. Such circular lien problems, however, are not unique in the law.

EXAMPLE III:

The facts stated in example 16 remain true. Assume Unit 5, before termination, paid its pro rata share of both the P Paving lien and the tort lien. This reduces the P Paving lien to $10,000, and the tort lien to $80,000. Under Section 3-117, this entitles Unit 5 to a partial release of both claims, and neither P Paving nor the child has a further claim against Unit 5. The interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Common Expense Lien	600	-0-	-0-	-0-	-0-
First Mortgage Liens	50,000	40,000	25,000	-0-	-0-
Common Expense Lien	600	-0-	-0-	-0-	-0-
XYZ Pool Lien	20,000	20,000	20,000	20,000	-0-
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	8,800	10,000	10,000	10,000	-0-
Tort Lien	-0-	10,000	20,000	-0-	-0-
Due Owners	-0-	-0-	5,000	-0-	80,000

All the results stated above would be the same as to a condominium.

EXAMPLE 2:

The facts stated in example 16 remain true. Assume, however, that, at the outset, Unit 5 was twice as large as the others, sold for $100,000, or twice as much as the others, and twice the common expense liability was allocated to it. At termination, it remains twice as valuable. In those circumstances, the results on sale are as follows:

UNIT #	1	2	3	4	5
Sale Proceeds	66,666	66,666	66,666	66,666	133,332
Common Expense Lien	600	-0-	-0-	-0-	-0-
First Mortgage Lien	50,000	40,000	25,000	-0-	-0-
Common Expense Lien	600	-0-	-0-	-0-	-0-
XYZ Pool Lien	15,466	16,666	16,666	16,666	33,333
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	-0-	10,000	13,333	-0-	26,666
Tort Lien	-0-	1,667	16,666	-0-	33,333
Due Owners	-0-	-0-	-0-	-0-	50,000

Note that *all* the liens are allocated in accordance with each unit's common expense liability, since no special provision was made for allocating the costs of the pool, the paving or the tort claim. Unit 5 probably did not contemplate the size of its exposure; nevertheless, fewer dollars were available to creditors upon termination than in Example 16.

EXAMPLE 3:

The facts stated in Example 16 remain true, including the fact that Unit 5 was originally sold at the same price ($50,000) as the remaining units. Upon appraisal, however, assume that, because of improvements, Unit 5 is now worth $75,000. Three other units have remained at $50,000, while Unit 1 was neglected, and is now worth only $10,000. Common expense liabilities never changed. In this example, the total value of the units is now $265,000. Since sales proceeds are distributed in accordance with fair market values, the following distribution of proceeds would apply:

Unit 1:	(15.09433%)	$ 60,377
Unit 2:	(18.86793%)	$ 75,472
Unit 3:	(18.86793%)	$ 75,472
Unit 4:	(18.86793%)	$ 75,472
Unit 5:	(28.30188%)	$113,207
	100.00000%	$400,000

UNIT #	1	2	3	4	5
Sales Proceeds	60,377	75,472	75,472	75,472	113,207
Common Expense Lien	600	-0-	-0-	-0-	-0-
First Mortgage Lien	50,000	40,000	25,000	-0-	-0-
Common Expense Lien	600	-0-	-0-	-0-	-0-
XYZ Pool Lien	9,177	20,000	20,000	20,000	20,000
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	-0-	10,000	10,000	5,472	10,000
Tort Lien	-0-	5,472	20,000	-0-	20,000
Due Owners	-0-	-0-	472	-0-	63,207

In this example, the equal distribution of common expense liability coupled with the "fair value" distribution of sales proceeds create the greatest losses for the creditors of the association.

11. Subsection (j)(2) is an exception to the "fair market value" rule. It provides that, if appraisal of any condominium unit cannot be made, either through pictures or comparison with other units, so that any unit's appropriate share in the overall proceeds cannot be calculated, then the distribution will fall back on the only objective, albeit artificial, standard available, which is the common element interest allocated to each unit.

12. Foreclosure of a mortgage or other lien or encumbrance does not automatically terminate the condominium or planned community, but, if a mortgagee or other lienholder (or any other party) acquires units with a sufficient number of votes, that party can cause the condominium or planned

community ... e terminated pursuant ... subsection ... of this section.

13. A mortgage or deed of trust on a unit may provide for the lien to shift, upon termination, to become a lien on what will then be the borrower's undivided interest in the whole property. However, such a shift would be deemed to occur even in the absence of express language, pursuant to subsection (f).

Termination of Cooperatives

14. Subsection (f) deals with the very complex calculations and priorities which might result upon termination of a cooperative, in light of the possibility that the association itself might have its own secured creditors, while unit owners and their creditors would seek to enforce their own claims against the proceeds of sale. The Act recognizes, in considering this issue, that there are two competing interests to be resolved. On the one hand, cooperative developers and lenders have traditionally financed cooperatives through loans to the cooperative association secured by one or more blanket mortgages on the cooperative's real estate. Any uniform proposal to reduce the priorities of some or all such mortgages in favor of creditors secured only by interests in some of the units would have a negative effect on that traditional form of financing.

At the same time, it has become increasingly evident that the frequent inability of unit owners to readily resell their units may be traced in part to the reluctance of spot lenders to place mortgages on individual units which may always be subordinate to the claims of the association's secured creditors, even when those associations creditors obtain their security interest at a date later than the date of the spot loan. As a result, the Conference was urged to draft the Act in a manner which would enhance the financing of individual units.

This section became the focal point for much of that debate. In resolving it, the Act takes a nubbin approach, by providing the declarant an election among priority systems.

Subsection (f) permits the declarant to include in the declaration a provision that all the association's creditors, upon termination, will have priority over all the interests of unit owners and their creditors. If the declaration does so provide, the association's creditors would enforce their liens in their normal priority, while unsecured creditors of the association would be treated as if they had perfected their liens immediately prior to termination. Only when all of the association's creditors had been satisfied would the unit owners and their creditors be entitled to participate in the proceeds of sale. Such a result, while significantly different from the result flowing under UCA or UPCA, is a recognition of the fundamental differences between the financing of condominiums and cooperatives. Such a provision would likely maximize the ability of the cooperative to secure initial and subsequent blanket financing, while tending to discourage spot loans for units. Alternatively, Subsection (f) contemplates that the declarant may wish to enhance the financeability of units while insuring that the initial blanket financing of a cooperative will not be jeopardized. Accordingly, it provides that, in the absence of a provision in the declaration which grants senior priority to the association's creditors, the liens of all creditors with an interest in the cooperative's property would be fractionalized upon termination, and would constitute a lien against each unit proportionate to that unit's common expense liability. No lien would lie against the cooperative's real estate as a whole, but a senior blanket mortgage, for example, would constitute a first lien against every unit in proportion to the common expense liabilities of the various units.

15. In the case of fractionalized liens, a particularly complex series of creditors' rights questions arise upon termination. Those questions involve competing claims of holders of first security interests on individual units, the secured and unsecured creditors of individual unit owners, as well as blanket mortgagees and judgment creditors of the association. The second part of subsection (f) attempts to establish general rules with respect to these competing claims, but leaves to state law the resolution of the priorities of those claims. In considering this problem, in the analogous context of condominiums and planned communities, which mandate fractionalized liens upon termination, comment 10 above includes examples of how these competing claims might be resolved. If all creditors of the association have priority over all creditors of unit owners, of course, the examples set out in comment 10 have to be adjusted appropriately.

Other Provisions

16. Subsection (j) describes the method by which the interests of proprietary lessees are to be calculated, and adopts an appraisal procedure for allocation of the sales proceeds in all three forms of ownership.

It departs significantly from the usual result under most condominium acts. Under those acts the proceeds of the sale of the entire project are distributed upon termination to each unit owner in accordance with the common element interest which was allocated at the outset of the project. Of course, in an older development, those original allocations will bear little resemblance to the actual value of the units. For that reason, the Act adopts an appraisal procedure for distribution of the sales proceeds. As suggested in the examples on the distribution of proceeds, this appraisal may dramatically affect the amount of dollars actually received by unit owners. Accordingly, it is likely the appraisal will be required to be distributed prior to the time the termination agreement is approved, so that unit owners may understand the likely financial consequences of the termination. If an initial appraisal made pursuant to subsection (j) were rejected by vote of the unit owners, the association would be obligated to secure a new appraisal.

17. With respect to the association's role as trustee under subsection (g), see Section 3-119.

18. "Foreclosure" in subsection (k) includes deeds in lieu of foreclosure, and "liens" includes tax and other liens on real estate which may be converted or withdrawn from the project.

19. The termination agreement should adopt or contain any restrictions, covenants and other provisions for the governance and operation of the property formerly constituting the common interest community which the owners deem appropriate. These might closely parallel the provisions of the declaration and bylaws. This is particularly important in the case of a common interest community which is not to be sold pursuant to the terms of the termination agreement. In the absence of such provisions, the general law of the state governing tenancies in common would apply.

20. Subsection (l) recognizes the possibility that a pre-existing lien might not have been released prior to the time the condominium or planned community declaration was recorded. Recordation of the declaration should not constitute a changing of the priority of those liens; and it is contrary to all expectations that a prior lienholder may be involuntarily subjected to the condominium or planned community documents. For that reason, this section permits the non-consenting prior lienholder upon foreclosure to exclude the real estate subject to his lien from the condominium or planned community.

§ 2-119. Rights of Secured Lenders

The declaration may require that all or a specified number or percentage of the lenders who hold security interests encumbering the units approve specified actions of the unit owners or the association as a condition to the effectiveness of those actions, but no requirement for approval may operate to (i) deny or delegate control over the general administrative affairs of the association by the unit owners or the executive board, or (ii) prevent the association or the executive board from commencing, intervening in, or settling any litigation or proceeding, or (iii) prevent any insurance trustee or the association from receiving and distributing any insurance proceeds except pursuant to Section 3-113.

COMMENT

1. In a number of instances, particularly sale or encumbrances of common elements, or termination of a planned community, a lender's security may be dramatically affected by acts of the association. For that reason this section permits the declaration to provide that lender ratification of specified actions of the association is a condition of their effectiveness.

2. There are three important limitations on the rights of lender consent. They are: (1) a prohibition on control over the general administrative affairs of the association; (2) restrictions on control over the association's powers during litigation or other proceedings; and (3) prohibition of receipt or distribution of insurance proceeds prior to application of those proceeds for rebuilding.

3. It is important that lenders not be able to step in and unilaterally act as receiver or trustee of the association. There may, of course, be occasions when a court of competent jurisdiction would order appointment of a receiver for an association. While this would be possible in a court proceeding, the Act prohibits private contractual granting of such a power.

4. Since it may well be that association might find itself involved in litigation which would be adverse to the interests of the lender or the declarant, it is inappropriate for a secured party to be able to control the course of litigation in the absence of the consent of the other parties. In an appropriate case, of course, where the lenders' interests are affected, a lender might seek to intervene as a party.

5. Section 3-113 specifies the distribution of insurance proceeds. In particular, it prevents distribution of those proceeds to lenders until the intended purpose of the insurance has been met. For that reason, under this section the declaration may not provide the lender a right to receive insurance proceeds in any manner except the manner provided in Section 3-113.

6. In addition to the provisions of the declaration, the provisions of individual deeds to units may require that unit owner to secure his lender's consent before taking particular actions.

§ 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 provisions of this [Act] applicable to unit owners' associations apply to any such corporation [or unincorporated association], except as modified by this section.

(b) Unless it is acting in the capacity of an 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) If the declaration of any common interest community provides that the executive board may delegate certain powers to a master association, the members of the executive board have no liability for the acts or omissions of the master association with respect to those powers following delegation.

(d) 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) Even if a master association is also an association described in Section 3-101, the certificate of incorporation or other instrument creating the master association and the declaration of each common interest community the powers of which are assigned by the declaration or delegated to the master association, may provide that the executive board of the master association must be elected after the period of declarant control in any of the following ways:

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

(2) All members of the executive boards of all common interest communities subject to the master association may elect all members of the master association's executive board.

(3) All unit owners of each common interest community subject to the master association may elect specified members of the master association's executive board.

(4) All members of the executive board of each common interest community subject to the master association may elect specified members of the master association's executive board.

COMMENT

1. This section adopts the approach uniformly adopted by UCA, UPCA and MRECA.

2. It is common in large or multiphased condominiums or planned communities, particularly those developed under existing laws, for the declarant to create a master or umbrella association which provides management services or decision-making functions for a series of smaller projects. While it is expected that this phenomenon will be less necessary under this Act because of the permissible period of time for declarant control over the project, it is nonetheless possible in larger developments that this form of management will continue.

3. Subsection (a) states the general rule that the powers of a unit owners' association may only be exercised by, or delegated to, a master association if the declaration for the common interest community permits that result. The declaration may have originally provided for a master association; alternatively, the unit owners of several common interest communities may amend their declarations in similar fashion to provide for this power. 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.

4. Subsection (b) limits the ability of a master association to exercise the powers of the unit owners' association, except in those cases where the master association is actually acting as the only association for one or more common interest communities. In those cases, where it is not so acting, however, the only powers of the unit owners' association which the master association may exercise are the ones expressly permitted in the declaration or in the delegation of power. This is in significant contrast with the rule of Section 3-102 that all of the powers described in that section may be exercised unless limited by the declaration.

5. Subsection (c) clarifies the liability of the members of the executive board of a unit owners' association when the common interest community for which the unit owners' association acts has delegated some of its powers to a master association. In that instance, subsection (c) makes it clear that the members of the executive board of the unit owners' association have no liability for acts and omissions of the master association board; under subsection (a), that liability lies with the members of the master association.

6. Subsection (d) addresses the question of the rights and responsibilities of the unit owners in their dealings with the master board. A variety of sections enumerated in subsection (d) provide certain rights and powers to unit owners in their dealings with their association. In the affairs of the master association, however, it would be incongruous for the unit owners to maintain those same rights if those unit owners were not in fact electing the master board. Thus, for example, the question of election of directors, meetings, notice of meetings, quorums, and other matters enumerated in those sections would have little meaning if those sections were read literally when applied to a master board which was not elected by all members of the common interest community subject to the master board. For that reason, the rights of notice, voting, and other rights enumerated in the Act are available only to the persons who actually elect the board.

7. Subsection (e) recognizes that there may be reasons for a representative form of election of directors of the master association. Alternatively, there may be cases where at-large election is reasonable. For that rea-

son, subsection (c) provides that, after the period of ... declarant control has terminated, there may be 4 ways of electing the master association board. Those four ways are: (1) at-large election of the master board among all the common interest communities subject to the master association, (2) at-large election of the master board only among the members of the executive boards of all common interest communities subject to the master association, (3) each common interest community might have designated positions on the master board, and those spaces could be filled by an at-large election among all the members of each common interest community, or (4) the designated positions could be filled by an election only among the members of the executive board of the unit owners' association for each common interest community. It would only be in the case of an at-large election of the master board among all common interest communities that subsection (d) would have no relevance.

§ 2-121. Merger or Consolidation of Common Interest Communities

(a) Any 2 or more common interest communities of the same form of ownership, by agreement of the unit owners as provided in subsection (b), may be merged or consolidated into a single common interest community. In the event of a merger or consolidation, unless the agreement otherwise provides, the resultant common interest community is the legal successor, for all purposes, of all of the pre-existing common interest communities, and the operations and activities of all associations of the pre-existing common interest communities are merged or consolidated into a single association that holds all powers, rights, obligations, assets, and liabilities of all pre-existing associations.

(b) An agreement of 2 or more common interest communities to merge or consolidate pursuant to subsection (a) must be evidenced by an agreement prepared, executed, recorded, and certified by the president of the association of each of the pre-existing common interest communities following approval by owners of units to which are allocated the percentage of votes in each common interest community required to terminate that common interest community. The agreement must be recorded in every [county] in which a portion of the common interest community is located and is not effective until recorded.

(c) Every merger or consolidation agreement must provide for the reallocation of the allocated interests in the new association among the units of the resultant common interest community either (i) by stating the reallocations or the formulas upon which they are based or (ii) by stating the percentage of overall allocated interests of the new common interest community which are allocated to all of the units comprising each of the pre-existing common interest communities, and providing that the portion of the percentages allocated to each unit formerly comprising a part of the pre-existing common interest community must be equal to the percentages of allocated interests allocated to that unit by the declaration of the pre-existing common interest community.

COMMENT

1. There may be circumstances where common interest communities may wish to merge or consolidate their activities by the creation of a single common interest community; this section provides for that possibility.

Subsection (a) makes it clear that a merger or consolidation may occur by the same vote of the unit owners necessary to terminate the common interest community. If 2 or more common interest communities are merged or consolidated, the resulting common interest community is for all purposes the legal successor of the pre-existing common interest community, with a single association for all purposes. In the event common interest communities did not wish to completely merge or consolidate their affairs, it would also be possible for them to create a master association pursuant to Section 2-120.

2. Under subsection (b), the merger or consolidation agreement is treated for recording purposes as an amendment to the declaration, and the same requirements for approval are mandated as for termination.

3. Subsection (c) does not state a minimum requirement for the contents of a merger or consolidation agreement, and any additional clauses not inconsistent with subsection (c) may be included. The important point that subsection (c) makes is that the reallocation of the allocated interests must be carefully stated.

Subsection (c) states 2 alternative rules in this respect. First, the reallocations may be accomplished by stating specifically the allocation of allocated interests to each unit, or by stating the formulas by which these interests may be allocated to each unit in all of the pre-existing common interest communities. Alternatively, the merger or consolidation agreement may state the percentage of overall allocated interests allocated to "all of the units comprising each of the pre-existing common interest communities." The agreement might then also provide that the position of the percentage allocated to each unit from along the shares allocated to each common interest community will be equal to the percentage of allocated interests allocated to that unit by the declaration of the pre-existing common interest community. An example of how this alternative formulation would operate may be useful.

EXAMPLE:

Assume that 2 adjoining planned communities wish to merge their activities into one planned community. Assume that the first planned community consists of 10 one-bedroom units, with an annual budget of $10,000. Assume further that each of the units, being identical, has an equal common expense liability of 10% and one vote per unit.

The second planned community consists of 10 units, with 20 2-bedroom units and 20 3-bedroom units. The budget of the second planned community consists of $70,000 per year. Each of the 2-bedroom units has been allocated a 2% common expense liability, while each of the 3-bedroom units has been allocated a 3% common expense liability. Finally, each of the units in the second planned community also has an equal vote.

There is no provision in the Act which mandates a particular allocation among planned communities 1 and 2 as to either common expense liabilities or votes. Should the unit owners wish to retain as much similarity to their previous common expense liabilities, however, and should they wish to retain equal voting in a merged project, it would be possible for them, pursuant to subsection (c)(ii), to state "the percentage of overall common expense liabilities and votes in the new association" as follows: as to common expense liabilities, they might allocate 12.5% of the common expense liabilities in the merged project to planned community 1, and 87.5% thereof to planned community 2. If the agreement further provided that "The portion of the percentages allocated to each unit formerly comprising a part on the pre-existing planned community must be equal to the percentages of allocated interests allocated to that unit by the declaration of the pre-existing planned community" as required by subsection (c), each unit in planned community 1 would then have allocated to it 1.25% of the common expense liabilities in the new planned community. It happens that 1.25% of the common expenses of a merged planned community which has a budget of $80,000 equals $1,000.

Under the same rationale, if each of the 2-bedroom units in the second planned community, to which were formerly allocated 2% of the common expense liabilities, now has allocated 2% of the 87.5% allocated to the second planned community, each of those units would then have allocated to it 1.75% of the common expense liabilities of the new planned community. 1.75% of $80,000 is $1,400. Similarly, each of the 3-bedroom units would then have allocated to it 2.625% of the common expense liabilities in the merged planned community. That percentage of the common expense liabilities of $80,000 would yield an annual cost of $2,100, the same cost as previously obtained in planned community 2.

Further, the unit owners are free to allocate votes among the units in any way which they see fit. Of course, if they choose to allocate equal votes to all the units, which was the method previously used in both planned communities, this would have the effect of giving 20% of the votes to planned community 1, even though planned community 1 had only 12.5% of the common expense liabilities. It may be, however, that this tracks with the ex-

pectations of the unit owners in both planned communities. Alternatively, planned community 1 might be allocated 12.5% of the votes, which, when divided up among the 10 units, would give each one-bedroom unit a .125 vote. If 87.5% of the votes were allocated equally among the unit owners in the second planned community, then each of the unit owners in planned community 2 would have .21875 votes.

If some other configuration was to be desired, then the allocations would of necessity be made pursuant to paragraphs (c)(i) rather than (c)(ii).

The same result would be reached in a merger of planned communities or cooperatives.

§ 2-122. Addition of Unspecified Real Estate

In a planned community, if the right is originally reserved in the declaration, the declarant in addition to any other development right, may amend the declaration at any time during as many years as are specified in the declaration for adding additional real estate to the planned community without describing the location of that real estate in the original declaration; but, the amount of real estate added to the planned community pursuant to this section may not exceed 10 percent of the real estate described in Section 2-105(a)(3) and the declarant may not in any event increase the number of units in the planned community beyond the number stated in the original declaration pursuant to Section 2-105(a)(5).

COMMENT

In assembling land for large "new town" planned communities, developers have from time to time been unable to secure small parcels of real estate within the outer boundaries of the development at the time the original covenants for the development were recorded. Subsequently, however, for a variety of reasons, those parcels may become available and would logically form a part of the overall development. As a matter of policy, there is no reason to prohibit the amendment of the declaration to permit the addition of that land to the development, so long as that addition does not substantially increase the potential common expenses of the unit owners, nor the density of the project as originally projected by the declarant in his public offering statement.

This section was designed to address this relatively unusual problem. It permits the declarant to add those after-acquired parcels of real estate to the development. This power is available only if the declarant makes clear in his original declaration that this development right has been reserved. The section also requires the declarant to impose his own time limit on the period during which this development right may be exercised. To foreclose the possibility of an increase in the density of the project beyond that which was originally contemplated, the section also prohibits the declarant from increasing the number of units in the planned community beyond the number originally stated in the declaration. Finally, to impose a reasonable limitation on the amount of new land that may be added, the amount of real estate added to the planned community pursuant to this section may not exceed 10% of the real estate originally subjected to the declaration.

ARTICLE 3

MANAGEMENT OF THE COMMON INTEREST COMMUNITY

§ 3-101. Organization of Unit Owners' Association

A unit owners' association must be organized no later than the date the first unit in the common interest community is conveyed. The membership of the association at all times consists exclusively of all unit owners or, following termination of the common interest community, of all former unit owners entitled to distributions of proceeds under Section 2-118 or their heirs, successors, or assigns. The association must be organized as a profit or nonprofit corporation, trust, [or] partnership [, or as an unincorporated association].

COMMENT

1. The first purchaser of a unit is entitled to have in place the legal structure of the unit owners' association. The existence of the structure clarifies the relationship between the developer and other unit owners and makes it easy for the developer to involve unit owners in the governance of the common interest community even during a period of declarant control reserved pursuant to Section 3-103(d).

2. The bracketed language preserves the flexibility existing in practically all states today to organize the association of a condominium, cooperative or planned community as a profit or nonprofit corporation, trust or partnership. Most associations are either corporations or unincorporated associations, but occasionally developers or their lawyers have found trust or partnership forms valuable. Although at least one state (Georgia) requires the organization of a condominium association in corporate form, it is not desirable to mandate this result in a uniform act. If a state wishes to mandate incorporation, it should delete the bracketed language.

§ 3-102. Powers of Unit Owners' Association

(a) Except as provided in subsection (b), and subject to the provisions of the declaration, the association [, even if unincorporated,] may:

(1) adopt and amend bylaws and rules and regulations;

(2) adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from unit owners;

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

(4) institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or 2 or more unit owners on matters affecting the common interest community;

(5) make contracts and incur liabilities;

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

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

(8) acquire, hold, encumber, and convey in its own name any right, title, or interest to real estate or personal property, but (i) common elements in a condominium or planned community may be conveyed or subjected to a security interest only pursuant to Section 3-112 and (ii) 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) grant easements, leases, licenses, and concessions through or over the common elements;

(10) impose and receive any payments, fees, or charges for the use, rent[illegible] operation of the common elements, other than limited common elements described in Sections 2-102(2) and (4), and for services provided to unit owners;

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

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

(14) assign its right to future income, including the right to receive common expense assessments, but only to the extent the declaration expressly so provides;

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

(16) exercise all other powers that may be exercised in this State by legal entities of the same type as the association; and

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

(b) The declaration may not impose limitations on the power of the association to deal with the declarant which are more restrictive than the limitations imposed on the power of the association to deal with other persons.

COMMENT

1. This section permits the declaration, subject to the limitations of subsection (b), to include limitations on the exercise of any of the enumerated powers. The bracketed language making a specific reference to unincorporated associations is not intended to exclude other forms of association; the unincorporated association would have such powers, subject to the declaration, regardless of the legal status of an unincorporated association in the state. If a state wishes to permit the association to be unincorporated and the law of the state is unclear whether an unincorporated association would have such powers in the absence of the language, the bracketed language should be retained and the brackets removed.

2. Required provisions of the bylaws of the association, referenced in paragraph (1), are set forth in Section 3-106.

3. This Act makes clear that the association can sue or defend suits even though the suit may involve only units as to which the association itself has no ownership interest. In the absence of a statutory grant of standing such as that set forth in paragraph (4), some courts have held that a condominium association, because it has no ownership interest in the condominium, has no standing to bring, defend, or to intervene in litigation or administrative proceedings in its own name.

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.

5. The powers granted the association in paragraph (11) to impose charges for late payment of assessments and to levy reasonable fines for violations of the association's rules reflect the need to provide the association with sufficient powers to exercise its "governmental" functions as the ruling body of the common interest community. These powers are intended to be in addition to any rights which the association may have under other law.

6. Under paragraph (14), the declaration may provide for the assignment of income of the association, including common expense assessment income, as security for, or payment of, debts of the association. The power may be limited in any manner specified in the declaration--for example, the power might be limited to specified purposes such as repair of existing structures, or to income from particular sources

such as income from tenants, or to a specified percentage of common expense assessments. The power, in many instances, should help materially in securing credit for the association at favorable interest rates. The inability of associations to borrow because of a lack of assets, in spite of its income stream, has been a significant problem.

7. If the association is incorporated, it may, pursuant to paragraph (16), exercise all other po[illegible] of a corporation. Similarly, if the association is unincorporated, the association may, by virtue of paragraph (16), exercise all other powers of an unincorporated association. Inconsistent provisions of state corporation or unincorporated association law are subject to the provisions of this Act, as provided in Section 1-108.

§ 3-103. Executive Board Members and Officers

(a) Except as provided in the declaration, the bylaws, subsection (b), or other provisions of this [Act], the executive board may act in all instances on behalf of the association. In the performance of their duties, the officers and members of the executive board are required to exercise: (i) if appointed by the declarant, the care required of fiduciaries of the unit owners and (ii) if elected by the unit owners, ordinary and reasonable care.

(b) The executive board may not act on behalf of the association to amend the declaration (Section 2-117), to terminate the common interest community (Section 2-118), or to elect members of the executive board or determine the qualifications, powers and duties, or terms of office of executive board members (Section 3-103(f)), but the executive board may fill vacancies in its membership for the unexpired portion of any term.

(c) Within [30] days after adoption of any proposed budget for the common interest community, the executive board shall provide a summary of the budget to all the unit owners, and shall set a date for a meeting of the unit owners to consider ratification of the budget not less than 14 nor more than 30 days after mailing of the summary. Unless at that meeting a majority of all unit owners or any larger vote specified in the declaration reject the budget, the budget is ratified, whether or not a quorum is present. In the event the proposed budget is rejected, the periodic budget last ratified by the unit owners must be continued until such time as the unit owners ratify a subsequent budget proposed by the executive board.

(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 him, may appoint and remove the officers and members of the executive board. Regardless of the period provided in the declaration, a period of declarant control terminates no later than the earlier of: (i) [60] days after conveyance of [75] percent of the units that may be created to unit owners other than a declarant; (ii) [2] years after all declarants have ceased to offer units for sale in the ordinary course of business; or (iii) [2] years after any right to add new units was last exercised. A declarant may voluntarily surrender the right to appoint and remove officers and members of the executive board before termination of that period, but in that event the declarant may require, for the duration of the period of declarant control, 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.

(e) Not later than [60] days after conveyance of [25] percent 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 [50] percent of the units that may be created to unit

owners other than a declarant, not less than [33⅓] percent 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 3 members, at least a majority of whom must be unit owners. The executive board shall elect the officers. The executive board members and officers shall take office upon election.

(g) Notwithstanding any provision of the declaration or bylaws to the contrary, the unit owners, by a two-thirds vote of all persons present and entitled to vote at any meeting of the unit owners at which a quorum is present, may remove any member of the executive board with or without cause, other than a member appointed by the declarant.

COMMENT

1. Subsection (a) makes members of the executive board appointed by the declarant liable as fiduciaries 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.

Officers and board members elected by the unit owners are required only to exercise ordinary and reasonable care. This lower standard of care should increase the willingness of unit owners to serve as officers and members of the board.

2. The provisions of paragraph (c) permit the unit owners to disapprove any proposed budget, but a rejection of the budget does not result in cessation of assessments until a budget is approved. Rather, assessments continue on the basis of the last approved periodic budget until the new budget is in effect.

3. Subsections (d) and (e) recognize the practical necessity for the declarant to control the association during the developmental phases of a project. However, any executive board member appointed by the declarant pursuant to subsection (d) is liable as a fiduciary to any unit owner for his acts or omissions in such capacity.

4. Subsection (d) permits a declarant to surrender his right to appoint and remove officers and executive board members prior to the termination of the period of declarant control in exchange for a veto right over certain actions of the association or its executive board. This provision is designed to encourage transfer of control by declarants to unit owners as early as possible, without impinging upon the declarant's rights (for the duration of the period of declarant control) to maintain ultimate control of those matters which he may deem particularly important to him. It might be noted that the declarant at all times (even after the expiration of the period of declarant control) is entitled to cast the votes allocated to his units in the same manner as any other unit owner.

5. Subsection (e), in combination with subsection (d), provides for a gradual transfer of control of the association to the unit owners from the declarant. Such a gradual transfer is preferable to a one-time turnover of control since it assures that the unit owners will be involved, to some extent, in the affairs of the association from a relatively early date and that some unit owners will acquire experience in dealing with association matters.

§ 3-104. Transfer of Special Declarant Rights

(a) A special declarant right (Section 1-103(29)) created or reserved under this [Act] 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.

(b) 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 by this [Act]. Lack of privity does not deprive any unit owner of standing to maintain an action to enforce any obligation of the transferor.

(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.

(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) The liabilities and obligations of a person who succeeds to special declarant rights are as follows:

(1) A successor to any special declarant right who is an affiliate of a declarant is subject to all obligations and liabilities imposed on the transferor by this [Act] or by the declaration.

(2) A successor to any special declarant right, other than a successor described in paragraphs (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 non-exercise of special declarant rights; or

(ii) on his transferor, other than:

(A) misrepresentations by any previous declarant;

(B) warranty obligations on improvements made by any previous declarant, or made before the common interest community was created;

(C) breach of any fiduciary obligation by any previous declarant or his appointees to the executive board; or

(D) any liability or obligation imposed on the transferor as a result of the transferor's acts or omissions after the transfer.

(3) A successor to only a right reserved in the declaration to maintain models, sales offices, and signs (Section 2-115), may not exercise any other special declarant right, and is not subject to any liability or obligation as a declarant, except the obligation to provide a public offering statement [,] and any liability arising as a result thereof [, and obligations under Article 5].

(4) 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), may declare 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 other than any right held by his 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 exercise of those rights is void. So long as a successor declarant may not exercise special declarant rights under this subsection, the successor declarant is not subject to any liability or obligation as a declarant other than liability for his 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.

COMMENT

1. This section deals with the issue of the extent to which obligations and liabilities imposed upon a declarant by this Act are transferred to a third party by a transfer of the declarant's interest in a common interest community. There are two parts to the problem. First, what obligations and liabilities to unit owners (both existing and future) should a declarant retain, notwithstanding his transfer of interests. Second, what obligations and liabilities may fairly be imposed upon the declarant's successor in interest.

2. This section strikes a balance between the obvious need to protect the interests of unit owners and the equally important need to protect innocent successors to a declarant's rights, especially persons such as mortgagees whose only interest in the project is to protect their debt security. The general scheme of the section is to impose upon a declarant continuing obligations and liabilities for promises, acts, or omissions undertaken during the period that he was in control of the community, while relieving a declarant who transfers all or part of his special declarant rights in a project of such responsibilities with respect to the promises, acts, or omissions of a successor over whom he has no control. Similarly, the section absolves a non-affiliated transferee of responsibility for the promises, acts, or omissions of a transferor declarant over which he had no control. Finally, the section makes special provision for the interests of certain successor declarants (*e.g.*, a mortgagee who succeeds to the rights of the declarant pursuant to a "deed in lieu of foreclosure" and who holds the project solely for transfer to another person) by relieving such persons of virtually all of the obligations and liabilities imposed upon declarants by this Act.

3. Subsection (a) provides that a successor in interest to a declarant may acquire the special rights of the declarant only by recording an instrument which reflects a transfer of those rights. This recordation requirement is important to determine the duration of the period of declarant control pursuant to Section 3-103(d) and (e), as well as to place unit owners on notice of all persons entitled to exercise the special rights of a declarant under this Act. The transfer by a declarant of all of his interest in a project to a successor without a concomitant transfer of the special rights of a declarant pursuant to this subsection, results in the automatic termination of such special declarant rights and of any period of declarant control.

A declarant may wish to transfer special declarant rights as a part of his transfer to another person of units already constructed in a cooperative. If the declaration has specified that units are personal property, the transfer of the units themselves will be per sonal property transfers not subject to the real estate recording act. However, under subsection (a), if special declarant rights are to be transferred, that transfer must be evidenced by an instrument recorded in every county in which the cooperative lies. The intent of that provision is that the recording be in the land records and identify the real estate involved so that a title examination relating to the land in the cooperative would reveal the transfer of the special declarant right.

In a common interest community, a mortgage recorded prior to the recordation of the declaration would have priority over any rights of declarants or unit owners arising under the declaration. However, under Section 2-118(k) and (*l*), foreclosure of such a mortgage does not automatically terminate the effectiveness of a *condominium* or *planned community* declaration; the declaration becomes ineffective as to the land covered by the prior mortgage only if the purchaser at the foreclosure sale records an instrument excluding the real estate from the condominium or planned community. If the purchaser on the foreclosure of the prior mortgage elects to have the real estate remain in the condominium or planned community, it becomes a successor declarant subject to the general rules of this section, including those applicable to persons who acquire special declarant rights by virtue of foreclosure sales (subsection e).

However, under the Act, foreclosure of a mortgage which is prior to a *cooperative* declaration automatically removes the real estate from the cooperative since there is nothing in the Act which would change the ordinary rule that the foreclosure of a mortgage which is prior to any restrictive covenants or easements results in a transfer free of those "junior interests." (See Section 2-118(k) and (*l*)).

Therefore, in the absence of some contractual arrangement between the mortgagee and the association, under which the buyer at the foreclosure sale has a right to reconvey the property to the association, the p... buyer at the foreclosure sale could not succeed to any development rights of the declarant since the property would be removed from the cooperative by the foreclosure sale itself. However, there is nothing in the act which would preclude the developer from having the association contractually obligate itself to retake title to foreclosed property on specified terms. If the underlying mortgage is of the entire cooper... property, there would probably advantage in such an arrangement since the foreclosing mortgagee with the entire project could set up his own cooperative association and undertake new marketing efforts without regard to the obligations and liabilities of the prior cooperative association. If, on the other hand, the mortgage is on only a portion of the cooperative project there may be distinct advantage in giving the purchaser at the foreclosure sale the power to reconvey the property to the association and leaving the purchaser become own... of the units which would exist or ...ld be created in the property. In such a case, the position of the mortgagee would be essentially the same as that of a declarant who acquires the special declarant right to add additional land to the cooperative.

If the developer, while in control of the cooperative association, has had the cooperative association grant a mortgage in its real estate and has subordinated the declaration to the mortgage, the situation is the same as that just described; on foreclosure, that real estate would no longer be a part of the cooperative. Again, in the ordinary case no special declarant rights could pass to the purchaser at the foreclosure sale since he would not have any real estate in the cooperative. If, however, the association is obligated to accept a reconveyance of the real estate which has been foreclosed the purchaser at the foreclosure sale would have special declarant rights as just described.

If the declarant in a cooperative has given a mortgage or security interest in his own special declarant rights or in his unsold units, purchasers at the foreclosure sale would acquire rights as to property still in the cooperative and would therefore be able to succeed to the declarant's special declarant rights.

4. Under subsection (b), a transferor declarant remains liable to unit owners (both existing and future) for all obligations and liabilities, including

warranty obligations on all improvements made by him, arising prior to the transfer. If a declarant transfers any special declarant right to an affiliate (as defined in Section 1-103(1)), the transferor remains subject to all liabilities specified in paragraph (1) of subsection (b) and, in addition, is jointly and severally liable with his successor in interest for all obligations and liabilities of the successor.

5. The obligations and liabilities imposed upon transferee declarants under the Act are set forth in subsection (c). In general, a transferee declarant (other than an affiliate of the original declarant and other than a successor by foreclosure or conveyance in lieu of foreclosure) becomes subject to all obligations and liabilities imposed upon a declarant by the Act or by the declaration with respect to any promises, acts, or omissions undertaken subsequent to the transfer which relate to the rights he holds. Such a transferee also is liable for the promises, acts, or omissions of the original declarant undertaken prior to the transfer, except as set forth in paragraph (c)(2),(3). For example, because of the exclusions in (c)(2)(ii), a successor declarant would not be liable for the warranty obligations of the original declarant with respect to improvements to the project made by the original declarant. Similarly, a successor would not be liable, under normal circumstances, for any misrepresentation or breach of fiduciary duty by the original declarant prior to the transfer. The successor is liable, however to complete improvements which the developer is obligated to complete under Section 4-119.

6. To preclude declarants from evading their obligations and liabilities under this Act by transferring their interests to affiliated companies, paragraph (1) of subsection (c) makes clear that any successor declarant who is an affiliate of the original declarant is subject to all obligations and liabilities imposed upon the original declarant by the Act or by the declaration. Similarly, as previously noted, paragraph (2) of subsection (b) provides that an original declarant who transfers his rights to an affiliate remains jointly and severally liable with his successor for all obligations and liabilities imposed upon declarants by the Act or by the declaration.

7. The section handles the problem of certain successor declarants (i.e., persons whose sole interest in the project is the protection of debt security) in three ways. First, subsection (c) provides that, in the case of a foreclosure of a security interest or a sale by a trustee in bankruptcy of any units owned by a declarant, any person acquiring title to all of the units being foreclosed or sold may request the transfer of special declarant rights. In that event, and only upon such request, such rights will be transferred in the instrument conveying title to the units and such transferee will thereafter become a successor declarant subject to the other provisions of this section. In the event of a foreclosure, sale by a trustee under a deed of trust, or sale by a trustee in bankruptcy of *all* units owned by a declarant, if the transferee of such units does not request the transfer of special declarant rights then, under subsection (d), those special declarant rights cease to exist and any period of declarant control terminates.

Second, any person who succeeds to special declarant rights as a result of the transfers just described, or by a conveyance in lieu of foreclosure, may, pursuant to paragraph (4) of subsection (c), declare his intention (in a recorded instrument) to hold those rights solely for transfer to another person. Thereafter, such a successor may transfer all special declarant rights to a third party acquiring title to any units owned by the successor but may not, prior to such transfer, exercise any special declarant rights other than the right to control the executive board of the association in accordance with the provisions of Section 3-103(c). A successor declarant who holds special declarant rights solely for transfer is relieved of any liability under the Act except liability for any acts or omissions related to his control of the executive board of the association. This provision is designed to deal with the typical problem of a foreclosing lender who opts to bid in and obtain the project at the foreclosure sale solely for the purpose of subsequent resale. It permits a foreclosing lender to undertake such a transaction without incurring the full burden of declarant obligations and liabilities. At the same time, the provision recognizes the need for continuing operation of the association and, to that end, permits a foreclosing lender to assume control of the association for the purpose of ensuring a smooth transition.

Third, paragraph (3) of subsection (c) provides that a successor who has only the right to maintain model units, sales offices, and signs does not thereby become subject to any obligations or liabilities as a declarant, except for the obligation to provide a public offering statement and any liability resulting therefrom. This provision also is designed to protect mortgage lenders and contemplates the situation where a lender takes over a project and desires to sell out existing units without making any additional improvements to the project. This provision facilitates such a transaction by relieving the mortgage lender, in that instance, from the full burden of obligations and liabilities ordinarily imposed upon a declarant under the Act.

Under Section 2-116, a declarant may reserve the right to create additional units in portions of a common interest community which were originally designated as common elements, even though, in a condominium, rights of unit owners have otherwise attached to the common elements, and even though, in a planned community or cooperative, the common elements have been conveyed to the association. The declarant, upon creation, becomes the owner of any units created. The right to create the units is an interest in land which may be sold or in which a security interest may be granted. If the mortgagee of that interest forecloses, the purchaser at the foreclosure sale has the choices concerning development rights and resulting liability which are described in the preceding paragraph. That is, under subsections (c) and (d), the purchaser may limit his liability by agreeing to hold the developments only for the purpose of transfer as provided by paragraph (c)(4) or may buy the rights under paragraph (c).

§ 3-105. Termination of Contracts and Leases of Declarant

If entered into before the executive board elected by the unit owners pursuant to Section 3-103(f) takes office, (i) any management contract, employment contract, or lease of recreational or parking areas or facilities, (ii) any other contract or lease between the association and a declarant or an affiliate of a declarant, or (iii) any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the circumstances then prevailing, may be terminated without penalty by the association at any time after the executive board elected by the unit owners pursuant to Section 3-103(f) takes office upon not less than [90] days' notice to the other party. This section does not apply to: (i) any lease the termination of which would terminate the common interest community or reduce its size, unless the real estate subject to that lease was included in the common interest community for the purpose of avoiding the right of the association to terminate a lease under this section, or (ii) a proprietary lease.

COMMENT

1. This section deals with a common problem in the development of condominium, planned community and cooperative projects: the temptation on the part of the developer, while in control of the association, to enter into, on behalf of the association, long-term contracts and leases with himself or with an affiliated entity.

The Act deals with this problem in two ways. First, Section 3-103(a) imposes upon all executive board members appointed by the declarant liability as fiduciaries of the unit owners for all of their acts or omissions as members of the board. Second, Section 3-105 provides for the termination of certain contracts and leases made during a period of declarant control.

2. In addition to contracts or leases made by a declarant with himself or with an affiliated entity, there are also certain contracts and leases so critical to the operation of the common interest community and to the unit owners' full enjoyment of their rights of ownership that they too should be voidable by the unit owners upon the expiration of any period of declarant control. At the same time, a statutorily-sanctioned right of cancellation should not be applicable to all contracts or leases which a declarant may enter into in the course of developing a project. For example, a commercial tenant would not be willing to invest substantial amounts in equipment and other improvements for the operation of his

business if a case could unilaterally be cancelled by the association. Accordingly, this section provides that (subject to the exception set forth in the last sentence thereof), upon the expiration of any period of declarant control, the association may terminate without penalty, any "critical" contract (i.e., any management contract, employment contract, or lease of recreational or parking areas or facilities) entered into during a period of declarant control, any contract or lease to which the declarant or an affiliate of the declarant is a party, or any contract or lease previously entered into by the declarant which is not *bona fide* or which was unconscionable to the unit owners at the time entered into under the circumstances then prevailing.

3. The last sentence of the section addresses the usual leasehold common interest community situation where the underlying real estate is subject to a long-term ground lease. Because termination of the ground lease would terminate the community, this sentence prevents cancellation. However, in order to avoid the possibility that recreation and other leases otherwise cancellable under subsection (a) will be restructured to come within the exception, a subjective test of "intent" is imposed. Under the test, if a declarant's principal purpose in subjecting the leased real estate to the common interest community was to prevent termination of the lease, the lease may nevertheless be terminated.

§ 3-106. Bylaws

(a) The bylaws of the association must provide

(1) the number of members of the executive board and the titles of the officers of the association;

(2) election by the executive board of a president, treasurer, secretary, and any other officers of the association the bylaws specify;

(3) the qualifications, powers and duties, terms of office, and manner of electing and removing executive board members and officers and filling vacancies;

(4) which, if any, of its powers the executive board or officers may delegate to other persons or to a managing agent;

(5) which of its officers may prepare, execute, certify, and record amendments to the declaration on behalf of the association; and

(6) a method for amending the bylaws.

(b) Subject to the provisions of the declaration, the bylaws may provide for any other matters the association deems necessary and appropriate.

COMMENT

1. Because the Act does not require the recordation of bylaws, it is contemplated that unrecorded bylaws will set forth only matters relating to the internal operations of the association and various "housekeeping" matters with respect to the common interest community. The Act requires specific matters to be set forth in the recorded declaration and not in the bylaws, unless the bylaws are to be recorded as an exhibit to the declaration.

2. The requirement, set forth in subsection (a)(5), that the bylaws designate which of the officers of the association has the responsibility to prepare, execute, certify, and record amendments to the declaration reflects the obligation imposed upon the association by several provisions of this Act to record such amendments in certain circumstances. These provisions include Section 1-107 (Eminent Domain), Section 2-109 (expiration of certain leases), Section 2-112 (Relocation of Boundaries Between Adjoining Units), and Section 2-113 (subdivision or conversion of units). Section 2-117(c) provides that, if no officer is designated for this purpose, it shall be the duty of the president.

§ 3-107. Upkeep of Common Interest Community

(a) Except to the extent provided by the declaration, subsection (b), or Section 3-113(b), the association is responsible for maintenance, repair, and replacement of the common elements, and each unit owner is responsible for maintenance, repair, and replacement of his unit. Each unit owner shall afford to the association and the other unit owners, and to their agents or employees, access through his unit reasonably necessary for those purposes. If damage is inflicted on the common elements or on any unit through which access is taken, the unit owner responsible for the damage, or the association if it is responsible, is liable for the prompt repair thereof.

(b) In addition to the liability that a declarant as a unit owner has under this [Act], the declarant alone is liable for all expenses in connection with real estate subject to development rights. No other unit owner and no other portion of the common interest community is subject to a claim for payment of those expenses. Unless the declaration provides otherwise, any income or proceeds from real estate subject to development rights inures to the declarant.

(c) In a planned community, if all development rights have expired with respect to any real estate, the declarant remains liable for all expenses of that real estate unless, upon expiration, the declaration provides that the real estate becomes common elements or units.

COMMENT

1. The Act permits the declaration to separate maintenance responsibility from ownership. This is commonly done in practice. In the absence of any provision in the declaration, maintenance responsibility follows ownership of the unit or rests with the association in the case of common elements. Under this Act, limited common elements (which might include, for example, patios, balconies, and parking spaces) are common elements. *See* Section 1-103(19). As a result, under subsection (a), unless the declaration provides that unit owners are responsible for the upkeep of such limited common elements, the association will be responsible for their maintenance. Under Section 3-115(c), the cost of maintenance, repair, and replacement for such limited common elements is assessed against all the units in the common interest community, unless the declaration provides for such expenses to be paid only by the units *benefited*. *See* Comment 1 to Section 2-108.

2. Under Section 2-110, a declarant may reserve the right to create units in portions of the common interest community originally designated as common elements. However, under Section 3-107(b), the developer is obligated to pay all of the expenses of (including real estate taxes properly apportionable to) that real estate even though, in the case of a planned community or cooperative, it has been conveyed to the association. As to real estate taxes, see Section 1-105(c).

§ 3-108. Meetings

A meeting of the association must be held at least once each year. Special meetings of the association may be called by the president, a majority of the executive board, or by unit owners having 20 percent, or any lower percentage specified in the bylaws, of the votes in the association. Not less than [10] nor more than [60] days in advance of any meeting, the secretary or oth

sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner. The notice of any meeting must state the time and place of the meeting and the items on the agenda, including the general nature of any proposed amendment to the declaration or bylaws, any budget changes, and any proposal to remove an officer or member of the executive board.

§ 3-109. Quorums

(a) Unless the bylaws provide otherwise, a quorum is present throughout any meeting of the association if persons entitled to cast [20] percent of the votes that may be cast for election of the executive board are present in person or by proxy at the beginning of the meeting.

(b) Unless the bylaws specify a larger percentage, a quorum is deemed present throughout any meeting of the executive board if persons entitled to cast [50] percent of the votes on that board are present at the beginning of the meeting.

COMMENT

Mandatory quorum requirements lower than 50 percent for meetings of the association are often justified because of the common difficulty of inducing unit owners to attend meetings. The problem is particularly acute in the case of resort common interest communities where many owners may reside elsewhere, often at considerable distances, for most of the year.

3-110. Voting; Proxies

(a) If only one of several owners of a unit is present at a meeting of the association, that owner is entitled to cast all the votes allocated to that unit. If more than one of the owners are present, the votes allocated to that unit may be cast only in accordance with the agreement of a majority in interest of the owners, unless the declaration expressly provides otherwise. There is majority agreement if any one of the owners casts the votes allocated to that unit without protest being made promptly to the person presiding over the meeting by any of the other owners of the unit.

(b) Votes allocated to a unit may be cast pursuant to a proxy duly executed by a unit owner. If a unit is owned by more than one person, each owner of the unit may vote or register protest to the casting of votes by the other owners of the unit through a duly executed proxy. A unit owner may revoke a proxy given pursuant to this section only by actual notice of revocation to the person presiding over a meeting of the association. A proxy is void if it is not dated or purports to be revocable without notice. A proxy terminates one year after its date, unless it specifies a shorter term.

(c) 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: (i) the provisions of subsections (a) and (b) apply to lessees as if they were unit owners; (ii) unit owners who have leased their units to other persons may not cast votes on those specified matters; and (iii) lessees are entitled to notice of meetings, access to records, and other rights respecting those matters as if they were unit owners. Unit owners must also be given notice, in the manner provided in Section 3-108, of all meetings at which lessees are entitled to vote.

(d) No votes allocated to a unit owned by the association may be cast.

COMMENT

Subsection (c) addresses an increasingly important matter in the governance of common interest communities: the role of tenants occupying units owned by investors or other persons. Most present statutes require voting by owners in the association. However, it may be desirable to give lessees, rather than lessors, of units the right to vote on issues involving day-to-day operation both because the lessees may have a greater interest than the lessors and because it is desirable to have lessees feel they are an integral part of the common interest community.

§ 3-111. Tort and Contract Liability

Neither the association nor any unit owner except the declarant is liable for that declarant's torts in connection with any part of the common interest community which that declarant has the responsibility to maintain. Otherwise, an action alleging a wrong done by the association must be brought against the association and not against any unit owner. If the wrong occurred during any period of declarant control and the association gives the declarant reasonable notice of and an opportunity to defend against the action, the declarant who then controlled the association is liable to the association or to any unit owner for (i) all tort losses not covered by insurance suffered by the association or that unit owner, and (ii) all costs that the association would not have incurred but for a breach of contract or other wrongful act or omission. Whenever the declarant is liable to the association under this section, the declarant is also liable for all expenses of litigation, including reasonable attorney's fees, incurred by the association. Any statute of limitation affecting the association's right of action under this section is tolled until the period of declarant control terminates. A unit owner is not precluded from maintaining an action contemplated by this section because he is a unit owner or a member or officer of the association. Liens resulting from judgments against the association are governed by Section 3-117 (Other Liens).

COMMENT

1. This section provides that any action in tort or contract arising out of acts or omissions of the association shall be brought against the association and not against the individual unit owners. This changes the law in states where plaintiffs are forced to name individual unit owners as the real parties in interest to any action brought against the association. The subsection also provides that a unit owner is not precluded from bringing an action in tort or contract against the association solely because he is a unit owner or a member or officer of the association.

2. In recognition of the practical control that can (and in most cases will) be exercised by a declarant over the affairs of the association during any period of declarant control permitted pursuant to Section 3-103, subsection (a) provides that the association or any unit owner has a right of action against the declarant for any losses (including both payment of damages and attorneys' fees) suffered by the association or any unit owner as a result of an action based upon a tort or breach of contract arising during any period of declarant control. To assure that the decision to bring such an action can be made by an executive board free from the influence of the declarant, the subsection also provides that any statute of limitations affecting such a right of action by the association shall be tolled until the expiration of any period of declarant control.

3. If a suit based on a claim which accrued during the period of developer control is brought against the association after control of the association has passed from the developer, reason-

able notice and grant of an opportunity to the developer to defend, are conditions to developer liability. If, however, suit is brought against the association while the developer is still in control, obviously the developer cannot later resist a suit by the association for reimbursement on the grounds of failure to notify.

§ 3-112. Conveyance or Encumbrance of Common Elements

(a) In a condominium or planned community, portions of the common elements may be conveyed or subjected to a security interest by the association if persons entitled to cast at least [80] percent of the votes in the association, including [80] percent of the votes allocated to units not owned by a declarant, or any larger percentage the declaration specifies, agree to that action; but all owners of units to which any limited common element is allocated must agree in order to convey that limited common element or subject it to a security interest. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to non-residential uses. Proceeds of the sale are an asset of the association.

(b) Part of a cooperative may be conveyed and all or part of a cooperative may be subjected to a security interest by the association if persons entitled to cast at least [80] percent of the votes in the association, including [80] percent of the votes allocated to units not owned by a declarant, or any larger percentage the declaration specifies, agree to that action; but, if fewer than [all] of the units or limited common elements are to be conveyed or subjected to a security interest, then all unit owners of those units, or the units to which those limited common elements are allocated, must agree in order to convey those units or limited common elements or subject them to a security interest. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential uses. Proceeds of the sale are an asset of the association. Any purported conveyance or other voluntary transfer of an entire cooperative, unless made pursuant to Section 2-118, is void.

(c) An agreement to convey common elements in a condominium or planned community, or to subject them to a security interest, or in a cooperative, an agreement to convey any part of a cooperative or subject it to a security interest, must be evidenced by the execution of an agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of unit owners. The agreement must specify a date after which the agreement will be void unless recorded before that date. The agreement and all ratifications thereof must be recorded in every [county] in which a portion of the common interest community is situated, and is effective only upon recordation.

(d) The association, on behalf of the unit owners, may contract to convey an interest in a common interest community pursuant to subsection (a), but the contract is not enforceable against the association until approved pursuant to subsections (a), (b), and (c). Thereafter, the association has all powers necessary and appropriate to effect the conveyance or encumbrance, including the power to execute deeds or other instruments.

(e) Unless made pursuant to this section, any purported conveyance, encumbrance, judicial sale, or other voluntary transfer of common elements or of any other part of a cooperative is void.

(f) A conveyance or encumbrance of common elements or of a cooperative pursuant to this section does not deprive any unit of its rights of access and support.

(g) Unless the declaration otherwise provides, a conveyance or encumbrance of common elements pursuant to this section does not affect the priority or validity of pre-existing encumbrances.

(h) In a cooperative, the association may acquire, hold, encumber, or convey a proprietary lease without complying with this section.

Comment

Subsection (a) provides that a condominium or planned community association may sell or encumber portions of the common elements and subsection (b) provides that a cooperative association may sell part, or encumber all, of the cooperative. The difference in treatment of condominiums and planned communities, on the one hand, and cooperatives, on the other, arises out of the fact that in a cooperative title to the entire cooperative is in the association. Also, historically, cooperative associations have had greater control over the regime real estate, including the units, than has been the case in condominiums or planned communities.

The power given by subsections (a) and (b) can be exercised only on agreement of unit owners holding 80% of the votes in the association (80% is the percentage required for termination of a common interest community under Section 2-118). This power may be exercised during the period of declarant control, but, in order to be effective, 80% of non-declarant unit owners must approve the action. The ability, without termination, to sell common elements in a condominium or planned community or to sell part of a cooperative gives common interest communities desirable flexibility. For example, the unit owners, some years after the initial creation of the common interest community may decide to convey away a portion of the open space which has been reserved as a part of the common elements because they no longer find the area useful or because they wish to use sale proceeds to make other improvements. Similarly, the ability to encumber real estate in the common interest community gives the association power to raise money for improvements through the device of mortgaging the improvements themselves. Of course, recreational improvements will frequently not be sufficient security for a loan for their construction. Nevertheless, the ability to take a security interest in such improvements may lead lenders to be more favorably disposed toward making a loan in larger amounts and at lower interest rates.

2. Subsection (c) requires that the agreement for sale or encumbrance be evidenced by the execution of an agreement in the same manner as a deed by the requisite majority of the unit owners. The agreement then must be recorded in the land records. The recorded agreement signed by the unit owners is not the conveyance itself, but is rather a supporting document which shows that the association has full power to execute a deed or mortgage. Under subsection (d) it is contemplated that the association will execute the normal instrument of conveyance. Under subsection (f), a conveyance or encumbrance under this section may not deprive a unit owner of rights of access and support.

§ 3-113. Insurance

(a) Commencing not later than the time of the first conveyance of a unit to a person other than a declarant, the association shall maintain, to the extent reasonably available:

(1) property insurance on the common elements and, in a planned community, also on property that must become common elements, insuring against all risks of direct physical loss commonly insured against or, in the case of a conversion building, against fire and extended coverage perils. The total amount of insurance after application of any deductibles must be not less than 80 percent of the actual cash value of the insured property at the time the insurance is purchased and at each renewal date, exclusive of land, excavations, foundations, and other items normally excluded from property policies; and

(2) liability insurance, including medical payments insurance, in an amount determined by the executive board but not less than any amount specified in the declaration, covering all occurrences commonly insured against for death, bodily injury, and property damage arising out of or in

connection with the use, ownership, or maintenance of the common elements and, in cooperatives, also of all units.

(b) In the case of a building that is part of a cooperative or that contains units having horizontal boundaries described in the declaration, the insurance maintained under subsection (a)(1), to the extent reasonably available, must include the units, but need not include improvements and betterments installed by unit owners.

(c) If the insurance described in subsections (a) and (b) is not reasonably available, the association promptly shall cause notice of that fact to be hand-delivered or sent prepaid by United States mail to all unit owners. The declaration may require the association to carry any other insurance, and the association in any event may carry any other insurance it considers appropriate to protect the association or the unit owners.

(d) Insurance policies carried pursuant to subsections (a) and (b) must provide that:

(1) each unit owner is an insured person under the policy with respect to liability arising out of his interest in the common elements or membership in the association;

(2) the insurer waives its right to subrogation under the policy against any unit owner or member of his household;

(3) no act or omission by any unit owner, unless acting within the scope of his authority on behalf of the association, will void the policy or be a condition to recovery under the policy; and

(4) if, at the time of a loss under the policy, there is other insurance in the name of a unit owner covering the same risk covered by the policy, the association's policy provides primary insurance.

(e) Any loss covered by the property policy under subsections (a)(1) and (b) must be adjusted with the association, but the insurance proceeds for that loss are payable to any insurance trustee designated for that purpose, or otherwise to the association, and not to any holder of a security interest. The insurance trustee or the association shall hold any insurance proceeds in trust for the association, unit owners, and lien holders as their interests may appear. Subject to the provisions of subsection (h), the proceeds must be disbursed first for the repair or restoration of the damaged property, and the association, unit owners, and lien holders are not entitled to receive payment of any portion of the proceeds unless there is a surplus of proceeds after the property has been completely repaired or restored, or the common interest community is terminated.

(f) An insurance policy issued to the association does not prevent a unit owner from obtaining insurance for his own benefit.

(g) An insurer that has issued an insurance policy under this section shall issue certificates or memoranda of insurance to the association and, upon written request, to any unit owner or holder of a security interest. The insurer issuing the policy may not cancel or refuse to renew it until [30] days after notice of the proposed cancellation or non-renewal has been mailed to the association, each unit owner and each holder of a security interest to whom a certificate or memorandum of insurance has been issued at their respective last known addresses.

(h) Any portion of the common interest community for which insurance is required under this section which is damaged or destroyed must be repaired or replaced promptly by the association unless (i) the common interest community is terminated, in which case Section 2-118 applies (ii) repair or replacement would be illegal under any state or local statute or ordinance governing health or safety, or (iii) [80] percent of the unit owners, including every owner of a unit or assigned limited common element that will not be rebuilt, vote not to rebuild. The cost of repair or replacement in excess of insurance proceeds and reserves is a common expense. If the entire common interest community is not repaired or replaced, (i) the insurance proceeds attributable to

the damaged common elements must be used to restore the damaged area to a condition compatible with the remainder of the common interest community, and (ii) except to the extent that other persons will be distributees (Section 2-105(a)(2)(ii)), (A) the insurance proceeds attributable to units and limited common elements that are not rebuilt must be distributed to the owners of those units and the owners of the units to which those limited common elements were allocated, or to lien holders, as their interests may appear, and (B) the remainder of the proceeds must be distributed to all the unit owners or lien holders, as their interests may appear, as follows: (1) in a condominium, in proportion to the common element interests of all the units and (2) in a cooperative or planned community, in proportion to the common expense liabilities of all the units. If the unit owners vote not to rebuild any unit, that unit's allocated interests are automatically reallocated upon the vote as if the unit had been condemned under Section 1-107(a), and the association promptly shall prepare, execute, and record an amendment to the declaration reflecting the reallocations.

(i) The provisions of this section may be varied or waived in the case of a common interest community all of whose units are restricted to non-residential use.

COMMENT

1. Subsections (a) and (b) provide that the required insurance must be maintained only to the extent reasonably available. This permits the association to comply with the insurance requirements even if certain coverages are unavailable or unreasonably expensive.

2. Subsection (b) represents a significant departure from the present law as to condominiums and planned communities in virtually all states by requiring that the association obtain and maintain property insurance on *both* the common elements *and* the units within buildings with "stacked" units. *See* Comment 3. While it has been common practice in many parts of the country (either by custom or as mandated by statute) for associations to maintain property insurance on the common elements, it has generally not been the practice for the property insurance policy to cover individual units as well. However, given the great interdependence of the unit owners in the stacked unit situation, mandating property insurance for the entire building is the preferable approach. Moreover, such an approach will greatly simplify claims procedures, particularly where both common elements and portions of a unit have been destroyed. If common elements and units are insured separately, the insurers could be involved in disputes as to the coverage provided by each policy.

The Act does not mandate association insurance on condominium or planned community units in town house or other arrangements in which there are no stacked units. However, if the developer wishes, the declaration may require association insurance as to units having shared walls or as to all units in the development. Many developments will have some units with horizontal boundaries and other units with no horizontal boundaries. In that case, association insurance as to the units having horizontal boundaries is required, but it is not necessary as to other units.

In a cooperative, the association must carry insurance on all units since legal title to all units is in the association.

3. The distinction between what is a common element and what is a unit with respect to the insurance coverage required by this section is complex. The definitions of common elements and a unit in Section 1-103(4) and (31) are not sufficient for this purpose. To determine the distinction between the common elements and units, one must refer first to the declaration's section on unit boundaries. That section will define the unit boundaries. If the declaration fails to do so, and if ceilings, walls, or floors are boundaries, the provisions of Section 2-102 apply.

Section 2-102 provides that, if the declaration is silent, all non-loadbearing and non-structural portions of the walls, floors and ceilings are part of the unit, while all loadbearing and structural portions of the walls, floors and ceilings are common elements. Further, with respect to any structure partially within and partially outside of the boundaries of a unit, any portion thereof serving only that unit is a lim-

lited common element (see definition in Section 1-103(19)), and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements.

Under 2-102, all spaces, interior partitions, electrical, plumbing and mechanical systems, and all other items within the boundaries of the unit which are attached to the unit boundaries, whether or not deemed fixtures under state law, are part of the unit.

Put simply, if any item is installed, constructed, repaired or replaced by the declarant or his successor in connection with the original sale of a stacked unit, the item is insured by the association. Clearly, this does not include items of personal property easily movable within the unit or easily removable from the unit (whether or not deemed a fixture under state law), such as a vase, table or other furnishings. If improvements or betterments are made to a unit by a unit owner, they will typically be covered under the owner's insurance policy, even if the unit itself is generally covered by the association's policy, since most policies exclude "improvements or betterments made by the owner", and the Act does not mandate improvements and betterments coverage. The subject is a complex one, and careful attention should be paid to it by the association's insurance advisor.

4. Although "all risk" coverage is not required as to conversion buildings, but merely fire and extended coverage, this is not intended to imply that such coverage is unnecessary. "All risk" coverage is not required because it may not be appropriate in the case of an unrenovated conversion where cost is a critical factor.

5. The minimum requirement as to the amount of insurance, which is 80% of the actual cash value, should not be viewed as a recommendation; rather, the 80% is a floor. Typically, many common interest community documents require insurance in an amount equal to *100% of the replacement cost* of the insured property. The Act permits greater flexibility, however, inasmuch as different types of construction and varieties of projects may not require such total coverage with its attendant higher premium cost.

6. Subsection (a)(2) covers only the liability of the association, and unit owners as members, but does not cover the unit owner's individual liability for his acts or omissions or liability for occurrences within his unit.

7. Clause (i) of the third sentence of subsection (b) would operate as follows: (1) if the common interest community consists of composites, restoration after fire damage might consist of merely resodding the area damaged; (2) if the common interest community consists of separate garden-type buildings, restoration after fire damage might consist of demolishing the remaining structure and paving or landscaping the area; and (3) if the common interest community consists of a single high-rise building, restoration may not be required (if the building is substantially destroyed) inasmuch as "a condition compatible with the remainder of the common interest community" would be damaged and unrestored.

8. The scheme of this section, as set forth in subsection (b), is that any damage or destruction to any portion of the common interest community must be repaired (if repairs can be made consistent with applicable safety and health laws) absent a decision to terminate the common interest community or a decision by 80% of the unit owners (including the owners of any damaged units) not to rebuild. Unless a decision is made not to rebuild, any available insurance proceeds must be used to effectuate such repairs. For this reason, subsection (c) provides that any loss covered by the association's property insurance policy shall be adjusted with the association and that the proceeds for any loss shall be payable to the association or to any insurance trustee that may be designated for such purpose. Significantly, such insurance proceeds may not be paid to any mortgagee or other outside party. This provision is necessary to insure that insurance proceeds are available to effectuate any repairs or restoration to the common interest community that may be required.

If units or limited common elements are not rebuilt, insurance proceeds are to be distributed to lienholders or owners of units unless the declaration provides that such payments are to go to some other person."

§ 3-114. Surplus Funds

Unless otherwise provided in the declaration, any surplus funds of the association remaining after payment of or provision for common expenses and any prepayment of reserves may be paid to the unit owners in proportion to their common expense liabilities or credited to them to reduce their future common expense assessments.

COMMENT

Surplus funds of the association are generally used first for the pre-payment of reserves, and remaining funds are thereafter credited to the account of unit owners or paid to them. In some cases, however, unit owners might prefer that surplus funds be used for other purposes (*e.g.*, the purchase of recreational equipment). Accordingly, this section permits the declaration to specify any other use of surplus funds.

§ 3-115. Assessments for Common Expenses

(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 at least annually, based on a budget adopted at least annually by the association.

(b) Except for assessments under subsections (c), (d), and (e), 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). Any past due common expense assessment or instalment thereof bears interest at the rate established by the association not exceeding [18] percent per year.

(c) To the extent required by the declaration:

(1) any common expense associated with the maintenance, repair, or replacement of a limited common element must be assessed against the units to which that limited common element is assigned, equally, or in any other proportion the declaration provides;

(2) any common expense or portion thereof benefiting fewer than all of the units must be assessed exclusively against the units benefited; and

(3) the costs of insurance must be assessed in proportion to risk and the costs of utilities must be assessed in proportion to usage.

(d) Assessments to pay a judgment against the association (Section 3-117(a)) 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) If any common expense is caused by the misconduct of any unit owner, the association may assess that expense exclusively against his unit.

(f) If common expense liabilities are reallocated, common expense assessments and any instalment thereof 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 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

connection with the use, ownership, or maintenance of the common elements and, in cooperatives, also of all units.

(b) In the case of a building that is part of a cooperative or that contains units having horizontal boundaries described in the declaration, the insurance maintained under subsection (a)(1), to the extent reasonably available, must include the units, but need not include improvements and betterments installed by unit owners.

(c) If the insurance described in subsections (a) and (b) is not reasonably available, the association promptly shall cause notice of that fact to be hand-delivered or sent prepaid by United States mail to all unit owners. The declaration may require the association to carry any other insurance, and the association in any event may carry any other insurance it considers appropriate to protect the association or the unit owners.

(d) Insurance policies carried pursuant to subsections (a) and (b) must provide that:

(1) each unit owner is an insured person under the policy with respect to liability arising out of his interest in the common elements or membership in the association;

(2) the insurer waives its right to subrogation under the policy against any unit owner or member of his household;

(3) no act or omission by any unit owner, unless acting within the scope of his authority on behalf of the association, will void the policy or be a condition to recovery under the policy; and

(4) if, at the time of a loss under the policy, there is other insurance in the name of a unit owner covering the same risk covered by the policy, the association's policy provides primary insurance.

(e) Any loss covered by the property policy under subsections (a)(1) and (b) must be adjusted with the association, but the insurance proceeds for that loss are payable to any insurance trustee designated for that purpose, or otherwise to the association, and not to any holder of a security interest. The insurance trustee or the association shall hold any insurance proceeds in trust for the association, unit owners, and lien holders as their interests may appear. Subject to the provisions of subsection (h), the proceeds must be disbursed first for the repair or restoration of the damaged property, and the association, unit owners, and lien holders are not entitled to receive payment of any portion of the proceeds unless there is a surplus of proceeds after the property has been completely repaired or restored, or the common interest community is terminated.

(f) An insurance policy issued to the association does not prevent a unit owner from obtaining insurance for his own benefit.

(g) An insurer that has issued an insurance policy under this section shall issue certificates or memoranda of insurance to the association and, upon written request, to any unit owner or holder of a security interest. The insurer issuing the policy may not cancel or refuse to renew it until [30] days after notice of the proposed cancellation or non-renewal has been mailed to the association, each unit owner and each holder of a security interest to whom a certificate or memorandum of insurance has been issued at their respective last known addresses.

(h) Any portion of the common interest community for which insurance is required under this section which is damaged or destroyed must be repaired or replaced promptly by the association unless (i) the common interest community is terminated, in which case Section 2-118 applies (ii) repair or replacement would be illegal under any state or local statute or ordinance governing health or safety, or (iii) [80] percent of the unit owners, including every owner of a unit or assigned limited common element that will not be rebuilt, vote not to rebuild. The cost of repair or replacement in excess of insurance proceeds and reserves is a common expense. If the entire common interest community is not repaired or replaced, (i) the insurance proceeds attributable to

the damaged common elements must be used to restore the damaged area to a condition compatible with the remainder of the common interest community, and (ii) except to the extent that other persons will be distributees (Section 2-105(a)(12)(ii)), (A) the insurance proceeds attributable to units and limited common elements that are not rebuilt must be distributed to the owners of those units and the owners of the units to which those limited common elements were allocated, or to lien holders, as their interests may appear, and (B) the remainder of the proceeds must be distributed to all the unit owners or lien holders, as their interests may appear, as follows: (1) in a condominium, in proportion to the common element interests of all the units and (2) in a cooperative or planned community, in proportion to the common expense liabilities of all the units. If the unit owners vote not to rebuild any unit, that unit's allocated interests are automatically reallocated upon the vote as if the unit had been condemned under Section 1-107(a), and the association promptly shall prepare, execute, and record an amendment to the declaration reflecting the reallocations.

(i) The provisions of this section may be varied or waived in the case of a common interest community all of whose units are restricted to non-residential use.

COMMENT

1. Subsections (a) and (b) provide that the required insurance must be maintained only to the extent reasonably available. This permits the association to comply with the insurance requirements even if certain coverages are unavailable or unreasonably expensive.

2. Subsection (b) represents a significant departure from the present law as to condominiums and planned communities in virtually all states by requiring that the association obtain and maintain property insurance on *both* the common elements *and* the units within buildings with "stacked" units. *See* Comment 3. While it has been common practice in many parts of the country (either by custom or as mandated by statute) for associations to maintain property insurance on the common elements, it has generally not been the practice for the property insurance policy to cover individual units as well. However, given the great interdependence of the unit owners in the stacked unit situation, mandating property insurance for the entire building is the preferable approach. Moreover, such an approach will greatly simplify claims procedures, particularly where both common elements and portions of a unit have been destroyed. If common elements and units are insured separately, the insurers could be involved in disputes as to the coverage provided by each policy.

The Act does not mandate association insurance on condominium or planned community units in town house or other arrangements in which there are no stacked units. However, if the developer wishes, the declaration may require association insurance as to units having shared walls or as to all units in the development. Many developments will have some units with horizontal boundaries and other units with no horizontal boundaries. In that case, association insurance as to the units having horizontal boundaries is required, but it is not necessary as to other units.

In a cooperative, the association must carry insurance on all units since legal title to all units is in the association.

3. The distinction between what is a common element and what is a unit with respect to the insurance coverage required by this section is complex. The definitions of common elements and a unit in Section 1-103(4) and (31) are not sufficient for this purpose. To determine the distinction between the common elements and units, one must refer first to the declaration's section on unit boundaries. That section will define the unit boundaries. If the declaration fails to do so, and if ceilings, walls, or floors are boundaries, the provisions of Section 2-102 apply.

Section 2-102 provides that, if the declaration is silent, all non-loadbearing and non-structural portions of the walls, floors and ceilings are part of the unit, while all loadbearing and structural portions of the walls, floors and ceilings are common elements. Further, with respect to any structure partially within and partially outside of the boundaries of a unit, any portion thereof serving only that unit is a liev-

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. Under subsection (c), the declaration may provide for assessment on a basis other than the allocation made in Section 2-107 as to limited common elements, other expenses benefiting less than all units, insurance costs, and utility costs.

3. If additional units are added to a common interest community after a judgment has been entered against the association, the new units are not assessed any part of the judgment debt. Since unit owners will know the assessment, and since such unpaid judgment assessments would affect the price paid by purchasers of units, it would be complicated and unnecessary to fairness to reallocate judgment assessments when new units are added.

4. Subsection (f) refers to those instances in which various provisions of this Act require that common expense liabilities be reallocated among the units of a common interest community by amendment to the declaration. These provisions include Section 1-107 (Eminent Domain), Section 2-106(d) (expiration of certain leases), Section 2-110 (Exercise of Development Rights) and Section 2-113(b) (subdivision of units).

§ 3-116. Lien for Assessments

(a) The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12) are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes, or takes subject to, (ii) a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. [The lien under this section is not subject to the provisions of [Insert appropriate reference to state homestead, dower and curtesy, or other exemptions].]

(c) Unless the declaration otherwise provides, if 2 or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

(d) Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

(e) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within [3] years after the full amount of the assessments becomes due.

(f) This section does not prohibit actions to recover sums for which subsection (a) creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

(g) A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

(h) The association upon written request shall furnish to a unit owner a statement setting forth the amount of unpaid assessments against the unit. If the unit owner's interest is real estate, the statement must be in recordable form. The statement must be furnished within [10] business days after receipt of the request and is binding on the association, the executive board, and every unit owner.

(i) In a cooperative, upon nonpayment of an assessment on a unit, the unit owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and the lien may be foreclosed as provided by this section.

(j) The association's lien may be foreclosed as provided in this subsection:

(1) In a condominium or planned community, the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [Insert appropriate state statute]];

(2) In a cooperative whose unit owners' interests in the units are real estate (Section 1-105), the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [Insert appropriate state statute]] [or by power of sale under subsection (k)]; or

(3) In a cooperative whose unit owners' interests in the units are personal property (Section 1-105), the association's lien must be foreclosed in like manner as a security interest under [Insert reference to Article 9, Uniform Commercial Code.]

[(4) In the case of foreclosure under [Insert reference to state power of sale statute], the association shall give reasonable notice of its action to all lien holders of the unit whose interest would be affected.]

[(k) In a cooperative, if the unit owner's interest in a unit is real estate (Section 1-105):

(1) The association, upon non-payment of assessments and compliance with this subsection, may sell that unit at a public sale or by private negotiation, and at any time and place. Every aspect of the sale, including the method, advertising, time, place, and terms must be reasonable. The association shall give to the unit owner and any lessees of the unit owner reasonable written notice of the time and place of any public sale or, if a private sale is intended, of the intention of entering into a contract to sell and of the time after which a private disposition may be made. The same notice must also be sent to any other person who has a recorded interest in the unit which would be cut off by the sale, but only if the recorded interest was on record 7 weeks before the date specified in the notice as the date of any public sale or 7 weeks before the date specified in the notice as the date after which a private sale may be made. The notices required by this subsection may be sent to any address reasonable in the circumstances. Sale may not be held until 5 weeks after the sending of the notice. The association may buy at any public sale and, if the sale is conducted by a fiduciary or other person not related to the association, at a private sale.

(2) Unless otherwise agreed, the debtor is liable for any deficiency in a foreclosure sale.

(3) The proceeds of a foreclosure sale must be applied in the following order:

(i) the reasonable expenses of sale;

(ii) the reasonable expenses of securing possession before sale; holding, maintaining, and preparing the unit for sale, including pay-

ment of taxes and other governmental charges, premiums on hazard and liability insurance, and, to the extent provided for by agreement between the association and the unit owner, reasonable attorney's fees and other legal expenses incurred by the association;

(iii) satisfaction of the association's lien;

(iv) satisfaction in the order of priority of any subordinate claim of record; and

(v) remittance of any excess to the unit owner.

(4) A good faith purchaser for value acquires the unit free of the association's debt that gave rise to the lien under which the foreclosure sale occurred and any subordinate interest, even though the association or other person conducting the sale failed to comply with the requirements of this section. The person conducting the sale shall execute a conveyance to the purchaser sufficient to convey the unit and stating that it is executed by him after a foreclosure of the association's lien by power of sale and that he was empowered to make the sale. Signature and title or authority of the person signing the conveyance as grantor and a recital of the facts of non-payment of the assessment and of the giving of the notices required by this subsection are sufficient proof of the facts recited and of his authority to sign. Further proof of authority is not required even though the association is named as grantee in the conveyance.

(5) At any time before the association has disposed of a unit in a cooperative or entered into a contract for its disposition under the power of sale, the unit owner[s] or the holder of any subordinate security interest may cure the unit owner's default and prevent sale or other disposition by tendering the performance due under the security agreement, including any amounts due because of exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees of the creditor.]

COMMENT

1. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (b) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first security interests recorded before the date the assessment became delinquent. However, as to prior first security interests the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit. If the lender wishes, no escrow for assessments can be required. Since this provision may conflict with the provisions of some state statutes which forbid some lending institutions from making loans not secured by first priority liens, the law of each state should be reviewed and amended when necessary.

In cooperatives, the association has legal title to the units and depending on the election made in the declaration pursuant to Section 2-118(1) may have power to create, assume, or take subject to security interest[s] in the units which have priority over the interest of unit owners. Obviously, the cooperative association's lien should not have priority over an interest which the association itself has given, assumed, or taken subject to and subsection (b) expressly so provides.

The special reference to cooperatives in subsection (b)(iii) merely recognizes that in a cooperative both the association and the unit owner have an interest in a unit.

2. Units may be part of two common interest communities. For example, a large real estate development may consist of one or more condominiums which are also part of a larger planned community. In that case, the planned community association might assess the condominium units for the general maintenance expenses of the planned community and the condominium association would assess for the direct maintenance expenses of the building itself. In such a situation, subsection (c) provides that unpaid liens of the two associations have equal priority regardless of the relative time of creation of the two regimes and regardless of the time the assessments were made or became delinquent.

3. Subsection (f) makes clear that the association may have remedies short of foreclosure of its lien that can be used to collect unpaid assessments. The association, for example, might bring an action in debt or breach of contract against a recalcitrant unit owner rather than resorting to foreclosure.

4. The rights of the association against a unit upon nonpayment of an assessment on that unit depends on whether the common interest community is a condominium or planned community on the one hand, or a cooperative on the other.

In the typical cooperative the association will have a substantial underlying mortgage on all or a substantial portion of the real estate in the cooperative and a large part of each unit owner's periodic assessment will go toward payment of that particular unit's proportionate share of the mortgage. If the unit owner fails to pay his assessment on time, the association may be forced into default on its own mortgage payments with consequent possible foreclosure of the underlying mortgage and loss by all unit owners of their interests in the cooperative. Therefore, in the cooperative context it is essential that the cooperative association have a fast and effective remedy for failure of a unit owner to pay his assessment. The act provides in Subsection (i) that upon nonpayment the cooperative unit owner may be evicted in the same manner as an unlawfully holding over commercial tenant. Those rules will ordinarily be the most rapid and efficient rules in the state as to eviction of tenants.

If the unit owner's interest is real estate, subsection (j)(2) then offers the state two alternatives as to nonjudicial foreclosure of a cooperative association's lien. The first alternative is power of sale under any existing state statute authorizing power of sale under mortgages. If there is no power of sale statute or if the legislature chooses to adopt a special power of sale provision for foreclosure of the lien on cooperative units, the state can choose the 2d alternative, power of sale under subsection (k) of this section.

Subsection (k), which is patterned after the power of sale foreclosure provisions of the Uniform Land Transactions Act, is a modern power of sale provision which frees private power of sale foreclosure from many of the costly, time consuming, and inefficiency producing strictures of most existing private power of sale statutes. At the same time, it provides reasonable protection to the unit owner and junior interests.

If the unit owners' interest in a cooperative is personal property, the association's lien is foreclosed as if it were a security interest under Article 9 of the Uniform Commercial Code. Article 9 foreclosure is generally less expensive and faster than either judicial or power of sale real estate foreclosure. This difference in cost and speed of foreclosure, both for association liens and security interests, is one of the major factors to be considered in choosing whether, under Section 1-105, a unit owner's interest in a cooperative will be real property or personal property. Article 9 foreclosure is currently used in foreclosing security interests in mobile homes, and has been accepted in the various states as a permissible method of foreclosure in that housing area without serious challenge.

In a condominium or planned community, there is not likely to be a substantial underlying mortgage for which unit owners are assessed. Therefore, failure to pay assessments on time will have less serious consequences for the association than in the case of cooperatives. The section provides that the association lien in a condominium or planned community is to be foreclosed according to the rules generally applicable to real estate mortgages in the state rather than setting out a special faster method of foreclosure in the statute.

§ 3-117. Other Liens

(a) In a condominium or planned community:

(1) Except as provided in paragraph (2), a judgment for money against the association [if recorded] [if docketed] [if (insert other procedures required under state law to perfect a lien on real estate as a result of a judgment)], is not a lien on the common elements, but is a lien in favor of the judgment lien holder against all of the units in the common interest community at the time the judgment was entered. No other property of a unit owner is subject to the claims of creditors of the association.

(2) If the association has granted a security interest in the common elements to a creditor of the association pursuant to Section 3-112, the holder of that security interest shall exercise its right against the common elements before its judgment lien on any unit may be enforced.

(3) Whether perfected before or after the creation of the common interest community, if a lien, other than a deed of trust or mortgage (including a judgment lien or lien attributable to work performed or materials supplied before creation of the common interest community), becomes effective against two or more units, the unit owner of an affected unit may pay to the lien holder the amount of the lien attributable to his unit, and the lien holder, upon receipt of payment, promptly shall deliver a release of the lien covering that unit. The amount of the payment must be proportionate to the ratio which that unit owner's common expense liability bears to the common expense liabilities of all unit owners whose units are subject to the lien. After payment, the association may not assess or have a lien against that unit owner's unit for any portion of the common expenses incurred in connection with that lien.

(4) A judgment against the association must be indexed in the name of the common interest community and the association and, when so indexed, is notice of the lien against the units.

(b) In a cooperative:

(1) If the association receives notice of an impending foreclosure on all or any portion of the association's real estate, the association shall promptly transmit a copy of that notice to each unit owner of a unit located within the real estate to be foreclosed. Failure of the association to transmit the notice does not affect the validity of the foreclosure.

(2) Whether or not a unit owner's unit is subject to the claims of the association's creditors, no other property of a unit owner is subject to those claims.

COMMENT

1. This section deals with the effect on unit owners of judgments against the association. The issue is not free from difficulty. Presently, in most states, if the association is organized as a corporation, the unit owners are likely to receive the insulation from liability given shareholders of a corporation, so that the judgment lienholder can satisfy his judgment only against the property of the association. On the other hand, if the association is organized as an unincorporated association, under the law of most states each unit owner would have joint and several liability on the judgment. This Act strikes a balance between the two extremes.

2. In condominiums and planned communities, the Act makes the judgment lien a direct lien against each individual unit, but allows the individual unit owner to discharge the lien by payment of his pro-rata share of the judgment based on that unit's relative common expense liability. The judgment would also create a lien against any property owned by the association. In cooperatives, title to the units is in the cooperative so that it is not necessary for the Act to provide that a judgment against the association creates a lien against units. The Act does provide, however, that no property of a cooperative unit owner other than the unit is subject to the claims of association creditors. The result is that the relationship between creditors of the association and unit owners is similar in all three forms of ownership.

There are, however, significant differences between cooperatives and condominiums or planned communities as to the position of unit owners as against association creditors. In one respect cooperative unit owners have greater liability than condominium or planned community unit owners and in another respect they have lesser liability.

They have greater liability in that, in a cooperative, if a judgment lien has priority over a unit owner's interest in a unit, the lien against the unit is not limited to the unit's common expense liability percentage. In contrast, in a condominium or planned community, the lien against a unit is only for the unit owner's pro rata share of the judgment. For example, suppose a four unit project in which there is a judgment against the association for $50,000. Further suppose that each of the units has a value of $100,000 and that there are outstanding mortgages as follows:

	Unit A	Unit B	Unit C	Unit D
Value	$100,000	$100,000	$100,000	$100,000
Mortgage	50,000	90,000	90,000	75,000
Equity	50,000	10,000	10,000	25,000

In a condominium or planned community, the judgment lien attaches to each unit in proportion to that unit's liability for common expense liability. If, in the above example, the common expense liability is equal, the lien would attach to each unit for $12,500. Therefore, the association judgment creditor could reach the full equity of Unit owners B and C in their units, but could reach only $12,500 of the interest of Unit owners A and D. Since the association cannot assess A and D for any additional amounts of the judgment, if B and C allow their interest to be foreclosed and foreclosure produces only $20,000, the association judgment creditor will collect only $15,000 of its $50,000 judgment. That is less than it would collect if all unit owners' interests in units were fully liable, but more than it would collect if only association assets were subject to attachment. (The judgment creditor may, however, satisfy his judgment in full by reaching the income stream of the association by appropriate creditor process.)

In a cooperative, on the other hand, the association creditor can reach the entire interest of any of the unit owners in their units and will have its judgment satisfied in full.

The liability of cooperative unit owners to association judgment creditors is less than that of unit owners in condominiums and planned communities in that there is no statutory provision giving the judgment creditor a direct lien against units. Since, in a cooperative, title to the units is in the cooperative, a judgment creditor of the association will have a lien on the units, but under ordinary recording and priority rules, that lien will be subordinate to unit owner interests in units if those interests were recorded prior to the attachment of the judgment lien. Therefore, in a cooperative, there is a possibility that the judgment lienor will have no rights as against the interests of the unit owners. However, the declaration may provide that association creditors have priority over the interests of cooperative unit owners, and, if it does so, such a provision is effective (See Section 2-118), and even in the absence of Section 2-118 would be effective, as a general subordination of unit owner interest to creditors of the association. (The Act in Section 2-118 requires that all creditors of the association be treated in the same way as to priority against unit owners so that the declaration cannot provide, for example, that only contract creditors have priority over unit owners or, for another example, that only regulated financial institution debt has priority. However, the unit owners might subordinate their interest to the rights of individual creditors of the association by giving that individual creditor a subordination agreement.)

However, upon termination of the cooperative, liens against the cooperative which did not have priority over the cooperative interests do become proportional fractional liens against each individual cooperative interest (see Section 2-118(i) and the comments thereto).

3. The provisions of Section 3-117 applicable to condominiums and planned communities were adopted after substantial consideration by the committee and the National Conference and achieve what the drafters believe

is appropriate. Unit owner liability for association debts. The somewhat different treatment given cooperatives arises out of the different history of cooperatives and out of the different tradition as to financing of cooperatives. The rules just stated in effect continue the existing law as to the relationship between cooperative unit owners (today commonly called proprietary lessees) and association creditors. The provisions also take account of a common way of financing cooperatives: In the typical cooperative, the cooperative association will take title to the real estate and will assume or take subject to existing mortgages on the real estate, or if there are no existing mortgages, will borrow a significant portion of the purchase price of the cooperative real estate and secure that price by a mortgage on the real estate. Thereafter, when individual units are conveyed (leased) to individual unit owners, the unit owner's interest will be subject to the prior recorded underlying mortgage. The unit owner also will commonly borrow money on the security of his lease interest to pay the purchase price of the unit owner's interest. Unless a subordination agreement has been taken from the unit owner or subordination of the unit owner interest to subsequent association creditors is provided for in the declaration, the unit purchase financing lender who lends on the security of the unit owner's interest can assess his risk on the assumption that he will never be subject to a greater proportion of the underlying debt than he is at the time the loan is originally made. If there is a subordination agreement, the unit financing lender knows that his security interest is subject to being entirely defeated by subsequent transactions between the association and its creditors. In the cooperative context, that system has worked reasonably well, and many people with substantial experience with housing cooperatives wished to continue that system in the Model Real Estate Cooperative Act and in the Uniform Common Interest Ownership Act.

In the case of condominiums and planned communities, while the condominium or planned community judgment creditor has a direct lien against the units, the lien against a particular unit is limited to that unit's common interest percentage liability, and based on ordinary priority rules, the association judgment creditor's lien will be junior to any prior perfected liens or security interests in the unit owner's unit. Since the priority between association judgment creditors and holders of security interests or liens against individual units in condominiums or planned communities will be determined according to ordinary priority rules, as is the case of cooperatives in the absence of subordination agreements, the result as between association judgment creditors and holders of security interest or liens on individual units is essentially the same under all three acts. However, as pointed out above, as against the unit owner himself, the cooperative association lien creditor who has priority over a unit owner's interest will have greater rights than does the association judgment creditor in the case of condominiums and planned communities.

It should be noted that, while the judgment lien runs directly against unit owners in condominiums and planned communities, the actual liability of the unit owner is almost identical with what it would be if the ordinary corporation rule insulating the unit owner from direct liability were applied. If the incorporated condominium or planned community association only is liable for a judgment, it will, of course, have no assets to satisfy the judgment except whatever personal property and real estate not a part of the common elements it owns. If a checking account or other cash funds of the association are attached or garnished by the creditor, the association, in order to maintain its operations and fulfill its other obligations, will be obliged to make an additional assessment against the unit owners to cover the judgment. The same result follows if the association is to prevent the sale of other assets at an execution sale. That additional assessment would be in precisely the amount for which this Act gives a direct lien against the individual unit owners. Further, if an association which is without sufficient assets to satisfy a judgment refuses to make assessments from which the creditor can have his claim satisfied, it is very likely that a court, in a supplemental proceeding on the judgment, would direct the association to make the necessary assessments against the unit owners. Unpaid assessments made by the association constitute liens against units just as do judgments.

Therefore, whether the lien of the judgment creditor runs against the units directly, or whether the lien is only against the association which finds it necessary to make additional assessments to satisfy the judgment, the unit owner who does not pay his

proportionate share will end up with a lien against his unit.

The differences, therefore, between the lien system established by Section 3-117 for condominiums and planned communities and the system which would be applicable if ordinary corporation rules were applied are these:

(1) The unit owner can discharge his unit from the lien and free it from the possibility of being subsequently assessed by the association for the judgment by making a payment directly to the lien holder. This ability may be valuable to a unit owner who is in the process of selling or securing a mortgage on his unit during the period between the time the judgment is entered and the time the association makes a formal assessment against individual unit owners for the amount of the judgment lien.

(2) The judgment creditor through his ability to threaten to foreclose the lien on an individual unit if the judgment is not paid is given some leverage over individual unit owners to encourage them to see that the association pays the judgment. Procuring an assessment through pressure on individual unit owners may be quicker and cheaper for the judgment creditor than using supplemental proceedings and having a judge order that the board of directors make the necessary assessment.

5. In the rare case where, under corporation law an association could avoid payment of a judgment by dissolution of the association and vesting of title to the units or common elements the unit owners as tenants in common or otherwise, the National Conference of Commissioners on Uniform State Laws believes that that result is inappropriate, and that the unit in the condominium or planned community itself should be viewed as equity property of the association cap. of being reached by judgment creditors in satisfaction of the judgment. As a matter of social policy the condominium or planned community association is in quite a different position than the ordinary corporation. The corporation statutes provide shareholders immunity from liability for debts of the corporation to encourage investment in corporations whose entrepreneurial activities in the marketplace contribute to the general wealth and well being of society. The condominium or planned community association, in managing the affairs of the homeowners, does not serve the same entrepreneurial function. It seems reasonable, as a matter of social policy, that an individual homeowner who would be fully liable for debts incurred in the renovation and maintenance of his home or for torts caused by his failure to adequately maintain the premises should not be able to entirely avoid that liability through the device of organizing with other homeowners into a condominium or planned community association. On the other hand, it is perhaps not fair to a unit owner in a condominium or planned community regime to have all of his assets at risk based on the contracts of the association over which he has little control and as to which he has only a fractional interest or benefit.

It should be noted that, except for situations in which the association has given a mortgage or deed of trust on common elements, the judgment creditor cannot assert a lien against common elements, but is rather left to a lien against the units. That is, the judgment creditor has no power to levy on the golf course or on the swimming pool or other open spaces and sell them independently of the units to satisfy the judgment.

§ 3-118. Association Records

The association shall keep financial records sufficiently detailed to enable the association to comply with Section 4-109. All financial and other records must be made reasonably available for examination by any unit owner and his authorized agents.

§ 3-119. Association as Trustee

With respect to a third person dealing with the association in the association's capacity as a trustee, the existence of trust powers and their proper ex-

ercise by the association may be assumed without inquiry. A third person is not bound to inquire whether the association has power to act as trustee or is properly exercising trust powers. A third person, without actual knowledge that the association is exceeding or improperly exercising its powers, is fully protected in dealing with the association as if it possessed and properly exercised the powers it purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the association in its capacity as trustee.

ARTICLE 4

PROTECTION OF PURCHASERS

§ 4-101. Applicability; Waiver

(a) This Article applies to all units subject to this [Act], except as provided in subsection (b) or as modified or waived by agreement of purchasers of units in a common interest community in which all units are restricted to non-residential use.

(b) Neither a public offering statement nor a resale certificate need be prepared or delivered in the case of:

(1) a gratuitous disposition of a unit;

(2) a disposition pursuant to court order;

(3) a disposition by a government or governmental agency;

(4) a disposition by foreclosure or deed in lieu of foreclosure;

(5) a disposition to a dealer;

(6) a disposition that may be canceled at any time and for any reason by the purchaser without penalty; or

(7) a disposition of a unit in a planned community in which the declaration limits the maximum annual assessment of any unit to not more than $300, as adjusted pursuant to Section 1-115 (Adjustment of Dollar Amounts) if:

(i) the declarant has a reasonable and good faith belief that the maximum stated assessment will be sufficient to pay the expenses of the planned community;

(ii) the declaration cannot be amended to increase the assessment during the period of declarant control without the consent of all unit owners; and

(iii) the planned community is not subject to any development rights.

COMMENT

1. In the case of commercial and industrial common interest communities, the purchaser is often more sophisticated than the purchaser of residential units and thus better able to bargain for the protections he believes necessary. While this may not always be true, no objective test can be developed which easily distinguishes those commercial purchasers who are able to protect themselves from those who, in the ordinary course of business, have not developed such sophistication. At the same time, the cost of protection imposed by Article 4 may be substantial. Accordingly, subsection (a) permits waiver or modification of Article 4 protections in common interest communities where all units are restricted to non-residential use. However, except for certain waivers of implied warranties of quality (*see* Section 4-115) and certain exemptions from public offering statement and resale certificate requirements (*see* subsection (b)), no express waiver of the protections of this Article with respect to the purchasers of residential units is

permitted by this subsection. Accordingly, by operation of Section 1-101, the rights provided by this Article may not be waived in the case of residential purchasers. Moreover, because of the interrelated rights of residential and commercial owners in mixed-use common interest communities, waiver or modification of rights conferred by this Article is restricted to purchasers in wholly non-residential common interest communities.

2. There are many single family subdivision or townhouse-type common interest communities in which the commonly owned and maintained facilities are relatively inconsequential and the assessment for maintenance of the common areas trivial. For example, the only common facility may be a road, a playground, or an open area. In such cases, the cost of the public offering statement required by this article is not justified any more than it would be justified in the sale of any residence in a subdivision or townhouse development. Therefore, (b)(7) provides that no public offering statement is necessary if the planned community declaration limits the maximum annual assessment of any unit to $300.00 (adjusted for inflation) and if the declarant has a good faith belief that the stated maximum will be sufficient to pay the expenses of the association.

§ 4-102. Liability for Public Offering Statement Requirements

(a) Except as provided in subsection (b), a declarant, before offering any interest in a unit to the public, shall prepare a public offering statement conforming to the requirements of Sections 4-103, 4-104, 4-105, and 4-106.

(b) A declarant may transfer responsibility for preparation of all or a part of the public offering statement to a successor declarant (Section 3-104) or to a dealer who intends to offer units in the common interest community. In the event of any such transfer, the transferor shall provide the transferee with any information necessary to enable the transferee to fulfill the requirements of subsection (a).

(c) Any declarant or dealer who offers a unit to a purchaser shall deliver a public offering statement in the manner prescribed in subsection 4-108(a). The person who prepared all or a part of the public offering statement is liable under Sections 4-108 and [,] 4-117 [, 5-105, and 5-106] for any false or misleading statement set forth therein or for any omission of a material fact therefrom with respect to that portion of the public offering statement which he prepared. If a declarant did not prepare any part of a public offering statement that he delivers, he is not liable for any false or misleading statement set forth therein or for any omission of a material fact therefrom unless he had actual knowledge of the statement or omission or, in the exercise of reasonable care, should have known of the statement or omission.

(d) If a unit is part of a common interest community and is part of any other real estate regime in connection with the sale of which the delivery of a public offering statement is required under the laws of this State, a single public offering statement conforming to the requirements of Sections 4-103, 4-104, 4-105, and 4-106 as those requirements relate to each regime in which the unit is located, and to any other requirements imposed under the laws of this State, may be prepared and delivered in lieu of providing 2 or more public offering statements.

COMMENT

This section permits declarants to transfer responsibility for preparation of a public offering statement to successor declarants or dealers, provided the declarant furnishes the information needed by the successor or dealer to complete the statement. The person who prepares the public offering statement is liable for his own misrepresentations and material omissions. A person who delivers a public offering statement prepared by others is responsible for any such deficiencies only to the extent he knows or reasonably should have known of them.

§ 4-103. Public Offering Statement; General Provisions

(a) Except as 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 either 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 or regulations 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) 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, without limitation:

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

(ii) a statement of any other reserves;

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

(iv) the projected monthly common expense assessment for each type of unit;

(6) any services not reflected in the budget that the declarant provides, or expenses that he pays and which he 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 at closing, 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:

(i) 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,

(ii) 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 his common expense liability, of any indebtedness of the association secured by security interests encumbering the common interest community, and

(iii) if a purchaser receives the public offering statement more than 15 days before signing a contract, he cannot cancel the contract;

(12) a statement of any unsatisfied judgments or pending suits against the association, and the status of any pending suits 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: (i) on use, occupancy, and alienation of the units, and (ii) 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 4-110 (Declarant's Obligation to Complete and Restore);

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

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

(20) in a cooperative, (i) 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 (ii) 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.

(b) If a common interest community composed of not more than 12 units is not subject to any development rights 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 but need not include the information otherwise required by paragraphs (9), (10), (15), (16), (17), (18), and (19) of subsection (a) and the narrative descriptions of documents required by subsection (a)(4).

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

COMMENT

1. The best "consumer protection" that the law can provide to any purchaser is to insure that he has an opportunity to acquire an understanding of the nature of the products which he is purchasing. Such a result is difficult to achieve, however, in the case of the common interest community purchaser because of the complex nature of the bundle of rights and obligations

which each unit owner obtains. For this reason, the Act, adopting the approach of many so-called "second generation" condominium statutes, sets forth a lengthy list of information which must be provided to each purchaser before he contracts for a unit. This list includes a number of important matters not typically required in public offering statements under existing law. The requirement for providing the public offering statement appears in Section 4-102(c), and Section 4-108 provides purchasers with cancellation rights and imposes civil penalties upon declarants not complying with the public offering statement requirements of the Act.

2. Paragraph (a)(2) requires a general description of the common interest community and, to the extent possible, the declarant's schedule for commencement and completion of construction for all building amenities that will comprise portions of the common interest community.

Under Section 4-110 the declarant is obligated to complete all improvements shown on a site plan or other graphic representation in the public offering statement or other promotional materials unless they are labeled "NEED NOT BE BUILT." The estimated schedule of commencement and completion of construction dates provides a standard for judging whether a declarant has complied with those requirements.

3. Paragraph (4) requires the public offering statement to include copies of the declaration, bylaws, and any rules and regulations of the common interest community, as well as copies of any contracts or leases to be executed by the purchaser. In addition, the paragraph requires the public offering statement to include a brief narrative description of the significant features of those documents, as well as of any management contract, leases of recreational facilities, and other sorts of contracts which may be subject to cancellation by the association after the period of declarant control expires, as provided in Section 3-105. This latter requirement is intended to encourage the preparation of brief summaries of all common interest community documents in laymen's terms, *i.e.*, the "brief narrative description" should be more than a simple explanation of what a declaration (or other document) is, but less than an extended legal analysis duplicating the contents of the documents themselves. The summary requirement is intended to alleviate the common problem of public offering statements being drafted in lawyers' terms and being no more comprehensible to laymen than the documents themselves.

4. The disclosure requirement of paragraph (6) is intended to eliminate the common deceptive sales practice known as "lowballing," a practice by which a declarant intentionally underestimates the budget for the association by providing many of the services himself during the initial sales period. In such a circumstance, the declarant commonly intends that, after a certain time, these services (which might include lawn maintenance, painting, security, bookkeeping, or other services) will become expenses of the association, thereby substantially increasing the periodic common expense assessments which association members must ultimately bear. By requiring the disclosure of these services (including the projected common expense assessment attributable to each) in paragraph (6), the Act seeks to minimize "lowballing". In order to comply fully with the provisions of paragraph (5), the declarant must calculate the budget on the basis of his best estimate of the number of units which will be part of the common interest community during that budget year. This requirement as well operates to negate the effects of any attempted "lowballing."

5. Paragraph (9) requires disclosure of any financing "offered" by the declarant. The paragraph contemplates that a declarant disclose any arrangements for financing that may have been made, including arrangements with any unaffiliated lender to provide mortgages to qualified purchasers.

6. Under paragraph (10), the declarant is required to disclose the terms of all warranties provided by the declarant (including the statutory warranties set forth in Section 4-114) and to describe any significant limitations on such warranties, the enforcement thereof, or damages which may be collectible as a result of a breach thereof. This latter requirement would necessitate a description by the declarant of any exclusions or modifications of statutory warranties undertaken pursuant to Section 4-115. The statute of limitations for warranties set forth at Section 4-116, together with any separate written agreement (as required by Section 4-116) providing for reduction of the period of such statute of limitations, must also be disclosed.

7. Paragraph (14) requires that the declarant disclose the existence of any

right 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.

8. Under paragraph (16), the declarant is obligated to disclose any current or expected fees or charges which unit owners may be required to pay for the use of the common elements and other facilities related to the common interest community. Such fees or charges might include swimming pool fees, golf course fees, or required membership fees for recreation associations. Such fees can represent a substantial addition to monthly assessments.

9. The "financial arrangements" required to be disclosed pursuant to paragraph (17) may vary substantially from one development to another. It is the intent of the paragraph to give purchasers as much information as possible with which to assess the declarant's ability to carry out his obligations to complete the improvements. For example, if a declarant has a commitment from a bank to provide construction financing for a swimming pool when 50% of the units in the common interest community are completed, that fact should be disclosed to potential purchasers.

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, and the like.

11. The cost of preparing a public offering statement can be substantial and may, particularly in the case of small common interest communities, represent a significant portion of the cost of a unit. For that reason, subsection (b) permits a declarant to exclude from a public offering statement certain information in the case of a small common interest community (*i.e.*, less than 12 units) which is not subject to development rights and which is not potentially part of a larger common interest community or group of common interest communities. Essentially, subsection (a) permits a declarant to exclude from a public offering statement those materials which, as a practical matter, require extended preparation effort by an attorney or engineer in addition of the normal effort which must be exerted to provide the declaration, bylaws, plats and plans, or other documents required by the Act.

§ 4-104. Same; Common Interest Communities Subject to Development Rights

If the declaration provides that a common interest community is subject to any development rights, the public offering statement must disclose, in addition to the information required by Section 4-103:

(1) the maximum number of units, and the maximum number of units per acre, that may be created;

(2) a statement of how many or what percentage of the units that may be created will be restricted exclusively to residential use, or a statement that no representations are made regarding use restrictions;

(3) if any of the units that may be built within real estate subject to development rights are not to be restricted exclusively to residential use, a statement, with respect to each portion of that real estate, of the maximum percentage of the real estate areas, and the maximum percentage of the floor areas of all units that may be created therein, that are not restricted exclusively to residential use;

(4) a brief narrative description of any development rights reserved by a declarant and of any conditions relating to or limitations upon the exercise of development rights;

(5) a statement of the maximum extent to which each unit's allocated interests may be changed by the exercise of any development right described in paragraph (3);

(6) a statement of the extent to which any buildings or other improvements that may be erected pursuant to any development right in any part of the common interest community will be compatible with existing buildings and improvements in the common interest community in terms of architectural style, quality of construction, and size, or a statement that no assurances are made in those regards;

(7) general descriptions of all other improvements that may be made and limited common elements that may be created within any part of the common interest community pursuant to any development right reserved by the declarant, or a statement that no assurances are made in that regard;

(8) a statement of any limitations as to the locations of any building or other improvement that may be made within any part of the common interest community pursuant to any development right reserved by the declarant, or a statement that no assurances are made in that regard;

(9) a statement that any limited common elements created pursuant to any development right reserved by the declarant will be of the same general types and sizes as the limited common elements within other parts of the common interest community, or a statement of the types and sizes planned, or a statement that no assurances are made in that regard;

(10) a statement that the proportion of limited common elements to units created pursuant to any development right reserved by the declarant will be approximately equal to the proportion existing within other parts of the common interest community, or a statement of any other assurances in that regard, or a statement that no assurances are made in that regard;

(11) a statement that all restrictions in the declaration affecting use, occupancy, and alienation of units will apply to any units created pursuant to any development right reserved by the declarant, or a statement of any differentiations that may be made as to those units, or a statement that no assurances are made in that regard; and

(12) a statement of the extent to which any assurances made pursuant to this section apply or do not apply in the event that any development right is not exercised by the declarant.

COMMENT

ds section requires disclosure in public offering statement of the ner in which the declarant's exer- of development rights may affect hasers who acquire units before rights have been fully exercised. purpose is to put the purchaser on notice of the extent to which the exercise of these rights may alter, sometimes quite dramatically, both the physical and the legal aspects of the project. For example, the prospective purchaser may be contemplating the acquisition of a particular unit because it enjoys a view of open, undeveloped land over which the declarant has, however, reserved development rights. It may be that the boundary of the parcel as to which development rights have been reserved actually coincides with, or runs quite close to, the outer wall of the unit in question. The disclosures or statements made pursuant to paragraphs (8) and (12) of this section will indicate to the prospective purchaser the extent (if any) to which he can rely on the declarant not to do anything which would radically alter the view from the unit.

§ 4-105. Same; 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, particularly with respect to resort common interest communities. In recognition of this fact, this section requires the disclosure of certain information with respect to time sharing.

2. Virtually all 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 4-109 of the Model Act governs conflicts between this Act and time-share legislation.

§ 4-106. Same; Common Interest Communities Containing Conversion Buildings

(a) The public offering statement of a common interest community containing any conversion building must contain, in addition to the information required by Section 4-103:

(1) a statement by the declarant, based on a report prepared by an independent [registered] architect or engineer, describing the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the building;

(2) a statement by the declarant of the expected useful life of each item reported on in paragraph (1) or a statement that no representations are made in that regard; and

(3) a list of any outstanding notices of uncured violations of building code or other municipal regulations, together with the estimated cost of curing those violations.

(b) This section applies only to buildings containing units that may be occupied for residential use.

COMMENT

1. In the case of a common interest community containing one or more conversion buildings, the disclosure of additional information relating to the condition of those buildings is required in the public offering statement because of the difficulty inherent in a single purchaser attempting to determine the condition of what is likely to be an older building being renovated for the purpose of common interest community sales.

2. Paragraph (a)(1) requires the person who gives the public offering statement to retain an independent architect or engineer to report on the present condition of all structural components and fixed mechanical and electrical installations in the conversion building. Such information is as useful to declarant as to the purchaser since, under the implied warranty provisions of Section 4-114, a declarant impliedly warrants all improvements made by any person to the building "before creation of the common interest community" unless such improvements are specifically excluded from the implied warranty of quality pursuant to Section 4-115(b).

3. *See* Comment 6 to Section 2-101 concerning the meaning of "structural components" as used in paragraph (a)(1). Any material changes in the "present condition" of these systems must be reported by an amendment to the public offering statement.

4. Under paragraph (a)(3), the person required to give the public offering statement is required to provide purchasers with a list of all outstanding notices of uncured violations of building codes or other municipal regulations. The literal wording of this provision does not require disclosure of known violations of such building codes or municipal regulations (at least violations having no effect upon the structural components or fixed mechanical and electrical installations of the planned community) unless actual "notices" of such violations have been received. To the extent that outstanding notices of uncured violations do exist, the cost of curing such violations would become a liability of the unit owners or the association following transfer of the unit to a purchaser. For that reason, the estimated cost of curing any outstanding violations must also be disclosed.

5. For the reasons set forth in the Comment to Section 4-101(a), this section does not apply to units which are restricted exclusively to non-residential use.

§ 4-107. Same; Common Interest Community Securities

If an interest in a common interest community is currently registered with the Securities and Exchange Commission of the United States, a declarant satisfies all requirements relating to the preparation of a public offering statement of this [Act] if he delivers to the purchaser [and files with the agency] a copy of the public offering statement filed with the Securities and Exchange Commission. [An interest in a common interest community is not a security under the provisions of [insert appropriate state securities regulation statutes].]

COMMENT

1. Some common interest communities will be regarded as "investment contracts" or other "securities" under federal law because they exhibit certain investment features such as mandatory rental pools. *See* SEC Securities Act Release No. 5347 (January 1973). The purpose of this section is to permit the declarant to file or deliver, in lieu of a public offering statement specifically prepared to comply with the provisions of this Act, the prospectus filed with and distributed pursuant to the regulations of the United States Securities and Exchange Commission. Absent this provision, prospective purchasers of common interest communities classified by the SEC as "securities" would have to be given two public offering statements, one prepared pursuant to this Act and the other prepared pursuant to the Securities Act of 1933. Not only would this result increase the declarant's costs (and thus the price) of units, it might also reduce the likelihood of either public offering statement actually being read by prospective purchasers.

2. The bracketed language in the first sentence of this section should be inserted by states which choose to accept the agency provisions of Article 5 of the Act. The second sentence should also be inserted by states opting to incorporate Article 5 of the Act to avoid duplicative regulation of common interest communities by the agency administering the State's securities regulation statutes.

§ 4-108. Purchaser's Right to Cancel

(a) A person required to deliver a public offering statement pursuant to Section 4-102(c) shall provide a purchaser with a copy of the public offering statement and all amendments thereto before conveyance of the unit, and not later than the date of any contract of sale. Unless a purchaser is given the public offering statement more than 15 days before execution of a contract for the purchase of a unit, the purchaser, before conveyance, may cancel the contract within 15 days after first receiving the public offering statement.

(b) If a purchaser elects to cancel a contract pursuant to subsection (a), he may do so by hand delivering notice thereof to the offeror or by mailing notice thereof by prepaid United States mail to the offeror or to his agent for service of process. Cancellation is without penalty, and all payments made by the purchaser before cancellation must be refunded promptly.

(c) If a person required to deliver a public offering statement pursuant to Section 4-102(c) fails to provide a purchaser to whom a unit is conveyed with that public offering statement and all amendments thereto as required by subsection (a), the purchaser, in addition to any rights to damages or other relief, is entitled to receive from that person an amount equal to [10] percent of the sale price of the unit, plus [10] percent of the share, proportionate to his common expense liability, of any indebtedness of the association secured by security interests encumbering the common interest community.

COMMENT

1. The "cooling off" period provided to a purchaser in this section is similar to provisions in many current state condominium statutes.

2. Subsection (a) requires that each purchaser be provided with both the public offering statement and all amendments thereto prior to the time that the unit is conveyed. If there is a contract for the sale of the unit, these documents must be provided not later than the date of the contract. The section makes clear that any amendments to the public offering statement prepared between the date of any contract and the date of conveyance must also be provided to the purchaser.

3. This section does not require the delivery of a public offering statement prior to the execution by the purchaser of an agreement pursuant to which the purchaser reserves the right to buy a unit but is not contractually bound to do so. Because such agreements (frequently referred to as "non-binding reservation agreements") may be unilaterally cancelled at any time by a prospective purchaser without penalty, they do not constitute "contract[s] of sale" within the meaning of the section.

4. The requirement set forth in subsection (a) that a purchaser be provided with subsequent amendments to the public offering statement during the period between execution of the contract for purchase and conveyance of the unit does not, in itself, extend the "cooling off" period. Indeed, the delivery of such amendments is required even if the "cooling off" period has expired. The purpose of this requirement is to assure that purchasers of units are advised of any material change in the common interest community which may affect their sales contracts under general law. While many such amendments will be merely technical and will not affect the bargain that the purchaser and declarant entered into, each purchaser should be

permitted to judge for himself the materiality of any change in the nature of the common interest community.

5. Under the scheme set forth in this section, it is at least theoretically possible that there will be a contract for sale of the unit, and that a public offering statement will be given to the purchaser at closing just prior to conveyance. However, the available evidence suggests that such practice would be rare, and that the provision of a public offering statement moments prior to conveyance would, in itself, tend to dampen the enthusiasm of the purchaser for immediate closing. In such circumstances, under subsection (a), the purchaser would, as a matter of right, be able to extend the date of closing for 15 days from the time the public offering statement is provided. This fact, together with the generally unsatisfactory experience with mandatory "cooling off" periods such as that imposed under the federal Real Estate Settlement Procedures Act, supports the conclusion that it is inappropriate to require a minimum period of delay between delivery of a public offering statement and conveyance.

6. Under subsection (a), the failure to deliver a public offering statement before conveyance does not result in a statutory right by the purchaser to cancel the conveyance or to reconvey the unit once conveyance has occurred. Any such cancellation or reconveyance following an actual conveyance could create serious mechanical and title problems that could not be easily resolved. The failure of the Act to provide for such cancellation or reconveyance is not, however, intended to diminish any right which a purchaser may otherwise have under general state law. For example, where it appears that a seller, by deliberate or failing to disclose certain material information with respect to a transaction, substantially changed the bargain which he and the purchaser entered into, it is possible that under the common law in some states reconveyance would be an available remedy.

Even absent such resort to general law, however, the penalty provisions of subsection (c) are designed to provide a sufficient incentive to the seller to insure that the public offering statement is provided in the timely fashion required by the Act. The penalty so specified in the subsection is in addition to any right a prevailing purchaser may have under Section 4-117 to collect punitive damages and attorney's fees in connection with his action against the declarant.

§ 4-109. Resales of Units

(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 execution of any contract for sale of a unit, or otherwise before conveyance, a copy of the declaration (other than any plats and plans), the bylaws, the rules or regulations of the association, and a certificate containing:

(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;

(2) a statement setting forth the amount of the monthly 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 unit owners;

(4) a statement of any capital expenditures anticipated by the association for the current and 2 next 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 to 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 knowledge that any alterations or improvements 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 knowledge of any violations of the health or building codes with respect to the unit, the limited common elements assigned thereto, or any other portion of the common interest community;

(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; and

(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.

(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 5 days thereafter or until conveyance, whichever first occurs.

COMMENT

1. In the case of the resale of a unit by a private unit owner who is not a declarant or a person in the business of selling real estate for his own account, a public offering statement need not be provided. *See* Section 4-102(c). Nevertheless, there are important facts which a purchaser should have in order to make a rational judgment about the advisability of purchasing the particular unit. Accordingly, each unit owner not required to furnish a public offering statement under Section 4-102(c) and not exempt under Section 4-101(b) is required to furnish to a resale purchaser, before the execution of any contract of sale, a copy of the declaration, bylaws, and rules and regulations of the association and a variety of fiscal, insurance, and other information concerning the common interest community and the unit.

2. While the obligation to provide the information required by this section rests upon each unit owner (since the purchaser is in privity only with that unit owner), the association has an obligation to provide the information to the unit owner within 10 days after a request for such information. Under Section 3-102(a)(11)(12), the association is entitled to charge the unit owner a reasonable fee for the preparation of the certificate. Should the association fail to provide the certificate as required, the unit owner would have a right to action against the association pursuant to Section 4-117.

3. Under subsection (c), if a purchaser receives a resale certificate which fails to state the proper amount of the unpaid assessments due from the purchased unit, the purchaser is not liable for any amount greater than that disclosed in the resale certificate. Because a resale purchaser is dependent upon the association for information with respect to the outstanding assessments against the unit which he contemplates buying, it is altogether appropriate that the association should be prohibited from later collecting greater assessments than those disclosed prior to the time of the resale purchase.

§ 4-110. Escrow of Deposits

Any deposit made in connection with the purchase or reservation of a unit from a person required to deliver a public offering statement pursuant to Section 4-102(c) must be placed in escrow and held either in this State or in the state where the unit is located in an account designated solely for that purpose by [a licensed title insurance company] [an attorney] [a licensed real estate broker] [an independent bonded escrow company or] an institution whose accounts are insured by a governmental agency or instrumentality until (i) delivered to the declarant at closing; (ii) delivered to the declarant because of the purchaser's default under a contract to purchase the unit; or (iii) refunded to the purchaser.

COMMENT

1. This section applies to the sale by persons required to furnish public offering statements of residential units and of non-residential units unless waived pursuant to the provisions of Section 4-101. It does not apply, however, to resales of units between private parties.

2. This section provides declarant a number of choices as to the appropriate escrow agent. Whether the escrow agent must deposit the funds in an insured institutional depository, or in a particular type of account, depends on state law or the agreement of the parties. To minimize record keeping, of course, the institutional depository could itself be the escrow agent. The section does not require a separate account for each unit, so that mingling of funds in a single escrow account would be permitted. The account may be held either in the state where the unit is located, or in the enacting state, in recognition that buyers are often from outside the state where the unit is located.

3. The escrow requirements of this section apply in connection with *any* deposit made by a purchaser, whether such deposit is made pursuant to a binding contract or pursuant to a non-binding reservation agreement (with respect to which no public offering statement is required under Section 4-101(b)(6)).

4. In some states current practice permits escrows to be held by certain title insurance or escrow companies, attorneys, or real estate brokers. Accordingly, the bracketed language should be included or deleted in accordance with local practice.

5. Under this section, any interest earned on an escrow deposit may, but need not, be credited to the purchaser at closing, added to any deposit forfeited to the seller, or added to any deposit refunded to the purchaser. In short, disposition of any interest is left to agreement of the parties.

6. In some states, such as New York, the substitution of a bond in place of a deposit escrow is permitted. The evidence indicates, however, that in many instances the use of the bonding device has forced purchasers to incur substantial costs and delay prior to obtaining refunds to which they are entitled. For this reason, this Act does not include bonding as an alternative to the required escrow of deposits.

§ 4-111. Release of Liens

(a) In the case of a sale of a unit where delivery of a public offering statement is required pursuant to Section 4-102(c), a seller

(1) before conveying a unit, shall record or furnish to the purchaser releases of all liens, except liens on real estate that a declarant has the right to withdraw from the common interest community, that the purchaser does not expressly agree to take subject to or assume and that encumber:

(i) in a condominium, that unit and its common element interest, and

(ii) in a cooperative or planned community, that unit and any limited common elements assigned thereto; or

(2) shall provide a surety bond or substitute collateral for or insurance against the lien as provided for liens on real estate in [insert appropriate references to general state law or Sections 5-211 and 5-212 of the State Uniform Simplification of Land Transfers Act].

(b) Before conveying real estate to the association, the declarant shall have that real estate released from: (1) all liens the foreclosure of which would deprive unit owners of any right of access to or easement of support of their units, and (2) all other liens on that real estate unless the public offering statement describes certain real estate that may be conveyed subject to liens in specified amounts.

COMMENT

1. The exemption for withdrawable real estate set forth in subsection (a) is designed to preserve flexibility for the declarant in terms of financing arrangements. It deals with the unusual case in which a unit has been assigned a limited common element (for example, a parking space) on real estate which the developer has the right to withdraw from the common interest community. In that case, the limited common element can be assigned to the unit without release of liens or assumption of them by the unit owner. Theoretically, a developer might partially avoid the lien release requirement of subsection (a) by placing part of the limited common element improvements such as a parking garage on withdrawable real estate. By doing so, it could separately mortgage that part of the limited common elements without being obligated to discharge the mortgage or secure partial releases when individual units to which the limited common elements are assigned are sold.

If a mortgage or other lien created by or arising against the developer attaches to withdrawable real estate after the declaration has been recorded, a lapse of the developer's right to withdraw the real estate would also terminate the rights of the lienors, since the lien would attach only to the developer's interest (the right to withdraw). However, an alert lienor would not permit the right to withdraw to lapse without taking steps to see that the right to withdraw is exercised. If the mortgage or other lien attached to the real estate and was perfected before the planned community declaration was recorded, lapse of the right to withdraw would not affect the lienor's rights and it could foreclose on the real estate whether or not the developer had lost the right to withdraw. As a practical matter, whether the mortgage or other lien against withdrawable real estate arises before or after the declaration is recorded, unit owners may find that, if the association does not release liens on withdrawable real estate containing limited common elements, the lienor will be able to withdraw the land and deprive the unit owners of its use. Therefore, unit purchasers and their counsel should be alert to that possibility.

2. Subsection (b) will most commonly apply in the case of a planned community, where all of the common elements, whatever they may be in a particular project, must be owned by the association, see section 1-103(4), or in a cooperative, where section 2-101 requires that all the real estate comprising the cooperative must be conveyed to the association at the time the cooperative is created. The section would also apply, however, in the event other real estate, such as units or other real property not subject to the declaration, is conveyed to the association.

§ 4-112. Conversion Buildings

(a) A declarant of a common interest community containing conversion buildings, and any dealer who intends to offer units in such a common interest community, shall give each of the residential tenants and any residential subtenant in possession of a portion of a conversion building notice of the

conversion no...rovide those persons with the public offering statement no later than 120 days before the tenants and any subtenant in possession are required to vacate. The notice must set forth generally the rights of tenants and subtenants under this section and must be hand delivered to the unit or mailed by prepaid United States mail to the tenant and subtenant at the address of the unit or any other mailing address provided by a tenant. No tenant or subtenant may be required to vacate upon less than 120 days' notice, except by reason of nonpayment of rent, waste, or conduct that disturbs other tenants' peaceful enjoyment of the premises, and the terms of the tenancy may not be altered during that period. Failure to give notice as required by this section is a defense to an action for possession.

(b) For [60] days after delivery or mailing of the notice described in subsection (a), the person required to give the notice shall offer to convey each unit or proposed unit occupied for residential use to the tenant who leases that unit. If a tenant fails to purchase the unit during that [60] day period, the offeror may not offer to dispose of an interest in that unit during the following [180] days at a price or on terms more favorable to the offeree than the price or terms offered to the tenant. This subsection does not apply to any unit in a conversion building if that unit will be restricted exclusively to non-residential use or the boundaries of the converted unit do not substantially conform to the dimensions of the residential unit before conversion.

(c) If a seller, in violation of subsection (b), conveys a unit to a purchaser for value who has no knowledge of the violation, the recordation of the deed conveying the unit or, in a cooperative, the conveyance of the unit, extinguishes any right a tenant may have under subsection (b) to purchase that unit if the deed states that the seller has complied with subsection (b), but the conveyance does not affect the right of a tenant to recover damages from the seller for a violation of subsection (b).

(d) If a notice of conversion specifies a date by which a unit or proposed unit must be vacated and otherwise complies with the provisions of [insert appropriate state summary process statute], the notice also constitutes a notice to vacate specified by that statute.

(e) Nothing in this section permits termination of a lease by a declarant in violation of its terms.

COMMENT

1. One of the most controversial issues in the field of common interest community development relates to conversion of rental buildings to a common interest community. Opponents of conversions point out that the frequent result of conversions, which occur principally in large urban areas, is to displace low- and moderate-income tenants and provide homes for more affluent persons able to afford the higher prices which the converted apartments command. Indeed, studies indicate that the burden of conversion displacement falls most frequently on low- and moderate-income and elderly persons. At the same time, the conversion of a building to common interest community ownership can lead to a substantial increase in property value, a result which proponents believe can be an important factor in curtailing the problem of declining urban tax bases. Proponents also point out that the conversion of rental units in inner-city areas to individual ownership frequently results in the stabilization of the buildings concerned, thus providing an important technique for use in neighborhood preservation and revitalization. This section, which seeks to balance these competing interests, is based principally on similar provisions set forth in the condominium statutes of Virginia and the District of Columbia.

2. In an attempt to strike a fair balance between the competing interests of rental tenants and prospective owners, subsection (b) provides the tenant a right for 60 days to purchase the unit which he leases at a price and on terms offered by the declarant. The subsection discourages unreasonable offers by declarants by providing that, if the tenant fails to accept the terms offered, the declarant may not thereafter

sell the unit at a lower price or upon more favorable terms to a third person for at least 180 days. However, the declarant is not required to offer residential tenants the right to purchase commercial units or to offer to sell to tenants if the dimensions of their previous apartments have been substantially altered. The reason for this exception is that, if an apartment is subdivided or if two apartments are merged into a single planned community unit, compliance with the requirements of subsection (b) would be impossible.

3. Jurisdictions with rent control statutes should consider whether amendments to this section are necessary to conform to the procedures or substantive requirements set out in the rent control laws or whether modifications to the rent control laws may be required as a result of the enactment of this section.

4. Except for the restrictions on permissible evictions stated in subsection (a), this Act does not change the law of summary process in a state. As a result, if a tenant refuses to vacate the premises following the 120-day notice, the usual provisions of the state's summary process statutes would apply, while any defenses available to a tenant would also be available.

§ 4-113. Express Warranties of Quality

(a) Express warranties made by any seller to a purchaser of a unit, if relied upon by the purchaser, are created as follows:

(1) any affirmation of fact or promise which relates to the unit, its use, or rights appurtenant thereto, or to improvements to the common interest community that would directly benefit the unit, or the right to use or have the benefit of facilities not located in the common interest community, creates an express warranty that the unit and related rights and uses will conform to the affirmation or promise;

(2) any model or description of the physical characteristics of the common interest community, including plans and specifications of or for improvements, creates an express warranty that the common interest community will conform to the model or description;

(3) any description of the quantity or extent of the real estate comprising the common interest community, including plats or surveys, creates an express warranty that the common interest community will conform to the description, subject to customary tolerances; and

(4) a provision that a purchaser may put a unit only to a specified use is an express warranty that the specified use is lawful.

(b) Neither formal words, such as "warranty" or "guarantee", nor a specific intention to make a warranty, are necessary to create an express warranty of quality, but a statement purporting to be merely an opinion or commendation of the real estate or its value does not create a warranty.

(c) Any conveyance of a unit transfers to the purchaser all express warranties of quality made by previous sellers.

COMMENT

1. This section, together with Sections 4-111, 4-115, and 4-116, are adapted from the real estate warranty provisions contained in the Uniform Land Transactions Act (ULTA).

2. This section, which parallels Section 2-308 of ULTA, deals with express warranties, that is, with the expectations of the purchaser created by particular conduct of the declarant in connection with inducement of the sale. It is based on the principle that, once it is established that the declarant has acted so as to create particular expectations in the purchaser, warranty should be found unless it is clear that, prior to the time of final agreement, the declarant has negated the conduct which created the expectation.

3. Subsection (b) makes it clear that no specific intention to make a warranty is necessary if any of the factors mentioned in subsection (a) are made part of the basis of the bargain between the parties. In actual practice, representations made by a declarant concerning common interest community property during the bar-

gaining process are typically regarded as a part of the description. Therefore, no particular reliance on the representations need be shown in order to weave them into the fabric of the agreement. Rather, the burden is on the declarant to show that representations made in the bargaining process were not relied upon by the purchaser at the time of contracting.

4. Subsection (a)(1) provides that representations as to improvements and facilities not located in the common interest community may create express warranties. Declarants often assert that recreational facilities, such as swimming pools, golf courses, tennis courts etc., will be constructed in the future and that unit owners will have the right to utilize such facilities once constructed. Such assertions are intended to be included within the language "have the benefit of facilities not located in the planned community." If, under the circumstances, such improvements would benefit the unit being sold, then the declarant may be liable for breach of express warranty if they are not completed. Such liability is distinct from the declarant's obligations, under Section 4-119, to complete all improvements labeled "MUST BE BUILT" on plats and plans.

5. Under subsection (a)(1), a contract provision permitting the purchaser to use a common interest community unit only for a specified use or uses creates an express warranty that the unit may lawfully be used for that purpose. Therefore, if there is a limitation on use, the resulting express warranty could not be disclaimed by a disclaimer of implied warranties under Section 4-115.

6. The precise time when representations set forth in subsection (a) are made is not material. The sole question is whether the language or other representations of the declarant are fairly to be regarded as part of the contract between the parties.

7. Subsection (b) makes clear that it is not necessary to the existence of a warranty that the declarant have intended to assume a warranty obligation. On the other hand, mere statements of opinion or commendations by the declarant do not necessarily create warranties. Whether a particular statement purports to be merely opinion or commendation is basically a question of whether the purchaser could reasonably rely upon the statement as a meaningful representation or promise with respect to the planned community. That determination depends, in turn, not merely upon the words used but also upon the relative characteristics and skills of the parties. Thus, a representation by a declarant to a novice purchaser that a particular planned community unit is in "good condition" may be more than mere opinion or commendation, while the same statement by a novice seller to a professional buyer would likely be only opinion or commendation, and thus not a warranty.

8. The provision of subsection (c) that the conveyance of a unit transfers to the purchaser all express warranties made by prior declarants is intended, in part, to avoid the possibility that a declarant could negate his warranty obligations through the device of transferring a unit through a shell entity to the ultimate purchaser.

4-114. Implied Warranties of Quality

(a) A declarant and any dealer warrants that a unit will be in at least as good condition at the earlier of the time of the conveyance or delivery of possession as it was at the time of contracting, reasonable wear and tear excepted.

(b) A declarant and any dealer impliedly warrants that a unit and the common elements in the common interest community are suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by him, or made by any person before the creation of the common interest community, will be:

(1) free from defective materials; and

(2) constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner.

(c) In addition, a declarant and any dealer warrants to a purchaser of a unit that may be used for residential use that an existing use, continuation of

which is contemplated by the parties, does not violate applicable law at the earlier of the time of conveyance or delivery of possession.

(d) Warranties imposed by this section may be excluded or modified as specified in Section 4-115.

(e) For purposes of this section, improvements made or contracted for by an affiliate of a declarant (Section 1-103(1)) are made or contracted for by the declarant.

(f) Any conveyance of a unit transfers to the purchaser all of the declarant's implied warranties of quality.

COMMENT

1. This section, which is based upon Section 2-309 of ULTA, overturns the rule still applied in many states that a professional seller of real estate makes no implied warranties of quality (the rule of *"caveat emptor"*). In recent years, that rule has been increasingly recognized as a relic of an earlier age whose continued existence defeats reasonable expectations of purchasers. Since the 1930's, more and more courts have completely or partially abolished the *caveat emptor* rule, and it is clear that the judicial tide is now running in favor of seller liability.

2. The principal warranty imposed under this section is that of suitability of both the unit and common elements for ordinary uses of real estate of similar type, and of quality of construction. Both of these warranties, which arise under subsection (b), are imposed only against declarants and dealers and not against unit owners selling their units to others.

3. Many recent cases have held that a seller of new housing impliedly warrants that the houses sold are habitable. The warranty of suitability under this Act is similar to the warranty of habitability. However, under the Act, the warranty of suitability applies to both units and common elements in both commercial and residential common interest communities. If, for example, a commercial unit is sold for commercial use and is not suitable for the ordinary uses of common interest community units of that type, the warranty of suitability has been breached. Moreover, this warranty of suitability arises in the case of used, as well as new, buildings or other improvements in the common interest community.

4. The warranty of suitability and of quality of construction arises only against a declarant and dealers. As in the case of sales of goods, a non-professional seller is liable, if at all, only for any express warranties made by him. However, if a non-professional seller fails to disclose defects of which he is aware, he may be liable to the purchaser for fraud or misrepresentation under the common law of the state where the transaction occurred. Also, the warranties imposed by this section may be used to give content to a general "guarantee" by a non-professional seller.

5. The warranty as to quality of construction for improvements made or contracted for by the declarant or made by any person before the creation of the common interest community is broader than the warranty of suitability. Particularly, it imposes liability for defects which may not be so serious as to render the units or common elements unsuitable for ordinary purposes of real estate of similar type. Moreover, subsection (c) prevents a declarant from avoiding liability with respect to the quality of construction warranty by having an affiliated entity make the desired improvements.

6. Under subsection (c), a declarant also warrants to a residential purchaser that an existing use contemplated by the parties does not violate applicable law. The declarant, therefore, is liable for any violation of housing codes or other laws which renders any existing use of the unit or common elements unlawful.

7. The issue of declarant liability for warranties is an important one in cases where a transfer of the declarant's rights occurs, either as an arm's length transaction, as a transfer to an affiliate, or as a transfer by foreclosure or a deed in lieu of foreclosure. Subsection (f) makes clear that a conveyance of a unit transfers to the purchaser all warranties of quality made by any declarant, and Section 3-101(b)(1) makes clear that the original declarant remains liable for all warranties of quality with respect to improvements made by him, even after he transfers all declarant rights, regardless of whether the unit is purchased from the declarant who made the improvements. If the successor

declarant is an associate of the original declarant. It is clear, under both Sections 3-101(b)(2) and 1-111(f), that the original declarant remains liable for warranties of quality or improvements made by his successor even after the declarant himself ceases to have any special declarant rights.

8. As to the liability of successor declarants for warranties of quality, a successor who is an affiliate of a declarant is liable, pursuant to Section 3-101(c)(1), for warranties or improvements made by his predecessor. However, any non-affiliated successor of the original declarant is liable only for warranties of quality for improvements made or contracted for by him, and is not liable for warranties which may lie against the original declarant even if the successor sells units completed by the original declarant to a purchaser. *See* Section 3-101(c)(2). In the case of a foreclosing lender, this is the same result as that reached under Section 2-309(f) of ULTA. The same result is also reached under ULTA in the case of a successor who, under ULTA Section 3-309(b), would be a dealer since under that subsection the seller is liable only for warranties for improvements made or contracted for by him.

§ 4-115. Exclusion or Modification of Implied Warranties of Quality

(a) Except as limited by subsection (b) with respect to a purchaser of a unit that may be used for residential use, implied warranties of quality:

(1) may be excluded or modified by agreement of the parties; and

(2) are excluded by expression of disclaimer, such as "as is," "with all faults," or other language that in common understanding calls the purchaser's attention to the exclusion of warranties.

(b) With respect to a purchaser of a unit that may be occupied for residential use, no general disclaimer of implied warranties of quality is effective, but a declarant and any dealer may disclaim liability in an instrument signed by the purchaser for a specified defect or specified failure to comply with applicable law, if the defect or failure entered into and became a part of the basis of the bargain.

COMMENT

1. This section parallels Section 2-311(b) and (c) of UCITA.

2. Under this section, implied warranties of quality may be disclaimed. However, a warranty disclaimer clause, like any other contract clause, is subject to a possible court holding of unconscionability. Although the section imposes no requirement that a disclaimer be in writing, except in the case of residential units, an oral disclaimer might be ineffective under the law of parole and extrinsic evidence.

3. Except as against purchasers of residential units, there are no formal standards for the effectiveness of a disclaimer clause. All that is necessary under this section is that the disclaimer be calculated to effectively notify the purchaser of the nature of the disclaimer.

4. Under subsection (b), general disclaimers of implied warranties are not permitted with respect to purchasers of residential units. However, a declarant may disclaim liability for a specified defect or a specified failure to comply with applicable law in an instrument signed by such a purchaser. The requirement that the disclaimer as to each defect or failure be in a signed instrument is designed to insure that the declarant sufficiently calls each defect or failure to the purchaser's attention and that the purchaser has the opportunity to consider the effect of the particular defect or failure upon the bargain of the parties. Consequently, this section imposes a special burden upon the declarant who desires to make a "laundry list" of defects or failures by requiring him to emphasize each item on such a list and make its import clear to prospective purchasers. For example, the declarant of a conversion common interest community might, consistent with this subsection, disclaim certain warranties for "all electrical wiring and fixtures in the building, the furnace, all materials

comprising or supporting the roof, and all components of the air conditioning system."

5. This section is not intended to be inconsistent with, or to prevent, the use of insured warranty programs offered by some home builders. However, under the Act, the implied warranty that a new unit will be suitable for ordinary uses (*i.e.*, habitable) and will be constructed in a sound, workmanlike manner, and free of defective materials, cannot be disclaimed by general language.

§ 4-116. Statute of Limitations for Warranties

(a) A judicial proceeding for breach of any obligation arising under Section 4-113 or 4-114 must be commenced within 6 years after the [claim for relief] [cause of action] accrues, but the parties may agree to reduce the period of limitation to not less than 2 years. With respect to a unit that may be occupied for residential use, an agreement to reduce the period of limitation must be evidenced by a separate instrument executed by the purchaser.

(b) Subject to subsection (c), a [claim for relief] [cause of action] for breach of warranty of quality, regardless of the purchaser's lack of knowledge of the breach, accrues:

(1) as to a unit, at the time the purchaser to whom the warranty is first made enters into possession if a possessory interest was conveyed or at the time of acceptance of the instrument of conveyance if a nonpossessory interest was conveyed; and

(2) as to each common element, at the time the common element is completed or, if later, as to (i) a common element that may be added to the common interest community or portion thereof, at the time the first unit therein is conveyed to a bona fide purchaser, or (ii) a common element within any other portion of the common interest community, at the time the first unit is conveyed to a bona fide purchaser.

(c) If a warranty of quality explicitly extends to future performance or duration of any improvement or component of the common interest community, the [claim for relief] [cause of action] accrues at the time the breach is discovered or at the end of the period for which the warranty explicitly extends, whichever is earlier.

COMMENT

1. Under subsection (a), the parties may agree that the statute of limitations be reduced to as little as 2 years. However, such a contract provision (which, in the case of residential units, must be reflected in a separate written instrument executed by the purchaser) could, like other contract provisions, be subject to attack on grounds of unconscionability in particular cases.

2. Except for warranties of quality which explicitly refer to future performance or duration, a cause of action for breach of a warranty of quality would normally arise when the purchaser to whom it is first made enters into possession. Suit on such a warranty would thus have to be brought within 6 years thereafter. Even an inability to discover the breach would not delay the running of the statute of limitations in this regard.

3. Real estate sales frequently include warranties that certain components (*e.g.*, furnaces, hot water heaters, air conditioning systems, and roofs) will last for a particular period of time. In the case of such warranties, the statute of limitations would not start running until the breach is discovered, or, if not discovered before the end of the warranty term, until the end of the term.

§ 4-117. Effect of Violations on Rights of Action; Attor fees

If a declarant or any other person subject to this [Act] fails to comply with any of its provisions or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. Punitive damages may be awarded for a willful failure to comply with this [Act]. The court, in an appropriate case, may award reasonable attorney's fees.

COMMENT

This section provides a general cause of action or claim for relief for failure to comply with the Act by either a declarant or any other person subject to the Act's provisions. Such persons might include unit owners, persons exercising a declarant's rights of appointment pursuant to Section 3-103(d), or the association itself. A claim for appropriate relief might include damages, injunctive relief, specific performance, recission or reconveyance if appropriate under the law of the state, or any other remedy normally available under state law. The section specifically refers to "any person or class of persons" to indicate that any relief available under the state class action statute would be available in circumstances where a failure to comply with this Act has occurred. This section specifically permits punitive damages to be awarded in the case of willful failure to comply with the Act and also permits attorney's fees to be awarded in the discretion of the court to any party that prevails in an action.

§ 4-118. Labeling of Promotional Material

No promotional material may be displayed or delivered to prospective purchasers which describes or portrays an improvement that is not in existence unless the description or portrayal of the improvement in the promotional material is conspicuously labeled or identified either as "MUST BE BUILT" or as "NEED NOT BE BUILT."

COMMENT

This section requiring the labeling of improvements depicted on promotional material is necessary to assure that purchasers are not deceived with respect to improvements the declarant indicates he intends to make in a common interest community.

§ 4-119. Declarant's Obligation to Complete and Restore

(a) Except for improvements labeled "NEED NOT BE BUILT," the declarant shall complete all improvements depicted on any site plan or other graphic representation, including any plats or plans prepared pursuant to Section 2-109, whether or not that site plan or other graphic representation is contained in the public offering statement or in any promotional material distributed by or for the declarant.

(b) The declarant is subject to liability for the prompt repair and restoration, to a condition compatible with the remainder of the common interest community, of any portion of the common interest community affected by the exercise of rights reserved pursuant to or created by Section 2-110, 2-111, 2-112, 2-113, 2-115, or 2-116.

COMMENT

1. The duty imposed by subsection (a) is a fundamental obligation of the declarant and is one with which a successor declarant is obligated to comply under Section 3-101.

2. Section 4-119(b) requires the declarant to repair and restore the common interest community following the exercise of any rights reserved or created to exercise a development right (Section 2-110), to alter units (Section 2-112), relocate the boundaries between adjoining units (Section 2-112), subdivide units (Section 2-113), use units or common elements for sales purposes (Section 2-115), or exercise of easement rights (Section 2-116.) Plainly, this obligation on the declarant exists only if the declarant, in his capacity as a unit owner, exercises these rights. If any right to, for example, alter units, is exercised by another unit owner, that unit owner and not the declarant, would be responsible for the consequences of those acts.

§ 4-120. Substantial Completion of Units

In the case of a sale of a unit in which delivery of a public offering statement is required, a contract of sale may be executed, but no interest in that unit may be conveyed, until the declaration is recorded and the unit is substantially completed, as evidenced by a recorded certificate of substantial completion executed by an independent [registered] architect, surveyor or engineer, or by issuance of a certificate of occupancy authorized by law.

COMMENT

The purpose of this section, complemented by Section 4-110, is to assure that the declarant is not able to obtain use of the purchaser's money until the purchaser is able to get a completed unit.

[OPTIONAL]

ARTICLE 5

ADMINISTRATION AND REGISTRATION OF COMMON INTEREST COMMUNITIES

§ 5-101. Administrative Agency

As used in this [Act], "agency" means [insert appropriate administrative agency], which is an agency within the meaning of [insert appropriate reference to state administrative procedure act]. [Insert any related provisions on creation, selection, and remuneration of personnel, budget, annual reports, fees, and other administrative provisions appropriate to the particular state.]

COMMENT

1. Each state should insert in lieu of the bracketed language in the first sentence that agency, whether it be the Real Estate Commission, the Attorney General's Office, or any other existing or new agency, which the state deems appropriate for regulation of common interest communities.

2. The 1961 Revised Model State Administrative Procedure Act (the "Model Act") had been adopted in 20 states and the District of Columbia by 1981. The appropriate reference in those states to the definition of "Agency" would be the statute adopting Section 1(1) of the Model Act. In those states which have not adopted the Model Act, reference to a similar statute should be made to insure that the procedures of the agency regulating planned communities are undertaken in accordance with the principles of procedural due process which underlie the Model Act. In those states which do not have an administrative procedure act, appropriate administrative proce-

dures should be included, either in this section or elsewhere in this article, to provide for hearings, appellate review, regulations, and other administrative matters.

3. As indicated, Article 5 was not designed to solve all procedural matters which are appropriate for an agency. Rather, the Act relies on the cross reference to a state administrative procedure act. Even in such states, however, it may be appropriate to include other provisions, either in Section 5-101 or elsewhere in this article, which are necessary under state practice to insure the proper functioning of a state agency. This might include budget authority, salary levels, civil service requirements, and the like. This may be particularly important when a new state agency is created.

§ 5-102. Registration Required

A declarant may not offer or dispose of a unit intended for residential use unless the common interest community and the unit are registered with the agency, but a common interest community consisting of no more than 12 units and which is not subject to development rights is exempt from the requirements of this section and Section 5-103(a).

COMMENT

1. Registration of a common interest community is only required in the case of a common interest community or unit intended for residential use. Commercial and industrial common interest communities, accordingly, are exempt from registration under this Act. Also exempt from the requirement of registration is a small common interest community containing 12 or fewer units, so long as the common interest community is not subject to development rights. However, the small common interest community and the industrial or commercial common interest community are still subject to scrutiny by the agency under its general powers, despite the fact that registration is not required.

2. If Article 5 were adopted in a particular state, a declarant could not offer or dispose of a residential unit unless that unit were registered with the agency. However, he could offer and dispose of the unit after registration was approved but before the common interest community was created, subject to the requirements of Sections 2-101 and 5-103.

§ 5-103. Application for Registration; Approval of Uncompleted Units

(a) An application for registration must contain the information and be accompanied by any reasonable fees required by the agency's [rules] [regulations]. A declarant promptly shall file amendments to report any actual or expected material change in any document or information contained in the application.

(b) If a declarant files with the agency a declaration or proposed declaration, or an amendment or proposed amendment to a declaration, creating units that he proposes to convey before they are substantially completed in the manner required by Section 4-120 and, in a condominium, by Section 2-101(b), the declarant shall also file with the agency:

(1) a verified statement showing all costs involved in completing the buildings containing those units;

(2) a verified estimate of the time of completion of construction of the buildings containing those units;

(3) satisfactory evidence of sufficient funds to cover all costs to complete the buildings containing those units;

(4) a copy of the executed construction contract and any other contracts for the completion of the buildings containing those units;

(5) a 100 percent payment and performance bond covering the entire cost of construction of the buildings containing those units;

(6) plans for the units which, in the case of a condominium or planned community, shall conform to the requirements of Section 2-103(c);

(7) if purchasers' funds are to be utilized for the construction of the common interest community, an executed copy of the escrow agreement with an escrow company or financial institution authorized to do business within the state which provides that:

(i) disbursements of purchasers' funds may be made from time to time to pay for construction of the common interest community, architectural, engineering, finance, and legal fees, and other costs for the completion of the common interest community in proportion to the value of the work completed by the contractor as certified by an independent [registered] architect or engineer, on bills submitted and approved by the lender of construction funds or the escrow agent;

(ii) disbursement of the balance of purchasers' funds remaining after completion of the common interest community must be made only when the escrow agent or lender receives satisfactory evidence that (A) the period for filing mechanic's and materialman's liens has expired, (B) the right to claim those liens has been waived, or (C) adequate provision has been made for satisfaction of any claimed mechanic's or materialman's lien; and

(iii) any other restriction relative to the retention and disbursement of purchasers' funds required by the agency; and

(8) any other materials or information the agency may require by its [rules] [regulations].

(c) The agency may not register the units described in the declaration or the amendment unless the agency determines, on the basis of the material submitted by the declarant and any other information available to the agency, that there is a reasonable basis to expect that the units to be conveyed will be completed by the declarant following conveyance.

COMMENT

1. Subsection (a) is a general provision empowering the agency by regulation to develop requirements for information to be submitted to the agency, and for the imposition of reasonable fees by the agency. Such rules or regulations, under the Model Act, could be adopted only after providing notice to interested persons and an opportunity to be heard. *See* Section 3 of the Model Act. The article encourages, but does not require, development of uniform regulations between states adopting Article 5. *See* Section 5-107(e).

2. Under Section 2-101(b) a condominium declaration may not be recorded until all structural and mechanical systems for units which will be created by the recording are substantially completed. While there is no similar requirement for planned communities and cooperatives, Section 4-120, which is applicable to all types of common interest communities, prohibits *conveyance* of units before they are substantially completed.

In addition, under Section 4-110, any deposit made in connection with the purchase or reservation of a unit must be held in escrow until closing. The combined effect of Sections 2-101(b), 4-120 and 4-110 is to insure that any funds of a purchaser are held in escrow until his unit is substantially completed and the purchaser has title.

Subsection (b) is a departure from the requirements of Sections 2-103(b) and 4-120. The need for consumer protection suggests that substantial completion of a residential unit should be a prerequisite for conveying the unit to a purchaser in the absence of an agency to control and review planned community projects. Under subsection (b), however, a declarant may file a declaration or proposed declaration, or an amendment to a declaration, for the purpose of creating a common interest community in which the units are not substantially completed. Subsection (b) contemplates that the agency might nevertheless register the units described in the declaration or amendment, if the agency were satisfied that the units would be completed. Registration would then permit the declarant to offer to sell and convey the uncompleted units.

In addition, paragraph (7) of Section 5-103(b) contemplates that purchaser's funds might be used, despite the language of Section 4-110 for construction of the planned community. Controls are imposed, however, to insure that disbursements are made in accordance with the value of work completed and approved by an escrow agent.

Note that the common elements in the common interest community under the Act need not be completed at the time of the sale, even in the absence of an agency. Completion of common elements, however, is governed by Section 4-119 (Obligation to Complete and Restore).

3. The agency, by regulation, should determine the parties whom the payment and performance bond required under paragraph (b)(5) indemnifies.

§ 5-104. Receipt of Application; Order of Registration

(a) The agency shall acknowledge receipt of an application for registration within [5] business days after receiving it. Within [60] days after receiving the application, the agency shall determine whether:

(1) the application and the proposed public offering statement satisfy the requirements of this [Act] and the agency's [rules] [regulations];

(2) the declaration and bylaws comply with this [Act]; and

(3) it is likely that the improvements the declarant has undertaken to make can be completed as represented.

(b) If the agency makes a favorable determination, it shall issue promptly an order registering the common interest community. Otherwise, unless the declarant has consented in writing to a delay, the agency shall issue promptly an order rejecting registration.

COMMENT

1. This section provides reasonable deadlines for agency review of an application for registration, and describes the standards by which the application should be measured. The agency is directed to review the documents provided to the purchaser, and is given a great deal of discretion in mandating the form and content of the public offering statement; *see* Section 5-110.

2. The agency is also charged with reviewing those common element improvements which a declarant has promised to make, and which would be labeled under Section 4-118 as "MUST BE BUILT," to determine whether the declarant has the financial capacity to build them.

3. In the event the agency were to issue an order rejecting registration under subsection (b), an important issue concerning judicial review of that order may arise in some states.

The order would appear to be a rejection of an application for a license, as defined in Section 1(3) of the Model Act; it would be a "contested case", however, within the meaning of Section 1(2) of the Model Act, only if "an opportunity for hearing" is provided. No right to a hearing, or right of appeal, is provided in the Act.

The order rejecting registration thus might not be appealable under Section 15 of the Model Act, because judicial review is provided under Section 15 only for "contested cases". While that section does not limit utilization of, or the scope of judicial review available under, other means of review, some courts have held that, in the absence of specific statutory authority to hear an appeal from an administrative decision, courts have no jurisdiction to entertain such an appeal. *See, e.g., Rybinski v. State Employees' Retirement Comm.*, 173 Conn. 462 (1977).

Accordingly, the law of each state should be carefully reviewed. In cases where the state administrative procedure act provides for appeals from decisions on licensing matters made by state agencies regardless of the availability of a hearing, no amendment would be required.

§ 5-105. Cease and Desist Orders

If the agency determines, after notice and hearing, that any person has disseminated or caused to be disseminated orally or in writing any false or misleading promotional materials in connection with a common interest community or that any person has otherwise violated any provision of this [Act] or the agency's [rules] [regulations] or orders, the agency may issue an order to cease and desist from that conduct, to comply with the provisions of this [Act] and the agency's [rules] [regulations] and orders, or to take affirmative action to correct conditions resulting from that conduct or failure to comply.

§ 5-106. Revocation of Registration

(a) The agency, after notice and hearing, may issue an order revoking the registration of a common interest community upon determination that a declarant or any officer or principal of a declarant has:

(1) failed to comply with a cease and desist order issued by the agency affecting that common interest community;

(2) concealed, diverted, or disposed of any funds or assets of any person in a manner impairing rights of purchasers of units in that common interest community;

(3) failed to perform any stipulation or agreement made to induce the agency to issue an order relating to that common interest community;

(4) misrepresented or failed to disclose a material fact in the application for registration; or

(5) failed to meet any of the conditions described in Sections 5-103 and 5-101 necessary to qualify for registration.

(b) A declarant may not convey, cause to be conveyed, or contract for the conveyance of any interest in a unit while an order revoking the registration of the common interest community is in effect, without the consent of the agency.

(c) In appropriate cases the agency, in its discretion, may issue a cease and desist order in lieu of an order of revocation.

COMMENT

1. This section permits the agency, after notice and hearing, to revoke a prior registration of a common interest community. Under Section 15 of the Model Act, the revocation would not be effective until the last day for seeking review of the agency order. While the filing of the appeal would not stay the agency's decision, the agency or reviewing court could grant a stay of the revocation. Naturally, this result may vary in a particular state.

2. A declarant is prohibited from disposing of any interest in a unit when registration has been revoked, without consent of the agency.

§ 5-107. General Powers and Duties of Agency

(a) The agency may adopt, amend, and repeal [rules] [regulations] and issue orders consistent with and in furtherance of the objectives of this [Act], but the agency may not intervene in the internal activities of an association except to the extent necessary to prevent or cure violations of this [Act]. The agency may prescribe forms and procedures for submitting information to the agency.

(b) If it appears that any person has engaged, is engaging, or is about to engage in any act or practice in violation of this [Act] or any of the agency's rules or orders, the agency without prior administrative proceedings may maintain an action in the [appropriate court] to enjoin that act or practice or for other appropriate relief. The agency is not required to post a bond or prove that no adequate remedy at law exists.

(c) The agency may intervene in any action involving the powers or responsibilities of a declarant in connection with any common interest community for which an application for registration is on file.

(d) The agency may accept grants in aid from any governmental source and may contract with agencies charged with similar functions in this or other jurisdictions, in furtherance of the objectives of this [Act].

(e) The agency may cooperate with agencies performing similar functions in this and other jurisdictions to develop uniform filing procedures and forms, uniform disclosure standards, and uniform administrative practices, and may develop information that may be useful in the discharge of the agency's duties.

(f) In issuing any cease and desist order or order rejecting or revoking registration of a common interest community, the agency shall state the basis for the adverse determination and the underlying facts.

(g) The agency, in its sound discretion, may require bonding, escrow of portions of sales proceeds, or other safeguards it may prescribe by its [rules] [regulations] to guarantee completion of all improvements which a declarant is obligated to complete pursuant to Section 4-119 (Declarant's Obligation to Complete and Restore).

COMMENT

1. Under subsection (a), the agency is empowered to adopt regulations and issue orders in furtherance of the objectives of this Act. Those objectives are the same as the underlying purposes of the Act. The agency, however, is prohibited from intervening in the internal activities of the association except to the extent necessary to prevent or cure violations of this Act. The principal purpose of the agency is to regulate the behavior of the declarant, not the behavior of individual unit owners. If, however, the declarant is misusing the association by virtue of his power to control its activities, and thereby violating the Act, the agency may act to prevent the violation.

2. Subsection (g) empowers the agency to require bonding, escrow, or other safeguards to guarantee completion of improvements labeled "MUST BE BUILT" (Section 4-118).

A substantive requirement for bonding is not included under Article 4 for all common interest communities, in all circumstances. While some states have adopted bonding and escrow requirements for completion of the common elements in condominiums (see, e.g., Section 47-74d, Conn. Gen. Stat), the available economic evidence indicates that a universal bonding requirement would increase the cost of units, and that the cost of such provisions may not always be justified. The principal concern for consumer protection in this regard has been resolved in the Act by requiring substantial completion of all units prior to conveyance (Section 4-120) and by requiring labeling of common elements as either "MUST BE BUILT" or "NEED NOT BE BUILT."

At the same time, particularly in the case of common interest communities registered under Section 5-103(b), there may be individual cases where the agency, in its discretion, may find escrowing or bonding to be in the public interest. For that reason, this power is included only as a permissible power for the agency under Article 5.

§ 5-108. Investigative Powers of Agency

(a) The agency may initiate public or private investigations within or outside this State to determine whether any representation in any document or information filed with the agency is false or misleading or whether any person has engaged, is engaging, or is about to engage in any unlawful act or practice.

(b) In the course of any investigation or hearing, the agency may subpoena witnesses and documents, administer oaths and affirmations, and adduce evidence. If a person fails to comply with a subpoena or to answer questions

propounded during the investigation or hearing, the agency may apply to the [appropriate court] for a contempt order or injunctive or other appropriate relief to secure compliance.

COMMENT

The powers enumerated in Sections 5-107 and 5-108 are specifically granted to the agency because of judicial determinations in various states that, in the absence of such statutory powers, agencies have no authority to act.

§ 5-109. Annual Report and Amendments

(a) A declarant, within 30 days after the anniversary date of the order of registration, annually shall file a report to bring up-to-date the material contained in the application for registration and the public offering statement. This provision does not relieve the declarant of the obligation to file amendments pursuant to subsection (b).

(b) A declarant promptly shall file amendments to the public offering statement with the agency.

(c) If an annual report reveals that a declarant owns or controls units representing less than [25] percent of the voting power in the association and that a declarant has no power to increase the number of units in the common interest community, or to cause a merger or confederation of the common interest community with other common interest communities, the agency shall issue an order relieving the declarant of any further obligation to file annual reports. Thereafter, so long as the declarant is offering any units for sale, the agency has jurisdiction over the declarant's activities, but has no other authority to regulate the common interest community.

COMMENT

1. This section requires annual reports from a declarant to the agency in order to keep the information filed with the agency current. This requirement parallels the declarant's obligation to provide a current public offering statement to unit owners. *See* Section 4-103(c).

2. Under subsection (c), if the period of declarant control has passed, the declarant is relieved of the obligation to continue to file an annual report. However, the obligation to continue to provide public offering statements is imposed on a declarant under Section 4-103(c) so long as he is offering any unit for sale. The agency would thus continue to have jurisdiction over the declarant's activities, but would have no other authority to regulate the common interest community.

§ 5-110. Agency Regulation of Public Offering Statement

(a) The agency at any time may require a declarant to alter or supplement the form or substance of a public offering statement to assure adequate and accurate disclosure to prospective purchasers.

(b) The public offering statement may not be used for any promotional purpose before registration and afterwards only if it is used in its entirety. No person may advertise or represent that the agency has approved or recommended the common interest community, the disclosure statement, or any of the documents contained in the application for registration.

(c) In the case of a common interest community situated wholly outside this State, an application for registration or proposed public offering statement filed with the agency which has been approved by an agency in the state where the common interest community is located and substantially complies with the requirements of this [Act] may not be rejected by the agency on the grounds of non-compliance with any different or additional requirements imposed by this [Act] or by the agency's [rules] [regulations]. However, the agency may require additional documents or information in particular cases to assure adequate and accurate disclosure to prospective purchasers.

COMMENT

1. Subsection (c) attempts to facilitate interstate sales of units by requiring the agency in the enacting state to accept an agency-approved public offering statement from the state where the common interest community is located. This avoids the need for a different public offering statement in several states for the same project. If no agency exists in the state where the common interest community is located, however, a public offering statement must be prepared and approved before offering an out-of-state unit in an enacting state.

2. Because of the bracketed language contained in Section 1-208, which should be inserted in the Act if Article 5 is enacted, a foreign common interest community must only be registered under this Article in an enacting state if a declarant is "offering" units in that common interest community in the enacting state. Thus, general advertising which did not meet the definition of "offering" could be circulated in the enacting state without registration. If an "offering" is once made, however, then all of Article 5 applies to the foreign common interest community. Any "disposition" of a foreign residential common interest community in an enacting state, of course, would require delivery of a public offering statement even in the absence of an agency; *see* Section 1-208. If an agency exists in the enacting state, any disposition in that state would be illegal if the common interest community were not registered in the enacting state; *see* Section 1-208.

Landlord Tenant Act

lord cannot thereafter demand forfeiture of the lease without first giving the tenant notice that strict compliance with the terms of the lease will be demanded in the future. Hendrickson v. Freericks, Sup. Ct. Op. No. 2226 (File Nos. 4292, 4565, 4605), 620 P.2d 205 (1980).

A purchaser of a building had standing to enforce compliance with a preexisting lease when the seller had not reserved leasehold rights. Hendrickson v. Freericks, Sup. Ct. Op. No. 2226 (File Nos. 4292, 4565, 4605), 620 P.2d 205 (1980).

Sec. 34.03.225. Limitations on mobile home park operator's right to terminate. A mobile home park operator may evict a mobile home or a mobile home park dweller or tenant only for one of the following reasons:

(1) the mobile home dweller or tenant has defaulted in the payment of rent owed;

(2) the mobile home dweller or tenant has been convicted of violating a federal or state law or local ordinance, and that violation is continuing and is detrimental to the health, safety or welfare of other dwellers or tenants in the mobile home park;

(3) the mobile home dweller or tenant has violated a provision, enforceable under AS 34.03.130, of the rental agreement or lease signed by both parties and not prohibited by law including rent and the terms of agreement; and

(4) a change in the use of the land comprising the mobile home park, or the portion of it on which the mobile home to be evicted is located; however, all dwellers or tenants so affected by a change in land use shall be given at least 90 days notice, or longer if a longer notice period is provided in a valid lease. (§ 5 ch 138 SLA 1976; am § 1 ch 48 SLA 1982)

Effect of amendments. — The 1982 amendment, in paragraph (3), substituted "a provision, enforceable under AS 34.03.130, of the rental agreement or lease signed by both parties and not prohibited by law including rent and the terms of agreement" for "a reasonable rule or regulation properly established by the operator."

Legislative history reports. — For report on ch. 138, SLA 1976 (SCS CSHB 829 am S [re-engrossed]), see 1976 Senate Journal, p. 1368.

NOTES TO DECISIONS

Construction of paragraph (3) as it existed prior to 1982 amendment. — See Osness v. Dimond Estate, Inc., Sup. Ct. Op. No. 2150 (File Nos. 4192 4193), 615 P.2d 605 (1980).

Sec. 34.03.230. Remedies for absence, nonuse and abandonment.

NOTES TO DECISIONS

Cited in Public Safety Employees Ass'n v. State, Sup. Ct. Op. No. 2607 (File No. 6053), 658 P.2d 769 (1983).

Chapter 07. Horizontal Property Regimes Act.

Article 1. Formation of Horizontal Property Regimes.

Sec. 34.07.010. This chapter applicable only if declaration executed and recorded. (a) This chapter is applicable only to property, the sole owner or all of the owners of which submit it to the horizontal property regime by executing and recording a declaration under (c) of this section and § 20 of this chapter.

(b) No declaration or any amendment to the declaration is valid unless recorded.

(c) The declaration shall be recorded in the recording district in which the property is located. (§ 1 ch 44 SLA 1963; am § 25 ch 208 SLA 1975)

Effect of amendment. — The 1975 section and § 20" for "§§ 150—160" in amendment substituted "(c) of this subsection (a).

Sec. 34.07.020. Contents of declaration. The declaration shall contain

(1) a description of the land on which the building and improvement are or are to be located;

(2) a description of the building, stating the number of stories and basements, the number of apartments and the principal materials of which it is or is to be constructed;

(3) the apartment number of each apartment, and a statement of its location, approximate area, number of rooms, and immediate common areas to which it has access, and any other data necessary for its proper identification;

(4) a description of the common areas and facilities;

(5) a description of the limited common areas and facilities, if any, stating to which apartment their use is reserved;

(6) the value of the property and of each apartment, and the percentage of undivided interest in the common areas and facilities appertaining to each apartment and its owner for all purposes, including voting;

(7) a statement of the purposes for which the building and each of the apartments are intended and restricted as to their use;

(8) the name of a person to receive service of process in the cases provided for in this chapter, together with the address of his residence or his place of business which shall be within the city or recording district in which the building is located;

(9) a provision as to the percentage of votes by the apartment owners which determines whether or not to rebuild, repair, restore, or sell the property in the event of the damage or the destruction of all or a part of the property;

(10) a provision authorizing and establishing procedures for the subdividing or combining of an apartment or apartments, common areas and facilities or limited common areas and facilities, through the use of a metes and bounds description or otherwise;

(11) a provision requiring the adoption of bylaws for the administration of the property or for other purposes not inconsistent with this chapter which may include that the property be administered by a board of directors elected from among the apartment owners, or by a manager, or by a managing agent, or otherwise, and the procedures for the adoption and amendment of the bylaws;

(12) any further details in connection with the property which the person executing the declaration may consider desirable to set out consistent with this chapter;

(13) the method by which the declaration may be amended, consistent with this chapter, except that not less than 60 per cent of the apartment owners may consent to any amendment; and

(14) a reference to the file number of the floor plans of the building affected which are required to be filed simultaneously with the declaration under § 30 of this chapter. (§ 1 ch 44 SLA 1963)

Sec. 34.07.030. Filing of survey map and floor plans with verified statement. There shall be filed simultaneously with the recording of the declaration in the recording district in which the property is located

(1) a survey map of the surface of the land submitted to the provisions of this chapter showing the location of the building on it;

(2) a set of the floor plans of the building showing the layout, apartment numbers and dimensions of the apartments in sufficient detail to identify and locate each apartment with certainty, stating the name of the building or that it has no name, and bearing the verified statement of a registered architect or registered professional engineer certifying that it is an accurate copy of portions of the plans of the building as filed with and approved by the governmental entity having jurisdiction over the approval or issuance of permits for the construction of the building, or a statement that no approval or permit is required. (§ 1 ch 44 SLA 1963)

Sec. 34.07.040. Amendments to declaration in place of verified statement by architect or engineer regarding floor plans. (a) If the

floor plans do not include a verified statement by a registered architect or registered professional engineer that the plans fully and accurately depict the layout, apartment numbers, and dimensions of the apartments as built, there shall be recorded before the first conveyance of an apartment an amendment to the declaration to which shall be attached a verified statement of a registered architect certifying that the plans previously filed or being filed simultaneously with the amendment fully and accurately depict the layout, apartment number and dimensions of the apartments as built.

(b) The plans shall each contain a reference to the date of recording of the declaration and the volume, page, and receiving number of the recorded declaration. (§ 1 ch 44 SLA 1963)

Sec. 34.07.050. Form of floor plans. The recording office shall prescribe the style, size, form, and quality of floor plans filed under § 30 of this chapter. (§ 1 ch 44 SLA 1963)

Sec. 34.07.060. Survey map and floor plans subject to state and local laws. The survey map and floor plans are subject to the provisions of state and local laws relating to plats, planning and plans, subdivisions, and zoning, if the laws are not inconsistent with the purposes of this chapter and if the building is or is to be located on land which is not owned in common. (§ 1 ch 44 SLA 1963)

Sec. 34.07.070. Recording of instruments affecting horizontal property regimes. The declaration, an amendment to it, or any instrument by which the property may be removed from this chapter and every instrument affecting the property or an apartment may be recorded. (§ 1 ch 44 SLA 1963)

Article 2. Apartment Ownership and Conveyancing.

Sec. 34.07.080. Apartment classified as real property. Each apartment, together with its undivided interest in the common areas and facilities is not considered an intangible or a security or any interest therein but for all purposes constitutes and is classified as real property under the provisions of this chapter. (§ 1 ch 44 SLA 1963)

Sec. 34.07.090. Apartment ownership and possession. Each apartment owner shall have exclusive ownership and possession of his apartment, but any apartment may be owned by husband and wife as

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Sec. 34.07.100. Separation of apartment ownership from common areas and facilities ownership prohibited. The percentage of the undivided interest in the common areas and facilities shall not be separated from the apartment to which it appertains even though the interest is not expressly mentioned or described in the conveyance or other instrument. (§ 1 ch 44 SLA 1963)

Sec. 34.07.110. Release or partial release from encumbrance affecting apartment with first conveyance. At the time of the first conveyance of each apartment, every mortgage, deed of trust, lien, or other encumbrance affecting the apartment, including the percentage of undivided interest of the apartment in the common areas and facilities, shall be paid and satisfied of record, or the apartment being conveyed and its percentage of undivided interest in the common areas and facilities shall be released by a recorded partial release. (§ 1 ch 44 SLA 1963)

Sec. 34.07.120. Liability of grantee for unpaid common expenses at time of conveyance. In a voluntary conveyance the grantee of an apartment is jointly and severally liable with the grantor for all unpaid assessments against the latter for his share of the common expenses up to the time of the grantor's conveyance, without prejudice to the grantee's right to recover from the grantor the amounts paid on the assessments by the grantee. (§ 1 ch 44 SLA 1963)

Sec. 34.07.130. Person obtaining possession upon foreclosure of apartment not liable for common expenses. If a mortgagee of a recorded mortgage or a trustee of a recorded deed of trust or other purchaser of an apartment obtains possession of the apartment as a result of foreclosure of the mortgage or deed of trust, the possessor, his successors and assigns are not liable for the share of the common expenses or assessments by the association of apartment owners chargeable to the apartment which became due before his possession. This unpaid share of common expenses or assessments is a common expense collectable from all of the apartment owners including the possessor, his successors and assigns. (§ 1 ch 44 SLA 1963)

Sec. 34.07.140. Grantee entitled to statement of unpaid assessments. A grantee is entitled to a statement from the manager or board of directors setting out the amount of the unpaid assessments against the grantor. The grantee is not liable for, nor is the apartment conveyed subject to a lien for, any unpaid assessments against the grantor in excess of the amount in the statement. (§ 1 ch 44 SLA 1963)

Sec. 34.07.150. Contents of apartment deed. An apartment deed shall include

(1) a description of the land as provided in § 20 of this chapter, or the

post office address of the property, and in either case, the date of recording of the declaration and its volume, page, and receiving number;

(2) the apartment number of the apartment in the declaration and any other data necessary for its proper identification;

(3) a statement of the use for which the apartment is intended and any restrictions on its use;

(4) the percentage of undivided interest appertaining to the apartment, the common areas and facilities and limited common areas and facilities appertaining to it, if any; and

(5) any further details which the grantor and grantee may set out consistent with the declaration and with this chapter. (§ 1 ch 44 SLA 1963)

Article 3. Common Areas and Facilities Owned With Apartments.

Sec. 34.07.160. Common areas and facilities ownership. (a) Each apartment owner has the common right to a share, with other apartment owners, in the common areas and facilities.

(b) Each apartment owner is entitled to an undivided interest in the common areas and facilities in the percentage expressed in the declaration. The percentage is computed by taking as a basis the value of the apartment in relation to the value of the property. (§ 1 ch 44 SLA 1963)

Sec. 34.07.170. Nonexclusive easement to use common areas and facilities. Each apartment owner has a nonexclusive easement for, and may use the common areas and facilities in accordance with the purpose for which they were intended without hindering or encroaching upon the lawful right of the other apartment owners. (§ 1 ch 44 SLA 1963)

Sec. 34.07.180. Alteration of common areas and facilities ownership. (a) The percentage of the undivided interest of each apartment owner in the common areas and facilities as expressed in

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the declaration shall not be altered except in accordance with procedures set out in the bylaws and by amending the declaration.

(b) The bylaws shall provide for a periodic reappraisal of the apartments and the common areas and facilities together with a recomputation, if required, of the percentage of the undivided interest of each apartment owner in the common areas and facilities. (§ 1 ch 44 SLA 1963)

Sec. 34.07.190. Partition of common areas and facilities ownership prohibited. (a) The common areas and facilities shall remain undivided and no apartment owner or other person may bring an action for partition or division of any part, unless the property has been removed from the provisions of this chapter as prescribed by §§ 300 — 340 of this chapter. Any covenant to the contrary is void.

(b) Nothing in this chapter limits the right of partition by a husband and wife owning as tenants by the entirety or by the owners in common of one or more of the apartments as to the ownership of the apartment or apartments. (§ 1 ch 44 SLA 1963)

Sec. 34.07.200. Maintenance, repair and replacement of common areas and facilities. (a) The necessary work of maintenance, repair and replacement of the common areas and facilities and the making of an addition or improvement may be carried out only as provided in this chapter and in the bylaws.

(b) The association of apartment owners have the irrevocable right, to be exercised by the manager or board of directors, to have access to each apartment from time to time during reasonable hours as may be necessary for

(1) the maintenance, repair, or replacement of any of the common areas and facilities in it, or accessible from it; or

(2) making emergency repairs in the apartment necessary to prevent damage to the common areas and facilities or to another apartment. (§ 1 ch 44 SLA 1963)

Sec. 34.07.210. Apartment owner liable for his share of the common expenses of common areas and facilities. No apartment owner may exempt himself from liability for his contribution towards the common expenses of common areas or facilities by his waiver of the use or enjoyment of any of the common areas and facilities or by abandonment of his apartment. (§ 1 ch 44 SLA 1963)

Sec. 34.07.220. Collection of unpaid common expenses from apartment owner. A sum assessed by the association of apartment owners but unpaid for the share of the common expenses chargeable to any apartment may be enforced by the manager or board of directors acting on behalf of the apartment owners, upon first obtaining the approval of a majority of all apartment owners, in the following manner

(1) ten days' notice shall be given the delinquent apartment owner stating that unless the assessment is paid within ten days any or all utility services will be immediately severed and shall remain severed until the assessment is paid; or

(2) by the lawful method of enforcement as may be provided in the declaration or bylaws. (§ 1 ch 44 SLA 1963)

Sec. 34.07.230. Unpaid common expense is lien on apartment, order of lien priority. A sum assessed by the association of apartment owners but unpaid for the share of the common expenses chargeable to an apartment constitutes a lien on the apartment prior to all other liens except

(1) tax liens on the apartment in favor of an assessing unit or special district; and

(2) sums unpaid on deeds of trust or mortgages of record. (§ 1 ch 44 SLA 1963)

Sec. 34.07.240. Common expense lien foreclosure. (a) A common expense lien as provided for in § 230 of this chapter may be foreclosed in a civil action brought by the manager or board of directors, acting on behalf of the apartment owners, in the same manner as a lien on, or mortgage of or a deed of trust of real property.

(b) In the event of foreclosure, the apartment owner shall be required to pay a reasonable rental for the apartment, if provided for in the bylaws, and the plaintiff in the foreclosure may appoint a receiver to collect it.

(c) The manager or board of directors, acting on behalf of the apartment owners may, unless prohibited by the declaration, bid in the apartment at the foreclosure sale, and may acquire and hold, lease, mortgage and convey the apartment. (§ 1 ch 44 SLA 1963)

Sec. 34.07.250. Action to recover a judgment for unpaid common expenses does not waive lien. An action to recover a judgment for unpaid common expenses is maintainable without foreclosing or waiving the lien securing it. (§ 1 ch 44 SLA 1963)

Sec. 34.07.260. Causes of action relating to common areas and facilities. (a) Without limiting the rights of an apartment owner, a cause of action may be brought by the manager or board of directors, in either case in the discretion of the board of directors, on behalf of two or more apartment owners, as their respective interests may appear, with respect to a cause of action relating to the common areas and facilities of more than one apartment.

(b) A cause of action relating to the common areas and facilities for damages arising out of tortious conduct shall be maintained only against the association of apartment owners and a judgment lien or other charge is a common expense. The judgment lien or charge is removed from an apartment and its percentage of undivided interest in the common areas and facilities upon payment by the respective owner

of his proportionate share based on the percentage of undivided interest owned by him. (§ 1 ch 44 SLA 1963)

Sec. 34.07.270. Service of process on two or more apartment owners. Service of process on two or more apartment owners in an action relating to the common areas and facilities of more than one apartment may be made on the person designated in the declaration to receive service of process. (§ 1 ch 44 SLA 1963)

Sec. 34.07.280. Receipts and expenditures records to be kept. (a) The manager or board of directors shall keep detailed and accurate records in chronological order of the receipts and expenditures affecting the common areas and facilities, specifying and itemizing the maintenance and repair expenses of the common areas and facilities and any other expenses incurred.

(b) All books and records shall be kept in accordance with good accounting procedures and shall be audited at least once a year by an auditor outside of the organization. (§ 1 ch 44 SLA 1963)

Sec. 34.07.290. Examination by apartment owner of receipts and expenditures. The receipts and expenditures records and vouchers authorizing payment for maintenance and repair of common areas and facilities required to be kept by § 280 of this chapter shall be available for examination by an apartment owner at convenient hours of weekdays. (§ 1 ch 44 SLA 1963)

Article 4. Damage or Destruction of Property.

Sec. 34.07.300. Determination to be made by apartment owners if property destroyed. If within 60 days of damage or destruction of all or part of the property it is not determined by a majority of all apartment owners to repair, reconstruct, or rebuild in accordance with the original plan, or by a unanimous vote of all apartment owners to do otherwise, then

(1) the property shall be owned in common by the apartment owners;

(2) the undivided interest in the property owned in common which appertains to each apartment owner shall be the percentage of undivided interest previously owned by him in the common areas and facilities; and

(3) mortgages, deeds of trust, or liens affecting any of the apartments are transferred in accordance with the existing priorities to the percentage of the undivided interest of the apartment owner in the property. (§ 1 ch 44 SLA 1963)

Sec. 34.07.310. Action for partition if apartment owners fail to act under § 300 of this chapter. An action for partition may be started by an apartment owner if the apartment owners fail to act under § 300 of this chapter after the damage to or destruction of the property. (§ 1 ch 44 SLA 1963)

Sec. 34.07.320. Distribution of funds from partition sale. (a) The net proceeds of a sale of the property conducted in an action for partition started under § 310 of this chapter shall be considered as one fund.

(b) The fund shall be divided into separate shares, one for each apartment owner in a percentage equal to the percentage of undivided interest which he has in the property.

(c) After first paying out of the respective share of each apartment owner, all mortgages, deeds of trust, and liens on the undivided interest in the property owned by the apartment owner, the balance remaining in each share shall be distributed to each apartment owner respectively. (§ 1 ch 44 SLA 1963)

Article 5. Removal of Property From the Horizontal Property Regime.

Section

Sec. 34.07.330. Removal of property from the provisions of this chapter. All of the apartment owners may remove a property from the provisions of this chapter by a recorded instrument to that effect if the mortgagees, trustees, and holders of all liens affecting any of the apartments consent or agree, in either case by a recorded instrument, that their mortgages, deeds of trust, and liens are transferred to the percentage of the undivided interest of the apartment owner in the property as provided in § 340 of this chapter. (§ 1 ch 44 SLA 1963)

Sec. 34.07.340. Ownership of property upon removal from the provisions of this chapter. (a) Upon removal of the property from the provisions of this chapter, the property is owned in common by the apartment owners.

(b) The undivided interest in the property owned in common which appertains to each apartment owner is the percentage of the undivided interest previously owned by the owners in the common areas and facilities. (§ 1 ch 44 SLA 1963)

Sec. 34.07.350. Removal of property does not bar subsequent resubmission under this chapter. The removal of property provided for in §§ 330 — 340 of this chapter does not bar the subsequent

resubmission of the property to the provisions of this chapter. (§ 1 ch 44 SLA 1963)

Article 6. Miscellaneous Provisions.

Sec. 34.07.360. Strict compliance with bylaws by apartment owner necessary. Each apartment owner shall comply strictly with the bylaws and with the adopted administrative regulations, as either may be lawfully amended from time to time, and with the covenants, conditions and restrictions set out in the declaration or in the deed to his apartment. Failure to comply with any of the foregoing is ground for an action to recover sums due for damages or injunctive relief, or both, maintainable by the manager or board of directors on behalf of the association of apartment owners or by a particularly aggrieved apartment owner. (§ 1 ch 44 SLA 1963)

Sec. 34.07.370. Unanimous consent of all apartment owners needed for certain work on individual apartment. No apartment owner may do any work which will jeopardize the soundness or safety of the property, reduce its value, or impair any easement or hereditament without the unanimous consent of all of the other apartment owners being first obtained. (§ 1 ch 44 SLA 1963)

Sec. 34.07.380. Common profits and expenses shared by apartment owners. The common profits of the property shall be distributed among and the common expenses shall be charged to the apartment owners according to the percentage of the undivided interest in the common areas and facilities. (§ 1 ch 44 SLA 1963)

Sec. 34.07.390. Persons subject to this chapter. (a) An apartment owner, his tenant, or their employees, or any other person that may in any manner use the property or any part of it under this chapter are subject to the provisions of this chapter, and to the declaration and bylaws of the association of apartment owners adopted under this chapter.

(b) An agreement, decision, and determination made by the association of apartment owners under this chapter, the declaration or the bylaws and in accordance with the voting percentages established under this chapter, declaration, or the bylaws is binding on all apartment owners. (§ 1 ch 44 SLA 1963)

Sec. 34.07.400. Insurance of property. (a) A manager or board of directors, if required by the declaration, bylaws, or by a majority of the apartment owners, or if requested by a mortgagee or trustee having a mortgage or a deed of trust of record covering an apartment, shall obtain insurance for the property against loss or damage by fire and other hazards under the terms and amounts required or requested.

(b) The insurance coverage shall be written on the property in the name of the manager or of the board of directors of the association of apartment owners, as trustee for each of the apartment owners in the percentages established by the declaration.

(c) Premiums for insurance coverage secured under (a) of this section are a common expense.

(d) Provision for insurance under this section does not prejudice the right of an apartment owner to insure his own apartment or the personal contents in it for his benefit. (§ 1 ch 44 SLA 1963)

Sec. 34.07.410. Liens against property, apartments, common areas, and facilities. (a) After the recording of the declaration as provided in this chapter, and while the property remains subject to this chapter, no lien may thereafter arise or be effective against the property. During this period, liens or encumbrances may arise or be created only against each apartment and the percentage of undivided interest in the common areas and facilities appurtenant to the apartment in the same manner and under the same conditions as liens or encumbrances may arise or be created upon or against any other separate parcel of real property subject to individual ownership. However, no labor performed or materials furnished with the consent of or at the request of the owner of any apartment, or the owner's agent, contractor, or subcontractor, may be the basis for the filing of a lien against any other apartment or any other property of any other apartment owner not expressly consenting to or requesting the same. However, express consent is considered given by an apartment owner in the case of emergency repairs.

(b) Labor performed or materials furnished for the common areas and facilities, if authorized as provided in this chapter, or by the declaration or bylaws, or by the association of apartment owners, the manager or the board of directors, is considered performed or furnished with the express consent of each apartment owner and may be the basis for the filing of a lien against each of the apartments and is subject to the provisions of § 420 of this chapter. (§ 1 ch 44 SLA 1963)

Sec. 34.07.420. Removal of lien against two or more apartments. (a) If a lien against two or more apartments becomes effective, the apartment owners of the separate apartments may remove their apartments and the percentage of undivided interest in the common areas and facilities appurtenant to the apartments from the lien by payment of the fractional or proportional amounts attributable to each

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of the apartments affected. The individual payments are computed by reference to the percentage appearing on the declaration.

(b) After payment, discharge, or satisfaction of the lien, the apartment and the percentage of undivided interest in the common areas and facilities appurtenant to it are free and clear of the liens paid, satisfied, or discharged. The partial payment, satisfaction, or discharge does not prevent the lienor from proceeding to enforce his rights against any apartment and the percentage of undivided interest in the common areas and facilities appurtenant to it not paid, satisfied, or discharged. (§ 1 ch 44 SLA 1963)

Sec. 34.07.430. Assessment and taxation of apartments. (a) An apartment and its undivided interest in the common areas and facilities are a parcel and it is subject to separate assessments and taxation by each assessing unit for all types of taxes authorized by law including special ad valorem levies and special assessments. No building, property, or any of the common areas and facilities may be a security or a parcel for any purpose.

(b) Nothing in this chapter detracts from or limits the powers and duties of any assessing or taxing unit or official otherwise granted or imposed by law or regulation. (§ 1 ch 44 SLA 1963)

Sec. 34.07.440. Interpretation of local ordinances, resolutions, or zoning laws. Local ordinances, resolutions, or laws relating to zoning shall be construed to treat like structures, lots, or parcels in like manner regardless of whether or not the ownership is divided by sale of apartments under this chapter rather than by lease of apartments. (§ 1 ch 44 SLA 1963)

Article 7. General Provisions.

Sec. 34.07.450. Definitions. In this chapter unless the context otherwise requires

(1) "apartment" means a part of the property intended for any type of independent use, including one or more rooms or enclosed spaces located on one or more floors (or part or parts of the floors) in a building, regardless of whether or not it is destined for a residence, an office, the operation of any industry or business, or for any other use not prohibited by law, and which has a direct exit to a public street or highway, or to a common area leading to the street or highway; and the boundaries of an apartment are the interior surfaces of the perimeter walls, floors, ceilings, windows and doors thereof, and the apartment includes both the portions of the building so described and the air space so encompassed; and interpreting declarations, deeds, and plans, the existing physical boundaries of the apartment as originally constructed

or as reconstructed in substantial accordance with the original plans shall be conclusively presumed to be its boundaries rather than the metes and bounds expressed or depicted in the declaration, deed or plan, regardless of settling or lateral movement of the building and regardless of minor variance between boundaries shown in the declaration, deed, or plan and those of apartments in the building;

(2) "apartment owner" means the person or persons owning an apartment in fee simple absolute or qualified, or by way of a periodic estate, or in any other manner in which real property may be owned in this state, together with an undivided interest in a like estate of the common areas and facilities in the percentage specified and established in the recorded declaration;

(3) "apartment number" means the number, letter, or a combination of them, designating the apartment in the recorded declaration;

(4) "association of apartment owners" means all of the apartment owners acting as a group in accordance with the bylaws and with the recorded declaration;

(5) "building" means a building, containing two or more apartments, or two or more buildings each containing two or more apartments, and comprising a part of the property;

(6) "common areas and facilities" unless otherwise provided in the recorded declaration includes

(A) the land on which the building is located;

(B) the foundations, columns, girders, beams, supports, main walls, roofs, halls, corridors, lobbies, stairs, stairways, fire escapes, and entrances and exits of the building;

(C) the basements, yards, gardens, parking areas and storage spaces;

(D) the premises for the lodging of janitors or persons in charge of the property;

(E) the installations of central services such as power, light, gas, hot and cold water, heating, refrigeration, air conditioning, and incinerating;

(F) the elevators, tanks, pumps, motors, fans, compressors, ducts and in general all apparatus and installations existing for common use;

(G) the community and commercial facilities as provided for in the recorded declaration;

(H) all other parts of the property necessary or convenient to its existence, maintenance and safety, or normally in common use;

(7) "common expenses" includes

(A) all sums lawfully assessed against the apartment owners by the association of apartment owners;

(B) expenses of administration, maintenance, repair, or replacement of the common areas and facilities;

(C) expenses agreed upon as common expenses by the association of apartment owners;

(D) expenses declared common expenses by the provisions of this chapter, or by the recorded declaration, or by the bylaws;

(8) "common profits" means the balance of all income, rents, profits and revenues from the common areas and facilities remaining after the deduction of the common expenses;

(9) "declaration" means the instrument by which the property is submitted to provisions of this chapter and as it may be, from time to time amended;

(10) "land" means the material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance, and includes free or occupied space for an indefinite distance upwards as well as downwards, subject to limitations upon the use of airspace imposed, and rights in the use of the airspace granted by the laws of the state or of the United States;

(11) "limited common areas and facilities" includes those common areas and facilities designated in the recorded declaration, as reserved for use of certain apartment or apartments to the exclusion of the other apartments;

(12) "majority" or "majority of apartment owners" means the apartment owners with 51 per cent or more of the votes in accordance with the percentages assigned in the recorded declaration, to the apartments for voting purposes;

(13) "property" means the land, the building, all its improvements and structures, all owned in fee simple absolute or qualified or by way of a periodic estate, or in any other manner in which real property may be owned in the state, and all easements, rights, and appurtenances belonging to it, none of which shall be considered as a security or security interest, and all articles of personalty intended for use in connection with it, which have been or are intended to be submitted to this chapter. (§ 1 ch 44 SLA 1963)

Sec. 34.07.460. Short title. This chapter may be cited as the Horizontal Property Regimes Act. (§ 1 ch 44 SLA 1963)

Chapter 10. Land Registration Law.

Article
1. Administration (§§ 34.10.010 — 34.10.030)
2. Registration (§§ 34.10.040 — 34.10.060)
3. Enforcement (§§ 34.10.070 — 34.10.170)
4. Redemption (§§ 34.10.180 — 34.10.240)

Article 1. Administration

Section
10. Administration
20. Collection of penalties
30. Funds for administration

Sec. 34.10.010. Administration. (a) The Department of Natural Resources shall administer this chapter. The department shall make rules and regulations considered necessary to carry out this chapter.

(b) The department has custody of all land registration records assembled under this chapter, and of those records in the Department

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☐ PLEASE REPLY TO THE ABOVE ADDRESS.

January 31, 1985

The Honorable Senator Pat Rodey
Chairman, Judiciary Committee
Pouch B
Juneau, Alaska 99811

Re: Senate Bill 44, Common Interest Ownership Act

Dear Senator Rodey:

The following review is designed to point out a few of the important differences between the existing act (A.S. 34.07.) and Senate Bill 44. As you are aware the existing act covers only condominiums and does not cover planned unit developments, leasehold planned communities, planned communities, timeshare communities, or cooperatives.

Specific Area of Concern	AS.34.07.	SB 44
1. Association Insurance needs.	Generally addressed by AS 34.07.400	Detailed insurance requirements contained in AS 34.08.440

Insurance needs of the associations should be clearly spelled out to avoid confusion on the part of developers and association boards and assure adequate coverage. The new statute requires insurance to be at 100% of the replacement value, for example.

2. Transition Problems	Not addressed	Detailed requirements contained in AS 34.08.340

There must be a specific statute which identifies those items or acts which must be completed as part of turning the control of the project over to the owners. This new section accomplishes that purpose. Owners, directors, managers and developers benefit by having the requirements clearly established.

Specific Area of Concern	AS.34.07.	SB 44

The declarant is required to provide the board with all financial records, amendments to declarations or bylaws, warranties from suppliers and subcontractors and so forth. Plans for the building and underground utilities must be provided. The Associations and the unit owners will benefit by having such information. A punch list of common area repairs must be made thus elliminating disputes over common area repairs. This will tend to reduce unnecessary litigation.

3.	Developer reservation of rights.	Not addressed	Addressed in detail AS.34.08.180

Developers must be able to phase projects. Purchasers should know what the developer must build and what the developer may build to avoid misleading representations. By avoiding innocent misrepresentation the developer, realtor and homebuyer will benefit. Unnecessary litigation can be avoided.

4.	Association Budget for Reserves	Not addressed	Addressed in detail As 34.08.___

The method of computing reserves should be clearly understood by developer and owners. In this manner "low balling" of budgets can be limited. Proper budgeting for reserves will avoid unexpected special assessments or large increases in the monthly assessments Homebuyers will be assured of having a monthly assessment within their projected household budget.

5.	Maintenance of Units	Not addressed	Addressed in

Developer, managers, and boards often dispute whether an item within a unit is the association's responsibility, or the unit owner's responsibility. The new definition will help avoid these disputes. The new unit boundary definition allows clear

Specific Area of Concern	AS.34.07.	SB 44

distinction to be drawn between owner responsibility and association responsibility. Owners will know that they are responsible for certain maintenance items and can plan accordingly. Arguments about such maintenance items should be limited.

6.	Transfer of reserves rights by declarant	Not addressed	AS 34.08.350 allows declarant to transfer rights reserved by declarant to third parties, generally builders or other developers.

This section allows the developer to transfer specific declarant rights to another developer. In this manner a project can proceed even though the initial developer may choose not to do further work.

7.	Termination of Contracts entered into by developer	Not addressed	AS 34.08.360 allows the association to terminate contracts entered into by declarant and avoids unfair contracts

This section avoids situations where a developer may have entered into a contract on behalf of the association on terms that are unfavorable. The association has the right to cancel. This avoids the situation where snow removal is being done by the developer's wife's company at exorbitant rates.

Specific Area of Concern	AS.34.07.	SB 44
8. Assessments for Common Expenses	AS.34.07.380 and .450(7)	AS 34.08.460 more clearly spells out assessment requirements.

What is, or is not a common expense, is sometimes a problem. In the case of a P.U.D. there is no statutory definition to aid the association. This section solves those problems.

9. Borrowing by Association	Not addressed	AS 34.08.320(a)(14) specifically allows associations to assign future income

Associations presently have no ability to borrow funds by assigning future income. As potential borrowers the associaton needs to have statutory authority to assign future income to secure borrowing for repairs.

10. Disclosure to Purchasers	Not addressed	AS 34.08.530 sets forth specific information which must be contained in the Public Offering Statement clearly spelled out in AS 34.08.460

Numerous complaints by unit owners involve nondisclosure of future plans by the developer. The Public Offering statement

Specific Area of Concern	AS.34.07.	SB 44

tells potential purchasers and realtors exactly what the project entails and should reduce misleading information being given to buyers. AS 34.08.680 requires the declarant to mark promotional literature with "must be built" or "need not be built" to avoid confusion. Buyers will have available information which will advise them of the developers intentions and plans. Such information will substantially reduce complaints by purchasers.

11.	Liability for Assessments for Common Expenses	Addressed but confusing	Clearly spelled out in AS 34.08 .460

Developers often believe they do not have the same liability as unit owners to pay for common expense assessments. This statute clearly sets forth those responsibilities.

12.	Access to Records	AS.34.07.290 allows access to financial expenditure records	AS 34.08.490 allows access to all records

Some developers and managers refuse to allow associations to have access to corporate records prior to transition. This statute clearly sets forth the unit owners right to access all records.

13.	Resale Disclosure	Not addressed	AS 34.08.590

Many complaints have involved nondisclosure of material facts by unit owners upon resale. The problem can be substantially resolved by requiring the unit owner to give the required information to a purchaser. To do this the associations will be required to keep all the records current. Unit owners, buyers realtors and managers will benefit from up to date informaton.

Specific Area of Conern	AS.34.07.	SB 44
14. Express Warranties of Quality	Not addressed	AS 34.08.630 sets forth how express warranties are created and what they are.

Numerous difficulties are involved in warranty disputes. These statutes clearly set forth what a warranty is.

15. Implied Warranties	Not addressed	AS 34.08.640 sets forth implied warranties. AS 34.08.650 discusses how warranties can be modified or excluded. AS 34.08.660 establishes a statute of limitations for implied warranties.

Under present Alaska law an implied warranty goes on until the court decides the time period is too long. This statute sets up specific implied warranty periods and avoids much confusion that exists in the area of implied warranty liability.

16. Organization of Unit Owners	Not addressed	Requires association corporations to be formed no later than the date of first conveyance of unit.

Numerous disputes involve situations where the associaton was not created until time of transition. Thus owners were paying assessments to a nonexisting association prior to transition. This section requires the declarant to have the association in place prior to the conveyance of the first unit so the unit purchaser will be a member of an existing association.

There are numerous other differences between the present act and Senate Bill 44. The purpose of this summary is to highlight specific areas that have caused difficulties in the past and reflect the fact that these areas are covered in Senate Bill 44.

Sincerely yours,

LAW OFFICES OF VINCENT VITALE
A Professional Corporation

By: _____
WILLIAM L. McNALL

WLM:ail

Bradley
2/19/85 ✓

Original sponsors: Ringstad, Duncan,
Sund, et al

IN THE HOUSE

BY THE LABOR AND
COMMERCE COMMITTEE

CS FOR HOUSE BILL NO. 155 (L&C)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act permitting the establishment of horizontal property regimes for mobile homes; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 34.07 is amended by adding a new section to read:

ARTICLE 8. HORIZONTAL PROPERTY REGIME FOR MOBILE HOMES.

Sec. 34.07.500. HORIZONTAL PROPERTY REGIME FOR MOBILE HOMES. (a) Notwithstanding the provisions of AS 34.07.010 - 34.07.460, a horizontal property regime for mobile homes may be established as an estate in real property consisting of an undivided interest in common in a portion of the real property together with a separate interest in space, the boundaries of which are described in a declaration filed by the sole owner or all of the owners of the property and which complies to the extent applicable with AS 34.07.020.

(b) The portion of the parcel of real property held in undivided interest may be all of the real property of an existing parcel except for the separate interests in space without regard to any three-dimensional aspects of the real property if the purpose of the horizontal property regime is the establishment of a horizontal property regime for mobile homes.

* Sec. 2. This Act takes effect immediately in accordance with AS 01.-10.070(c).

To: Mike

From: Roger February 20,85 HB 155 continued

As follow-up to the testimony provided by Maureen Kennedy, Director of the Alaska Public Interest Research Group, your file contains the testimony she gave in teleconference on Feb. 7 on this bill. She also sent a list of the the type of living unit, including mobile homes, for each of the 33 Community Councils in Anchorage, giving you at least some Anchorage sub-area figures as well as totals for the whole Anchorage area. Further, she has this information broken out by each of the election districts in Anchorage, so that each legislator can see how much they are impacted.

Additionally, this bill, despite its short notice for this hearing, has drawn further concern and interest. Linda O'Bannon, of the Consumer Protection AGency, Dept. of Law, who testified last time, called and said she would like the opportunity for further input and if you have another hearing would like to provide input through a teleconference. She also pointed out that the proposed CS submitted by Ringstad via Gerrald Watts not only has changed the language from "manufactured housing" back to "mobile homes" (because the latter is defined in statute but the former is not), but they have also dropped part (c) in Section 1 of the bill in response to her criticism in committee Feb 7.

Basically, she felt it was poor drafting (we have had other problems with the bill drafter, Dick Bradley, before--lots of people seem to), and thus ended up saying "those sections of the horizontal property regime act that already apply, apply, and those sections that don't, don't." She felt section 1 (c) should be put back in but should be written so that it spells out the parts of the horizontal property regime act that specifically do not apply, and then state that all the rest of the act does. Bradley really messed it up.

Also, Maureen Weeks, of Senator Halford's office, wanted to be kept informed of when the hearings took place, and if perhaps it could be put first on the calendar. Senator Halford or herself will be there to testify on the bill; they see it as one small part of SB 44 which covers a whole range of issues and problems; if HB 155 passes, SB 44 won't apply to it, and mobile home park owners will have free rein to act without any protection written into the laws for the mobile home owners. Also, Liz Hickerson of SEnate Advisory Council did a lot of work on this bill for SEnator Halford, and would like to provide input on it if possible at a future date.

Maureen Weeks also indicated that next Tuesday, February 26 from 1:30 to 3:00 in the Beltz Room of the Capitol, the Senate Judiciary Committee will be taking teleconferenced testimony from a man in Connecticut who is an expert on the whole issue of condominium and cooperative regulations, as he helped develop the program in Connecticut. You may wish to encourage [illegible] members to attend, and you may wish to hold the bill over in order to give them the opportunity.

My personal feeling is tna while it might b ood strategy to move this bill thru the House to Rules and then hold it co see what happens to SB 44, I feel in its present condition it doesn't protect consumers, is poorly written, is solely aimed at serving a special interest group, and I am offended at the entire way Gerrald has approached this (sending backup materials way late, bragging about it being his bill, wanting it thru for this construction season, trying not co let people know he was pushing to bring it back up for hearings this week, etc.)

This morning Maureen Kennedy of Akpirg called, and she would like to see the bill held o
ver and teleconferenced further. She will also be sending down a list of proposed amendments to allow the bill to protect consumers.

Also, Marueen Weeks wrote up some comments on SB 44 which are included in the members files, and they will be substituted in place of the testimony of Senator Halford, though she can be available for questions if you so wish.

I also understand that Gerrald is using the arguement that we should get this bill to at least Rules so its in position in case SB 44 doesnt move; but once it goes to Rules, it is pretty clear he will push them to get it on out, and if it goes thru the SEnate, it will superced SB 44's provisions dealing with mobile home parks. It strikes me that with Halford, Sturgelewski, and some of the other SEnate members pushing SB 44, premature moving of HB 155 may or may not cause some hard feelings--it should maybe be checked on--perhaps you can talk to Senator Halford about it further, to get a better read on SB 44's chances.

Proposed Amendments to HB 155

Alaska Public Interest Research Group

Article 8. Horizontal Property Regime for Mobile Homes.

(c) The owner(s) of property proposed to be converted into a horizontal property regime for mobile homes shall give each residential tenant and each residential subtenant notice of the conversion and provide each person with an offer of sale no later than 120 days before the tenant or subtenant is required to vacate. The failure to give notice as required by this section is a defense to an action for possession.

(d) For 60 days after delivery or notice described in (c) of this section, the person required to give notice shall offer to convey each unit of space or proposed unit occupied for residential use to the tenant who leases the unit. If a tenant fails to purchase the unit during the 60-day period, the owner(s) may not offer to dispose of an interest in the unit during the following 180 days at a price or terms more favorable to the offeree than the price or terms offered to the tenant.

Change (c) to (e).

MUNICIPALITY OF ANCHORAGE
COMMUNITY PLANNING DEPARTMENT
RESEARCH SECTION

1983 POPULATION BY COMMUNITY COUNCIL AND STRUCTURE TYPE

CODE	COMMUNITY COUNCIL NAME	SINGLE FAMILY	DUPLEX	3-4 UNITS	5-19 UNITS	20+ UNITS	MOBILE HOME PARKS	MOBILE HOME LOTS	RV'S	GROUP QUARTERS	HOTELS MOTELS	TOTAL
1	ABBOTT LOOP	5262	1311	833	344	536	1378	793	12	43	0	10512
2	AIRPORT HEIGHTS	2000	1026	331	274	0	0	0	0	40	0	4671
3	BIRCHWOOD	1705	80	36	44	0	0	309	12	0	0	2186
4	CAMPBELL PARK	2518	350	260	485	1034	1016	54	0	4	0	5721
5	CHUGIAK	4496	160	104	114	49	302	666	131	0	0	6022
6	DOWNTOWN	322	33	32	309	435	0	0	0	201	16	1347
7	EAGLE RIVER	4276	125	222	616	0	199	238	0	226	0	5902
8	EAGLE RIVER VALLEY AND SOUTH FORK	7202	410	50	44	0	0	131	4	0	0	7837
9	ELMENDORF-FORT RICHARDSON	0	0	0	0	0	0	0	0	16574	0	16574
10	BAYSHORE-KLATT	4054	734	307	500	86	37	304	244	10	0	6284
11	FAIRVIEW	2428	818	2337	2210	1808	233	10	116	151	87	10260
12	GIRDWOOD VALLEY	909	29	27	10	52	25	16	0	0	8	1076
13	GOVERNMENT HILL	440	353	21	220	1609	0	7	0	0	0	2739
14	HILLSIDE EAST	3490	32	0	0	0	9	90	0	0	0	3621
15	HUFFMAN O'MALLEY	4591	57	24	10	0	0	240	0	31	0	4961
16	MID-HILLSIDE	3495	47	0	0	0	0	24	0	0	0	3564
17	NORTHEAST	10205	2661	1737	1515	319	6425	495	93	21	0	23554
18	NORTH MOUNTAIN VIEW	1775	694	2021	1572	316	229	19	89	28	7	6950
19	NORTH STAR	497	520	221	330	352	73	0	0	0	0	1993
20	OLD SEWARD-OCEANVIEW	4247	249	240	94	0	0	227	279	0	0	5336
21	RABBIT CREEK	4010	47	0	0	0	0	175	0	10	0	4242
22	ROGERS PARK	3347	140	81	560	0	0	0	0	15	0	4151
23	RUSSIAN JACK PARK	2573	1054	1463	2154	987	1478	20	178	30	1	9945
24	SAND LAKE	11024	2079	1672	1555	493	0	233	0	48	0	17904
25	SCENIC PARK AREA	3813	1330	481	259	0	0	3	0	9	0	5895
26	SOUTH ADDITION	1998	1240	503	326	654	0	0	0	227	0	4958
27	SPENARD	6434	1466	1923	3023	2034	2099	106	68	280	6	18387
28	TAKU CAMPBELL	4616	1251	1245	1175	222	1595	150	130	19	0	10403
29	TUDOR AREA	1207	455	107	154	0	24	2	0	14	0	2043
30	TURNAGAIN	5096	1709	1209	1441	534	231	84	0	6	30	10360
31	UNIVERSITY AREA	3452	1021	813	1331	905	929	44	0	302	0	8817
32	GLEN ALPS	335	5	0	0	0	0	3	0	0	0	343
33	TURNAGAIN ARM	319	3	0	0	0	0	35	2	0	0	359
999	REMAINDER OF THE AREA	260	10	31	236	284	1001	7	0	88	4	1921
	TOTAL	114266	21527	18671	20940	13669	17273	4591	1358	18392	159	230846

RV'S = RECREATIONAL VEHICLES USED AS RESIDENTIAL HOUSING UNITS
HOTELS/MOTELS = THE NUMBER OF RESIDENT PERSONS LIVING IN ROOMS RENTED ON A MONTHLY BASIS

SOURCE: OFFICIAL 1983 MUNICIPAL HOUSEHOLD SURVEY

2/7/85

Good afternoon. My name is Maureen Kennedy; I am the Director of the Alaska Public Interest Research Group. We have 650 members throughout the state, and have been working on housing issues since our beginning in 1974. Mobile home issues have been of concern to us over the years--in the late '70s, we exposed a kickback arrangement between mobile home dealers and park owners which considerably restricted competition and increased costs to citizens back in those days of particularly tight markets. Last year, we worked with AHFC in reworking the mobile home financing and insurance programs.

Like it or not, mobile homes are an important source of low cost housing for many Alaskans. Though the business page articles attest to the fact that vacancy rates are increasing, those improved vacancy rates do not mean that low and moderate income Alaskans are finding housing that is reasonably priced. A state study last year found that 70% of low and moderate income Alaskans are paying more than the now-traditional 35% of income on housing. For many people, especially those with larger families, mobile homes on lots are their only alternative.

The two bills under consideration today ease the pressure on mobile home dwellers. We support HB 148--it promises to save the state time and money by removing the "state as middleman" and allow mobile home owners to more quickly and efficiently protect their interests. It makes sense for the Dept. of Law to oversee this activity.

HB 155 also will help keep mobile homes a visble housing option in many parts of the state. We would support it, however, only if it is amended to include protections for people renting spaces at the time of conversion.

HB 155 is analogous to the condo conversion laws that most other states in the country have passed. Housing that was used for rental units becomes less profitable as it depreciates, and often the owner can do better by selling the units as condos. Fair enough. Housing is being preserved; ownership is just changing. Yet most states recognize that such transfers can impose unreasonable hardships on previous renters--the stereotypical example is the 70 year old widow who has lived in the same apartment for 20 years, has no savings and is on Social Security. She cannot afford the downpayment, or perhaps the mortgage on a unit whose value has increased substantially as a result of the sale. If you exchange the widow for a young, lower income family with no savings and a 5 year old trailer, we're in the same situation.

State laws on condo conversions vary substantially, but nearly all incorporate some advance notice provisions, a first right of refusal to previous tenants (if they can afford the lot, they should be entitled to stay where they are), and special provisions for the elderly and low income to continue renting their apartments. I would suggest that park tenants be entitled to 6 months' notice of eviction, and that they have

first right of refusal. I'm sorry I could not prepare more extensively for this hearing: we'd be happy to do some analysis of laws on condo conversions in other states to give you some perspective.

Finally, to give you some perspective right now, let me give you some statistics on mobile home park residents. Though we are a statewide organization, I was only able to track down information for Anchorage this morning.

As you may know, Mayor Knowles has been working out voluntary agreements with mobile home parks to find new housing for displaced residents after conversion. The Community Planning Dept. has identified the displacement problem as a high priority.

There are roughly 6,100 mobile homes in parks, according to Muni. figures. More than 1,500 of these are in district 10 and nearly 3,000 are in district 14. Mobile home park residents tend to have 50% more people per unit than other rental units in the city. People live in mobile homes because they can't afford more expensive housing. If HB 155 passes without this amendment, over the next few years, many of those 6,100 families will be faced with eviction with little notice and no other available space in the area. Then we'll have a real housing problem.

Thanks very much for hearing by testimony, and please let me know if I can be of help in working out an equitable solution to this problem.

H.B. 155

STATEMENT

History: H.B. 155 is the 1985 House version of last year's S.B. 464 sponsored by Sen. Halford. That bill went through the Senate Labor & Commerce, Judiciary and Finance Committees, then later passed the Senate 20-0. Last year the House version died in committee just prior to adjournment.

Intent: H.B. 155 is an act amending A.S. 34.07, whereas it includes a section relating to "manufactured housing" under the "Horizontal Property Regimes Act." The language of this year's bill is virtually identical to last year's S.B. 464. The only change is in the evolution of terminology, where "mobile home" has been replaced by "manufactured housing."

Purpose: H.B. 155 is designed to allow the owners of mobile homes an opportunity to become the legal property owners of the designated parcel of land on which their mobile home lies. This bill also allows mobile home park owners the opportunity to sell independent parcels within their park.

Currently, many mobile home owners throughout Alaska are faced with the frustration of having to relocate their unit to another

area, simply because they do not have title to the property on which their mobile home sits. An overwhelming sense of insecurity is the result of this non-ownership. In the event of an eviction, or by the unfortunate circumstance where an entire mobile home park must relocate, a tremendous burden is placed on the mobile home family. Where do these people go?

From a developer's standpoint, H.B. 155 will allow that developer to operate fairly as a competitor in the marketplace.

I strongly urge this committee to consider H.B. 155 and expedite it from committee with a DO PASS.

To: Mike
From: Roger February 7, 1985

HB 155: This bill has a lot of snags in it. I gather that the real pressure from it is ccming from some local Juneau Mobile Home Park Owners, particularly Vic Perez and Jessie Walters (the latter owns Juneau Mortgage Co.). They stand to make a lot of bucks on it if it goes thru, because they can subdivide and instead of rent their lots, they can sell them. While we shouldnt prevent an owner from doing this, there have to be at least some controls in place that keep an owner from doing this on 30 days notice to renters of mobile home lots for example, or charging exorbitant condo fees for the lot because there is a market for it in the housing crunch. One spin-off problem is that you could suddnely have a couple hundred people looking for new home sites at a time, which wouldnt hurt Anchorage much, but would have possible devestating consequences in smaller communites like Juneau.

To provide some balance to this, I have contacted Maureen Kennedy, from the Alaska Public Interest Research Group, who will be testifying on this via teleconference from ANchorage. I also contacted the City and Borouugh of Juneau, which has had a Task Force working on these issues for a couple of years, and as a result, STeve Gilbertson, Manager of the cities Lands and Resoures office, and Lori Bender of the Juno Boro's Planning Office will be there as observors, but you might want to call on them too. Also, Linda O' Bannon will be there because of her testimony on HB 148, and she is privately opposed to it, but because she is in a Dept. of Law office, she cant take an offical public position on it, but might be willing to respond to questions if you have any.

Capital 85 will be there taping the meeting for the press; and we will also have a VTR set up so that Lori Bender will be able to show a five-minute tape to the committee. The teleconference was basically set up at the request of Ringstad's office.

Another aside to this is that I heard that Rick Uehling had originally sponsored this bill and since then has asked that his name taken off of the sponsor's list; and we will need to check with him to find out why.

Given the press attention on this bill, and the fact that there is a better and more comprehensive bill in the Senate, I suggest at the very least that you hold this bill over, possibly for Committee Substitute, and to get more background on why Ringstad is pushing this bill so hard and why he doesnt want to go with SB 44?

Offered: 5/25/84
Referred: Rules

Original sponsor: Halford

IN THE SENATE BY THE FINANCE COMMITTEE

CS FOR SENATE BILL NO. 464 (Finance)

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act permitting the establishment of horizontal property regimes for mobile homes."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 34.07 is amended by adding a new section to read:

ARTICLE 8. MOBILE HOMES HORIZONTAL PROPERTY REGIME.

Sec. 34.07.500. MOBILE HOME HORIZONTAL PROPERTY REGIME. (a) Notwithstanding the provisions of AS 34.07.010 - 34.07.450, a horizontal property regime for mobile homes may be established as an estate in real property consisting of an undivided interest in common in a portion of the real property together with a separate interest in space, the boundaries of which are described in a declaration filed by the sole owner or all of the owners of the property and which complies to the extent applicable with AS 34.07.020.

(b) The portion of the parcel of real property held in undivided interest may be all of the real property of an existing parcel except for the separate interests in space without regard to any three-dimensional aspects of the real property if the purpose of the horizontal property regime is the establishment of a horizontal property regime for mobile homes.

(c) Except to the extent that AS 34.07.010 - 34.07.460 is inapplicable to a horizontal property regime for mobile homes, the provisions of AS 34.07.010 - 34.07.460 apply to a horizontal property regime established for mobile homes.

SB 464

2/13/84 Introduced in the Senate by Senator Rick Halford
Referred to Senate Labor & Commerce and Judiciary.

3/15/84 Labor & Commerce Meeting, Senator Eliason Chairman (R,Sitka)
Witnesses:
Senator Halford, prime sponsor, favored the bill
Fred Ferrara, Society of Real Estate Appraisers, In Favor
Michael Lynch, Exec. Dir AHFC, felt other vehicles were
available to served to purpose of the prime sponsor
Michael Cohern, S.H.A.F.T Corporation, In Favor

3/16/84 Senate Labor & Commerce Report:
Replaced with a committee substitute
DO PASS - Eliason
NO RECOMMENDATION - Pettyjohn, Mulcahy, Rodey, Sackett
Request by Senator Sackett for a Senate Finance Committee
Referral/AHFC Impact.

4/2/84 Senate Judiciary Report:
After a discussion among committee members, the bill was waive
from to committee to the Senate Finance Committee with the
Labor & Commerce Substitute by unanimous consent.

5/25/84 Senate Finance Committee Report:
Labor & Commerce Substitute replaced with a Senate Finance
Committee Substitute:
DO PASS - Bennett, Mulcahy, Faiks, Fischer
NO RECOMMENDATION - Ferguson

5/29/84 Placed on Senate Supplemental Calendar
PASSED the Senate, 20-0.

5/29/84 First Reading in the House of Representatives
Referred to the House Labor & Commerce Committee, where it
died.

HB 155 FILE CONTENTS

1) Bill Summary -- Legislative Reporting Service

2) Overview -- Committee Staff Memo

3) Bill Analysis -- Legislative Legal Counsel Memo 2/6/85

4) Fiscal Note -- Dept. of Law, Administrative Servs. 2/4/85

5) Backup -- Packet on Last Year's CSSB 464 (Finance), including Minutes of Senate Finance Comm. Testimony on the Bill (provided by Bill Sponsor)

HB 154 (cont'd)

--state department or agency that is hiring would be required to notify non-profit organizations that offer employment agency services, as well as postmaster, village council or city government of existing job vacancies;

--the state department hiring would be required to publicize the vacancy on local radio or TV station and in local newspapers serving the area. The department shall provide vacancy notices to the legislative information office serving the region." (underlined language added);

--if, by the time the department is prepared to makes its hiring decision, neither the department or the division of personnel had determined that the applicant meets the minimum qualifications, the department shall presume that the applicant meets those qualifications (Senate version stated that unless the department had determined that the applicant did not meet the qualifications, the department would be required to consider the applicant for employment).

Does not provide for an effective date (takes effect 90 days after Governor signs bill).

Introduced January 30 and referred to Community & Regional Affairs, then Finance. On Feb. 1 the Speaker added a State Affairs referral. To C&RA, State Affairs, then Finance.

Manufactured Housing (condo-izing)

HOUSE BILL NO. 155, by Reps. Ringstad, Duncan, Sund, Marrou, Jenkins and Oehling. Seeks to allow conversion of mobile home or modular-type home parks to a "condominium" arrangement, whereby all residents would hold an undivided interest in the real estate on which the home is located, with each resident owning his own "space", and holding an interest in common areas. Provides Act takes effect immediately.

Introduced January 30 and referred to Labor & Commerce, then Judiciary.

Legislative Ethics Comm. (composition)

HOUSE BILL NO. 156, by Rep. Thompson. Changes the make-up of the Select Committee on Legislative Ethics. Under Rep. Thompson's version, the committee would be made up of a senate subcommittee of two members of the senate, appointed by the president with concurrence by roll call vote of 2/3 of the full membership of the senate; and a house subcommittee, of two members appointed in the same fashion by the speaker. The committ would also have three public members to be selected by 2/3 of each subcommittee (this may be a drafting error, as 2/3 of a two member subcommittee means it would take 1 1/3 vote) and ratified by 2/3 of the full membership of the house and senate. Would not allow legislative subcommittee members to be from the same political party or the same organizational caucus. Does not provide for an effective date (takes effect 90 days after Governor signs bill).

Introduced February 1 and referred to State Affairs, then

M E M O R A N D U M

TO: All Members, House Labor and Commerce Committee

FROM: Committee Staff

DATE: February 7, 1985

SUBJECT: Overview, House Bill 155

On Thursday, February 7, 1985, the House Labor and Commerce Committee meets at 1:15 pm in Room 102 of the Capitol Building on House Bill 155: " An Act permitting the establishment of horizontal property regimes for manufactured housing."

Last session, CSSB 464 (Finance) passed the Senate 20-0 on May 29, 1984, which was too close to the end of session for it to pass through the House. This bill is being revived in altered form as SB 44 this year, sponsored by Halford. HB 155 is a sort of "mini-companion" piece of legislation in the House side. Rather than repeating all of the issues of SB 44, it has pulled out one issue of that bill for separate attention, so that if SB 44 fails to pass, the issue of establishment of horizontal property regimes for manufactured housing contained within it has a separate chance of survival.

Part of the problem is that much of the law dealing with condominiums and related properties goes back to the original 1963 law, which is very outdated, and the major reason we have managed to get by in this area without certain protections and procedures intact appears to be because of the requirements that various lenders impose on the buyers; and another reason is that at least some local communites have developed their own ordinances to deal with the issues and problems.

One of the differences between SB 44 and HB 155 is that SB 44 deals with the issue conversions and HB 155 doesnt. Conversions are when you take an existing structure (such as an apartment) and change it to a condominium porperty. There are financial advantages to this for the original property owner, which need to be balanced against protecting the consumers, such as mobile home owners from unfair treatment. This bill may not provide the consumer protection that SB 44 does.

Another area of consideration is that of spelling out the rules and procedures for setting up a condominium association, which is not covered in HB 155. Another advantage of SB 44 is that developers, real estate agencies, and the consumers all appear to support SB 44 for at least one major reason: it spells out clearly the liability and limitations involved if there is are violations. Another distinction is that HB 155 basically deals with property lots, and not with buildings.

STATE OF ALASKA
THE LEGISLATURE

POUCH V STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M February 6, 1985

SUBJECT: Manufactured housing condominia (HB 155)

TO: Representative John Ringstad
Chairman, House

FROM: Richard A. Bradley
Legislative Counsel

You have requested a brief analysis of HB 155.

As a preliminary matter, note that any analysis or summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

The predecessor to HB 155 in the Thirteenth Legislature was a sequel to the rather long bill that was drafted to permit the establishment of the "horizontal property regime," (i.e., condominia) for mobile home parks. The problem was that the typical word used throughout AS 34.07, the chapter dealing with condominia, to describe what is owned in a condominium by the individual owner is "apartment" and it was thought that that word did not quite accurately describe the condominium estate that would result in a condominium for mobile homes. I assume that a condominium for mobile homes would consist of land improved by utility connections for the individual mobile homes-- but not much more is required.

The phrase "manufactured housing" seems to describe "mobile homes" generically.

The provisions of sec. 500(a) describe the condominium estate ("an estate in real property consisting of an undivided interest in common in a portion of real property

together with a separate interest in space") with reference to the needs of a condominium for manufactured housing.

Sec. 500(b) acknowledges the fact that a condominium regime for manufactured housing will not have any "three-dimensional aspects" to the real property owned.

And sec. 500(c) states the intent of the legislature that unless the provisions of AS 34.07.010 - 34.07.460 are "inapplicable" to a condominium regime for manufactured housing, the provisions of that chapter apply.

If I may be of further assistance, please advise.

RAB:ojb
J11/062

	Mobile Hms in Parks	On Lots	# of Apartments
District 7 (Szymanski)	3[illegible]	[illegible]16	330
District 8 (Cowdery and Pestinger)	4[illegible]3	394	828
District 9 (Hayes and Flood)	0	87	1805
District 10 (Bussell and Lindauer)	1543	144	5222
District 11 (Abood and Tischer)	109	42	1546
District 12 (Clocksin and Uehling)	130	8	5304
District 13 (Ward and Martin)	853	31	4481
District 14 (Barnes and Furnace)	2862	211	4362
District D (partial P. Fischer & Gilman)	54[illegible]	292	530
District E (Pettyjohn, Faiks)	489	481	2633
District F (Sturgulewski, Rodey)	1652	150	6768
District G (Josephson, Fischer, V.)	953 387	39	10365
District H (Halford, Kelly partial)	187	381	500. 652.
District 15 (Phillips and Liska, partial)	187	381	652 550

Senator Ray moved that the journal for the sixty-seventh legislative day be approved as certified. Without objection, it was so ordered.

MESSAGES FROM THE GOVERNOR

SB 348

Message of March 14 was read, stating the Governor signed and transmitted the engrossed and enrolled copies of the following bill to the Lieutenant Governor's Office for permanent filing:

HOUSE CS FOR CS FOR SENATE BILL NO. 348 (FIN)

An Act making a supplemental appropriation for the operation of the legislature; and providing for an effective date.

Chapter 17, SLA 1984

STANDING COMMITTEE REPORTS

SB 301

The Resources Committee considered SENATE BILL NO. 301 (furbearer management fund; efd) and recommended it be replaced with

CS FOR SENATE BILL NO. 301 (RES), entitled:

"An Act relating to furbearer management and increasing related license fees; and providing for an effective date."

with a majority do pass. The report was signed by Senator Fahrenkamp, Chairman and concurred in by Senators Sturgulewski, Vic Fischer, Eliason and Ziegler.

SENATE BILL NO. 301 was referred to the Finance Committee.

SB 315

The Finance Committee considered SENATE BILL NO. 315 (Road Improvement Districts) and recommended it be replaced with

CS FOR SENATE BILL NO. 315 (FIN), entitled:

SB 315 cont'd

"An Act relating to road maintenance service areas; and providing for an effective date."

Senator Bennett, Co-Chairman and Senator Faiks signed "do pass". Senators Mulcahy and Josephson signed "no recommendation".

Fiscal Note appears in Senate Supplement No. 61.

SENATE BILL NO. 315 was referred to the Rules Committee.

SB 432

The Labor and Commerce Committee considered SENATE BILL NO. 432 (Alaska Securities Act) and a majority of the committee recommended do pass. The report was signed by Senator Ellis on, Chairman and concurred in by Senators Mulcahy, Rodey and Sackett. Senator Pettyjohn signed "do not pass".

SENATE BILL NO. 432 was referred to the Judiciary Committee.

SB 464

The Labor and Commerce Committee considered SENATE BILL NO. 464 (establishment of horizontal property regimes for mobile homes) and recommended it be replaced with

CS FOR SENATE BILL NO. 464 (L&C), entitled:

"An Act revising the laws relating to horizontal property regimes and permitting the establishment of condominiums for mobile homes."

Senator Eliason signed "do pass". Senators Pettyjohn, Mulcahy and Rodey signed "no recommendation". Senator Sackett signed "(no recommendation) - send to Finance Committee because of AHFC impact".

SENATE BILL NO. 464 was referred to the Judiciary Committee.

TO: REP. MIKE NAVARRE
FROM: SEN. RICK HALFORD'S OFFICE
SUBJECT: HB 155, Manufactured Housing Under Horizontal Property Regimes Act
DATE: Feb. 20, 1985

Following is a summary of problems we feel are associated with HB 155:

1. There is no notice requirement or right of first purchase for mobile home owners presently living in parks which attempt to convert under this bill.
Without these protections, numerous park dwellers would be required to vacate without adequate notice or right of first purchase.

   It is unclear whether the Landlord Tenant Act would apply. Under that Act, certain eviction protections are available: 90 day notice (unless the tenant has violated the lease, not paid the rent, etc.)

2. The Horizontal Property Regimes Act was written more than 20 years ago when the notion of condominiums was still new. Since then, common interest ownership has become more sophisticated and broadened to include cooperatives, planned unit developments and time shares. Today, there are serious gaps in the Horizontal Property Regimes law.

   If mobile homes are allowed to be developed, marketed and financed under the Horizontal Property Regimes law, they will be plagued with the same problems which presently beset owners, developers, lenders, and real estate agents of condominiums. Among them:

   - no statutory warranties
   - no regulations for reserve accounts and association dues
   - no statutory guidelines governing the transition period from developer control to association control
   - no statutory guidelines governing insurance coverage
   - no guidelines for association management

3. SB 44 provides for the establishment of mobile home parks as common interest ownership property. It also provides protection for the mobile home tenant (120 day notice, right of first purchase).

   In addition, it protects the developer, the real estate agent, the lender and the unit owner by requiring extensive disclosure. It allows the developer freedom to "phase" projects to meet the demands of the market place. Its detailed guidelines will help avoid misunderstandings and therefore reduce litigation. Numerous consumer protection provisions are established.

4. Those mobile home park owners who convert under HB 155, if it is passed before SB 44 becomes law, will be considered pre-existing condominiums and will not be required to comply with vital consumer protection provisions.

Adding a new type of condominium development, such as mobile home sites, under an insufficient regulatory law does not provide adequate protection for the purchaser or the lending institution. Based on present problems evidenced by numerous complaints to the Consumer Protection Division of the Attorney General's office, it can only be anticipated that future complaints will escalate.

At the last hearing before the House Labor and Commerce committee, Linda O'Bannon from Consumer Protection and Betty Cook from AHFC expressed similar concerns and asked the committee to review SB44 as a comprehensive measure to address present problems.

COMMUNICATIONS

The Secretary announced receipt of the 1983 ANNUAL REPORT OF THE ALASKA LAND USE COUNCIL, IN A SPIRIT OF COOPERATION dated March 7 from Governor Sheffield, State Co-Chairman and Vernon Wiggins, Federal Co-Chairman implemented by the Alaska National Interest Lands Conservation Act (P.L. 96-487). The report is on file in the Office of the Secretary of the Senate.

STANDING COMMITTEE REPORTS

SCR 42

The Resources Committee considered SENATE CONCURRENT RESOLUTION NO. 42 (sport fishing of salmon and underutilized species) and a majority of the committee recommended do pass. The report was signed by Senator Fahrenkamp, Chairman and concurred in by Senators Ziegler, Paul Fischer and Mulcahy.

SENATE CONCURRENT RESOLUTION NO. 42 was referred to the Rules Committee.

SB 45

The Resources Committee considered 2d SPONSOR SUBSTITUTE FOR SENATE BILL NO. 45 (establishing an agricultural land sale payment moratorium; efd) and a majority of the committee recommended do pass. The report was signed by Senator Fahrenkamp, Chairman and concurred in by Senators Ziegler, Paul Fischer and Kerttula. Senator Mulcahy signed "no recommendation".

2d SPONSOR SUBSTITUTE FOR SENATE BILL NO. 45 was referred to the Finance Committee.

SB 369

The Resources Committee considered SENATE BILL NO. 369 (planning, designing and construction of agriculture and forestry facilities by the Department of Natural Resources) and a majority of the committee recommended do pass. The report was signed by Senator Fahrenkamp, Chairman and concurred in by Senators Ziegler, Paul Fischer and Mulcahy.

SENATE BILL NO. 369 was referred to the Transportation Committee.

SB 432

The Judiciary Committee considered SENATE BILL NO. 432 (amending the Alaska Securities Act). Senator Ray, Chairman and Senator Josephson signed "do pass". Senator Ziegler signed "no recommendation". Senator Pettyjohn signed "do not pass".

SENATE BILL NO. 432 was referred to the Finance Committee.

SB 448

The State Affairs Committee considered SENATE BILL NO. 448 (state personnel rules for open competitive examinations; efd) and recommended it be replaced with

CS FOR SENATE BILL NO. 448 (SA)

with a majority do pass. The report was signed by Senator Vic Fischer, Chairman and concurred in by Senators Kelly, Sturgulewski and Ray.

Fiscal note appears in Senate Supplement No. 69.

SENATE BILL NO. 448 was referred to the Finance Committee.

SB 464

The Judiciary Committee discussed SENATE BILL NO. 464 (permitting the establishment of horizontal property regimes for mobile homes) and decided to waive it with a further referral to the Finance Committee. However, the following amendment to the Labor and Commerce Committee Substitute was suggested for the Finance Committee's consideration:

Page 4, line 27: after "chapter" delete all language through "common" on line 28

Senator Ray moved and asked unanimous consent that the Judiciary Committee referral be waived on SENATE BILL NO. 464. Without objection, it was so ordered. Senator Ray recommended SENATE BILL NO. 464 be referred to the Finance Committee.

President Kerttula stated that SENATE BILL NO. 464 would have an additional referral to the Finance Committee.

SENATE BILL NO. 464 was referred to the Finance Committee.

The presence of Senator Josephson was noted.

Senator Bay moved that the journal for the one hundred thirty-seventh legislative day and Supplement No. 90 be approved as certified. Without objection, it was so ordered.

STANDING COMMITTEE REPORTS

SB 409

The Finance Committee considered SENATE BILL NO. 409 (miscellaneous supplemental appropriations and transfers among appropriations; efd) and recommended it be replaced with

CS FOR SENATE BILL NO. 409 (2d FIN), entitled:

"An Act making miscellaneous appropriations and transfers among appropriations and amending the lapse dates or purposes of certain appropriations; and providing for an effective date."

with a majority do pass. The report was signed by Senator Bennett, Co-Chairman and concurred in by Senators Sackett, Ferguson, Vic Fischer, Mulcahy and Josephson. Senator Folke signed "no recommendation".

SENATE BILL NO. 409 was referred to the Rules Committee.

SB 464

The Finance Committee considered SENATE BILL NO. 464 (revising the laws to horizontal property regimes and permitting the establishment of condominiums for mobile homes) and recommended it be replaced with

CS FOR SENATE BILL NO. 464 (FIN), entitled:

"An Act permitting the establishment of horizontal property regimes for mobile homes."

with a majority do pass. The report was signed by Senator Bennett, Co-Chairman and concurred in by Senators Mulcahy, Folke and Vic Fischer. Senator Ferguson signed "no recommendation".

SENATE BILL NO. 464 was referred to the Rules Committee.

HCR 56

The Finance Committee considered HOUSE CONCURRENT RESOLUTION NO. 56 (appropriations for program receipts) and recommended do pass. The report was signed by Senator Bennett, Co-Chairman and concurred in by Senators Folke, Ferguson, Sackett, Mulcahy, Josephson and Vic Fischer.

HOUSE CONCURRENT RESOLUTION NO. 56 was referred to the Rules Committee.

HB 198

The Finance Committee considered HOUSE BILL NO. 198 am (membership of the Legislative Budget and Audit Committee, the Alaska Legislative Council and to records of the legislative audit division; efd) and a majority of the committee recommended do pass. The report was signed by Senator Bennett, Co-Chairman and concurred in by Senators Folke, Sackett, Vic Fischer, Mulcahy and Josephson.

HOUSE BILL NO. 198 am was referred to the Rules Committee.

HB 663

The Finance Committee considered CS FOR HOUSE BILL NO. 663 (FIN) am (certain state housing loan programs; efd) and recommended it be replaced with

SENATE CS FOR CS FOR HOUSE BILL NO. 663 (FIN)

with a majority do pass. The report was signed by Senator Bennett, Co-Chairman and concurred in by Senators Ferguson, Mulcahy, Josephson and Vic Fischer. Senator Folke signed "no recommendation".

LETTER OF INTENT
SCS CSHB 663 (FIN)

In effecting Sec. 7 of the subject bill, the committee acknowledges that neighborhood groups have suggested the possibility of low-income, owner-occupied housing on the former S & S Apartment site within the Municipality of Anchorage.

It is the intent of the committee that insofar as prior statutory language would appear to prohibit grants for an owner-occupied program, the prohibition is to be removed as to this site so that owner-occupied housing will be eligible, if otherwise feasible. (Nothing in this amendment shall prohibit the use of appropriated moneys for low-rent housing on the site).

HB 705 cont'd

Senator Vic Fischer moved and asked unanimous consent for the adoption of Amendment No. 1. Senators Kerttula and Fahrenkamp objected, then withdrew their objections. There being no further objection, Amendment No. 1 was adopted.

Senator Pettyjohn offered Amendment No. 2:

Page 1, line 18: After "agreement" insert "with the commission"

Senator Pettyjohn moved and asked unanimous consent for the adoption of Amendment No. 2. Without objection, Amendment No. 2 was adopted.

Senator Ray moved and asked unanimous consent that SENATE CS FOR CS FOR HOUSE BILL NO. 705 (L&C) am S be considered engrossed, advanced to third reading and placed on final passage. Without objection, it was so ordered.

SENATE CS FOR CS FOR HOUSE BILL NO. 705 (L&C) am S was read the third time.

The question being: "Shall SENATE CS FOR CS FOR HOUSE BILL NO. 705 (L&C) am S (real estate surety fund) pass the Senate?" The roll was taken with the following result:

SCS CSHB 705 LC AM S 3RD

Yeas: 20 Bennett, Eliason, Fahrenkamp, Folka, Ferguson, Fischer Paul, Fischer Vic, Gilman, Halford, Josephson, Kelly, Kerttula, Moss, Mulcahy, Pettyjohn, Ray, Rodey, Sackett, Sturgulewski, Ziegler

Nays: 0

and so, SENATE CS FOR CS FOR HOUSE BILL NO. 705 (L&C) am S passed the Senate.

SENATE CS FOR CS FOR HOUSE BILL NO. 705 (L&C) am S was engrossed, signed by the President and Secretary and returned to the House for consideration.

CITATIONS

Senator Ray moved that the following citations be approved:

Honoring - The Frontiersman
by Senator Kerttula

Honoring - Frances Bryner
by Senators Gilman, Paul Fischer and Sturgulewski
Representatives Malone and Fritz

In Memoriam - Roger Culp; Larry McVey; Dale Majeste; Albert Hagan; Lyman, Joyce and Marshall Klein; and Fred Burk
by Representatives Davis, Hurlbert, Bettisworth, Liska, Szymanski, Vezka, Kaponen, Ringstad, Shultz, M.W. Miller and All Other Members of the House
Senators Halford, Fahrenkamp and All Other Members of the Senate

Honoring - Taiwan Trade Delegation
by Senators Vic Fischer, Ziegler, Kerttula, Paul Fischer and Sturgulewski

Honoring - Korean Trade Delegation
by Senators Vic Fischer, Ziegler, Sturgulewski, Paul Fischer and Kerttula

Without objection, the citations were approved and referred to the Secretary for transmittal.

SUPPLEMENTAL CALENDAR

SECOND READING OF SENATE BILLS

SB 464

SENATE BILL NO. 464 (permitting the establishment of horizontal property regimes for mobile homes) was read the second time.

Senator Sackett moved and asked unanimous consent for the adoption of the Finance Committee Substitute offered on page 3268. Without objection, CS FOR SENATE BILL NO. 464 (FIN), was adopted.

SB 464 cont'd

CS FOR SENATE BILL NO. 464 (FIN) was read the second time.

Senator Ray moved and asked unanimous consent that CS FOR SENATE BILL NO. 464 (FIN) be considered engrossed, advanced to third reading and placed on final passage. Without objection, it was so ordered.

CS FOR SENATE BILL NO. 464 (FIN) was read the third time.

The question being: "Shall CS FOR SENATE BILL NO. 464 (FIN) (establishment of horizontal property regimes for mobile homes) pass the Senate?" The roll was taken with the following result:

CS SB 464 FIN 3RD

Yeas: 20 Bennett, Ellason, Fahrenkamp, Falks, Ferguson, Fischer Paul, Fischer Vic, Gilman, Halford, Josephson, Kelly, Kerttula, Moss, Mulcahy, Pettyjohn, Ray, Rodey, Sackett, Sturgulewski, Ziegler

Nays: 0

and so, CS FOR SENATE BILL NO. 464 (FIN) passed the Senate.

CS FOR SENATE BILL NO. 464 (FIN) was engrossed, signed by the President and Secretary and transmitted to the House for consideration.

SECOND READING OF HOUSE BILLS

HB 571

CS FOR HOUSE BILL NO. 571 (FIN) (venue of actions in superior court and the number of superior and district court judges; efd) was read the second time.

Senator Ray moved and asked unanimous consent for the adoption of the Judiciary Senate Committee Substitute offered on page 3128. Without objection, SENATE CS FOR CS FOR HOUSE BILL NO. 571 (JUD) was adopted.

HB 571 cont'd

SENATE CS FOR CS FOR HOUSE BILL NO. 571 (JUD) was read the second time.

Senator Ray moved and asked unanimous consent that SENATE CS FOR CS FOR HOUSE BILL NO. 571 (JUD) be considered engrossed, advanced to third reading and placed on final passage. Without objection, it was so ordered.

SENATE CS FOR CS FOR HOUSE BILL NO. 571 (JUD) was read the third time.

The question being: "Shall SENATE CS FOR CS FOR HOUSE BILL NO. 571 (JUD) (venue of actions in superior court and the number of superior and district court judges; efd) pass the Senate?" The roll was taken with the following result:

SCS CSHB 571 JUD 3RD

Yeas: 19 Ellason, Fahrenkamp, Falks, Ferguson, Fischer Paul, Fischer Vic, Gilman, Halford, Josephson, Kelly, Kerttula, Moss, Mulcahy, Pettyjohn, Ray, Rodey, Sackett, Sturgulewski, Ziegler

Nays: 0

Absent: 1 Bennett

and so, SENATE CS FOR CS FOR HOUSE BILL NO. 571 (JUD) passed the Senate.

Senator Ray moved and asked unanimous consent that the roll call on the passage of the bill be considered the roll call on the effective date clause. Without objection, it was so ordered.

SENATE CS FOR CS FOR HOUSE BILL NO. 571 (JUD) was engrossed, signed by the President and Secretary and returned to the House for consideration.

FIRST READING AND REFERENCE OF SENATE BILLS

CSSB 464(Fin)

COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 464 (Finance) by the Finance Committee, entitled:

"An Act permitting the establishment of horizontal property regimes for mobile homes."

was read the first time and referred to the Labor & Commerce Committee.

REPORTS OF STANDING COMMITTEES

CSSCR 19(Res)

The Resources Committee has had COMMITTEE SUBSTITUTE FOR SENATE CONCURRENT RESOLUTION NO. 19 (Resources) (relating to a statewide system of trails) under consideration, recommends it be replaced with HOUSE COMMITTEE SUBSTITUTE FOR COMMITTEE SUBSTITUTE FOR SENATE CONCURRENT RESOLUTION NO. 19 (Resources) (same title), and reports it back as follows: Larson, Liska and Cowdery recommend do pass; Ringstad (Co-Chairman) and Shultz have no recommendation.

CSSCR 19(Res) was referred to the Rules Committee for placement on the calendar.

CSSB 411(Res)

The Resources Committee has had COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 411 (Resources) (relating to preferential use of Alaska agricultural products) under consideration and reports it back as follows: Ringstad (Co-Chairman), Shultz, Larson, Liska and Cowdery recommend do pass.

CSSB 411(Res) was referred to the Finance Committee.

REPORTS OF SPECIAL COMMITTEES

A report dated May 28, 1984, was read stating that the Select Committee on Legislative Ethics has selected Cheri Jacobus as the public member of the Select Committee on Legislative Ethics and recommends that her selection be ratified. The report was signed by Representatives Barnes (Chairman) and concurred in by Representatives Furnace and M. K. Miller.

INTRODUCTION OF CITATIONS

The following citations were received and referred to the Rules Committee for placement on the calendar:

Honoring - Mrs. Elizabeth Baines
by Representative Fuller and Senator Ferguson

Honoring - Bernard L. Warren
by Representatives Furnace and Barnes

Honoring - Hugh Malone
by Representatives M. K. Miller, Hayes and All Other Members of the House

ENGROSSMENT

HCS CSSB 289(Res)amH

HCS CSSB 289(Res)amH was engrossed, signed by the Speaker and the Chief Clerk and transmitted to the Senate for consideration.

HCS CSSB 504(Jud)

HCS CSSB 504(Jud) was engrossed, signed by the Speaker and the Chief Clerk and transmitted to the Senate for consideration.

HCS CSSB 525(Fin)

HCS CSSB 525(Fin) was engrossed, signed by the Speaker and the Chief Clerk and transmitted to the Senate for consideration.

ENROLLMENT

SCS CSHB 298(Fin)

The following was enrolled, signed by the Speaker and the Chief Clerk, the President and Secretary of the Senate and the engrossed and enrolled copies were transmitted to the Office of the Governor at 2:25 p.m., May 29, 1984:

SB 458

SENATE BILL NO. 458 by Senators Vic Fischer and Pettyjohn, entitled:

"An Act terminating the Alaska Transportation Commission and repealing transportation laws administered by the commission; and requiring persons who carry persons or freight intrastate for compensation to have insurance or other security."

was read the first time and referred to the Labor and Commerce Committee and the Finance Committee.

SB 459

SENATE BILL NO. 459 by Senator Fahrenkamp, entitled:

"An Act relating to oil and gas unitization agreements."

was read the first time and referred to the Resources Committee and the Finance Committee.

SB 460

SENATE BILL NO. 460 by Senators Vic Fischer and Kerttula, entitled:

"An Act renaming and expanding the functions of the Medicaid Rate Commission and providing for the regulation of rates charged for services provided by health facilities."

was read the first time and referred to the Health, Education and Social Services Committee and the Finance Committee.

SB 461

SENATE BILL NO. 461 by Senator Fahrenkamp, entitled:

"An Act relating to the management and use of water in mining; and providing for an effective date."

was read the first time and referred to the Resources Committee.

SB 462

SENATE BILL NO. 462 by Senator Fahrenkamp, entitled:

"An Act making a special appropriation to the Mining Water Use Board for loans and grants concerned with the management and use of water in mining; and providing for an effective date."

was read the first time and referred to the Resources Committee and the Finance Committee.

SB 463

SENATE BILL NO. 463 by Senators Vic Fischer, Moss, Ellason, Rodey, Josephson, Halford, Gilman, Sturgulewski, Kerttula, Fahrenkamp, Kelly and Paul Fischer, entitled:

"An Act relating to veterans exposed to radiation from above-ground nuclear weapons testing or to a biological or chemical agent, including Agent Orange."

was read the first time and referred to the State Affairs Committee and the Health, Education and Social Services Committee.

SB 464

SENATE BILL NO. 464 by Senator Halford, entitled:

"An Act permitting the establishment of horizontal property regimes for mobile homes."

was read the first time and referred to the Labor and Commerce Committee and the Judiciary Committee.

SB 465

SENATE BILL NO. 465 by Senators Halford, Sturgulewski, Josephson, Vic Fischer, Ellason, Fahrenkamp, Faiks, Kelly and Paul Fischer, entitled:

"An Act establishing an annuity program; amending the longevity bonus program and the permanent fund dividend distribution program; and providing for an effective date."

was read the first time and referred to the Judiciary Committee and the Finance Committee.

LAW OFFICES OF WILLIAM McNALL
3333 DENALI ST., SUITE 120
ANCHORAGE, ALASKA 99503
(907) 276 2535

March 18, 1985

Rep. Mike NaVarr, Chairman
House Labor & Commerce Committee
Pouch V
Juneau, Alaska 99811

Re: HB 155

Dear Representative NaVarr,

Representative Boucher specifically requested additional information concerning problems with House Bill 155, Manufactured Housing under Horizontal Property Regimes Act, during the February 25, 1985 teleconference testimony.

There are several areas which must be addressed to aid mobile home park development as common interest communities. Some of these areas are as follows:

a.) express and implied warrants,
b.) disclosure requirements to purchase,
c.) association reserve, budget and accountin requirements,
d.) association insurance coverage,
e.) association management guidelines.

HB 155 essentially allows development of a mobile home park condominium but does not provide much needed assistance to the project after the initial development process has been started. I believe that developers, realtors, and sellers of mobile homes will be poorly served by this statute. I predict that there will be litigation which could have been avoided if HB 155 is passed into law.

Mobile home parks must have specific statutory authority to regulate through the Mobile Home Park Unit owners Association such matters as outside storage, removal of nuisance items, built-on additions such as garages, carport, wannigans, storage buildings, attachment to the foundation, sewer and electrical hookups, parking, playground facilities and insurance coverage for liability issues related to these items.

Finally, the replacement of old or delapidated units must be addressed. At what point may the association require a unit owner to upgrade to a newer mobile home? Alaska Housing Finance will not finance sales of used homes with less than a twelve year life expectancy. If a unit owner conveys a delapidated unit to a purchaser can the association prevent the sale or require an upgrade?

All of these issues must be carefully thought out. Senate Bill 44 provides the flexibility to address all of these issues. HB 155 and the present Horizontal Property Regime Act do not.

Sincerely yours,

William L. McNall

William L. McNall

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

9/5/89
Date

02-519 (REV 8/78)